

FILED

APR 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B:

NO. 293807-III

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

**DENNIS R. AND DEBORAH BALDWIN, husband and wife, d/b/a B&D
CONSTRUCTION,**

Plaintiffs;

vs.

**THOMAS J. SILVER AND ROBIN G. SILVER, husband and wife; and
FARMERS INSURANCE OF WASHINGTON, a corporation,**

Appellants;

vs.

FARMERS INSURANCE OF WASHINGTON, a Washington Corporation,

Respondent.

**BRIEF OF RESPONDENT
FARMERS INSURANCE COMPANY OF WASHINGTON**

Thomas Lether, WSBA #18089
Eric J. Neal, WSBA #31863
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Respondent, Farmers Insurance Company of Washington (hereinafter, "Farmers"), respectfully requests that this Court affirm the Superior Court dismissal of this lawsuit in all respects.

I. ASSIGNMENTS OF ERROR

A. Issues Pertaining to Appellant's Assignments of Error.

Four of the five assignments of error raised in Appellant's brief focus solely on the conduct of the Superior Court Judge during the hearing on Farmers' Motion for Summary Judgment. These assignments of error are entirely without merit. This Court is in possession of the complete Verbatim Report of Proceedings from that hearing as well as from the hearing on the Silvers' Motion for Reconsideration.

In addition, during the hearing on the Silvers' Motion for Reconsideration, where these issues were first raised, the Superior Court specifically invited the Court of Appeals to listen to the recordings of the summary judgment hearing. RP 23.

Simply put, there is absolutely no basis in fact or law for these assignments of error. Counsel for the Silvers was given ample opportunity to present the Silvers' position on the motion for summary judgment. The Superior Court did not cut him off or otherwise limit his ability to present his client's position and the Superior Court *certainly* did not display any personal prejudice against counsel.

his client's position and the Superior Court *certainly* did not display any personal prejudice against counsel.

The only substantive assignment of error raised by the Silvers involves a purported issue of fact concerning the two checks that were issued by Farmers to the Silvers that were allegedly not received. This assignment of error is without merit. The two checks at issue total approximately \$700. However, the record in this case establishes that the Silvers cashed checks totaling more than \$3,400 that were issued by Farmers for payment of contractors and vendors, without actually paying those vendors. Farmers later paid those vendors directly. Thus, Farmers paid the entire claim *twice*. This alleged issue of fact is a complete red herring and is not grounds for reversal of the Superior Court. This is particularly true where the Silvers' have previously represented in open Court that the sole basis for their claims in this case are based on issues surrounding payment for damage to their deck. CP 265-295.

The Silvers' complaints about the Superior Court's conduct in the hearing on the summary judgment motion were first raised in a Motion for Reconsideration that was denied by the Superior Court. CP 483-486; CP 502. The Silvers' have not assigned error to that ruling.

Moreover, although certain other issues are discussed throughout the Silvers' brief, it does not appear that they have actually assigned error

to such rulings as the Superior Court's dismissal of their Consumer Protection Act claims, their third-party liability claim, and their claim for recovery of attorney's fees under the *Olympic Steamship* doctrine. Nonetheless, because it is unclear what exactly it is that forms the basis of the Silvers' appeal, Farmers will address all of the issues raised by the Silvers' claims.

B. Farmers' Assignments of Error

Farmers does not assign error to any ruling of the Superior Court.

II. STATEMENT OF THE CASE

A. Background

This lawsuit arises from a disputed insurance claim following a residential house fire which occurred on April 3, 2006, at the residence of the Appellants Thomas and Robin Silver ("the Silvers"). CP 330. At the time of the loss, the Silvers' residence was insured pursuant to the terms and conditions of a policy of insurance issued by Farmers. CP 132. Following the fire, which was caused by overheated cooking oil in the kitchen, the Silvers initiated a claim under their policy.

Farmers promptly acknowledge the claim and began investigating and issuing payments. CP 329-332. Over the course of the next several months, the Silvers retained several vendors, including ServiceMaster and B&D Construction to perform repairs. Farmers accepted coverage and

issued payments for the work performed by the Silvers' contractors. CP 329-332.

Farmers issued the checks directly to its insureds, the Silvers. The Silvers, who were experiencing financial difficulties that would ultimately lead to bankruptcy, admittedly cashed the checks and spent the money without paying the vendors. One vendor, B&D, was forced to sue the Silvers for failure to pay for work it had performed. CP 174-182.

Consequently, Farmers paid B&D a sum of \$6,225.00 in order to settle B&D's claims against the Silvers, and secure a release of B&D's lien on their residence. CP 186-191. Farmers was also forced to settle with ServiceMaster, another vendor hired but not paid by the Silvers, the sum of \$700 in order to avoid a second lawsuit. CP 192-194.

Despite Farmers' actions to mitigate any potential liability for the Silvers, and thereby paying the claim twice, the Silvers nonetheless filed cross-claims against Farmers alleging that Farmers had breached the policy of insurance and had acted in bad faith and violated the Washington Consumer Protection Act in the handling of their claim. CP 195-199. The Silvers' allegations are simply without merit.

B. Farmers Paid The Silvers' Insurance Claim In Its Entirety

In fact, Farmers substantially *overpaid* the claim. This resulted in the Silvers' receiving both significantly greater benefits than those to

which they were entitled pursuant to the terms and conditions of their policy of insurance. Specifically, Farmers issued the following payments on the Silvers' claims:

