

67507-9

67507-9

NO. 675079

---

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

---

ETHAN ALLEN AND DOROTHEA MARSHALL,

Appellants,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

---

**RESPONDENT'S BRIEF**

---

Joseph D. Hampton, WSBA #15297  
Vasudev N. Addanki, WSBA #41055  
Attorneys for State Farm Fire &  
Casualty Company  
Betts Patterson & Mines, P.S.  
One Convention Place, Suite 1400  
701 Pike Street  
Seattle WA 98101-3927  
Telephone: (206) 292-9988  
Facsimile: (206) 343-7053

~~FILED~~  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 17 PM 3:59

**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES .....   | iii         |
| I. INTRODUCTION .....  | 1           |
| II. STATEMENT OF ISSUES .....  | 3           |
| III. STATEMENT OF THE CASE .....   | 4           |
| A. Factual Background .....  | 4           |
| 1. Initial adjustment of claim .....   | 4           |
| 2. Appellants’ retention of appraiser and the appraisal process .....  | 8           |
| 3. Retention of forensic engineer Paul Way by State Farm at Appellants’ request.....   | 11          |
| B. Procedural History .....  | 14          |
| IV. ARGUMENT.....  | 15          |
| A. Summary Judgment Is Appropriate Where, as Here, a Party Cannot Produce Evidence Sufficient to Meet Its Burden of Proof on the Elements of Its Claims..... | 15          |
| B. Appellants Failed to Submit Any Evidence of Lightning-Related Damage.....   | 17          |
| 1. Appellants failed to timely or properly disclose any expert testimony to State Farm ....  | 17          |
| 2. Appellants had the burden of proof of establishing lightning-related causation and damages .....  | 18          |
| 3. Appellants’ conclusory allegations and statements were insufficient to defeat summary judgment .....  | 21          |
| C. The Trial Court Was Correct in Ruling that State Farm Did Not Act in Bad Faith .....  | 23          |
| 1. Appellants improperly make new arguments on appeal .....  | 23          |
| 2. Basic rules of an insurer’s extracontractual liability .....  | 24          |
| 3. State Farm’s investigation was prompt and reasonable .....  | 25          |
| 4. State Farm did not stop the appraisal process...  | 27          |

**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| D. Appraisal Was Inappropriate for this Claim and the Trial Court Properly Disregarded Appellants' Citations to Out-of-Jurisdiction Case Law ..... | 29          |
| 1. Appellants failed to establish a right to appraisal under the policy .....  | 29          |
| 2. The numerous cases cited by Appellants have no bearing on the issues before this Court .....  | 31          |
| E. The Trial Court Properly Did Not Reach the Issue of Appellants' Alleged Emotional Distress Damages .....  | 37          |
| F. Attorney's Fees .....   | 37          |
| V. CONCLUSION.....   | 38          |

## TABLE OF AUTHORITIES

|   | <u>Page</u>    |
|---|----------------|
| <b><u>WASHINGTON CASES</u></b>  |                |
| <i>Badgett v. Security State Bank</i> , 116 Wn.2d 563 (1991) .....  | 25             |
| <i>Baldwin v. Silver</i> , _____ Wn. App. _____ (Dec. 29, 2011) .....                                       | 21, 22         |
| <i>Black v. National Merit Ins. Co.</i> , 154 Wn. App. 674 (2010).....                                      | 17             |
| <i>Coventry Assocs. v. American States Ins. Co.</i> , 136 Wn.2d 269,<br>961 P.2d 933 (1998) .....           | 24, 27         |
| <i>Dombrowsky v. Farmers Ins. Co. of Wash.</i> , 84 Wn. App. 245<br>(1996).....                             | 17             |
| <i>Graff v. Allstate Ins. Co.</i> , 113 Wn. App. 799 (2002).....  | 18             |
| <i>Howell v. Spokane &amp; Inland Empire Blood Bank</i> , 117 Wn.2d<br>619 (1991).....                      | 16             |
| <i>Northwest Bedding Co. v. National Fire Ins. Co. of Hartford</i> ,<br>154 Wn. App. 787 (2010).....        | 17             |
| <i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417 (2002) .....  | 25             |
| <i>Seybold v. Neu</i> , 105 Wn. App. 666 (2001) .....   | 16             |
| <i>Silverhawk, LLC v. Keybank Nat'l Ass'n</i> , _____ Wn. App. _____<br>(Oct. 31, 2011).....                | 23, 24         |
| <i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478 (2003).....   | 24, 27         |
| <i>Tiger Oil Corp. v. Yakima County</i> , 158 Wn. App. 553 (2010).....                                      | 21             |
| <b><u>OTHER JURISDICTIONS</u></b>   |                |
| <i>Hawkinson Tread Tire Service Co. v. Indiana Lumbermens<br/>Mut. Ins. Co.</i> , 245 S.W.2d 24 (1951)..... | 36             |
| <i>Kawa v. Nationwide Mut. Fire Ins. Co.</i> , 664 N.Y.S.2d 430<br>(N.Y. Sup. Ct. 1997).....                | 35, 36, 37     |
| <i>State Farm Lloyds v. Johnson</i> , 209 S.W.3d 886 (2009).....  | 31, 33, 34     |
| <i>State Farm v. Licea</i> , 685 So. 2d 1285 (Fla. 1996).....   | 31, 32, 33, 34 |

## I. INTRODUCTION

Mr. Allen and Ms. Marshall want a remand for a trial on nothing. They appeal despite failing to submit any evidence of lightning-related damage or that State Farm acted in bad faith in the handling of their claim. This case can be separated into contractual claims (for additional payments pursuant to policy coverage), and extracontractual claims (for tort compensation). Appellants bore the burden of proving coverage, as well as breach, causation and damages, for both their contractual and extracontractual claims. However, Appellants failed to meet their burden and the trial court properly granted summary judgment in State Farm's favor.

Appellants argue that State Farm breached the policy's Appraisal provision by not considering the extent of lightning-related damage. This argument is flawed. Appellants never submitted any evidence of the extent of lightning-related damage for State Farm's consideration. Appellants had the opportunity to disclose the identity, opinions, and reports of those individuals that would support their version of lightning-related damage, as well as monetary damages such as loss of use and diminution in value. However, they did not. Appellants did not meet their burden because they failed to submit any admissible evidence in support of their position.

Appellants argue that State Farm acted in bad faith because State Farm's investigation was neither prompt nor reasonable. However, the evidence in the trial court showed that Appellants delayed the handling of

the claim for various reasons. State Farm acquiesced to most of Appellants' requests throughout the claims handling process and retained a lightning engineer specifically suggested by Appellants' appraiser to evaluate Appellants' claimed additional damage. Despite these efforts, Appellants were dissatisfied with State Farm's handling of their claim. State Farm went above and beyond to accommodate Appellants' requests but stopped short of Appellants' demand to pay an inflated, unsupported claim.

