

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.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPELLANT'S BRIEF

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I. IDENTITY OF THE APPELLANTS

Appellant, Allstate Indemnity Company (“Allstate”), was a Defendant in the King County Superior Court Cause No. 11-2-31670-0 SEA. Respondent, Mirtha Angarita (“Angarita”), was the Plaintiff below.

The trial court held as a matter of law that Perla Villanueva (“Villanueva”), the named insured, made material misrepresentations to Allstate that voided coverage to Villanueva. Angarita does not dispute these findings. The trial court nevertheless found that the misrepresentations by Villanueva did not preclude coverage for Angarita’s PIP claim or Allstate’s duty to defend Villanueva from the lawsuit brought by Angarita for negligence in the car accident.

Villanueva’s misrepresentations to Allstate occurred during Allstate’s investigation of a false UIM claim brought by Angarita and Villanueva. Angarita does not dispute that during Allstate’s investigation of the false UIM claim, Villanueva attempted to defraud Allstate, making numerous material misrepresentations regarding the facts and circumstances of the accident giving rise to the claim as well as her post-accident contact with the at-fault driver. Villanueva and Angarita submitted a UIM claim to Allstate claiming that they were involved in a hit and run. In reality, the at-fault driver, Mr. Butler, had

provided his name, phone number and license plate number. Further, Villanueva met with Mr. Butler days later to sign a release and receive a payment from Mr. Butler.

At the time that Allstate took Angarita's examination under oath, Angarita knew the above-stated 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. ASSIGNMENTS OF ERROR

1. Did the trial court err when it ruled, after finding as a matter of law that Villanueva intentionally misrepresented and concealed material information and that her policy was therefore void as a result, that Angarita was still entitled to coverage under Villanueva's insurance policy? Answer: *Yes. Washington law provides that an insured's entire policy is void for intentional misrepresentations of material facts and that the policy is void with regard to all insureds under the policy.*
2. Did the trial court err when it ruled that, although Villanueva's policy

was void due to Villanueva's intentional misrepresentations of material fact, Allstate maintained its duty to defend under the policy?

Answer: Yes. Washington law provides that an insured's entire policy is void for intentional misrepresentations of material facts and that the policy is void for all coverages under the insurance policy.

3. Did the trial court err when it ruled as a matter of law that Angarita did not conceal material information from Allstate during the course of its investigation of Villanueva's and Angarita's claims? *Answer: Yes. Angarita concealed material information from Allstate as a matter of law.*

III. STATEMENT OF THE CASE

The following facts are undisputed:

- A UIM claim was made by Angarita and Villanueva to Allstate, claiming a hit-and-run accident when the identity of the at-fault driver was known to them.
- Villanueva made numerous material misrepresentations to Allstate regarding the facts and circumstances of the accident giving rise to the claim as well as her post-accident contact with the at-fault driver.
- Villanueva asked Angarita to lie about the facts and circumstances of the accident prior to Angarita's examination

under oath.

- Angarita knew the identity of the at-fault driver, she knew that Villanueva had contacted and met with the at-fault driver after the accident, and she knew that Villanueva told her to lie during her examination under oath, but *Angarita concealed all of this information from Allstate.*
- The court below held as a matter of law that Villanueva misrepresented material information to Allstate and that her policy was void as a result.

A. Accident and Investigation

1. Overview

On February 19, 2010, at about 1:00 p.m. in the afternoon, Villanueva was driving her vehicle, a 1995 Mercedes Benz E300D, when she was rear-ended by another motorist. Angarita was a passenger in Villanueva's vehicle. Villanueva was the named insured on an insurance policy with Allstate at all relevant times.

Villanueva was driving southbound on I-5, near exit 172 in Seattle, Washington, when the accident occurred. She initially claimed that the driver fled the scene, preventing her from getting any information from him. See Recorded Statement of Perla Villanueva, Clerk's Papers (CP) 60. After the accident, Villanueva did not report the

accident to the police, nor did she fill out an accident report. *Id.*, CP 60.

2. Claims Reported to Allstate

Villanueva's claim was first made to Allstate when her chiropractor's office, Herrera Chiropractic, sent medical bills to Allstate on February 22, 2010. In the initial documentation, there was no mention of any passengers in Villanueva's vehicle at the time of the motor vehicle accident. See First Notice of Loss, CP 66 – 72.

Later, Allstate received chiropractor bills from Herrera Chiropractic for Angarita, an alleged passenger in the subject motor vehicle accident. Allstate also received bills from Herrera Chiropractic for Daniela Villanueva, Villanueva's five-year-old daughter, another alleged passenger. Prior to receiving medical bills for Angarita and Daniela Villanueva, Allstate had had numerous communications with Villanueva's former attorney, Mark Hammer, who never mentioned the presence of additional passengers. See Declaration of Timothy Sweeney, CP 156-159.

