

70201-7

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Case No. 70201-7-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

MIRTHA ANGARITA,
individually,

Respondent,

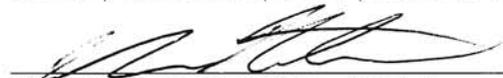
v.

ALLSTATE INDEMNITY COMPANY, a foreign insurance
company,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

It is undisputed that Perla Villanueva (“Villanueva”), the named insured, made material misrepresentations to Allstate that voided coverage to Villanueva. Villanueva’s numerous undisputed material misrepresentations to Allstate included the following issues:

- **Events leading up to the accident**
- **Where she and Plaintiff Mirtha Angarita (“Angarita”) were going when the accident happened**
- **Actions taken after accident was over**
- **Information from and contact with at fault driver**
- **Contact with at fault driver after the day of the accident**
- **Phone calls after the accident**

Angarita does not dispute that all of the above misrepresentation and concealments were material to Allstate’s investigation. Angarita does not dispute the Trial Court’s finding that the above misrepresentations and concealments precluded coverage to Villanueva.

Angarita concealed material information from Allstate. At the time that Allstate took Angarita’s examination under oath, Angarita knew information that could lead to the identity of the at-fault driver. She also knew that Villanueva had made contact with this driver after the

accident at issue, despite the fact that the accident had been initially reported as a hit-and-run to Allstate. Moreover, Angarita knew that Villanueva had asked Angarita to lie prior to giving her examination under oath testimony. Angarita did not offer *any* of this information to Allstate during her examination under oath.

II. ARGUMENT

A. All Issues Are Reviewed De Novo

Allstate is appealing the King County Superior Court's rulings regarding the Motions for Summary Judgment. A motion for summary judgment is reviewed de novo and in the light most favorable to the nonmoving party. *Reynolds v. Farmers Ins. Co.*, 90 Wn. App. 880, 884, 960 P.2d 432 (1998). Allstate has always claimed that Angarita is not entitled to coverage under Villanueva's policy due to Villanueva's misrepresentations and Angarita's concealments related to their PIP and UIM claims to Allstate. Therefore, this Court should review all arguments under a standard of de novo review.

B. Villanueva's Undisputed Misrepresentations Void the Entire Policy as to All Insureds

1. Villanueva's Misrepresentations Void All Coverage for Villanueva and Allstate Has No Duty to Defend or Indemnify As To Villanueva

As Allstate made clear in its Opening Brief, Washington law has consistently held that an entire policy is void for material misrepresentations by an insured, including an automobile insurance policy. *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wash. App. 339, 223 P.3d 1180 (2009); *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 973 P.2d 8, *review denied*, 138 Wn.2d 1012 (1999). This includes an insurer's duty to defend and duty to indemnify with regard to an insured whose policy has been voided due to material misrepresentations.

Courts have held that when an individual insured under an automobile insurance policy misrepresents facts regarding an auto accident to their insurer, the entire policy is void, the insurer is relieved of the duty to defend the insured and the insured is not entitled to benefits under the policy. In *Home Indemnity Co. of New York v. Standard Acc. Ins. Co. of Detroit*, 167 F.2d 919 (9th Cir. 1948), the insured gave different representations to his insurer regarding his involvement in a hit and run accident. The insured first represented to his insurer that he was not involved in the hit and run and damage to his car resulted from the parking lot of a racetrack. *Id.* at 927-28. The insurer eventually represented that he had fallen asleep at the wheel and pleaded guilty to hit and run. *Id.* at 928. The court held that this constituted non-cooperation with his insurer and that, due to the

insured's providing false testimony to the insurer regarding his automobile damages, the insurer was within its rights to withdraw defense of the insured. *Id.* See also *Kirk v. Home Indemnity Co.*, 431 F.2d 554 (7th Cir. 1970)(The insured, at the time of the accident and several times thereafter, made statements regarding his state of restfulness, intoxication, and the sequence of events surrounding the accident. Six days prior to the trial of the insured's action against his insurer, the insured made a statement totally contradicting his prior deposition testimony. Based upon the statement, the insurer withdrew from its defense of the case. The lower court granted summary judgment to the insurer based upon its defense of breach of the cooperation provisions by its insured. On appeal, the court affirmed the lower court's judgment).

The legal precedent in Washington and other jurisdictions presented above demonstrate that an insured's *entire* policy is void for material misrepresentations, extending to all coverage under the policy and including an insurer's duties to indemnify and defend.

2. Washington Law and Public Policy Regarding Insurance Fraud

Allstate's Opening Brief addresses in detail the validity and enforceability of the "void for fraud" provision in Villanueva's policy

pursuant to substantial and overwhelming legal precedent. While Villanueva's policy contains a valid "void for fraud" provision, Washington statutes and public policy also support the voiding of an insured's policy where the insured has offered misrepresentations, even in the absence of such a provision. Washington has enacted statutes related to good faith practices with regard to insurance claims. RCW 48.01.030 provides:

"The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers and their representatives, rests the duty of preserving inviolate the integrity of insurance."

RCW 48.01.030.

Additionally, RCW 48.30A.005 provides, in part:

"The Legislature finds that the business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters."

Further, RCW 48.30.230 provides, in part:

"It is unlawful for any person, who, knowing it to be such, to:

1. Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of loss under a contract of insurance;..."

In Washington, insurance statutes become part of each individual insurance policy. *Britton v. SAFECO*, 104 Wn.2d 518, 526, 707 P.2d 125 (1985); *Touchett v. Northwestern Mutual Ins.*, 80 Wn.2d 327, 332, 484 P.2d 479 (1972).

This public policy supports the fact that there can be no recovery under an insurance policy when an insured has submitted a false or fraudulent insurance claim. See *Cox*, 110 Wn.2d 643; *Salovich*, 41 Wn. App. 652; *Tornetta*, 94 Wn. App. 803.

Further, Washington case law supports voiding an insured's policy for fraud even in the absence of specific policy language equivalent to a void for fraud provision. In *Great American Insurance Company v. K & W Log, Inc.*, 22 Wn. App. 468, 591 P.2d 457 (1979), the court held that an insured had no coverage under his insurance policy due to willful destruction of insured property. *Id.* The denial of coverage in this matter was based on the conduct of the insured, not on the terms of a specific provision in the insured's policy. *Id.*

Angarita's argument that a policy can be voided only pursuant to the terms of a policy is without merit. The above-referenced law outlines the public policy, statutory and legal basis for voiding an insurance policy whenever there has been material misrepresentations by an insured.

3. Washington Statutes and Common Law Support Voiding Insurance Policies for Fraud

Angarita argues in her Respondent's Brief that there is "no statutory or common law basis for precluding coverage based on concealment, misrepresentation and/or fraud by an insured." Respondent's Brief, p. 21. This is a specious argument given the extensive statutory and common law precedent noted above. The statutes and law presented above directly contradict Angarita's assertion and show that an insurer is not required to rely solely on the language of an exclusion for fraud in a policy to have the authority to void a policy for misrepresentation or concealment by an insured.

Moreover, the statutes presented above make clear that Washington is committed to enforcing the public policy that those who attempt to defraud an insurance company, and those who are complicit in such fraud, should not be able to benefit from their fraudulent activity.

The undisputed facts show that Villanueva presented numerous material misrepresentations to Allstate during its investigation of her and Angarita's claims. Moreover, Angarita knew information that would have helped Allstate identify Villanueva's misrepresentations and identify the driver involved in the incident giving rise to Villanueva's and Angarita's claims. Angarita did not disclose this information to

Allstate. Instead, Angarita sat back and waited to obtain benefits under Villanueva's policy knowing the whole time that Villanueva was attempting to defraud Allstate.

If this Court were to grant coverage to Angarita, despite Villanueva's attempts to defraud Allstate and Angarita's knowledge thereof, this Court would encourage activity that violates the public policy of this state. For example, under Angarita's argument, there could be a situation where there are a number of "jump in" passengers in an insured's vehicle after a claimed loss. If the insured claims that the "jump in" passengers were in the vehicle, and the other claimants simply do not offer any information in contradiction, the "jump in" passengers could be covered under the insured's policy despite the insured's fraud.

Allowing Angarita to benefit from her concealment of Villanueva's misrepresentations violates the statutory law presented above that sets forth a public policy that seeks to prevent situations just like this one from occurring.

4. The FRA and MLIA Do Not Prohibit Void for Fraud Provisions in an Insurance Contract

Angarita incorrectly argues that the FRA and MLIA require that Allstate defend and indemnify Villanueva even though she committed insurance fraud. Arguments unsupported by legal authorities need not be

considered by the court. *Topline Equipment v. National Auction Services*, 32 Wn. App. 685, 692, 649 P.2d 165 (1982). Further, a claim unsupported by a coherent argument or a citation to legal authority is property dismissed. *Black v. Dept. of Labor & Indust.*, 131 Wn.2d 547, 557, 933 P.2d 1025 (1997).