- **April 28, 2006** – Farmers issued a check in the amount of \$3,438.17 to the Silvers. This check was accompanied by a cover letter and a repair estimate detailing the work that would be performed with the funds provided in the check. CP 242-259. Of this amount, \$2,727.96 was to be forwarded to B&D Construction. The remainder was partial payment for ServiceMaster's work on the property. CP 329-332. The Silvers admittedly deposited the checks into their personal accounts and spent the money without paying B&D or ServiceMaster.
- **June 21, 2006** – Farmers paid \$1,103.08 directly to Magic Carpet, another vendor that performed work on the Silvers' residence. CP 260. This payment included work that Magic Carpet was to have done to pressure wash the Silvers' deck. See Deposition of Robin Silver, *infra*.
- **July 6, 2006** – Farmers paid \$1,534.32 directly to ServiceMaster. CP 261.
- **July 27, 2006** – Farmers issued checks in the amounts of \$654.43 and \$70.00 for remaining building costs, including payment for the Silvers' own labor, as well as payment for additional living expenses. CP 262-264. The Silvers now claim that they never received these checks.
- **October 23, 2006** – Farmers agrees to pay B&D Construction \$6,225.74, in order to resolve all of B&D's claims. CP 186-191. Payment was issued shortly thereafter.
- **October 2, 2007** – Though not a party to this lawsuit, ServiceMaster continued to assert a claim for additional payment against the Silvers. In October of 2007, Farmers

agreed to pay an additional \$700.00 to ServiceMaster in order to resolve those claims. CP 192-194.

The Silvers now contend that Farmers acted in bad faith because they allegedly never received the two checks issued on July 27, 2006 totaling \$724.30. However, counsel for the Silvers has admitted, on the record in open court, that there was nothing unreasonable about Farmers' conduct with regard to these payments.

THE COURT: Okay, now, let me ask you. What is it that is unreasonable about Farmers sending a letter, with checks in it, and it just doesn't happen to get to your clients? There's nothing unreasonable there, right?

MR. GUINN: No, no.

See CP 265-295 at 273.

After this admission, counsel went on to indicate that the *only* element of the subject claim that is in dispute is the issue of payment for deck repair. *Id.* However, as will be discussed below, the deck claim is not only highly suspect, but Farmers did, in fact, pay to have the deck repaired.

Setting aside the deck repair issue for a moment, the clear and undisputed facts establish that Farmers substantially overpaid the subject claim. In total, Farmers issued checks totaling \$13,095.74. Of these amounts, the vendors received total payments from Farmers in the amount of \$9,563.14. In turn, the Silvers themselves received \$3,532.60.

Whether the Silvers received the July 27, 2006 checks is immaterial when considering the amounts paid by Farmers against the amounts for which a claim was actually made. The following will demonstrate the overpayment:

Total for Vendor Invoices:	\$6,575.57
Amount Paid By Farmers to Vendors	\$9,563.14
Overpayment on Vendor Invoices	\$2,987.57
Total Claimed By the Silvers for Personal Property and Loss of Use:	\$ 724.30
Total Amount of Farmers' Checks Cashed By the Silvers:	\$3,438.17
Overpayment to the Silvers:	\$2,713.87

Clearly, the claim that Farmers somehow acted in bad faith or breached the contract because the Silvers did not receive the July 27, 2006 checks is without merit. Not only has counsel admitted on the record that Farmers' conduct was not unreasonable in this regard, but the record clearly reflects that the Silvers have been made whole, and have actually received a windfall on this insurance claim.

Going one step further, it is clear from the record as well that the Silvers do not claim that any further work needs to be done to repair the fire damage to their residence.

- Q. Okay. And did B&D do the work?
A. They did.

- Q. Were you satisfied with B&D's work?
A. Yes.
Q. Did you ever pay B&D?
A. No.
...
Q. Did you pay any money to ServiceMaster for the work that was performed by ServiceMaster?
A. Nope.
Q. Did you pay any money to Magic Carpet?
A. Nope.
Q. Now, all three of these companies did the work to restore your residence; correct?
A. Uh-huh.
Q. Yes?
A. Yes. I'm sorry.
Q. And the work was performed to your satisfaction; correct?
A. Yes.

CP 277-278.

This testimony was confirmed by Mr. Thomas Silver, who testified that he too was satisfied with the work performed by the three contractors and that the work of those contractors had returned the residence to its pre-loss condition. CP 302. Further, Robin Silver admitted that there are no outstanding claims against them by any of the contractors.³ CP 288.

Thus, the undisputed facts in this matter are the following:

³ Frankly, any outstanding claims would have been discharged in the Silvers' 2007 bankruptcy in any event. However, in the interests of avoiding re-litigating any issues in the bankruptcy proceeding, it is sufficient to point out that the Silvers themselves acknowledge that the vendors are not making claims at this time against them for services rendered.

- The Silvers had a residential house fire. Farmers acknowledged the claim, accepted coverage, and began issuing payments.
- Three different contractors worked on the repairs to the Silvers' residence.
- Those contractors were all paid by Farmers.
- The Silvers paid no money to any of the contractors.
- The work of the contractors was done to the Silvers' satisfaction and returned the residence to its pre-loss condition.
- The Silvers personally cashed a check in an amount nearly four times in excess of the amount of money to which they were actually entitled, and they then spent that money without paying their contractors.

Despite the foregoing, the Silvers continue to insist that Farmers somehow acted in bad faith because they did not receive the July 27, 2006 checks. This position is completely without merit and should be rejected by the Court.

C. **There Is Nothing Unreasonable About Issuing Checks to the Insured**

The Silvers also continue to maintain that Farmers acted in bad faith by issuing the April 28, 2006 check in the amount of \$3,438.17 payable to them alone as opposed to jointly payable to the Silvers and their contractors. This argument has absolutely no basis in law, and is belied by the actual facts.

First, the check at issue was not merely mailed to the Silvers' without explanation. It was enclosed with a cover letter and a repair estimate detailing the work that the check was issued to cover. CP 242-259. The timing of the check is also important in that it represents a very early payment, having been issued only April 28, 2006, just three weeks after the fire. This is significant in that the Silvers admit that they cashed the check despite actually knowing that they had not submitted a claim for the amount contained therein.

Q. . . . Had you submitted a receipt or some sort of invoice or document to Farmers in this amount that made you think that they –

A. No.

Q. – were reimbursing you for some portion of your claim?

A. No.

CP 285.