Appellants also argue that State Farm acted in bad faith by withdrawing from the appraisal process. To the contrary, it was Appellants, not State Farm, who withdrew from the appraisal process. Appellants' own appraiser noted that the appraisal could not go forward because Appellants continued to add new claims of damage that had not been shown to be consequential to the lightning strike.

Moreover, proceeding to appraisal was improper. Appraisal is not intended to resolve the question that was unanswered in this claim, namely, whether the many problems complied by Appellants were the result of a covered cause of loss. Appraisal is intended to resolve disputes over how much should be paid to repair or replace damaged property when a covered cause of loss has been determined to have caused the damage.

Appellants cite to numerous out-of-jurisdiction cases in support of their position that the policy's Appraisal provision includes consideration of extent of loss in addition to amount of loss. They cite no Washington

cases. The out-of-jurisdiction cases are neither mandatory nor persuasive authority upon this Court. In addition, the trial court properly interpreted the policy's Appraisal provision to be limited to amount of loss, not extent of loss. Appellants' appraiser stopped the appraisal process because the parties could not agree upon the extent of loss and because of the presence of coverage issues. He could have gone forward with the appraisal on his own without State Farm's participation, but he did not because the appraisal process is limited to the determination of the amount of loss, not the extent of loss or whether claimed damage is the result of a cause not covered.

Appellants argue that they are entitled to recover emotional distress damages. But this argument depends upon a finding that State Farm acted in bad faith. Because the trial court properly ruled that State Farm did not act in bad faith, Appellants are not entitled to emotional distress damages any more than any other bad faith damages.

## II. STATEMENT OF ISSUES

1. Did the trial court err in dismissing Appellants' lawsuit because they failed to submit any evidence of lightning-related damage, and monetary damages such as loss of use and diminution in value, prior to the discovery cut-off thus enabling them to argue such evidence at trial? No. The trial court properly ruled that Appellants failed to submit any evidence of lightning-related damage in a timely manner.

2. Did the trial court err in dismissing Appellants' bad faith claims? No. The trial court followed Washington law in ruling that State

Farm did not act in bad faith in handling Appellants' property damage claim.

3. Did the trial court err in ruling that the policy's Appraisal provision is limited to determining the amount of loss and rejecting Appellants' citation to out-of-jurisdiction case law that expands the provision to extent of loss? No. The trial court gave the Appraisal clause its plain meaning and properly ignored out-of-jurisdiction case law that is neither persuasive nor mandatory authority in Washington.

4. Did the trial court err in not reaching the issue of whether Appellants suffered emotional distress? No. The trial court did not reach this issue because it properly found that State Farm did not act in bad faith in handling of Appellants' claim.

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

This case arises out of a lightning strike on Appellants' property on November 21, 2006. The lightning did not hit Appellants' house, but hit a tall fir tree in the backyard. As a result, the house sustained some damage, as did a retaining wall in the backyard, some contents of the home, and a greenhouse.

#### **1. Initial adjustment of claim**

On November 29, 2006, State Farm Claim Representative Danielle Kopatich was assigned to handle Appellants' claim. On December 14, 2006, Ms. Kopatich conducted an inspection of the damage to Appellants'

home. Ms. Kopatich recorded Ms. Marshall's belief that the energy from the lightning strike "shifted the house and caused structural damage to the home" and that a corresponding power surge caused content damage. Ms. Kopatich noted that a structural engineer was needed to inspect the damage to the dwelling and that she would work with Appellants in selecting a general contractor to bid repairs based on the engineer's report. State Farm Team Manager Paul Yan approved hiring Pacific Engineering to inspect Appellants' home and property and determine the extent of lightning-related damage. (CP 67.)

On December 27, 2006, engineer Kyle Bozick of Pacific Engineering performed an inspection of Appellants' home. However, appellant Ms. Marshall was dissatisfied with the inspection. In particular, Ms. Marshall was concerned that Mr. Bozick did not inspect the attic or the chimney. Also, Ms. Marshall no longer wanted Ms. Kopatich to handle Appellants' claim and asked State Farm that Ms. Kopatich be replaced with another Claims Representative. State Farm Claim Representative Jackie Jenkins was then assigned to handle Appellants' claim. (*Id.*)

Ms. Jenkins spoke with Mr. Bozick regarding Appellants' chimney and was assured that there was no lightning-related damage to the chimney. Nonetheless, Ms. Jenkins asked Mr. Bozick to look at the inside of the chimney, pursuant to Appellants' request, and he agreed to do so. (*Id.*)

Ms. Marshall was not happy with State Farm's decision to send Pacific Engineering out again to perform another inspection of her chimney. She felt that Pacific Engineering was not competent to address the damage to the home. Ms. Marshall did not want Mr. Bozick to inspect her home again, so Ms. Jenkins asked Pacific Engineering to assign another engineer to inspect Appellants' home. (*Id.*)

On January 9, 2007, Pacific Engineering notified Ms. Jenkins that it had assigned Mark Uchimura to handle the inspection of Appellants' home. On January 23, 2007, Ms. Jenkins met with Appellants and Mr. Uchimura for another inspection at Appellants' home. Mr. Uchimura inspected the home pursuant to an itemized list of damage prepared by Appellants. (*Id.* at 67-68.)

On January 30, 2007, Pacific Engineering forwarded its report to State Farm. (CP 68; 78-88.) The report was signed by both Mr. Uchimura and Mr. Bozick. Pacific Engineering opined that the following damage was due to the lightning strike: (1) damage to retaining wall; (2) damage to two of the basement windows (also, the looseness of the basement bathroom window may have been exacerbated by the lightning strike); (3) detachment of the flexible dryer exhaust from the exterior wall; (4) slight exacerbation of cracks in firebox brick and mortar joints, although mostly preexisting; (5) downward displacement of two roof soffit vent covers on south side of roof; (6) exacerbation of loose conditions of windows in kitchen, guest bathroom, and master bedroom and bath; (7) damage to tiles on the window sills in the kitchen and master bedroom

and bath, although not structurally significant; (8) cracks in the gypsum wall board (“GWB”), although not structurally significant; and (9) gaps along counter-wall interface in kitchen. Of significance is that Pacific Engineering did not find lightning damage to the chimney. The report noted that the separation between the chimney and the adjacent GWB was not caused by the lightning strike as evidenced by the rounded edges of the GWB and the dirt and debris inside the separation. Pacific Engineering also found that the crack in the foundation was the result of long-term differential settlement and not the result of the lightning strike as evidenced by the rounded and dull-colored edges. (CP 68; 78-83.)

By August 2007, Ms. Jenkins had received an estimate from Rainbow Construction to perform the repair work at Appellants’ home. On August 23, 2007, repairs were underway. At that time, Ms. Jenkins advised Appellants that State Farm would only pay for repairs of lightning-related damage. On October 27, 2007, State Farm issued a check to Appellants for repair of lightning-related damage to their home and property. Ms. Jenkins noted that it was appropriate to close the file at that time. (CP 68-69.)