On March 19, 2010, Allstate sent a letter to Mr. Hammer regarding his representation of both Villanueva and Angarita for a UIM claim. CP 444. On April 7, 2010, Allstate sent a letter to Mr. Hammer confirming the PIP and UIM claims of Angarita and Villanueva. CP 446. Moreover, on May 28, 2010, Allstate again sent a communication

to Mr. Hammer confirming the PIP and UIM claims for Angarita and Villanueva. CP 447-48. The communications between Allstate and Mr. Hammer confirmed that Angarita and Villanueva submitted UIM claims to Allstate, claiming from the beginning that a hit and run accident had taken place.

3. Recorded Statement of Perla Villanueva

On July 27, 2010, Villanueva gave a recorded statement regarding the motor vehicle accident on February 19, 2010. See CP 50 – 65. On the day of the loss, Villanueva stated that she went shopping at Northgate Mall with her friend Julieth (also known as Mirtha Angarita). *Id.* After shopping, Villanueva and Angarita took Daniela Villanueva to a relative’s house in Edmonds, Washington. *Id.* On their way home from Edmonds, Villanueva was driving southbound on I-5 in the far right lane when another vehicle, a light gray Toyota Tundra, merged into her lane and struck her vehicle from behind. *Id.* Villanueva estimated that she was traveling at about 10 mph at the time of the collision. *Id.* Angarita was in the passenger seat, and Daniela was in a child restraint seat behind the driver when the accident occurred. *Id.*

Villanueva stated that both parties pulled over onto the shoulder after the accident. *Id.* She further stated that the driver of the Tundra, a tall 30-year-old white male with short, blonde hair, suggested that they

exit the freeway and pull over to exchange information. *Id.* Villanueva took exit 172 onto 85th Street and pulled over. *Id.* Villanueva stated that the other vehicle initially pulled over, then left the scene before Villanueva could exchange information with the driver. *Id.*

4. Examinations Under Oath of Villanueva and Angarita

On January 14, 2011, Villanueva and Angarita appeared for examinations under oath at the request of Allstate. During her examination, Villanueva again stated that the at-fault driver did not provide any information to her after the accident and instead fled after pulling off of I-5:

Q. What happened when you pulled in and parked?

...

THE WITNESS: Well, I stopped on the first – I turned on the first street to stop because I had been waiting for him because I had been watching to see if he was following us, but when I turned, he didn't turn. So I stayed there. I couldn't believe it. I thought he was going to come, so I waited. And I was waiting for him to show up somewhere, but he never -- he never arrived. So we stayed there, and then Julieth and I were saying, "Wow, we didn't get any information from him or anything."

See Examination under oath of Perla Villanueva, CP 81 at 32:11-24.

However, Angarita contradicted Villanueva, stating that she had obtained the license plate number of the vehicle that fled the scene:

Q. My understanding is you said you took down his license plate number. Is that right?

A. Yes. The license plate that's on the car.

Q. Where did you put that information?

A. On a paper.

See Examination under oath of Mirtha Angarita, CP 94 at 26:24-27:4.

Angarita further contradicted Villanueva's testimony by stating that the at-fault driver had pulled over after both parties exited the freeway, and that Villanueva and the at-fault driver talked with each other, surveyed the damage to the vehicles and exchanged information including licenses and phone numbers:

Q. So once both cars stopped and everybody got out of their cars, what happened next?

A. Well, they looked at the car, at the damages on the car, and they talked, and they exchanged information and telephones, and Perla took the license plate and the phone number, and Perla kept that information.

Id. at 28:20-25.

Angarita did not discuss during her examination testimony, and therefore concealed, any interactions she had with Villanueva on the date of her examination under oath and any knowledge she had of Villanueva's contacts with the at-fault driver after the day of the accident.

B. Lawsuit Filed By Angarita

On September 15, 2011, Angarita filed her Complaint against Villanueva for negligence and against Allstate for bad faith breach of

contract, violation of the Washington Administrative Code (hereinafter “WAC”), violations of the Washington Consumer Protection Act, and for a breach of its fiduciary duty under the WAC. See Plaintiff’s Complaint, CP 102 – 106.

C. Depositions of Angarita and Villanueva

1. Deposition of Mirtha Angarita

Angarita’s deposition testimony was taken on April 24, 2012. See Deposition Testimony of Mirtha Angarita, CP 107-131. Angarita testified that she knew that Villanueva was in direct contact with the at-fault driver following the accident. *Id.* Specifically, Angarita knew that Villanueva was going to be meeting with the at-fault driver and obtaining money from him for the car damage post-accident. CP 63 at 65:10-21.