In fact, the Silvers have made it clear that the only basis on which they relied to cash the check and spend the money was the manner in which the check was made out. When asked about what portion of the claim or repair work she thought the check was meant to cover, Robin Silver stated simply, "I'm not entirely sure. I just knew that they sent it to us. It was made out to us. It says to cover a portion of our claim. Why would I not cash that." CP 285.

By contrast, the letter containing the check makes it entirely clear that the check is being issued for work being performed by the contractors.

Enclosed you will find an actual cash value payment for the covered portion of your building claim based on the attached estimate. Once the repairs are complete, you are entitled to recover the applicable depreciation.

...

Please forward all completed work receipts to me . . .

If you feel we have omitted an item or do not understand any aspect of your claim, please feel free to contact me for a complete explanation of how we arrived at your damage estimate. ***Our prices are based on average construction costs for your area and a copy of this estimate should be given to the contractor you select to perform repairs.***

CP 242-243 (emphasis added).

Despite the letter of explanation, an enclosed 13-page repair estimate totaling \$3,438.17, and an enclosed check for \$3,417.17, the Silvers continue to maintain not only that they were justified in cashing the check and not paying their contractors, but that Farmers somehow acted in bad faith by issuing the check in the first place:

Q. Just so everybody's clear, you cashed the check based pretty much entirely just on how it was made out. It was made out to you, so you cashed it; right?

A. Yes.

...

Q. . . . Do you know if you even looked at the estimate that was attached?

A. I looked at it somewhat. I didn't really understand it.

Q. Okay. And do you know if you contacted Farmers to say I don't understand why this estimate is attached?

A. I don't recall.

CP 286.

The Silvers admit that at the time that they cashed the Farmers' check, they were experiencing financial difficulties that would eventually lead them to bankruptcy. CP 285. Ultimately, the fact that they cashed the check does not in any way reflect any unreasonable conduct on the part of Farmers. Any argument arising out of how the check was made out is completely irrelevant to the issues before this Court.

D. Farmers Paid for Repairs to the Silvers' Deck

Ultimately, the Silvers' contention in this matter comes down to a claim that Farmers should pay to have their deck replaced. In answer to written Interrogatories, the deck was the only element that they claimed constituted property damage that was not repaired during the work that took place in 2006. See CP 316-326 at 321. It is undisputed that when the grease fire at the Silvers' residence took place, the grease pan was thrown out a door onto the deck causing some spillage of grease onto the decking surface.

Farmers initial investigation called for one of the Silvers' vendors, Magic Carpet, to pressure wash the deck to repair that staining. According to the Silvers, that work was not done.

Q. Was Magic Carpet also supposed to be doing the, the power washing of the deck?

A. I think they were supposed to, and it never happened.

CP 278.

Importantly, the documentation in the Silvers possession clearly established that Farmers is not the guarantor of work performed by the Silvers' contractors and is not responsible for ensuring that the work is actually performed:

We do not guarantee the work of any contractor. Contractors or repairman (sic) are selected and hired by you, not Farmers Insurance Company of Washington. It is up to you to make sure the work is completed.

CP 242-243.

Despite knowing that Magic Carpet was hired to clean the deck and it did not do so, and also knowing that it was their responsibility to ensure that the work was performed, there is no evidence that the Silvers ever made any effort to have Magic Carpet perform the work.

Q. Okay. Did you ever contact Magic Carpet to make a claim against them or to complain about the work that they did?

A. No.

CP 278.

Setting that issue aside, when the Silvers complained to Farmers that the work on the deck had not been completed, Farmers actually adjusted the claim *again*. Included with the July 27, 2006 checks was a letter and a breakdown of the amounts that were being paid, including a payment for pressure washing the deck. CP 262-264. The claim that Farmers somehow acted in bad faith or failed to provide coverage for the deck is completely false. In fact, Farmers investigated and adjusted the deck damage, as it did with every other aspect of the claim, *twice*.

The Silvers' now claim that Farmers should pay not for repair to deck, but rather for a complete deck replacement, despite the fact that the initial investigation revealed only minor staining. This claim arises from the fact that in 2007, while this litigation against Farmers was pending, the Silvers decided to demolish the deck, and did so without notice to Farmers thereby denying it any opportunity to investigate the status of the deck.

The Silvers now insist that Farmers should pay \$10,000 for a complete deck replacement, despite the initial power washing repair estimate of \$135. What is more perplexing about this position is that the Silvers admit that the deck removal had nothing to do with the cosmetic damage caused by the cooking grease.

- Q. Do you know what the square footage was on the deck?
- A. I don't know. I would say approximately 900 square feet.
- Q. And how much of the deck, the decking was visibly damaged?
- A. I would say approximately 350.
- Q. Square feet?
- A. Square feet, yeah.
- Q. Okay. And was any of the – was the deck structurally damaged?
- A. Basically – I mean, the – basically, the boards that you walk across were, you know, the damage. But the rest of it was all right.
- Q. The joists were not damaged by the fire?
- A. No. No, they were not.
- Q. Okay. The support beams not damaged by the fire?
- A. Support beams, no. Not that I recall.
- Q. Okay. So as far as you were concerned, when you saw the deck, there was damage to the decking, itself, but otherwise, it was structurally intact and, and undamaged by the event.
- A. Structurally – well, the problem was, like I say, I mean, you couldn't walk across the wood.
- Q. Right.
- A. But yeah, it was structurally intact.

CP 302.

On further questioning, it was revealed that the Silvers removed the deck because their new homeowners' insurer, Safeco Insurance Company, required the removal in order to write the new policy. CP 279. However, the Silvers profess no knowledge as to why Safeco required

demolition of the deck and yet they admit that the deck had dry rot issues completely unrelated to the subject fire. CP 307.

There is simply nothing in the record before this Court that supports the notion that the deck removal had anything to do with the subject fire. The Silvers admit that they never had a contractor, engineer or other professional inspect the deck. CP 304. The Silvers admit that they tore down the deck and removed all of the material without notice to Farmers and without even so much as taking pictures of the deck, while this litigation was pending. CP 305. Farmers paid to have the fire-related damage to the deck repaired. CP 262-264.