On November 7, 2007, Mike Kelty of Greater Northwest Chimney, a chimney repair company retained by Appellants, informed Ms. Jenkins that there was damage to the chimney that had been there for a long time and that there was also new damage that may have been caused by the lightning. On November 19, 2007, Ms. Marshall told Ms. Jenkins that she was very upset with Rainbow Construction and Pacific Engineering and

felt that they should have discovered what she thought was lightning-related chimney damage at the beginning. Ms. Jenkins advised Ms. Marshall that State Farm could only pay for those chimney repairs related to lightning damage. Ms. Marshall felt that State Farm needed to pay for all of the damage to the chimney. (CP 69.)

**2. Appellants' retention of appraiser and the appraisal process**

In a letter dated December 28, 2007, Roger Howson informed Ms. Jenkins that he had been retained by Appellants as an appraiser. State Farm retained John Colvard as its appraiser. (*Id.*) On January 10, 2008, Ms. Jenkins wrote a letter to John Colvard in which she stated that State Farm did not pay the Greater Northwest Chimney estimate because the estimate did not distinguish between lightning-related damage and basic wear and tear. (*Id.*)

On January 30, 2008, Mr. Colvard told Ms. Jenkins that he had met with Mr. Howson and received a lengthy list of damages that Appellants claimed were caused by the lightning strike. In a letter of the same date, Appellants complained that despite their concerns about the chimney, “neither of the engineers contracted by State Farm carried out more than a casual, external, visual survey of the chimney,” and that this indicated that “a complete and comprehensive engineering review of the house has not yet been done.” Appellants also stated that a full diagnosis of the damage caused by the lightning still needed to be done. The appraisal process did

not proceed because the appellants' new appraisal process list of claimed damage was under the engineers' review. (CP 69.)

Ms. Jenkins told Appellants that the only items the appraisers could address were the lightning-related damages identified in Pacific Engineering's report of January 30, 2007. (CP 69-70.) Nonetheless, on January 31, 2008, State Farm's appointed appraiser Mr. Colvard asked the engineer Mr. Uchimura to review the additional items of alleged lightning-related damage provided by Appellants. (CP 70; 90.) On that same date (January 31, 2008), Appellants' appointed appraiser Mr. Howson informed Appellants that Mr. Uchimura would inspect the additional items provided by Appellants, and would segregate lightning damage from non-lightning damage. (CP 70; CP 92.)

On April 4, 2008, Ms. Jenkins spoke with Mr. Colvard who stated that the appraisal was "not moving along." Mr. Colvard felt that the issues raised by Appellants were coverage issues, and that appraisals are not designed to address coverage. Appellants wanted experts hired to address the various issues. Mr. Colvard suggested that State Farm send a letter to Appellants stating that the appraisal needs to move forward or the information must be forwarded to the umpire. (CP 70.)

On April 28, 2008, Appellants' appraiser Mr. Howson sent a letter to State Farm's appraiser Mr. Colvard regarding the status of the appraisal. (CP 70; 94-96.) He stated that the appraisal was "at a standstill until several key issues can be decided." Mr. Howson felt that some of the issues were coverage questions that would exceed the authority of the

appraisal panel. He suggested that the parties' umpire determine whether the appraisal should move forward and how so. Mr. Howson stated that the "critical challenge" for the appraisal panel was that there were damages which had neither been proven nor disproven to be consequential to the lightning strike. Mr. Howson noted that Appellants had been "unrelenting in their insistence that State Farm would not conduct an appropriately thorough investigation of their claim until engineers (electrical and structural) with proven experience in lightning claims have inspected the damage, determined the cause, and prescribed an adequate remedy." Mr. Howson suggested that "bringing in engineers who are competent to investigate lightning claims would provide us with the basis for ultimately determining loss, damage, and valuation." (CP 70-71; 94-96.)

Mr. Howson stated that Mike Kelty of Greater Northwest Chimney found that 60-70% of the damage to the chimney was due to general wear and tear, however, Mr. Kelty was unable and unwilling to say or determine how much (if any) of the remaining 30-40% damage was due to the lightning strike. Mr. Howson stated that Mr. Kelty was "determinedly noncommittal about the cause of that damage," and did not know how much or whether the lightning was the reason Appellants had to replace their chimney and fireplace system. Mr. Kelty could not be sure that the lightning did not create sufficient additional damage to necessitate total replacement. Mr. Howson acknowledged that State Farm questioned

whether any of the damage to the chimney or consequential repairs was the result of lightning. (CP 71; 95.)

Mr. Howson stated that “the claim requires an expert qualified to identify and analyze lightning damage.” Mr. Howson commented that State Farm’s expert was Mr. Uchimura, who had no experience in lightning claims (Mr. Howson admitted that he did not, either).

Mr. Howson stated that in order to conduct a through investigation of Appellants’ claims, “State Farm needs to pay for a competent and entirely unbiased lightning expert to inspect the premises, identify all of the existing and potential damages and dangers (consequential to the lightning strike), determine an appropriate remedy, and recommend a scope of repairs. . . .” Mr. Howson warned that “anything short of this is a disservice to the policyholders.” (CP 71; 96.)

**3. Retention of forensic engineer Paul Way by State Farm at Appellants’ request**

On May 16, 2008, Ms. Jenkins spoke with Mr. Howson, and he agreed that appraisal may not be a good fit for Appellants’ claim. Mr. Howson recommended that State Farm hire Paul Way of Case Forensics to investigate possible lightning damage. In a letter of the same date, Ms. Jenkins (for State Farm) agreed to retain Mr. Way and stated “State Farm will pay for the cost of CASE Forensics.” (CP 71-72.)

On June 23, 2008, Mr. Way performed his inspection of Appellants’ home. On July 11, 2008, Mr. Way forwarded his report to State Farm. (CP 72; 98-101.) Mr. Way made the following conclusions:

(1) there was no physical evidence linking ongoing problems with electrical devices in the home to the lightning strike; (2) there was no physical evidence that the lightning strike caused damage to the front and rear porch brick fascia; (3) there was no physical evidence that the lightning strike caused damage to the basement floor; and (4) there was no physical evidence that the lightning strike caused damage to the driveway. (CP 72; 101.)

On July 18, 2008, after reviewing the Case Forensics report, State Farm concluded that Appellants' claim was not a candidate for appraisal because it involved coverage issues. (CP 72.) Despite this, Mr. Way prepared a supplemental report dated August 11, 2008, which addressed additional claimed lightning-related damages. (CP 72; 103.) After considering Appellants' additional claimed damage, Mr. Way concluded that "given the age of the home, all of the damage and/or deterioration to the home could have been long term and I found no evidence that suggested that the home was damaged by lightning except as noted in my previous report. Ms. Marshall's statements were the only indication that the deterioration was related to the lightning strike." (CP 72; 104.)