Angarita testified that on the day of the examinations under oath, Villanueva provided her examination under oath first and Angarita provided hers shortly thereafter. CP 120. As Angarita was on her way to appear for her examination under oath, she received a text message from Villanueva, wherein Villanueva asked Angarita to lie and stick with the story that Villanueva was providing regarding a hit-and-run vehicle:

Q. And how did you find out that Ms. Villanueva told Allstate that Mr. Butler had fled the scene?

A. How I found out?

Q. Yes.

A. On the day of the appointment she sent me a text message asking me to say that Mr. Butler had left the scene, unfortunately.

CP 120 at 51:18-24.

Angarita admitted that at no time until the day of her deposition did she ever tell Allstate that Villanueva actually had met with Butler and received money from Butler:

Q. So when you and I met on January 14th, 2011, you knew that Ms. Villanueva had met with Mr. Butler and received money; right?

A. Yes.

Q. So why didn't you tell Allstate at that time?

A. Well, I want to repeat that I simply responded to your questions.

CP 124 at 66:19-25.

In addition, Angarita agreed that she never told Allstate about the text from Villanueva:

Q. So do you agree with me, Ms. Villanueva [sic], at no time before today did you ever tell Allstate about this text message from Ms. Villanueva?

A. I'm almost certain.

Q. You're almost certain that you never told Allstate before today?

A. Yes. I am almost certain of that.

CP 120 at 53:25-54:6.

2. Deposition of Perla Villanueva

Villanueva's deposition was taken on September 27, 2012. See Deposition Testimony of Perla Villanueva, CP 132-151. During her deposition, Villanueva expressly stated that she had made

misrepresentations to Allstate

Q. (By Mr. Leid) So when you gave that testimony there on Page 2 and said that Mr. Butler didn't stop and didn't give you any information, were you telling the truth?

A. No.

CP 144 at 46:10-13.

Villanueva lied to Allstate when she testified that Butler had driven away from the scene of the accident and that she did not initially know the identity of the at-fault driver:

Q. So you agree with me, Ms. Villanueva, that when you came to my office on January 14, 2011, you never told myself or Allstate about the fact that you had information on who the driver was?

A. Yes.

Q. Why didn't you tell Allstate the fact that you knew information regarding Mr. Butler?

A. Well, because that man, he paid for the damage to my car, and I didn't have any intention to continue because he had paid for the damage and I didn't want to involve him. So I didn't want to involve him in the problem if he had already paid. And in this case I only asked for the medical care, because that's what I had the insurance for.

CP 139 at 27:17-28:4.

Moreover, Villanueva misrepresented and concealed her contacts with Butler:

Q. When you met me at my office on January 14th, 2011, did you ever tell myself or Allstate that you received money from Mr. Butler?

A. No.

...

Q. When did you first contact Mr. Butler after the accident?

A. Butler is the other driver?

Q. Correct.

A. I'm sorry. I don't even remember his name. Well, after the accident, I called him. I don't remember if it was the same day or the next day, but realize that I had made a big mistake in not asking for more information, because apart from the impact, I was going to end up with the debt for the car. And so I called him to tell him that he had to pay. And then after that day -- I don't remember if it was Sunday after the accident, and I saw him that day, and that was the last time I saw him.

Q. Where did you meet with Mr. Butler?

A. Well, I don't know the exact address. It's a McDonald's by Northgate, on Northgate Way. It's just next to the freeway, but I don't know the address. Close to the mall.

CP 140 at pg. 30:2-5; CP 142 at 41:5-22.

Lastly, Villanueva testified that she told Angarita, prior to their examinations under oath, that she was planning to give such misrepresentations to Allstate:

Q. So is it your testimony that before the examination under oath you told Ms. Angarita that you were going to lie?

...

THE WITNESS: I said that I was going to say that the man had left.

CP 148 at pg. 63:23-64:4.

IV. ARGUMENT

A. Villanueva's Material Misrepresentations Void the Entire Policy and Preclude Recovery for All Insureds Under the Policy

The trial court held, as a matter of law, that Villanueva misrepresented material information to Allstate and, as a result, Villanueva's policy was void and coverage for Villanueva was precluded. Pursuant to established legal precedent, these material

misrepresentations and concealments committed by Villanueva also preclude coverage for Angarita under Villanueva's insurance policy.

1. Policy Language

Villanueva's policy states that Allstate "may not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy." Villanueva Policy, CP 152-155. The language in the policy at issue here is identical to that in *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wash. App. 339, 223 P.3d 1180 (2009), in which the court found that material misrepresentations post-loss voided coverage under the contract.