Farmers did not breach the contract with respect to the deck and it certainly did not act in bad faith or violate the CPA in its handling of the deck claim. Moreover, the record before this Court demonstrates that Farmers never denied coverage, paid the subject claim, and acted reasonably at all times.

E. Procedural History

1. Initial Filings, Dismissal, and Appeal

On August 6, 2006, B&D filed suit against the Silvers for payment for its repair work. CP 174-180. Just two months later, on October 23, 2006, Farmers settled B&D's claims against the Silvers for a payment in the amount of \$6,225.74. CP 186-191. After Farmers had effectively ended

the litigation involving B&D's claims, the Silvers brought a claim against Farmers alleging breach of the insurance policy, and later amended their Complaint adding bad faith and Consumer Protection Act claims. CP 195-199.

In January 2007, the Silvers filed for bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Washington (CP 200-241). The Silvers failed to identify these claims as an asset in their bankruptcy petition. CP 200-241.

On August 23, 2007, Farmers filed a Motion for Summary Judgment seeking dismissal of the Silvers' claims based upon the doctrine of judicial estoppel. CP 106. Farmers' argued that the doctrine of judicial estoppel applied to bar the Silvers' claims because they had failed to indicate the claims as an asset in their bankruptcy filings. *Id.* The Superior Court agreed, dismissing the Silvers' claims based on the doctrine of judicial estoppel. *Id.* The Silvers appealed.

In an unpublished opinion, this Court reversed and remanded for further proceedings on the merits. CP 415.

2. Farmers' Motion for Summary Judgment on the Merits

Following remand, the parties engaged in additional discovery, including the depositions of Thomas and Robin Silver. Following the depositions of the Silvers, Farmers filed its Motion for Summary

Judgment. CP 103-127. Farmers also filed a Spoliation Motion Regarding the Silvers' Deck Damage Claim.¹ CP 3-14.

On July 29, 2010, the Superior Court, Honorable Rebecca M. Baker, heard oral argument on Farmers' motions. RP 1-21. At the time, counsel for the Silvers was provided with ample time to present argument in opposition to Farmers' motions. Moreover, the Silvers had presented substantial briefing and other materials in support of their oppositions. CP 390-410; 411-468; . The Superior Court's eventual order indicates on its face that the Court considered all of the Silvers' submissions. CP 480-481; CP 503-504.

Contrary to the allegations in the Silvers' briefing, the Superior Court allowed ample opportunity to present the Silvers' position. In fact, The verbatim report proceedings for the July 29, 2010 summary judgment hearing includes the following concluding exchange:

THE COURT:	Okay. Anything further, Mr. Guinn?
MR. GUINN:	No, Your Honor. I believe that's it.
THE COURT:	Okay, Alright. Well, let me just, um, say that...
MR. GUINN:	Unless you have questions.
THE COURT:	I don't think so.

RP 14-15.

¹ The Superior Court ultimately found that its ruling on the motion for summary judgment rendered the Spoliation motion moot. There is no order on that motion and the Silvers have not assigned error to the Court's determination that the motion was rendered moot.

Not only did the Court allow counsel to make any arguments that he felt were pertinent to his client's position throughout the entirety of the hearing, but at the end of that hearing, the Court specifically gave him an opportunity to add anything else that he felt appropriate. Counsel declined the opportunity.

At the conclusion of the hearing, the Superior Court granted Farmers' Motion for Summary Judgment, dismissing the Silvers' claims in their entirety. CP 480-481; CP 503-504.

3. The Silvers' Motion for Reconsideration

On August 4, 2010, just two business days after the hearing on the Motion for Summary Judgment, the Silvers filed a half-page Motion for Reconsideration in which they made the same allegations of misconduct on the part of the trial judge as are presented herein. The Silvers' also based their motion on unsubstantiated and improper assertions of alleged facts and made vague allegations of misconduct on the part of Farmers. CP 490-491.

On August 26, 2010, the Superior Court heard oral argument on the Silver's Motion for Reconsideration as well as Farmers' Cross-Motion for CR 11 Sanctions. CP 493-501. After denying the Silvers' motion, the Court turned to the issue of CR 11 sanctions, making the following

observations in regard to counsel's allegations about the conduct of the summary judgment hearing:

I would just like to say that I certainly welcome the Court of Appeals to not just review a transcript of the hearing on summary judgment, but to review the tone that I used throughout the course of the argument. I don't think I was high handed. I don't think it was disrespectful of Mr. Guinn. I did ask Mr. Guinn at one point to focus on the issue that was foremost in the court's mind which is often what I do and what other courts do when hearing argument on – on motions where there is a, um, large amount of documentary, um, materials that are presented.

...

Um, I at the tail end of the argument I ended up by asking Mr. Guinn "Anything further?" and he said "No, Your Honor." Uh, and I – I think he got a full-fledged opportunity to make his oral argument certainly.

RP 31-32.

The Court denied the motion for terms based upon the conclusion that counsel had not interposed the motion for reconsideration for improper purposes because counsel genuinely believed that the motion had merit. RP 32. Farmers has not appealed from this ruling.

In addition, while the Silvers did include the Superior Court's Order Denying Their Motion for Reconsideration in their Notice of Appeal, they have not assigned error to that order.

III. ARGUMENT

A. Standard of Review.

The Silvers' brief does not include any reference to the standard of review for this appeal. Farmers therefore takes the opportunity to do so here. An appellate court reviewing a summary judgment order must engage in the same inquiry as the trial court. *See Sedwick v. Gwinn*, 73 Wash.App. 879, 884, 873 P.2d 528, 531 (1994), *referencing Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). The appellate court reviews the facts and law with respect to summary judgment de novo. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

To the extent that any aspect of the Superior Court's rulings on the Silvers' Motion for Reconsideration are before this Court, the Court reviews those rulings for abuse of discretion. *Byerly v. Madsen*, 41 WN. App. 495, 499, 704 P.2d 1236 (1985).

A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons.