On March 17, 2009, based on Mr. Way's inspections, findings, and conclusions, State Farm closed the claims file. However, on May 12, 2009, Appellants' counsel set Ms. Jenkins a letter, stating that Mr. Way performed inadequate inspections and testing. Counsel stated that Appellants were in the process of performing their own test and that they expected State Farm to pay these expenses. Ms. Jenkins responded on

May 14, 2009, stating that State Farm conducted a reasonable investigation and further investigation was not warranted. Ms. Jenkins stated that Paul Way was qualified to conduct the testing and that if Appellants wished to conduct more testing, they would have to at their own expense. In a letter dated June 12, 2009, Appellants' counsel stated that Appellants' home was being inspected by an "additional engineer on June 18, 2009" and that a report would be forthcoming thereafter. State Farm has never received any such report. (CP 72-73.)

The primary reason that State Farm did not continue with the appraisal process was Appellant's appraiser's (Roger Howson) statement that the appraisal could not continue. But that does not mean State Farm did not pay what it owed on the claim. Rather, State Farm paid Appellants based on the inspections, findings, and conclusions of engineer Mark Uchimura of Pacific Engineering. These findings and conclusions were later confirmed by engineer Paul Way of Case Forensics, whom State Farm agreed to retain and pay based on the recommendation of Appellants' appraiser, Roger Howson, even though State Farm felt that Mr. Uchimura had more than adequately addressed Appellants' concerns. (*Id.*)

Throughout the claims handling process, State Farm agreed to extend the suit limitation deadline multiple times in an effort to accommodate Appellants even though it had no obligation to do so. During the claims handling and appraisal process, State Farm never received an estimate from Appellants for repair of the alleged lightning-

related damage until July 2010, which was well after suit was filed, when Appellants' current counsel forwarded a repair estimate prepared by H2L Partners, LLC. (CP 73; 106-107.) Critically, there is no evidence before this Court that the estimator (a) determined that the damage he assessed was actually caused by lightning, or (b) he was even competent to so opine.

**B. Procedural History**

On January 5, 2011, State Farm served its "First Set of Interrogatories and Requests for Production Upon Plaintiffs." (CP 164-82.) Interrogatory No. 13 asked Appellants for the identity of any experts that investigated Appellants' claims in the lawsuit. Interrogatory No. 14 asked Appellants to list each expert that Appellants intend to call at trial, including the expected subject matter of their testimony, the facts to which the expert will testify, the substance of the expert's opinions, and a summary of the grounds for each such opinion. Appellants did not propound any expert witness interrogatories upon State Farm.

On February 8, 2011, Appellants served their disclosure of possible primary witnesses. (CP 184-6.) Appellants disclosed, among others, Scott Hufford as a witness with "expert knowledge of damages caused by the lightning strike in question." Appellants did not disclose the expected subject matter of Mr. Hufford's testimony, the facts to which he will testify, the substance of his opinions, or a summary of the grounds for each such opinion.

On March 24, 2011, Appellants provided answers to State Farm's First Set of Interrogatories and Requests for Production. (CP 189-205). In answer to Interrogatory No. 13, Appellants listed four separate individuals. In answer to Interrogatory No. 14, Appellants answered "This [h]as not yet been determined." Appellants never answered Interrogatory No. 14.

On March 28, 2011, Appellants moved for an adjustment of trial date, which the Court granted. In addition to Appellants' motion, to which State Farm did not object, the parties agreed to enter into a Revised Case Schedule, which went into effect on April 29, 2011. (CP 242-4.) According to the Revised Case Schedule, the deadline for disclosing possible additional witnesses was May 13, 2011. (*Id.*) The parties exchanged their respective disclosures of possible additional witnesses by that date. In their disclosure of possible additional witnesses, Appellants disclosed Mike Kelty of Greater Northwest Chimney. (CP 247-8.) Mr. Kelty was not previously disclosed in Appellants' disclosure of possible primary witnesses. According to the Revised Case Schedule, the discovery cut-off was June 13, 2011. (CP 244.)

#### IV. ARGUMENT

##### A. **Summary Judgment Is Appropriate Where, as Here, a Party Cannot Produce Evidence Sufficient to Meet Its Burden of Proof on the Elements of Its Claims**

The general rules concerning a court's grant or denial of a motion for summary judgment are long- and well-established. This case concerns the application of particular summary judgment rules, namely, those

pertinent to a defendant's motion for summary judgment. Our Supreme Court has said:

On a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Yonne v. Key Pharmaceuticals, Inc.*, 112 Wash. 2d 216, 225, 770 P. 2d 182 (1989) (citing *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975)). A moving defendant may meet this burden by showing that there is an absence of evidence to support the non-moving party's case. 112 Wash. 2d at 225, 770 P.2d 182 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)). . . .

After this showing is made, the burden shifts to the party with the burden of proof at trial, the plaintiff. The plaintiff must come forward with evidence sufficient to establish the existence of each essential element of its case. If this showing is not made:

[T]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

112 Wash. 2d at 225, 770 P. 2d 182 (quoting *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552.

*Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624-5 (1991); see also *Seybold v. Neu*, 105 Wn. App. 666, 676 (2001). Here, Appellants failed to produce evidence supporting their claims, and the trial court correctly dismissed the case.

Appellants made two types of claims against State Farm, namely, a breach of contract claim for asserted failure to pay for all lightning-caused damage, and extracontractual claims (bad faith, violation of the Consumer

Protection Act, and violation of the Insurance Fair Conduct Act) related to State Farm's denial, and related to the abandoned appraisal. The Appellants bore the burden of proving that their claim is covered by State Farm's insurance policy. *Black v. National Merit Ins. Co.*, 154 Wn. App. 674, 680 (2010); *Northwest Bedding Co. v. National Fire Ins. Co. of Hartford*, 154 Wn. App. 787, 791 (2010). They further bore the burden of showing that State Farm acted in bad faith or committed other misconduct. *See, e.g., Dombrowsky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245 (1996). As the discussion below shows, Appellants did not produce evidence sufficient to justify a trial.

**B. Appellants Failed to Submit Any Evidence of Lightning-Related Damage**

**1. Appellants failed to timely or properly disclose any expert testimony to State Farm**

The primary issue in the trial court was whether Appellants submitted any evidence of the extent of lightning-related damage. Appellants failed to answer State Farm's Interrogatory No. 14, which asked for the identity of Appellants' testifying experts and their opinions and reports. The discovery cut-off was June 13, 2011 and Appellants never provided to State Farm any information regarding the identity of Appellants' testifying experts, what their opinions were, and what reports they created and/or would rely upon in support of their opinions. CR 41(b) states, "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for

dismissal of an action or any claim against him or her.” Appellants failed to comply with the trial court’s Revised Case Schedule by not disclosing the identity of their testifying experts prior to the discovery cut-off.