2. Washington Law Regarding Misrepresentation and Concealment By An Insured

a. Material Misrepresentation and/or Concealment Voids Policy for All Insureds

The law in Washington regarding misrepresentations by an insured to an insurer is well established. The Washington courts have repeatedly held that when an insured intentionally misrepresents or conceals any material fact, the entire policy is void and recovery for any portion of the claim is precluded. *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988); *Wickswat v. SAFECO Insurance*, 78 Wn. App. 958, 904 P.2d 767 (1995), *pet. for rev. den.*, 128 Wn.2d 1017

(1996); *Onyon v. Truck Ins. Exch.*, 859 F. Supp. 1338 (1994). The court in *Cox* further clarified that the policy is not severable where there is misrepresentation or fraud and the whole policy is void; therefore, the policy is void as to *all* insureds and *all* claims made under the policy. *Cox*, 110 Wn.2d at 649-50.

The holding in *Cox* follows widely accepted legal precedent that when a policy covers more than one insured and states that it is void for the fraudulent conduct, including material misrepresentations and concealment, of “any insured,” neither insured can recover under the policy if either insured engages in conduct which violates the concealment or fraud provision. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* §197:34, p. 197-66 (1999). Moreover, Washington courts have interpreted an exclusionary clause as precluding coverage for an innocent insured where coverage for the acts of another culpable insured is excluded under the policy. *Farmers Ins. Co. of Washington v. Hembree*, 54 Wn.App. 195, 200-03, 773 P.2d 105 (1989)(The insureds had a homeowner's insurance policy with the insurer that excluded personal liability coverage for bodily injury caused by an intentional act. The insured's children sexually assaulted other children. The court held that the exclusion applied not only to the intentional acts of the insured sought to be held liable, but also to anyone

insured under the policy); *Farmers Ins. Co. v. Edie*, 52 Wn.App. 411, 412, 763 P.2d 454 (1988)(The insureds' policy excluded coverage for bodily injury "[a]rising as a result of intentional acts of an insured." Insured's daughter brought suit against insureds based on the intentional acts of sexual assault of "an" insured, her father. The court held that the exclusion applied not only to the intentional acts of the father, but to his wife, also insured under the policy).

b. Other Jurisdictions Support Washington Precedent Regarding Void Policy for All Insureds

Moreover, this precedent has also been followed in many other jurisdictions. *See, e.g. Sales v. State Farm Fire & Casualty Co.*, 849 F.2d 1383 (11th Cir. 1988)(holding that that that the insurance contract, which referred to the fraudulent acts of "any insured," unambiguously provided that the insureds' rights and obligations were joint rather than several and that the entire policy was void when any insured intentionally concealed a material fact or circumstance); *Amick v. State Farm Fire & Casualty Co.*, 862 F.2d 704, 706 (8th Cir. 1988)(insurance policy denying recovery to "you and any other insured" in the event that "you or any other insured" commit fraud or misrepresent material facts, unambiguously denied recovery to innocent coinsured grandmother when house intentionally destroyed by coinsured grandson); *Spezialetti*

v. Pacific Employers Ins. Co., 759 F.2d 1139, 1141-42 (3d Cir. 1985)(policy referring to "any insured" rather than "the insured" creates no ambiguity regarding coverage of joint or several interests and thus, innocent coinsured spouse could not recover); *K&W Builders, Inc. v. Merchants & Business Men's Mutual Ins. Co.*, 255 Va. 5, 10-13, 495 S.E.2d 473, 476-78 (1998)(policy which voided coverage for any fraud committed by "you or any other insured" precluded recovery by innocent coinsured); *McCauley Enterprises, Inc. v. New Hampshire Ins. Co.*, 716 F. Supp. 718 (D.Conn.1989)(where policy excluded coverage for loss of personal property occurring as a result of any fraudulent, dishonest, or criminal act by "any insured," innocent insured cannot recover); *State Farm Fire and Cas. Inc. Co. v. Kane*, 715 F. Supp. 1558 (S.D.Fla.1989)(fire policy which excluded coverage for loss caused by any insured's criminal act precludes recovery by innocent insureds, landlord and tenant, after tenant's president committed arson); *Bryant v. Allstate Ins. Co.*, 592 F. Supp. 39 (E.D.Ky.1984)(where policy unambiguously excluded coverage for arson by co-owner, innocent wife is not entitled to proportional share of policy proceeds); *American Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376 (Colo.Ct.App.1989)(where policy excluded coverage for any loss "arising by or at the direction of any insured," innocent co-insured wife