Wagner Dev. v. Fidelity & Deposit, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

B. Legal Standard for Consideration of a CR 56 Motion for Summary Judgment

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law. *Fitzpatrick v. Okanogan County*, 143 Wash.App. 288, 293, 177 P.3d 716, 718 (2008); *Phillips v. King County*, 136 Wash.2d 946, 956, 968 P.2d 871 (1998); *Marincovich*, 787 P.2d at 562; *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); CR 56(c).

Our Supreme Court has traditionally noted that a moving party under CR 56 bears the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *See Schaaf v. Highfield*, 127 Wash.2d 17, 21, 896 P.2d 665, 666 (1995), referencing *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d at 225; *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact for trial.

When responding to the moving party's motion, the nonmoving party cannot rely on the allegations made in its pleadings. "CR 56(e) states that the response, 'by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Young*, 112 Wn.2d at 225-26.

The party opposing a motion for summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits accepted at face value . . . [T]he non-moving party must set forth specific facts that sufficiently rebut the moving

party's contentions and disclose that a genuine issue as to material fact exists.

Herman v. SAFECO Ins. Co. Of America, 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001); quoting *Seven Gables Corp. v. MGM/UAEntm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Here, it is the burden of the Silvers' to demonstrate through admissible *evidence and testimony* that there are genuine issues of material fact as to each of the elements of their causes of action. Bare allegations and conclusory statements are not sufficient. The Silvers' cannot meet their burden and the Superior Court should be affirmed.

C. **The Trial Court Provided the Silvers' With a Fair Hearing on Summary Judgment.**

Before reaching the actual substantive issues presented on the appeal of the Superior Court's summary judgment dismissal of the Silvers' claims against Farmers, it is necessary to address the allegations raised by the Silvers' concerning the Superior Court's conduct in holding oral argument.

As set forth above, the Superior Court provided counsel with more than adequate opportunity to present argument on behalf of the Silvers. The transcript speaks for itself in this regard. However, it is also critical to note that the Silvers have not presented *any* legal authority for the proposition that the Superior Court's conduct, even if the allegations are accepted as true, somehow raises an issue of material fact precluding

summary dismissal of their claims. Rather, the Silvers appear to raise these issues, including their numerous citations to the canons of judicial conduct, merely for purposes of making baseless allegations against the Superior Court.

The Silvers' allegations of misconduct on the part of the Superior Court are baseless. As pointed out by Judge Baker during the hearing on the Motion for Reconsideration, she did not cut counsel off, did not refuse to consider any evidence, and in fact asked counsel at the conclusion of the argument if he had anything further. RP 32.

The Silvers' assert that the Superior Court "didn't even acknowledge the Declaration (of Robin Silver), until it was brought up at Reconsideration by Mr. Guinn." Appellant's Brief, p. 13. This argument is simply false. During the hearing on the Motion for Summary Judgment, the Court and counsel specifically discussed that very declaration.

MR. GUINN: Declaration of Robin Silver in Support of Plaintiffs' Response to Defendant's Motion for Summary Judgment.

THE COURT: Okay. What page are you on of that declaration? Yes, I see it now. ...

MR. GUINN: And just – to look at the check, if I got this check and my name was Robin Silver, I would assume that that's who the check was made out to, Robin and Tom Silver, three thousand dollars and it was cashed.

RP 12-13.

In fact, as the hearing on the Motion for Summary Judgment progressed, counsel for the Silvers' was forced to admit not that the Superior Court was ignoring evidence, but that the evidence simply does not exist. When asked specifically about proof of alleged damages, counsel admitted that there is no such evidence.

THE COURT: What I'm asking is, is there any affidavit or any affidavit attaching an estimate or a bill or "It's gonna cost me this much" or "it did cost me that much"?

MR. GUINN: No, Your Honor.

RP 15.

Farmers will not trouble this Court with a complete recounting of every error in the Silvers' allegations against the Superior Court. Moreover, in light of the fact that this Court engages in *de novo* review of the Summary Judgment ruling, the Silvers' concerns about an adequate opportunity to be heard are moot.

These issues are not appropriate for appellate review and are apparently offered merely to make gratuitous allegations and/or to confuse the issues. The *facts* in this case demonstrate that Farmers paid this claim, that Farmers acted reasonably in dealing with its insureds, and that it was the conduct of the Silvers, not that of Farmers, that caused this dispute to

that Farmers acted reasonably in dealing with its insureds, and that it was the conduct of the Silvers, not that of Farmers, that caused this dispute to arise. The Silvers cannot avoid these facts simply by making baseless allegations against the Superior Court.

D. The Trial Court Properly Granted Farmers' Motion for Summary Judgment.

1. The Superior Court Properly Dismissed The Silvers' Breach of Contract Cause of Action

Under the subject policy, Farmers had an obligation to provide coverage for repair costs necessitated by a covered cause of loss. In that regard, Farmers promised to do the following:

We shall adjust all losses with you. We shall pay you unless another payee is named in the policy...

CP 146.

Under the policy, Farmers was obligated to adjust the loss and pay its insureds for all covered repair costs based on that adjustment. This is exactly what Farmers did in this case.

In order to demonstrate a breach of the insurance policy, the burden is on the insured to first demonstrate that there is damage caused by the covered loss that the insurer has failed to pay. Determining whether coverage exists is a two-step process. ***The insured must show a loss falls within the scope of the policy's insured losses.*** To avoid coverage, the insurer must then show the loss is excluded by specific policy language.

McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992) (emphasis added).

The Silvers have not identified any element of their claim that Farmers failed to pay. They claim that Farmers should pay for a new deck, but they cannot avoid the clear fact that Farmers actually paid for the damage to the deck that fell within the scope of their coverages. The replacement of the deck due to their unrelated dry-rot demolition is not within the scope of coverage.

In answer to interrogatories and in deposition, the Silvers were not able to identify any damage that Farmers failed to pay for relating to the fire loss. The Silvers have not previously, and do not now before this Court, present a single invoice, receipt, or other bill that they claim was not paid by Farmers. The Silvers have not presented any documents, evidence, or testimony of any kind identifying any amounts that they claim are due and owing.