If Appellants did indeed retain experts, they were the only persons who could submit admissible evidence of Appellants’ version of lightning-related damage (as well as evidence of monetary damages such as loss of use, diminution in value, and emotional distress). But they were “shielded” from deposition or further discovery by not being designated as testifying experts. Even if Appellants argue that their disclosed experts were always considered testifying experts, the fact remains that Appellants failed to answer Interrogatory No. 14, *i.e.*, failed to specifically identify the testifying experts, disclose their opinions, and produce any documents in reliance of those opinions.

**2. Appellants had the burden of proof of establishing lightning-related causation and damages**

Appellants had the burden of proving their damages in the trial court. *See Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 803 (2002). Since they did not meet their burden, the trial court properly dismissed Appellants’ lightning-related damage claims.

Appellants apparently claim that there was more damage to the house than State Farm paid for repairing. In the trial court, Appellants argued that they identified Konrad Koss and Mike Kelty as persons with knowledge about damage caused by the lightning strike. They pointed to their interrogatory answers and Mr. Koss’s “report” as evidence

preventing summary judgment. However, as the trial court recognized, there were at least three problems with this argument. First, this material failed to meet the requirement of CR 56 that submissions be “admissible in evidence,” because it was not sworn testimony from witnesses with personal knowledge — neither Mr. Koss nor Mr. Kelty: (a) *testified* that (b) certain *observed* conditions (c) were actually *caused* by lightning. Second, Mr. Koss’s report was merely an estimate of the cost of repairs, based upon an assumption of lightning damage. Third, Mr. Kelty, a chimney repairman, did not provide the required testimony that the conditions he observed in the chimney were caused by lightning, much less provide needed foundation that he was competent to so opine. In short, repair estimates are not causation evidence.

In an effort to get around their failure to timely identify testifying experts and their opinions, Appellants argue that appraisals do not require the testimony of expert witnesses in order to proceed. They argue that the matter should have proceeded to trial where the jury would have heard the testimony of the parties’ respective appraisers, whose opinions are somehow not subject to the Evidence Rules. First, Appellants filed suit against State Farm and invited the applicability of the rules of evidence and rules of civil procedure in their lawsuit. Instead of moving for summary judgment once suit was filed in an effort to resume the appraisal process, and ostensibly prevent the applicability of the rules of evidence in determining the amount and extent of the loss, Appellants did virtually nothing for the entire pendency of the lawsuit. Even on appeal, which is

*de novo* review, Appellants seek remand for trial, not resumption of the appraisal process. Appellants are trying to have it both ways. They argue that the trial court should have allowed the matter to proceed to trial but that witness testimony is not subject to the Rules of Evidence. This would lead to an absurd result.

Second, State Farm specifically pointed out in its summary judgment briefing that the material submitted by Konrad Koss and Mike Kelty was insufficient to cause a genuine issue of material fact under CR 56(c). However, even if Appellants' argument is correct and the matter should have proceeded to trial to hear the appraisers' testimony, the Appellants' appraiser would have relied upon Messrs. Koss and Kelty, who submitted no evidence supporting Appellants' version of lightning-related damage. And, clearly, Appellants have presented no evidence that either appraiser (theirs — Mr. Howson, or State Farm's — Mr. Colvard) was competent to testify whether certain observed conditions were in fact caused by the lightning strike.<sup>1</sup> Taking Appellants' argument to its logical conclusion, this matter would be remanded to the trial court for a trial in which Appellants would have had no evidence to support their claims. It would be a trial on nothing. Recognizing this, the trial court properly

---

<sup>1</sup> In fact, the lack of appraiser expertise was precisely why Mr. Howson demanded that State Farm hire the lightning expert, Paul Way, P.E. Moreover, if Messrs. Kelty or Koss had been qualified to opine on lightning damage causation, Mr. Howson would have said so and not insisted on Mr. Way being hired.

granted State Farm's Motion for Summary Judgment. This decision should not be disturbed.

**3. Appellants' conclusory allegations and statements were insufficient to defeat summary judgment**

Apparently believing they are qualified to testify regarding the amount of lightning damage to their home, Appellants cite to Ms. Marshall's conclusory declaration (CP 132-133) concerning the chimney in their Opening Brief. The trial court properly ignored this declaration in reaching its decision because conclusions do not suffice to establish a genuine issue of material fact. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 561-62 (2010). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Id.* at 561-62. Appellants failed to submit any testimony supporting their assertion of lightning-related damage, even from witnesses they disclosed in discovery. Appellants' testimony was limited to their opinions of the value of their property. *Id.* at 436-37.

Division III of the Court has recently made a similar ruling in an insurance case. In *Baldwin v. Silver*, \_\_\_\_\_ Wn. App. \_\_\_\_\_ (Dec. 29, 2011), the insureds (the Silvers) claimed that their insurer, Farmers, breached its contract by failing to pay the full amount due under the policy, after a covered loss. Farmers moved for summary judgment, and the trial court granted the motion. The Court of Appeals affirmed. These comments from the Court are particularly applicable to this case:

[W]hat the judge did here was refuse to consider the conclusory, unsupported statements set out in the affidavits. Though the trial court may be lenient to a nonmoving party's affidavits presented in response to a motion for summary judgment, it may not consider conclusory statements contained in the nonmoving party's affidavits. . . . A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact. . . .

In her affidavit, Ms. Silver claimed that the damage to her deck was worth \$10,000. But no receipt, quote, or any other piece of evidence supports her statement. The statement, then, is nothing more than an unfounded, conclusory statement of damages. . . .

\_\_\_\_\_ Wn. App. \_\_\_\_\_, (slip op. ¶¶ 15, 16).

Here, Appellants are not just opining as to the value of their home. Instead, they are seeking to provide opinions as to the cause and extent of damages. This is improper; just as in *Baldwin*, the Appellants attempt to avoid summary judgment by submitting unqualified, conclusory statements. Appellants had no basis to testify to the extent of lightning-related damage, and Ms. Marshall's declaration failed to raise an issue of fact on that issue. And, her declaration did not even establish the foundation necessary for a trier of fact to conclude that the chimney was in fact damaged by the event. That is, her declaration did not demonstrate knowledge of the fireplace or chimney's pre-event condition or operation. These submissions were insufficient to defeat summary judgment in the trial court, which properly dismissed Appellants' claims. Moreover, Ms. Marshall testified in her deposition that she did not even know the fair market value of her home. (CP 145, 66:4-11.)

**C. The Trial Court Was Correct in Ruling that State Farm Did Not Act in Bad Faith**

**1. Appellants improperly make new arguments on appeal**

Preliminarily, State Farm notes that Appellants have greatly expanded their argument concerning State Farm's supposed bad faith or other misconduct.<sup>2</sup>

Appellant's response to State Farm's motion for summary judgment is found at CP 108-117. It differs substantially from what Appellants have argued here. Below, Appellants simply argued that State Farm acted in bad faith, by performing an inadequate, slow investigation, and by improperly limiting the appraisal and shutting it down.<sup>3</sup> (CP 111-6).