cannot recover); *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589 (Iowa 1990)(whether arson by one co-insured spouse bars innocent co-insured spouse from recovering depends upon the insurance contract, and where policy stated that it did not insure for loss arising out of acts committed by or at direction of "an insured," all insureds are barred from recovery if any insured committed arson); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont. 69, 785 P.2d 192 (1990)(policy exclusion for loss caused by intentional act of insured bars innocent insured from recovering for personal property destroyed by co-insured's arson); *Fernandez v. Cigna Property and Cas. Ins. Co.*, 188 A.D.2d 700, 590 N.Y.S.2d 925 (1992)(under policy's intentional act exclusion, innocent wife is precluded from recovery if husband set fire); *Short v. Oklahoma Farmers Union Ins. Co.*, 1980 OK 155, 619 P.2d 588 (Okla.1980)(party owning property jointly with an arsonist cannot recover under insurance contract provision declaring policy to be void in case of fraud or false swearing on part of insured, irrespective of marital relationship); *McAllister v Millville Mut. Ins. Co.*, 433 Pa. Super. 330, 640 A.2d 1283, *appeal denied*, 539 Pa. 653, 651 A.2d 540 (1994)(where fire insurance policy excludes coverage for losses resulting from negligent or intentional acts committed by "any insured" or "an insured," coverage is properly denied to all insureds if one is guilty of arson); *Dolcy v. Rhode*

Island Joint Reinsurance Ass'n, 589 A.2d 313 (R.I.1991)(under policy exclusion for intentional losses committed by or at direction of "an" insured, husband's arson bars recovery by innocent, non-collusive wife).

The overwhelming majority of courts that have addressed the issue of material misrepresentations made to an insurer have held that material misrepresentations void an entire policy, and preclude coverage for *all insureds* under the policy. As such, there is no coverage for Angarita.

c. A Single Material Misrepresentation and/or Concealment Voids Policy

A single material misrepresentation is sufficient to preclude coverage for an entire claim. *Onyon*, 859 F. Supp. at 1341. Further, materiality of a misrepresentation is determined from the perspective of the insurer, not the insured. *Onyon*, 859 F. Supp. at 1342. A misrepresentation will be considered material if a reasonable insurance company, in determining its course of action, would attach importance to the fact misrepresented. *Onyon*, 859 F. Supp. at 1341.

In *Onyon*, the insured's claim related to the collapse of a retaining wall on Onyon's commercial property. *Onyon v. Truck Ins. Exch.*, 859 F. Supp. 1338 (1994). At the time of Onyon's initial statement to TIE, one of Onyon's employees had told Onyon that several

weeks prior to the wall's collapse, he had seen a front end loader run into the retaining wall; however, Onyon failed to disclose this information to TIE. *Id.* at 1339-40. The court ruled that this one instance of concealment from the insurer was material and precluded coverage under the insured's policy. *Id.* at 1343.

The concealments and misrepresentations in this matter by Villanueva exceed those discussed in *Onyon*. In this case, Villanueva made numerous undisputed misrepresentations to Allstate. Villanueva's misrepresentations preclude coverage for Villanueva and Angarita.

3. Villanueva's Numerous Material Misrepresentations Are Undisputed

Angarita does not dispute that Perla Villanueva made numerous material misrepresentations and concealments to Allstate during the investigation of Villanueva's and Angarita's claims. As noted above, even a single, material misrepresentation voids coverage for all insureds under a policy. However, Villanueva made not only a single misrepresentation but numerous undisputed material misrepresentations to Allstate, including the following:

1) Events leading up to the Accident

In her recorded statement, Villanueva stated that she picked

Angarita up by 10:00 a.m. on the day of the accident and they went shopping by Northgate Mall. After shopping, they then drove to Edmonds. However, in her examination under oath, Villanueva testified that she drove to Edmonds without Angarita, and instead picked her up after finishing her meeting in Edmonds. In addition, Angarita testified in her examination under oath that she did not do any shopping, but instead met Villanueva at a job site to clean.

2) Where they were going when the accident happened

In her examination under oath and recorded statement, Villanueva stated that she went to Edmonds and then was on her way back to her house in Bellevue to pack up her things when she got into the accident. However, Angarita testified that they worked at a cleaning job in the morning, and were on their way to another cleaning job when they got into the motor vehicle accident.

3) Actions after accident was over

Villanueva stated in her examination under oath and recorded statement that following the accident, she and the at-fault driver agreed to take the first exit off of the freeway and then exchange insurance information. Villanueva stated that the other driver never met up with them after taking the first exit and that she never got the other driver's license plate number. However, Angarita testified that the other driver

did meet up with Villanueva after taking the exit off of the freeway. Angarita also testified that Villanueva told her to write down the other driver's license plate number, which she did.