The Silvers admit that Farmers paid all of the contractors and that those contractors performed the repairs to their satisfaction, returning the residence to its pre-loss condition. CP 302. Moreover, they have never identified any amounts over and above the \$3,438.17 that they have already received that they now claim they are entitled to recover in this lawsuit, either for personal property damage or loss of use. CP 316-326.

There was no breach of the contract in this matter and the trial court properly dismissed this cause of action.

2. *Farmers Did Not Act In Bad Faith In Regard to the Silvers' Claim*

The Washington State Supreme Court has set forth the standard by which insurance bad faith cases are to be determined.

Claims by insureds against their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty. See, e.g. *SAFECO Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). As a substantive matter, an insurer has a duty of good faith to all of its policyholders, and to succeed on a bad faith claim, ***a policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded.*** *Overton*, 145 Wn.2d at 433.

...

A motion for summary judgment is properly granted where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Sherman v. State*, 128 Wn.2d 164, 905 P.3d (sic) 355 (1995). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995); see also *Ellwein*, 142 Wn.2d at 776.

Smith v. SAFECO Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003) (emphasis added); See also, *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 78 P.3d 1266 (2003).

The *Smith* Court went on to apply the above well known rule to cases involving insurance bad faith.

If the insured claims that the insurer denied coverage in bad faith, then the insured must come forward with evidence that the insurer acted unreasonably. ***The policyholder has the burden of proof.*** The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds. *Cf. Ellwein*, 142 Wn.2d at 776, 115 P.3d 640. . . ***If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable minds could not differ that its denial of coverage was justified.***

Id. at 486, 78 P.3d 1274 (emphasis added).

Washington courts have repeatedly held that in order for an insured to prove bad faith or violation of the CPA, the insured must show that the insurer acted in an unreasonable, frivolous, or unfounded manner. When an insurer's conduct is reasonable, the insurer does not act in bad faith.

Smith, 150 Wn. 2d at 485, 78 P.3d 1274.

A denial of coverage based on a reasonable interpretation of the policy is not bad faith, . . . and even if incorrect, does not violate the Consumer Protection Act if the insurer's conduct was reasonable.

Transcontinental Ins. Co. v. Washington Public Utilities District, 111 Wn.2d 452, 470, 760 P.2d 337 (1988)(internal citations omitted).

There is no bad faith, as a matter of law, if the insurer had a reasonable basis for denial of the claim. *Smith*, 150 Wn. 2d at 485, 78 P.3d 1274. Of course, in the instant matter, there was not a denial of

coverage. Farmers extended coverage and paid for every element of the Silvers' claim.

An insurer that has a reasonable basis for its actions cannot be said, as a matter of law, to be acting in bad faith in such a way to invoke a tort cause of action or the CPA. As the Court stated in *Miller v. Indiana Ins. Co.*, 31 Wn. App. 475, 642 P.2d 769 (1982):

Bad faith requires a showing of frivolous and unfounded denial of benefits. Indiana denied coverage based on a reasonable interpretation of the policy; this was not bad faith as a matter of law. . . The mere denial of benefits due to a debatable question of coverage is insufficient.

Id. at 479, 642 P.2d 769 (internal citations omitted).

Further, in *Capelouto v. Valley Forge Ins. Co.*, the Court of Appeals stated:

Our courts have rejected attempts to base bad faith and CPA claims on legal arguments when, as here, there is no showing of bad faith, there is a debatable question regarding coverage for the loss, and the denial of coverage is based on a reasonable interpretation of the insurance policy.

98 Wn. App. 7, 22, 990 P.2d 414 (1999) (internal citations omitted). See also *Eide v. State Farm Fire and Cas. Co.*, 79 Wn. App. 346, 901 P.2d 1090 (1995).

Once again, this case does not even involve a denial of benefits. Farmers promptly responded to the claim, promptly initiated payments to or on behalf of its insureds, and fully paid the subject claim. Moreover,

when B&D Construction and ServiceMaster came forward and brought claims against the Silvers, Farmers promptly paid those vendors to settle the subject claims.

Frankly, it is impossible to differentiate the Silvers' contractual claims from their extra-contractual claims. For instance, in the First Amended Cross-Claim, the Silvers allege that Farmers acted in bad faith by failing to repair their residence. CP 195-199. This allegation is entirely without merit. First, insurers are not contractors or repairmen. An insurance company's obligation is to pay for reasonable and necessary costs incurred to repair damage caused by a covered loss. *See Parrillo v. Commercial Union Insurance, Co.*, 85 F.3d 1245 (1996).

This allegation arises from the deck issue, which is also the sole issue in the Silvers' contractual claim. They patently fail to identify how any act or omission of Farmers caused any damage to the subject deck. The deck was superficially damaged by the subject fire. Farmers paid for that superficial damage to be repaired. The Silvers then removed the deck without notice to Farmers due to unrelated dry rot damage in the structure of the deck. Again, what act or omission of Farmers caused the dry rot in the deck?

The evidence in the record before this Court establishes the following undisputed facts: the Silvers had a residential house fire loss.

CP 330. Farmers acknowledged their claim, accepted coverage, and began issuing payments on the loss. CP 330. Three different contractors worked on the repairs to the Silvers' residence. CP 330. Despite the fact that the work of the contractors was done to the Silvers' satisfaction and returned the residence to its pre-loss condition, the Silvers paid no money to any of the contractors. CP 302. In spite of the fact that the Silvers owed money to these contractors, the Silvers personally cashed a check in an amount nearly four times in excess of the amount of money to which they were actually entitled, and they then spent that money without paying their contractors. CP 277-178. These contractors were all paid by Farmers. CP 330; 335-336; 338-340. No outstanding claims by any of those contractors exist against the Silvers due to Farmers' actions. CP 288.