There is no authority for this position; rather, Washington law has consistently upheld void for fraud provisions, even in automobile policies. Moreover, Angarita offers no authority for the position that a passenger may not be denied coverage due to a void for fraud provision of a driver's automobile insurance policy. As such, this Court may appropriately disregard Angarita's opposition to Allstate's provision.

In the event that this Court does address Angarita's argument on its merits, the following legal precedent in this state is instructive. Although Washington courts will not enforce limitations in insurance contracts which are contrary to public policy and statute, insurers are otherwise free to limit their contractual liability. *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 339-40, 922 P.2d 1335 (1996) (citing *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984)). Washington courts have occasionally questioned the wisdom of certain exclusion clauses, but have rarely invoked public policy to limit or void express terms in an insurance contract *even when those terms*

seem unnecessary or harsh in their effect. Cary, 130 Wn.2d at 340 (citing *Emerson*, 102 Wn.2d at 483). An exclusion violates public policy if it does not have a relationship to the increased risk faced by the insurer or denies coverage to innocent victims without good reason. *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 667, 999 P.2d 29 (2000)(citing *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 343-44, 738 P.2d 251 (1987)).

Public policy is generally determined by the Legislature and established through statutory provisions. *Cary*, 130 Wn.2d at 340. The proper starting place for determining public policy, then, is applicable legislation. *Id.* In general, Washington courts have determined that exclusion clauses in insurance contracts are contrary to public policy in only two areas: (1) the Financial Responsibility Act (FRA), RCW 46.29, and (2) the underinsured motorist (UIM), statute RCW 48.22.030. *Id.* at 344. Concerning the FRA, the court stated in *Mendoza*, that an exclusion focused on who is driving the vehicle, and directed against risks associated with particular classes of drivers, does not violate public policy. *Mendoza*, 140 Wn.2d at 667-68. Washington courts “will not invoke public policy to override an otherwise proper insurance contract in the absence of an expression of public policy from either the Legislature or a prior court decision.” *Cary*, 130 Wn.2d at 345. The Court in *Mendoza* listed several examples of automobile liability policy

exclusions that have been upheld as not violating the FRA, MLIA and the public policy expressed therein, including the following:

- Exclusion of coverage when vehicle was used by anyone under the influence of alcohol (*PEMCO v. Hertz Corp.*, 59 Wn. App. 641, 800 P.2d 831 (1990));
- Exclusion of coverage for passengers on motorcycle (*Progressive Cas. Ins. Co. v. Jester*, 102 Wn.2d 78, 683 P.2d 180 (1984));
- Exclusion of coverage for drivers other than those named in the insurance policy (*Planet Ins. Co. v. Wong*, 74 Wn. App. 905, 877 P.2d 198 (1994));
- Exclusion of coverage for drivers under a certain age (*Wong*, 74 Wn. App. 905);
- Exclusion of coverage for an unlicensed driver (*Continental Cas. Co. v. Weaver*, 48 Wn. App. 607, 739 P.2d 1192 (1987));
- Exclusion of coverage if the insured vehicle was taken out of a certain territorial area (*Lovato v. Liberty Mut. Fire Ins. Co.*, 109 Wn.2d 43, 742 P.2d 1242 (1987)); and
- Exclusion of motorcycle use for the purposes of an underinsured motorist clause in an automobile insurance policy (*Eurick*, 108 Wn.2d 338).

Mendoza, 140 Wn.2d at 667-68.

The exclusion at issue in this matter states that Allstate may not provide coverage for an insured who engages in fraudulent conduct. Such a void for fraud provision has been repeatedly upheld by the courts in Washington. See *Kim*, 153 Wash. App. 339, 223 P.3d 1180 (2009); 94 Wn. App. 803, 973 P.2d 8, *review denied*, 138 Wn.2d 1012 (1999). Again, Angarita has not, and cannot, provided any authority to the contrary. Angarita would have this Court create new law in Washington holding that a void for fraud provision violates the public policy expressed in the FRA and the MLIA. This argument should be rejected.

Void for fraud provisions are supported by and enforce the Washington public policy, set forth in the statutes noted above, of preventing and discouraging fraudulent behavior in the context of insurance claims. To hold that the void for fraud provision violates Washington public policy and that Angarita is entitled to coverage would be to hold against equally important Washington public policy, reverse established legal precedent with regard to void for fraud provisions in insurance policies and reward fraudulent behavior displayed by Villanueva's misrepresentations and Angarita's concealments.

C. Angarita's Material Concealments Preclude Recovery Under Villanueva's Policy

1. Undisputed Facts Regarding Angarita's Concealments

This Court's analysis of Angarita's concealments from Allstate must be undertaken with a clear view of the undisputed facts in this matter:

- Villanueva made numerous material misrepresentations to Allstate during its investigation of the PIP and UIM claims;
- At the time of her EUO, Angarita knew that Villanueva had information regarding the identity of the at-fault driver in the accident giving rise to their claims;
- At the time of her EUO, Angarita knew that Villanueva had asked her to lie during her EUO;
- Angarita did not disclose any of this information to Allstate during her EUO in January 2011;
- Angarita was made aware of Allstate's denial of her claims and the basis thereof in a denial letter dated February 2011; CP 102-104.
- After receiving the denial letter, Angarita still did not come forward to Allstate to offer any information on the identity of the at-fault driver or her knowledge of Villanueva's misrepresentations

2. Undisputed Facts Show Angarita's Concealments That Void Coverage Under Villanueva's Policy

Angarita's own concealments in this matter preclude her from

coverage under Villanueva's policy pursuant to this exclusion. Angarita argues that concealment cannot constitute fraudulent conduct. However, she offers no authority for this assertion. Arguments unsupported by legal authorities need not be considered by the court. *Topline Equipment v. National Auction Services*, 32 Wn. App. 685, 692, 649 P.2d 165 (1982). Further, a claim unsupported by a coherent argument or a citation to legal authority is properly dismissed. *Black v. Dept. of Labor & Indust.*, 131 Wn.2d 547, 557, 933 P.2d 1025 (1997).

Instead, courts have found that concealment does constitute conduct. The 9th Circuit in *Watson v. United States Fidelity & Guaranty Co.*, 427 F.2d 1355, cited to a definition of conduct which included "acts, language or ***silence amounting to a representation or concealment of material facts.***" *Watson*, 427 F.2d at 1357 (emphasis added)(quoting 3 Pomeroy, Equity Jurisprudence § 805, at 191 (5th ed. 1941)(citing 16A Appleman, Insurance Law & Practice § 9088 (1968 ed.)). This definition of conduct referenced in *Watson* specifically includes silence amounting to a concealment of material facts.

In this matter, Angarita concealed a significant amount of material information from Allstate during its investigation of her claim. Again, at the time that Allstate took Angarita's examination under oath:

- She knew information that could lead to the identity of the at-

fault driver.

- She knew that Villanueva had made contact with this driver after the accident at issue, despite the fact that the accident had been reported as a hit-and-run when initially reported to Allstate.
- She knew that Villanueva had asked her to lie prior to giving her examination under oath testimony; and
- She knew Villanueva provided false information to Allstate during her examination under oath.

Yet, Angarita did not offer *any* of this information to Allstate during her examination under oath. Further, Angarita had knowledge of all of this information in February 2011 when she received Allstate's denial letter, explaining that her claims were being denied and the reasons therefore, but still continued to stand silent, not disclosing any of the information to Allstate. By doing so, Angarita knowingly concealed much more than a single material fact from Allstate. Rather, Angarita concealed Villanueva's numerous misrepresentations detailed herein that were known to Angarita at the time of her examination under oath and thereafter.

Moreover, Angarita did not simply answer Allstate's questions during her examination under oath. Upon the conclusion of Angarita's examination under oath, the following interaction between counsel for

Allstate and Angarita took place:

Q. Is there anything that you want Allstate to know about the injury and the accident that we haven't spoken about, Ms. Angarita?

A. No. I think I have already said everything.

See Examination Under Oath of Angarita, CP 98 at 42:21-24. To hold that this is not concealment would be to allow an insured to withhold information from an insurer while at the same time requiring an insurer to ask questions specifically regarding the concealed information, of which it would have no prior information and therefore no indication to question. Appellant's counsel pointed out the ridiculous nature of this standard by asking Angarita during her deposition:

Q: And did you think that I was supposed to ask you, "Did you know that Ms. Villanueva sent you a text that told you you should not tell the truth"?

See Deposition of Angarita, CP 124 at 67:1-3. To answer "Yes" to this question would create an impossible situation for an insurer and should not be the standard for concealment. Additionally, Angarita's argument that an insurer could simply ask only this question in an EUO then deny coverage if the insured does not offer every piece of material information requires that this Court completely separate the question from its context. Allstate is not arguing that it may ask only that question and expect the insured to offer all material information; rather, Allstate argues that, in

light of the entirety of the EUO, which touched upon many subjects and issues, of which Angarita had knowledge which she did not provide, Angarita's refusal to reveal more information in response to Allstate's question is evidence of concealment by Angarita in this matter.

Further, at no point after Angarita's claim was first denied did she approach Allstate to clarify her position or explain Villanueva's misrepresentations. Angarita knew that Villanueva had made material misrepresentations to Allstate yet remained quiet, hoping to collect under Villanueva's policy.

Angarita's concealments noted above amount to conduct intended to defraud Allstate. Therefore, pursuant to the terms of the exclusion in Villanueva's policy noted above, Angarita is precluded from coverage in this matter.

D. Angarita's False UIM Claim Precludes Recovery Under Villanueva's Policy

Allstate has maintained from the very beginning of this matter that Angarita's UIM claim was falsely and fraudulently submitted due to Villanueva's misrepresentations and Angarita's own concealments. Angarita speciously argues that Allstate first brought this argument in its Motion for Reconsideration. Respondent's Brief at 15. The Motion for Reconsideration merely offered additional statutory and evidentiary

support for an argument Allstate had been making from the very beginning; namely, that Angarita's UIM claim was a false UIM claim and that Washington law precludes recovery in such a situation.

To reiterate, RCW 48.30.230 provides, in part:

"It is unlawful for any person, who, knowing it to be such, to:

1. Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of loss under a contract of insurance;..."

Moreover, in Washington, these insurance statutes become part of each individual insurance policy. *Britton*, 104 Wn.2d at 526; *Touchett*, 80 Wn.2d at 332.

Therefore, pursuant to the above statutory authority, it is improper for Angarita to present, or cause to be presented, a false insurance claim. This would include submitting a claim for UIM coverage due to a "hit and run" accident, while knowing the identity of the at-fault driver, as Angarita did through her attorney Mark Hammer in this matter.

E. Angarita Is Not Entitled To Attorney's Fees

Allstate contends that Angarita is not entitled to attorney's fees under *Olympic Steamship* because she is not entitled to coverage under Villanueva's policy. Allstate has always argued that Angarita is not

entitled to coverage due to Villanueva's misrepresentations and Angarita's own concealments from Allstate during its investigation of their claims. Angarita's argument that Allstate's "unclean hands" argument is being brought up for the first time on appeal is a meritless battle of semantics. The misrepresentations by Villanueva and concealments by Angarita preclude both from coverage under Villanueva's policy. Angarita is, therefore, not entitled to Olympic Steamship fees because she has no coverage. Her concealments, and Villanueva's misrepresentations, are conduct described as giving Angarita "unclean hands" in making a false UIM claim to Allstate.

V. CONCLUSION

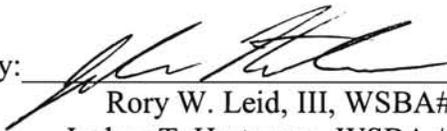
For the reasons noted herein, and in Allstate's Appellant's Brief, this Court should overturn the ruling of the trial court and hold that:

- 1) Villanueva's policy was void as to all claims and all insureds, including Angarita, due to Villanueva's undisputed material misrepresentations and Angarita's concealments;
- 2) There is no PIP coverage as to all insureds, no UIM coverage as to all insureds, and no duty to defend by Allstate because coverage is precluded for all claims and for all insureds;
- 3) Angarita is not entitled to attorney fees because there is no coverage for her under Villanueva's policy; and

- 4) Allstate is awarded its fees and costs in this matter, pursuant to RAP 14.3.

RESPECTFULLY SUBMITTED this 4th day of November, 2013.

COLE | WATHEN | LEID | HALL, P.C.

By: 
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CERTIFICATE OF SERVICE OF
APPELLANT'S REPLY BRIEF

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I, Tami L. Foster, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the aforementioned action.

2. I certify that on November 4, 2013, I sent out for service by ABC Legal messenger service for filing with the Court of Appeals for the State of Washington Division I the original and one copy of the Appellant's Reply Brief and Certificate of Service of Appellant's Reply Brief; and a copy of the same was emailed and sent out for service by ABC Legal messenger service to be served on the following:

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

DATED at Seattle, Washington, this 4th day of November, 2013.



Tami L. Foster, Legal Assistant