With regard to the adequacy and speed of the investigation, in the trial court, Appellants devoted one page to argument, and cited no law. (CP 111-2.) But here, Appellants expanded their discussion to five pages (Appellants' Opening Brief, pp. 9-13, 20-21), argued from two regulations and two treatises not previously cited (Appellants' Opening Brief, pp. 9, 11, 21), and raised many arguments not previously presented.

This is improper. Cursory argument below does not sanction wide-open briefing in this Court. This Court recently said so in *Silverhawk, LLC v. Keybank Nat'l Ass'n*, \_\_\_\_ Wn. App. \_\_\_\_ (Oct. 31,

---

<sup>2</sup> Appellants' alleged breach of contract, bad faith, and violation of insurance regulations, the Insurance Fair Conduct Act and the Consumer Protection Act. (CP 1-3.)

<sup>3</sup> Of course, as amply demonstrated by the record here, and as easily seen by the trial court, none of these allegations are true.

2011). This Division ruled that the appellant could not argue a contract analysis for the first time on appeal, where the discussion had not been presented to the trial court:

“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wash.App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wash.2d 1017, 199 P.3d 411 (2009). . . .

\_\_\_\_\_ Wn. App. \_\_\_\_\_ (slip op. at ¶ 18); *see also* RAP 9.12.

## **2. Basic rules of an insurer’s extracontractual liability**

Bad faith claims against an insurer are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485 (2003). 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.” *Smith*, 150 Wn.2d at 485. The duty does not require an insurer “to pay claims which are not covered by the contract or take other actions inconsistent with the contract.” *Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998). Similarly, an insurer has no liability to its insured under the Consumer Protection Act or the Insurance Fair Conduct Act if its conduct and

decisions were reasonable. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 434 (2002); RCW 48.30.010(7), .015(1).

None of the theories advanced by Appellants have merit. The requirement that contracting parties act in good faith towards each other is framed by, and relates to, the contractual obligations that they undertake toward each other. The duty to act in good faith does not create new obligations not existing in the contract. *Badgett v. Security State Bank*, 116 Wn.2d 563, 574 (1991). Because Appellants did not submit any evidence of bad faith or misconduct, the trial court properly granted State Farm's Motion for Summary Judgment and dismissed Appellants' claims under the Insurance Fair Conduct Act, the Consumer Protection Act, and Washington insurance regulations.

**3. State Farm's investigation was prompt and reasonable**

In an effort to deflect this Court's attention from their unfounded objections and consequent delay of the resolution of their own claim, Appellants allege that State Farm did not promptly conduct an adequate investigation. However, the actions by State Farm tell another story. The undisputed evidence in the trial court showed that Appellants, not State Farm, delayed the resolution of the claim by continuously expressing dissatisfaction with State Farm's handling of the claim. Rather than ignore its insureds, State Farm acquiesced to Appellants' requests and worked with Appellants throughout the claim and appraisal process, including: (1) asking Pacific Engineering to replace Kyle Bozick (with

whom Appellants were dissatisfied) with Mark Uchimura; (2) having Mark Uchimura inspect Appellants' home pursuant to an itemized list of damage prepared by Appellants; (3) agreeing with Appellants' appraiser, Roger Howson, to retain an unbiased lightning damage engineer to inspect Appellants' home and property and the additional damages claimed by Appellants; (4) agreeing with Mr. Howson's recommendation to retain Paul Way to perform an inspection of their property (including the damage which they alleged were lightning-related); and (5) extending the suit limitations period throughout the pendency of the claim.

The fact that State Farm acquiesced in Appellants' appraiser's request to retain Paul Way to perform the inspection extinguishes any argument that State Farm acted in bad faith or performed an inadequate investigation. State Farm went so far as to retain and pay Mr. Way, a lightning damage engineer, to inspect Appellants' home and Appellant's alleged additional lightning-related conditions in order to satisfy them. Despite this, Appellants were dissatisfied with Mr. Way's expert analysis and conclusions because the results were not in their favor.

Appellants fail to show how any workup by any engineer hired by State Farm was biased or incompetent. Appellants' argument that State Farm's engineer did not look inside the chimney is irrelevant because Appellants have no knowledge of, or testimony regarding, the standard of care; and they cannot say what the interior inspection would have shown, and why it would have made a difference. Moreover, they did not submit any evidence that the chimney was, in fact, damaged by the strike. Put

simply, Appellants would only be satisfied with an engineer who agreed with their unfounded causation claims. Appellants claim that State Farm acted unreasonably simply because it did not unquestionably agree with Appellants, regardless of whether the damage was actually caused by lightning. The policy does not require payment of uncovered claims (*Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 280 (1998)), and bad faith exists only where the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 485 (2003). Surely, the law does not require an insurer to hire successive experts until one finally agrees with the insured's groundless contentions. Here, Appellants produced no evidence to counter that supplied by State Farm, so they cannot show that State Farm was even wrong, much less unreasonably so.

The evidence shows that State Farm went above and beyond to accommodate Appellants' requests. It replaced the first claim representative. It replaced the first engineer. It hired a lightning strike expert. But it stopped at Appellants' demand to pay an inflated, unsupported claim. Thus, there is no evidence that State Farm performed an untimely or unreasonable investigation.

#### **4. State Farm did not stop the appraisal process**

Appellants also allege that State Farm acted in bad faith when it "withdrew" from the appraisal process. (CP 2.) This is inaccurate. Appellants' retained appraiser, Roger Howson, told State Farm's appraiser, John Colvard, that the appraisal process could not continue

because Appellants continued to add new claims of damage, which had neither been proven nor disproven to be consequential to the lightning strike. (CP 70-71; 94-96). Thus it was Appellants, not State Farm, who withdrew from the appraisal process.

After the appraisal was stopped, State Farm asked Appellants' counsel numerous times whether Appellants had substantiation for their claims and to forward same. Appellants never forwarded anything to State Farm until well after suit was filed, when current counsel forwarded H2L's repair estimate. Thus, Appellants were at fault for the truncation of the appraisal process. Appellants' claims of bad faith are without merit and were properly dismissed by the trial court.

Incredibly, Appellants cite to the declaration of Mr. Howson (CP 128-129) in arguing that Mr. Howson did not recommend that the appraisal not continue. However, Mr. Howson's declaration does not support Appellants' argument. Mr. Howson's declaration — provided for litigation, long after the related events occurred — ignores his own contemporaneous letter in which he stated that (1) the appraisal was “at a standstill until several key issues can be decided”; (2) the “critical challenge” for the appraisal panel<sup>4</sup> was that there were damages which had neither been proven nor disproven to be consequential to the lightning strike; and (3) State Farm should retain an unbiased lightning expert to inspect Appellants' property. (CP 70-71; 94-96.) This expert would

---

<sup>4</sup> The panel was Mr. Howson himself, and Mr. Colvard.

determine what damage was indeed caused by the strike, for the benefit of the appraisers. Moreover, the declaration did not deny that Mr. Howson spoke to and agreed with State Farm's Claim Representative Jackie Jenkins that appraisal may not be a good fit for Appellants' claims. (CP 71.)

**D. Appraisal Was Inappropriate for this Claim and the Trial Court Properly Disregarded Appellants' Citations to Out-of-Jurisdiction Case Law**

**1. Appellants failed to establish a right to appraisal under the policy**

Appellants appear to fault State Farm for not putting the entire policy into evidence. First, Appellants were free to do so and should not be heard to complain.

Second, this is another example of Appellants' failure to properly support and argue this case below. Having not put the critical policy language into evidence, it is not in the record and Appellants should not be asking the Court to interpret it, much less hold State Farm liable for supposed failure to comply with the contract language that has not even been admitted.

Third, Appellants' quotation of a standard form passage is inappropriate where the actual policy language is available. Without waiving the objection to Appellants' failure of proof, the key language of the appraisal condition is found in one sentence: "If you [Appellants] and we [State Farm] fail to agree on the amount of loss, either one can demand

that the amount of the loss be set by appraisal.” Appraisal was inapt in the Appellants’ claim for at least two reasons.

First, by its simple terms, it does not apply. The policy says that if the parties disagree as to the amount of the loss, the dispute is to be resolved by appraisal. It does not say that if the parties disagree as to whether a particular item was damaged because of a covered cause of loss, the dispute would be subject to appraisal. The dispute between Appellants and State Farm was the latter, not the former. Appellants claimed that State Farm did not admit that all the damage they claimed was caused by lightning; and that is a coverage issue, not an issue of amount of loss. State Farm notes that this conclusion is consistent with the meaning of the term “appraisal”:

- 1. the act of appraising. 2. An expert or official valuation of something, as for taxation.<sup>5</sup>
- valuation of property for damage resulting from an insured peril[.]<sup>6</sup>

Appraisal does not determine whether there has been damage from an insured peril or covered cause of loss, or the extent of such damage. Rather, appraisal concerns the monetary value or amount required to be expended to repair or replace property which has been damaged by a covered cause of loss.

---

<sup>5</sup> *The American Heritage Dictionary*, 2d Coll. ed. (1985), p. 121.

<sup>6</sup> *Barron’s Dictionary of Insurance Terms*, 5th ed. (2008), p. 31.

Second, the Appellants' own appraiser agreed that their current argument is without merit. He stopped the process due to a lack of expert opinion on the causation of the loss. If he had believed that appraisal was appropriate for determining whether claimed damages are actually covered, he would not have insisted that State Farm hire a lightning expert. But he did. So, irrespective of Appellants' citation to cases concerning the proper scope of appraisal, the plain policy language and the actions of the Appellants' own appraiser show the proper scope.

**2. The numerous cases cited by Appellants have no bearing on the issues before this Court**

Appellants cite to out-of-jurisdiction case law, *State Farm Lloyds v. Johnson*, 209 S.W.3d 886 (2009), and *State Farm v. Licea*, 685 So. 2d 1285 (Fla. 1996), to support their argument that appraisers can determine the extent, as well as amount, of loss. Essentially, Appellants argue that the trial court erred by not applying out-of-jurisdiction case law in ruling that the policy's Appraisal provision is limited to determining the amount, not extent, of a covered loss. Not surprisingly, Appellants fail to cite any Washington case law in support of their position or which holds that the trial court's interpretation of the Appraisal provision was incorrect.

Neither *Johnson* nor *Licea* are binding or persuasive authority. *Johnson* is distinguishable from the case at bar because the insurer in *Johnson* was merely contesting the scope or extent of the additional claimed damage. In contrast, here, State Farm questioned whether the Appellants' additional claimed damage was covered or excluded under the

policy, *i.e.*, settling, cracking, and wear and tear. State Farm had evidence, presented through Pacific Engineering and CASE Forensics, that the additional damage claimed by Appellants was due to settling and wear and tear, and, therefore, was not a covered loss.

Appellants cite *Licea* for the proposition that an appraisal includes a determination of the amount of loss as well as the extent of loss. (Appellants' Opening Brief at p. 17.) However, *Licea* does not stand for the proposition that an appraiser can determine a coverage question such as whether claimed damage was caused by a covered loss or a cause not covered. Appraisal may be based upon a determination by experts as to the extent of a covered loss. That is why State Farm paid for Pacific Engineering and CASE Forensics to determine what portion of Appellants' claimed damage was caused by the lightning and what portion was due to a cause not covered, *i.e.*, settling, cracking, and wear and tear. But that inquiry is not the appraisal; rather, it is in aid of the appraisal. Appraisers can only determine the amount of a covered loss. State Farm disputes that appraisers can determine extent of loss, including whether claimed damage was caused by a covered event or a cause not covered, because that necessarily includes coverage issues.

As noted above, Appellants never came forward during the appraisal process (or at any time during the pendency of this action) and presented evidence of lightning causation. There was no evidence that the claimed additional damage was caused by lightning. If they had, then the disputed extent of damage would have been litigated in court before

returning the issue to the appraisal panel to determine the amount of the loss.

*Johnson and Licea* are similar to *Cigna Ins. Co. v. Didimoi Prop. Holdings*, 110 F. Supp. 2d 259 (D. Del. 2000), which Appellants cited in their summary judgment briefing (CP 114), and which the trial court rejected (RP 16:4). In *Didimoi*, the District Court in Delaware held that causation was for appraisers to determine. 110 F. Supp. 2d at 268. However, *Didimoi* is distinguishable from the case at bar because in *Didimoi*, there were no opinions or expert reports regarding the cause and extent of loss. This left the appraisers to determine the extent of loss in addition to the amount of loss. In the case at bar, there are several, consistent opinions from engineering experts regarding the extent of lightning-related damage, including which portion of the claimed damage was not caused by lightning, but was instead due to settling, cracking, and wear and tear. Appellants had no evidence that the claimed additional damage was caused by lightning.

*Didimoi* is also distinguishable because the issue in *Didimoi* was the scope or extent of the damage caused by an admittedly covered peril. *Id.* at 266. In contrast, the issue in the case at bar, which was not raised in *Didimoi*, is a coverage question of whether the damage claimed was the result of an excluded peril. In fact, the *Didimoi* court noted that “the ultimate question of whether CIGNA is responsible for this damage or whether this damage is excluded under the Policy is a coverage question which requires judicial resolution.” *Id.* at 269.

The trial court read *Didimoi* but stated that it was not on point and that Delaware law “wasn’t helpful.” (RP 16:4.) The trial court was correct in its ruling. Because the trial court rejected *Didimoi*, it stands to reason that to the extent *Johnson* and *Licea* follow *Didimoi*’s limited applicability to extent of damaged caused by a covered peril, they should be rejected as well.

If failing to complete the appraisal process as alleged was a breach of some sort, Appellants would have cited authority to the effect that *appraisers* (as opposed to experts such as Pacific Engineering and CASE Forensics) must decide scope of loss in addition to appraising the amount of loss. If Appellants are convinced that the appraisers in this case should have been able to determine scope as well as amount of loss, why did they not move the trial court to compel appraisal in the 18 months this case had been pending? Why do Appellants not ask this Court to remand to the trial court to resume the appraisal process? This is why: (1) there is no Washington authority that supports their position; and (2) an appraisal by non-experts would not result in a ruling that the claimed additional damage was lightning-related. The reason Mr. Howson stated that the appraisal process came to a “standstill” was because Appellants did not have any evidence of lightning causation. The trial court noted this in its decision:

On the contractual claims, Plaintiffs have no witnesses that can testify to causation, neither Koss, who was – nor Kely can testify that certain needed repairs or damage were caused by the lightning. Construing all inferences in favor

of the nonmoving party, which in this case is the plaintiffs, this Court believes there is no genuine issues of material fact. Plaintiff has [sic] no witness, not Koss or Kelty, who can testify that the damages or needed repairs were caused by the lightning strike.

(RP 16:5-14.)

Case law from other jurisdictions support the trial court's interpretation of the Appraisal provision. *See e.g., Kawa v. Nationwide Mut. Fire Ins. Co.*, 664 N.Y.S.2d 430, 431 (N.Y. Sup. Ct. 1997). In *Kawa*, the court addressed the issue presented in the case at bar: the coverage question of whether the damage claimed was the result of an excluded peril. (*Id.* at 431.) The court held that an appraisal clause only applies to a case where the parties disagree as to the amount of loss or damage, not where the insurer denies liability. (*Id.*) The rationale underlying this rule is that disputes arising from questions of coverage or liability are purely legal issues, which should be left to the courts rather than to an appraisal process, which is limited to factual disputes over the amount of loss for which an insurer is liable.

In *Kawa*, the insured's home was damaged in a windstorm, including damage to the aluminum siding. (*Id.* at 430.) Nationwide inspected the premises and made an offer based on the extent of damage to the siding. (*Id.*) The insured rejected the offer and maintained that Nationwide should pay for replacing all of the siding. (*Id.*) The insured invoked appraisal but Nationwide refused to participate, arguing that there

was a legal dispute presented, not merely a question as to the value of the loss sustained. (*Id.*)

Nationwide maintained that the policy required it to indemnify the insured in a manner which would return the home to its pre-windstorm condition and that it needed only to repair the damage done. (*Id.* at 431.) The insured claimed that the policy required replacement of the entire damaged aluminum siding with new vinyl siding. (*Id.*) Nationwide contended that the dispute went to coverage under the policy and could only be resolved by analysis and application of the policy. (*Id.*) The court agreed with Nationwide. (*Id.*)

Citing to a decision from the Missouri Supreme Court, the court stated that it is “essential that the legal contentions of the parties be resolved in order to make correct computations in a determination of the actual loss sustained.” (*Id.*) (citing *Hawkinson Tread Tire Service Co. v. Indiana Lumbermens Mut. Ins. Co.*, 245 S.W.2d 24, 28 (1951)). The court held that an insurer contests liability and is not merely disagreeing as to the value of the loss when the insurer argues that the damage to insured property was the result of age, wear and tear and/or poor or improper maintenance and/or prior efforts to repair, and concluded that Nationwide contested liability and was not merely disagreeing as to the value of the loss. (*Id.*) In reaching this conclusion the court noted that the affidavit of Nationwide’s claims adjuster raised a question as to liability when she opined that the condition of the siding she observed was “the result of

age, wear and tear and/or poor or improper maintenance” and that the face nailing she observed ““was the result of prior efforts to repair the aluminum siding, and was not the result of Mr. Kawas’ actions during the windstorm.”” (*Id.*) (internal citation omitted.) Similar claims were made in the affidavit of the individual who inspected the premises for the insurer. (*Id.*)

*Kawa* is factually similar to the case at bar. Appellants wanted State Farm to appraise all the cracks at their home regardless of whether they were caused by lightning. State Farm was only willing to appraise those cracks which were caused by the lightning strike, as determined by the engineers. Those engineers concluded that the claimed additional damage was not lightning-related and instead was due to wear and tear. *Kawa* supports the trial court’s interpretation of the Appraisal provision.

**E. The Trial Court Properly Did Not Reach the Issue of Appellants’ Alleged Emotional Distress Damages**

The trial court ruled that State Farm did not act in bad faith in the handling of Appellants’ claim. Therefore, it was unnecessary for the trial court to reach the issue of Appellants’ claim for emotional distress damages because they were not entitled to recover for such damages.

**F. Attorney’s Fees**

Appellants are only entitled to fees and costs if they prevail on a coverage issue. Because their claims have no merit, their fee claim fails as well. State Farm is entitled to its fees and costs on appeal.

## V. CONCLUSION

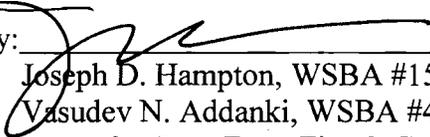
The reason that the trial court dismissed this case was that the Appellants lacked competent evidence to support their claims. State Farm showed the court that three different engineers opined that the supposed remaining damage to the house was not caused by the lightning strike. The Appellants had no evidence to refute that. State Farm showed the court that it went far out of its way to investigate Appellants' claims, disagreements and complaints regarding its claim handling. The Appellants had no evidence to show State Farm actually acted in bad faith. State Farm showed the court that Appellants' own appraiser declared the appraisal process a worthless exercise due to lack of evidence to support Appellants' causation claims. Appellants could not refute that, nor could they show that going through appraisal would have made any difference.

State Farm paid what it owed. State Farm acted in good faith and made correct claim decisions.

This Court should affirm each of the trial court's rulings.

RESPECTFULLY SUBMITTED this 17th day of February, 2012.

BETTS, PATTERSON & MINES, P.S.

By: 

Joseph D. Hampton, WSBA #15297

Vasudev N. Addanki, WSBA #41055

Attorneys for State Farm Fire & Casualty  
Company

**CERTIFICATE OF SERVICE**

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on February 17, 2012, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Respondent’s Brief; and**
- **Certificate of Service.**

***Counsel for Appellants Allen and Marshall:***  
James M. Beecher  
David A. LeMaster  
Hackett Beecher & Hart  
1601 Fifth Avenue, Suite 2200  
Seattle, WA 98101-1651

- U.S. Mail
- Hand Delivery
- Telefax
- UPS
- Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of February, 2012.

  
\_\_\_\_\_  
Valerie D. Marsh

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 17 PM 3:59