The facts as set forth above clearly demonstrate that Farmers was acting in good faith at all material times with regard to the Silvers' insurance claim. Farmers' reasonable conduct is a complete defense to this cause of action and the Superior Court appropriately dismissed the same.

3. ***The Silvers' Never Tendered the Defense of B&D's Claim to Farmers.***

The Silvers allege that Farmers acted in bad faith by not defending them from B&D Construction's lawsuit for payment. Despite making this allegation, it is undisputed that the Silvers' never tendered the liability claim to Farmers as the Silvers never asked Farmers to defend them from B&D Construction's lawsuit. Because the defense of this claim was never tendered to Farmers, there is no basis for the Silvers to claim that Farmers acted in bad faith by not defending them in this lawsuit.

The uncontroverted fact is supported by the correspondence from the Silvers' counsel from the Fall of 2006, in which he indicates that Farmers, "never offered to provide legal counsel," to the Silvers. CP 327-328. Clearly, the Silvers misconstrue Washington law pertaining to the tender of a defense.

In order to trigger an insurer's duty to defend, an insured must tender the defense of a lawsuit. *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 426-27, 983 P.2d 1155 (1999). In other words, an insurer has no obligation to provide defense to an insured unless, and until, the insured actually files a claim with the insurer and tenders defense of the lawsuit.

Id. The *Leven* Court stated this requirement as follows:

Several courts have concluded that a tender of defense is sufficient if the insured puts the insurer on notice of the claim, while others have determined that ***an insurer's duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action.***

In *Time Oil Company v. Cigna Property & Casualty Insurance*, the United States District Court for the Western District of Washington adopted the latter theory.

We agree with the federal court that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; ***the insured must affirmatively inform the insurer that its participation is desired.***

See Leven, 97 Wn. App. at 427; *see also Time Oil Co. v. Cigna Property & Cas. Ins.*, 743 F.Supp. 1400 (W.D.Wash. 1990).

In addition, the *Time Oil Company* Court clearly and succinctly stated the general rule as follows:

Courts and commentators agree that the duty to defend only arises after the insured tenders the defense.

See Time Oil Co. v. Cigna Property & Cas. Ins., 743 F.Supp. 1400, 1420, (W.D.Wash.1990) (citing *Solo Cup Co. v. Fed. Ins. Co.*, 619 F.2d 1178, 1183 (7th Cir. 1980); 1 G. Couch, *Insurance* § 50:35.

The Silvers never tendered the claim to Farmers. There is absolutely nothing in the record that would allow this Court to find an issue of fact on this subject. As a result, the Silvers never put Farmers on notice that they expected Farmers to defend them from B&D Construction's claims. The law is clear. Farmers never breached a duty to the Silvers by not providing a defense because no duty arose until the Silvers requested such a defense.

4. The Silvers' Were Not Harmed By Farmers' Conduct.

In order to establish a cause of action sounding in the tort of bad faith, the Silvers are required to establish that they suffered actual damage as a result of the allegedly unreasonable, frivolous or unfounded acts. *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). Accordingly, the Silvers were required to establish that they incurred some actual damages as a result of Farmers alleged conduct in order to maintain a suit for bad faith. The Silvers have failed to identify any damage flowing from any alleged unreasonable, frivolous, or unfounded acts by Farmers. Moreover, any potential damages incurred by the Silvers' were caused by the Silvers' own failure to forward Farmers' payments to their contractors.

For instance, aside from the replacement of their deck, which was not necessitated by any act or omission of Farmers, the Silvers' have also claimed that they were damaged in the amount of \$500 due to their insurance rates being increased on a policy that they subsequently purchased from Safeco. However, in deposition, the Silvers admitted that they have no information as to why their premium increased, speculating that it was likely due merely to inflation.

Q. Now, do you, do you know whether Safeco charged you a higher premium because you had a prior claim or because of something Farmers did?

- A. I don't know why. If it was just inflation because of time, or if its because of, you know, our claim. I do not know.

CP 305-306.

The Silvers assert: (1) that Farmers should pay for a deck that they voluntarily removed due to an unrelated condition; and (2) an increased insurance premium unsupported by any affirmation or evidence that the increase was attributable to any act or omission of Farmers. The damages that the Silvers have claimed in this case are beyond speculative. Ultimately, the Silvers have failed to identify *any* damages that flow from any alleged breach of duty on the part of Farmers. Accordingly, the Silvers' bad faith claim fails on the elements and the Superior Court properly dismissed the same.

5. *The Trial Court Properly Dismissed The Silvers' CPA Claim.*

In order to prevail on their Consumer Protection Act (CPA) claim, the Silvers bear the burden of proving the following elements:

1. An unfair or deceptive act or practice;
2. Occurring in trade or commerce;
3. That impacts the public interest;
4. Injury to his business or property; and
5. That the injury was proximately caused by the unfair or deceptive act.

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531, (1986).

The Supreme Court has ruled that the insured must establish each of the five elements of the *Hangman Ridge* test listed above in order to prevail on a CPA claim. See *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). The question of whether an act or practice is actionable under the Consumer Protection Act is a question of law. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127, review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Washington courts have repeatedly affirmed the dismissal of Consumer Protection Act claims on summary judgment. See *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists' Utils. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988)(court found that denial was based upon reasonable interpretation of policy and affirmed summary judgment dismissal of CPA claims); *Felice v. St. Paul Fire and Marine Insurance Co.*, 42 Wn. App. 352, 711 P.2d 1108 (1986)(denial of coverage due to a debatable question of coverage does not give rise to a CPA violation; court affirmed summary judgment dismissal of CPA claim); *Villella v. Pemco Insurance Co.*, 106 Wn.2d 806 725 P.2d 957 (1986)(court found that denial of coverage, although incorrect, based on reasonable conduct of the insurer does not give rise to a CPA claim; accordingly, the court dismissed the CPA claim); *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn.App. 686, 17 P.3d

1229 (2001)(court found that the evidence in the record did not support bad faith or CPA claims and affirmed summary judgment).