4) Information from and contact with at fault driver

Villanueva testified that she did not get any information from the at-fault driver following the accident. Angarita stated that Villanueva got the other driver's phone number, in addition to the license plate number as noted above.

Moreover, Villanueva initially claimed that she had no contact with the driver that rear-ended her, but later admitted that she had contact with Butler after the incident including meeting to sign a waiver and receive payment from Butler for damages to her vehicle.

5) Phone calls after the accident

In her recorded statement, Villanueva stated that after the other driver failed to meet her, she called Jhon Jaero Marulanda, Angarita's husband, for advice. However, in her examination under oath, she testified that she called Juan Prado, Villanueva's partner, for advice after the accident.

Villanueva testified in her recorded statement that she called Marulanda after the accident to call for advice, but Angarita testified in her examination under oath that she called her husband, not for advice,

but to ask if he would prepare an estimate for Villanueva.

6) Where they went after the accident

Angarita testified that after the accident, they drove to her husband's work in downtown Seattle, and then went to the other cleaning job, where they worked for several hours. Angarita did not mention ever helping Villanueva pack up her things on the day of the accident. However, Villanueva stated in her examination under oath and recorded statement that after the accident, Angarita helped her pack up her things in her home in Bellevue.

7) Knowledge of Angarita's phone number

Villanueva testified in her examination under oath that she did not recognize the number (206) 335-4110. However, Angarita testified in her examination under oath that her phone number is (206) 335-4110, a number that Villanueva surely would have known.

8) Information regarding Chiropractor

Angarita testified in her examination under oath that after she complained of her neck/back pain to Villanueva, Villanueva then asked her chiropractor if the insurance from the car accident would pay for Angarita as well. However, Villanueva never mentioned recommending Angarita to her chiropractor, nor did she mention asking her chiropractor if Angarita would be covered by her insurance for the accident.

9) Injuries to Villanueva's Daughter

Angarita testified in her examination under oath that Daniela, Villanueva's daughter, was not injured from the accident, and that Daniela never treated with a chiropractor after the accident. However, Villanueva stated in her examination under oath that Daniela told her that her back hurt and described numerous chiropractic treatments that Daniela received. Further, Villanueva stated in her examination under oath that she told Angarita that Daniela had treated with a chiropractor.

These numerous material misrepresentations by Villanueva are far more substantial than those of the insureds in the Washington cases establishing the precedent that material misrepresentations to an insurer void an entire policy as to all insureds.

In *Wickswat*, the insureds, a husband and wife, made a theft claim to their insurer, Safeco, for a train collection set that the insured, Mr. Wickswat, claimed was stolen from Mr. Wickswat's van. *Wickswat*, 78 Wn. App. at 960. Safeco denied the insureds' theft claim on the ground that the theft had not occurred and that the insureds had misrepresented or concealed facts material to the claim. *Id.* at 961-62. Mr. Wickswat brought suit against Safeco, and a jury found that a theft had occurred but that coverage was precluded because the insureds had intentionally concealed or misrepresented material facts, including their income and

the value of the train collection, during the course of their claim. *Id.* at 965-66. This ruling was upheld on appeal. *Id.* at 975.

In *Cox*, the insured made a claim for items lost in a fire and listed items on the unscheduled property list that were not in his home during the fire. *Id.* at 646. The court held that these misrepresentations were material and voided the insured's coverage under his policy. *Id.* at 651.

Just like the insured's misrepresentations in *Cox* and *Wickswat*, Villanueva made material misrepresentations to Allstate. In fact, in *Wickswat*, the insured only made two misrepresentations, one of which was regarding the insureds' income and not the subject of the claim, and both misrepresentations were deemed material and held to void the entire policy as to both insureds.

Here, there is no genuine issue of material fact that Villanueva made several material misrepresentations to Allstate, noted above, that directly related to the claim made by Villanueva and Angarita. As the court noted in *Onyon*, the types of facts misrepresented by Villanueva are reasonably important to Allstate in making coverage decisions and are, therefore, material. The identity of parties involved in an accident giving rise to a claim is information that is material to Allstate's claim investigation process.

Moreover, the court below held as a matter of law that Villanueva

made material misrepresentations to Allstate and that these representations voided Villanueva's policy. Angarita does not dispute this holding, nor does she dispute the material misrepresentations by Villanueva underlying the court's ruling. Therefore, just like in *Cox* and *Wickswat*, the entire policy is void for Villanueva's misrepresentations and all insureds, including Angarita, are precluded from coverage.

B. Angarita's Concealments Preclude Coverage Under Villanueva's Policy As a Matter of Law

As argued above, Angarita is precluded from coverage due to Villanueva's material misrepresentations, and the resultant voiding of the policy. However, Angarita's own material concealments from Allstate also preclude her from coverage under Villanueva's policy as a matter of law.