An insured may establish a per se unfair trade practice under the CPA by demonstrating a violation of RCW 48.30.010 based upon a violation of WAC 284-30-330. *Dombrosky*, 84 Wn. App. At 260, 928 P.2d 1127. However, even if there is a technical violation of a WAC provision, Washington Courts have held that reasonableness is a complete defense to a CPA claim. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 634, 915 P.2d 1140 (1996).

In the present case, the Silvers do not allege that Farmers violated any of the insurance regulations in the Washington Administrative Code. Rather, the CPA action is predicated on the same baseless allegations constituting the Silvers' contract and bad faith claims. The evidence that Farmers' conduct has been reasonable at all times material to the Silvers' claim remains undisputed as the Silvers' have failed to provide any actual evidence of any unfair or deceptive act in which Farmers allegedly engaged. The Silvers have no basis in law or fact to proceed with a CPA claim against Farmers. Accordingly, this Court should uphold the trial court's dismissal of this action.

6. *The Silvers Did Not Suffer Any Actual Injury to Business or Property Caused by Any Act or Omission of Farmers.*

The courts have also repeatedly held that the failure to establish the element of damage precludes recovery in a private CPA action. Specifically, the Silvers must provide proof of *damage to business or property proximately caused by conduct that violates the CPA* in order to meet the burden of proof on a CPA cause of action. See *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986); *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992).

The Silvers have admitted that Farmers' conduct did not cause them to incur any actual injury to any business or property interest. CP 291-291, 88-90. After her initial assertion that she had been damaged in her business by having to miss a week of work, Robin Silver admitted that she missed the work in April of 2006 because she had vacated the residence and driven to Wyoming as a result of the fire damage and the workers consequently being in her residence, not because of any conduct on the part of Farmers. *Id.* On the subject of property damage, Ms. Silver's testimony was clear:

Q. And my question is, did Farmers' conduct, Farmers' conduct itself, cause any damage to any property that you have?

A. I would guess not.

CP 292.

Likewise, Mr. Silver similarly denied any damage to business or property caused by any act or omission of Farmers.

Q. Mr. Silver, as a result of your complaints that you have with the way Farmers handled the claim, did you suffer any damage to any business that you may have had an interest in?

A. No.

Q. Did Farmers' acts or omissions in the way that it handled the claim cause any damage to any of your property?

.....
A. Property, no.

CP 307.

Accordingly, the Silvers' cause of action based upon CPA violations was properly dismissed due to a complete failure to demonstrate the damages element. The Silvers' have clearly failed to outline a disputed question of fact regarding Farmers' conduct as it relates to the CPA. Moreover, the trial court's dismissal is further supported by the fact that there has been no allegation of damages to business or property, let alone evidence or proof of damages sufficient to meet the Silvers' burden on summary judgment.

E. **The Silvers' Olympic Steamship Attorney Fee Claims Was Properly Dismissed.**

Farmers' Motion for Summary Judgment included a request for alternative relief asking the Superior Court to dismiss any claims for recovery of attorney's fees pursuant to Washington's *Olympic Steamship*

doctrine. The Superior Court, in granting Farmers' motion, rendered the issue moot, but the Court did indicate that it would have granted the relief if the issue was before it.

Although the Silvers do not assign error to this ruling, or advisory ruling as it may be, they do present discussion relating to this issue in their brief. As a result, to the extent that the issue of *Olympic Steamship* attorney's fees is before this Court, Farmers is compelled to address the same.

The Washington State Supreme Court has drawn a clear distinction between the types of disputes that trigger the *Olympic Steamship* doctrine and those that do not. Washington follows the American rule in awarding attorney fees.

Washington follows the American rule in awarding attorney fees. Under that rule, a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground in equity providing for fee recovery. We have recognized a narrow exception to this rule where specific facts and circumstances warrant. *Olympic Steamship* presents such a situation.

This case presents an entirely different set of circumstances. Coverage is not an issue; Farmers accepted coverage. Unlike the insured in *Olympic Steamship*, Mr. Dayton has not compelled Farmers to honor its commitment to provide coverage. Instead, *this case presents a dispute over the value of the claim presented*

under the policy. Such disputes are not properly governed by the rule in *Olympic Steamship*.

Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994) (internal citations omitted).

Washington Courts have repeatedly followed this claim/coverage distinction.

The coverage/claim distinction made in *Dayton* and followed in *Mailloux v. State Farm Mut. Auto Ins. Co.*, is equally applicable in the context of PIP arbitration. To paraphrase *Mailloux*, PIP coverage is denied when the PIP insurer says it has no contractual duty to pay even if the insured proves that her medical expenses are reasonable and necessary. PIP coverage is not denied if the insurer, while accepting its contractual duty to pay reasonable and necessary expenses, denies that certain proposed expenses are reasonable and necessary. When First National announced that it would no longer pay Kroeger's medical bills, it was not denying PIP coverage, it was denying a claim.

Kroeger v. First National Ins. Co. Of America, 80 Wn. App. 207, 209, 908 P.2d 371 (1995).

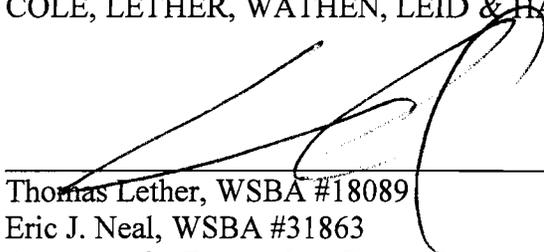
In the instant action, Farmers never denied coverage for the Silvers' claim. To the contrary, Farmers actually paid the Silvers' claim *twice*. Farmers never refused to make any payment. Farmers never raised a coverage issue with the Silvers or in this litigation. As such, the trial court's dismissal of this action should be affirmed.

II. CONCLUSION

Based on the foregoing, Farmers asks that the Superior Court be affirmed in its entirety and that a Mandate be issued ending this litigation.

SUBMITTED this 7 day of ^{April}~~March~~, 2011.

COLE, LETHER, WATHEN, LEID & HALL, P.C.



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