Washington courts have held that an insured's concealment will invalidate an insurance policy without the need to prove fraud. *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 653, 655-57, 705 P.2d 812 (holding that concealment is a different means to void a policy than fraud), *review denied*, 104 Wn.2d 1029 (1985). Moreover, *Onyon* sets forth that even a single material concealment or misrepresentation voids an entire policy. *Onyon*, 859 F. Supp. at 1341.

Angarita concealed a significant amount of material information

from Allstate during its investigation of her claim. 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. 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.

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. That Angarita knew the information detailed above and did not reveal the information to Allstate is concealment as a matter of law and precludes coverage.

Lastly, Angarita's concealment of this information is demonstrative of her non-cooperation with Allstate's investigation of her UIM claim. A Florida case, *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300 (1995), provides guidance regarding what is included

within an insured's duty to cooperate. *Goldman* states that "an insured has a duty to volunteer information related to the claim during an examination under oath in accordance with the policy while he would have no such obligation in a deposition." *Goldman*, 660 So.2d at 305. In her deposition testimony, Angarita openly admitted that, during her examination under oath testimony, she withheld information from Allstate relating to her communications with Villanueva prior to her examination under oath as well as her knowledge regarding Villanueva's contact with Butler, the at-fault driver, after the accident at issue. See Deposition of Angarita, CP 120-121 at 53:25-54:6; CP 124 at 66:19-25.

While knowing of Villanueva's undisputed and admitted false statements and Angarita's concealment of the same, and holding that Villanueva's policy was partially void as a matter of law, the trial court still granted coverage to Angarita under Villanueva's policy. Moreover, without offering any specific factual basis for the ruling, the trial court found, as a matter of law, that Angarita had not concealed information from Allstate. These rulings were made despite the factual evidence presented above that during her examination under oath, Angarita did not provide any information to Allstate that would allow Allstate to identify the owner/operator of the at-fault vehicle. However, at the time of her examination under oath, Angarita knew the identity of the driver in the

claimed “hit and run” accident, she knew that Villanueva had met with and received money from the driver, and she knew that Villanueva had asked her to lie about the accident in her own examination under oath. Angarita did not reveal *any* of this information to Allstate during her examination under oath. Such “[d]ishonesty by insureds cannot be ignored.” *Cox*, 110 Wn.2d at 649. Therefore, Angarita must be precluded from coverage under Villanueva’s policy.

C. Villanueva’s Material Misrepresentations Relieve Allstate from the Duty to Defend

When a policy is void and coverage precluded due to material misrepresentations, this also affects an insurer’s duty to defend. The duty to defend is an established part of coverage under an insurance policy. Therefore, if coverage for an insured is precluded because the policy is void, the insurer has no duty to defend the insured. While there is no Washington law directly on point regarding this matter, courts in other jurisdictions have held unequivocally 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 insured is not entitled to benefits under the policy, and the insurer is relieved of the duty to defend the insured. 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 insured 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).

Therefore, because Villanueva's policy was held void as a matter of law and all coverage is precluded as to *all insureds* under the policy, Allstate is also relieved of its duty to defend as to *all insureds* under the policy.

D. Angarita's Knowingly False UIM Claim Precludes Recovery

Though Villanueva's material misrepresentations and Angarita's concealments void the policy and preclude coverage for both insureds, the very act of making a knowingly false UIM claim also precludes recovery for Angarita in this matter.

Washington law supports the voiding of an insured's policy where the insured has made misrepresentations, or has caused a false claim to go forward. 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).

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 in this matter.

Angarita and Villanueva submitted false UM claims to Allstate, through their former attorney Mark Hammer, claiming that a hit and run accident had taken place and was responsible for their claimed injuries. This was in spite of the fact that Villanueva interacted with the at-fault

driver, Mr. Butler, after the accident; had contact information for Mr. Butler; met Mr. Butler after the accident; and received payment for her vehicle damage from Mr. Butler. Moreover, both Villanueva and Angarita knew all of this information when the hit and run UIM claims were submitted.

The communications between Allstate and Mr. Hammer confirm that Angarita and Villanueva submitted UIM claims to Allstate and the facts noted above show that these were knowingly false UIM claims. It is unarguable that Angarita allowed a false UM claim to be presented on her behalf and for the false claim to continue to be presented up until the time of litigation arising from Allstate's denial of her claim. Therefore, the applicable Washington statutes and related public policy require that Angarita be precluded from coverage for her false UIM claim.

E. Alternatively, At Least An Issue of Fact Exists Regarding Whether Angarita Concealed Information From Allstate

Allstate was entitled to all inferences in its favor at the summary judgment hearing on Respondent's Cross-Motion for Partial Summary Judgment re PIP Coverage. Courts have repeatedly held that all evidence and reasonable inferences therefrom are considered in the light most favorable to the non-moving party. See *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Allstate provided evidence showing that, when viewed in the light most favorable to Allstate, Angarita concealed information from Allstate during its investigation of her claims. As such, the trial court erred in finding that Angarita was entitled to PIP coverage as a matter of law and holding that Villanueva's policy was void only as to Villanueva. As a matter of law, Angarita concealed material information from Allstate, therefore the policy is void.

F. Angarita Is Not Entitled to Recovery of Attorney Fees

A court's award of *Olympic Steamship* attorney fees is an equitable remedy and limited to cases where an insured successfully sues an insurer to obtain coverage. *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 795-96, 189 P.3d 777 (2008)(citing *McRory v. Northern Ins. Co.*, 138 Wn.2d 550, 554-55, 980 P.2d 736 (1999)(quoting *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991))). It is well settled that equitable remedies are unavailable to parties that come to court with "unclean hands." *Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). Where acts that create "unclean hands" relate to the same transaction or controversy, this rule restraining a court's award of equitable remedies applies. *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961)(holding that a claimant is disqualified from equitable

relief where that person unjustly acted in the very transaction concerning that which he complains). The court followed this legal authority in *Wellman & Zuck, Inc. v. Hartford Fire Insurance Company*, 170 Wn. App. 666, 285 P.3d 892 (2012), holding that an insured was not entitled to recover *Olympic Steamship* fees due to “unclean hands.”

In this matter, the trial court awarded Angarita \$40,852.50 in attorney fees and \$1,703.99 in fees and costs after granting Angarita PIP coverage as a matter of law. For the reasons noted above, including Villanueva’s material misrepresentations and Angarita’s concealment of material information from Allstate, Angarita is not entitled to coverage in this matter. Therefore, Angarita is also not entitled to an award of attorney fees under *Olympic Steamship*.

Further, even if coverage is awarded against the weight of all the case law and evidence presented herein, it is well established that Angarita has “unclean hands” in this matter. Therefore, pursuant to the authority noted above, Angarita likewise is not entitled to an equitable award of attorney fees in this matter due to her “unclean hands.” Angarita should not be rewarded in a situation where material information was misrepresented to and concealed from Allstate.

G. Allstate Requests Recovery of Fees and Costs

Despite the undisputed, material misrepresentations of Villanueva and the concealment by Angarita, and the overwhelming authority for voided coverage in such cases, Allstate has been forced to defend itself in this lawsuit for its reasonable position and reasonable decision not to provide coverage for Angarita and Villanueva. In doing so, Allstate has incurred substantial costs associated with legal fees and court filing fees. Therefore, Allstate requests that the court award Allstate its fees and costs, to be determined at the conclusion of this matter, and in accordance with RAP 14.3.

V. CONCLUSION

For the reasons noted herein, this Court should overturn the ruling of the trial court and hold that:

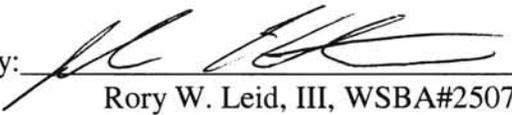
- 1) Villanueva's policy was void as to all claims and all insureds, including the Plaintiff, due to Villanueva's undisputed material misrepresentations and Angarita's concealments;
- 2) There is no PIP coverage as to all insureds, no UIM coverage as to all insureds, and no duty to defend by Allstate because coverage is precluded for all claims and for all insureds;
- 3) Angarita is not entitled to attorney fees because there is no coverage and she has "unclean hands" in this matter; and
- 4) Allstate is awarded its fees and costs in this matter, pursuant to RAP

14.3.

RESPECTFULLY SUBMITTED this 10th day of September, 2013.

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

By:


Rory W. Leid, III, WSBA#25075
Joshua T. Hartmann, WSBA #45008
Attorneys for Appellant

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.

CERTIFICATE OF SERVICE OF
APPELLANT'S BRIEF

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

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2013 SEP 10 PM 3:17
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

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.

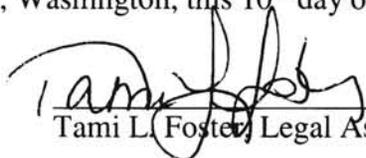
1. I am over the age of eighteen (18) years and not a party to the aforementioned action.

2. I certify that on September 10, 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 Brief and Certificate of Service of Appellant's 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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Attorney for Respondent

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 10th day of September, 2013.



Tami L. Foster, Legal Assistant

2013 SEP 10 PM 3:17
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON