HON. MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KAREN CARR,

Plaintiff,

v.

SPINNAKER INSURANCE COMPANY,

Defendant.

NO. 3:23-cv-05252-MJP

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
March 29, 2024

I. INTRODUCTION

This lawsuit arises out of an insurance claim following a painting project at Plaintiff's vacation rental house in Sekiu, Washington. In November 2021, Plaintiff hired a painter that she met on Facebook to paint the interior of her vacation house shortly after she purchased it. Unhappy with the quality of the painter's work, she filed an insurance claim with her homeowner's insurance company, Defendant Spinnaker Insurance Company ("Spinnaker"). Spinnaker found no coverage for the claim because the policy did not provide coverage for faulty workmanship. Spinnaker's investigation revealed that Plaintiff found the painter on Facebook, signed a contract with him, permitted him to enter the property, and paid him (in part) for the painting work that he performed. Spinnaker found no evidence that the painter intentionally damaged the vacation house.

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Plaintiff filed this lawsuit for coverage under the insurance policy and alleged various extracontractual claims. Discovery is closed, and trial is scheduled to begin on July 11, 2024.

Spinnaker seeks summary judgment on the following issues:

1. Declaratory judgment that there is no coverage for work performed by the painter at the vacation house under the applicable policy; and

2. Dismissal of Plaintiff's breach of contract claim;

3. Dismissal of Plaintiff's extracontractual claims of bad faith and violation of Washington's Insurance Fair Conduct Act ("IFCA").

II. STATEMENT OF FACTS

A. Plaintiff Hired a Painter on Facebook to Paint the Interior of her Vacation House, Which Led to Threats of Liens and Lawsuits between Plaintiff and the Painter

Plaintiff lives in Eatonville, Washington and has been a licensed real estate agent since 2001.[1] In November 2021, she purchased a four-bedroom, three-bathroom single-family house that is approximately 2,400 square feet in Sekiu, Washington, with views of Clallam Bay and the Strait of Juan de Fuca ("Vacation House").[2]

[1] Excerpts from Plaintiff's Deposition as Ex. 1 to Declaration of Eliot M. Harris ("Harris Decl.") at 6:10-14; 24:15-25:10.

[2] Ex. 1 to Harris Decl. at 43:9-44:13

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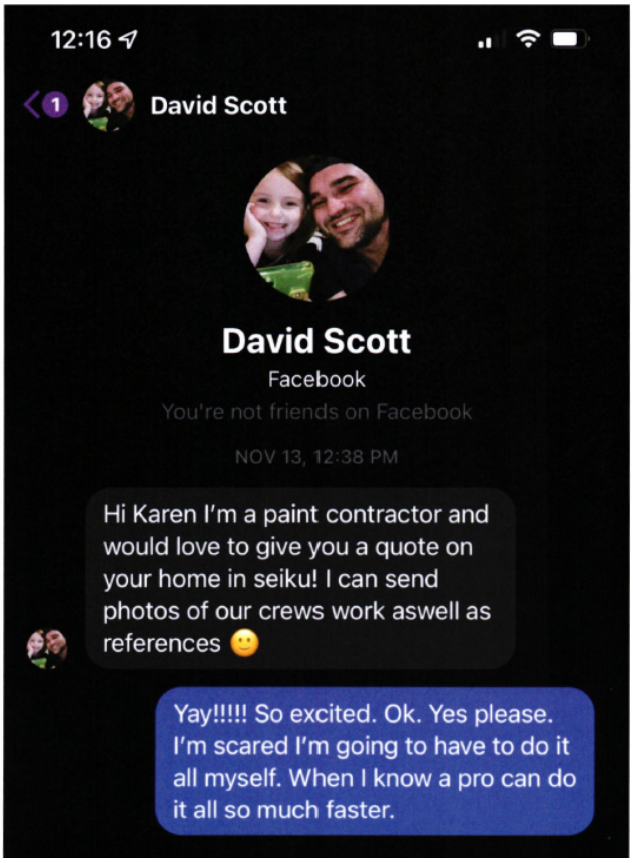
Plaintiff paid $544,000 for the Vacation House.[3] Plaintiff and her husband had spent a lot of time fishing in the area, and wanted to buy the Vacation House to rent out, or potentially live in full time at some point in the future.[4]

After she purchased the Vacation House, Plaintiff decided to hire a painter because the interior walls did not match.[5] She also wanted the kitchen cabinets painted.[6] To find a painter, Plaintiff placed an inquiry on a local Sekiu fisherman's page on Facebook.[7] In response, she received a message from a painting contractor, David Scott, who offered to provide a quote for the work.[8]



[3] Ex. 1 to Harris Decl. at 44:7-9.
[4] Ex. 1 to Harris Decl. at 44:23-45:4.
[5] Ex. 1 to Harris Decl. at 58:7-18.
[6] *Id.*
[7] Ex. 1 to Harris Decl. at 68:16-69:6.
[8] Excerpts of Plaintiff's Facebook Messenger as Ex. 2 to Harris Decl.

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After a series of private messages over Facebook, Plaintiff signed a $6,633.00 painting contract with Mr. Scott on November 29, 2021.[9] Plaintiff agreed to pay 50% up front.[10]

Plaintiff told Mr. Scott that she would be replacing the hardwood floors and trim, and ripping out the carpet.[11] As such, Mr. Scott believed that no masking would be needed in these areas, and wrote the bid accordingly.[12] Plaintiff also told Mr. Scott that she would be "demoing" counters and tile in the bathrooms and the kitchen, and sent him photos of those areas.[13] Plaintiff also told Mr. Scott that she was "rehoming" the appliances "in case you know anyone in need."[14] She also told Mr. Scott that she would be replacing the vinyl in all of the bathrooms, and that she was getting new hardware for the cabinets so he did not need to reinstall the old hardware on the cabinet doors.[15]

Mr. Scott began working at the Vacation House on December 2, 2021.[16] Plaintiff's sons were present, as well as another contractor ("handyman") that was working on other areas of the Vacation House.[17] Mr. Scott testified that Plaintiff told him that the handyman was an unlicensed contractor.[18] Mr. Scott also testified that Plaintiff's sons were unlicensed.[19]

Mr. Scott began by prepping the areas of the Vacation House that he was going to paint.[20] Mr. Scott had two other people help him with the paint and prep work.[21] The three of them spent the entire first day on prep work.[22]

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[9] Painting Contract as Ex. 3 to Harris Decl. (KCresp1-00099)
[10] Ex. 1 to Harris Decl. at 95:3-14.
[11] Ex. 2 to Harris Decl. at KC00386Sup; KC00414Sup; KC00427Sup.
[12] Excerpts from Deposition of David Scott as Ex. 4 to Harris Decl. at 39:8-40:13.
[13] Ex. 2 to Harris Decl. at KC00401Sup.
[14] Ex. 2 to Harris Decl. at KC408Sup.
[15] Ex. 2 to Harris Decl. at KC00415Sup.; KC 00418Sup.
[16] Ex. 2 to Harris Decl. at KC00414Sup.
[17] Ex. 2 to Harris Decl. at KC00410-412Sup
[18] Ex. 4 to Harris Decl. at 14:13-18; 15:12-18; 16:1-10.
[19] Ex. 4 to Harris Decl. at 16:6-10.
[20] Ex. 4 to Harris Decl. at 23:6-13.
[21] Ex. 4 to Harris Decl. at 21:2-16.
[22] Ex. 4 to Harris Decl. at 23:14-16.

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By December 4, 2021, Mr. Scott was almost done with his work and asked for payment of 40% of the remaining contract amount ($2,653.20).[23] Plaintiff paid him $1,500, less than half of the $3,331.50 that was remaining on the contract, and significantly less than the amount Mr. Scott had asked for.[24]

While Plaintiff was not able to be present at the Vacation House on December 4, 2021, to inspect the work (she had not been present on December 2nd or 3rd either), she had Mr. Scott send photos and videos of his work.[25] She was impressed by his work in the kitchen:

[23] Ex. 2 to Harris Decl. at KC00421-422Sup
[24] Ex. 1 to Harris Decl. at 99:7-10.
[25] Ex. 2 to Harris Decl. at KC00423Sup.; KC00429-430Sup.

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Ex. 2 to Harris Decl. at KC00423Sup.

Plaintiff was so impressed by Mr. Scott's painting work that she asked him if he would refinish her hard wood floors after he was done painting.[26] She never told Mr. Scott that she was unhappy with his work when he sent photos of his progress.[27]

Plaintiff and Mr. Scott planned to meet on December 6, 2021, to perform a walk through, but Mr. Scott had to reschedule.[28] Later, via text message, Plaintiff told Mr. Scott that "there's still a bit of touch up to do" and she had concerns about the cabinets.[29]

According to Mr. Scott, someone else at the Vacation House (he assumed the handyman or Plaintiff's sons) had closed the doors to the cabinets and doorways while the paint was wet, which caused damage to these areas.[30] Mr. Scott offered to fix it, but asked to be paid more since this damage was not his fault.[31] Not only did Plaintiff refuse to pay him more, she still owed him $1,831.50 from the original contract.[32]

When Plaintiff refused to pay him, Mr. Scott threatened to put a lien on the Vacation House.[33] In response, Plaintiff threatened to "start a claim with you as well" and told Mr. Scott to "Stay away from my property."[34] Three days later, Plaintiff reported an insurance claim to Spinnaker claiming that Mr. Scott had "vandalized" her property.[35]

B. The Spinnaker Homeowners Policy

Spinnaker issued a homeowners insurance Policy, No. HWA-7291391-00, to Plaintiff that provided certain property coverage for the Vacation House ("Policy"). The Policy provides

[26] Ex. 2 to Harris Decl. at KC00424Sup
[27] Ex. 4 to Harris Decl. at 24:2-14.
[28] Ex. 2 to Harris Decl. at KC00435Sup.
[29] Ex. 2 to Harris Decl. at KC00437Sup
[30] Ex. 4 to Harris Decl. at 33:17-34:24.
[31] Ex. 4 to Harris Decl. at 33:17-24.
[32] Ex. 4 to Harris Decl. at 16:13-22; 18:22-19:14; 32:22-33:1.
[33] Ex. 2 to Harris Decl. at KC00449Sup.
[34] Ex. 2 to Harris Decl. at KC00450Sup.
[35] Excerpts of the Claim Notes as Ex. 5 to Harris Decl. at pg. 18 (SIC 000018).

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coverage for "direct physical loss" to the property, except when excluded by the terms and conditions of the Policy.[36] In this regard, the Policy provides the following exclusionary language, in relevant part:

> **SECTION I – EXCLUSIONS**
>
> **B.** We do not insure for loss to property described in Coverages A and B caused by any of the following.
>
> However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.
> …
>
> **3**. Faulty, inadequate or defective:
>
> **a**. Planning, zoning, development, surveying, siting;
>
> **b**. Design specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> **c**. Materials used in repair, construction, renovation or remodeling; or
>
> **d.** Maintenance;
>
> of part or all of any property whether on or off the "residence premises."[37]

In addition, the Policy provides no coverage for "vandalism" when the property has been vacant for more than 60 consecutive days immediately before the loss. In this regard, the Policy provides as follows:

> **SECTION I – PERILS INSURED AGAINST**
>
> **A. Coverage A – Dwelling And Coverage B – Other Structures**
>
> **1.** We insure against direct physical loss to property described in Coverages A and B
>
> **2.** We do not insure however for loss:

[36] Excerpts of Policy as Ex. 6 to Harris Decl. (SIC0339-40; 382; 385-88; 406-407)
[37] Ex. 6 to Harris Decl. at 387-88.

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…

c. Caused by:

(4) Vandalism and malicious mischief, and any ensuing loss caused by any intentional or wrongful act committed in the course of the vandalism or malicious mischief, if the dwelling has been vacant for more than 60 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;[38]

Shortly after Mr. Scott had completed his work, Plaintiff looked into Mr. Scott's background and found that he was not a licensed or bonded contractor.[39] Plaintiff claims that Mr. Scott sent her a contractor's license and bond information for another contractor with a similar name, but no affiliation with Mr. Scott. Plaintiff later filed a police report with the Clallam County Sheriff's Department and filed a report with the Washington Department of Labor & Industries.[40] Plaintiff admits that neither Mr. Scott nor any of his workers stole anything from the Vacation House.[41]

The Clallam County Sheriff's Department told Plaintiff that she could file a civil claim against Mr. Scott.[42] Plaintiff never spoke to the Clallam County Prosecuting Attorney's office, and no criminal charges were ever filed against Mr. Scott.[43] Plaintiff never filed a civil lawsuit against Mr. Scott.[44]

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[38] Ex. 6 to Harris Decl. at 382; 406-07.
[39] Ex. 1 to Harris Decl. at 162:17-22.
[40] Ex. 1 to Harris Decl. at 167:2-7; 168:19-169:3.
[41] Ex. 1 to Harris Decl. at 162:2-6.
[42] Ex. 1 to Harris Decl. at 169:4-14.
[43] Ex. 1 to Harris Decl. at 174:11-175:2.
[44] Ex. 1 to Harris Decl. at 26:12-15.

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C. Plaintiff Seeks Coverage from Spinnaker to Repair Mr. Scott's Allegedly Deficient Painting Work

On December 9, 2021, Plaintiff filed an insurance claim under the Policy.[45] By December 15, 2021, Spinnaker had arranged for an onsite inspection of the Vacation House and obtained certain information from Plaintiff.[46] Plaintiff provided the following information to Spinnaker:

> There are some general damages. I just had new light fixtures installed. [The contractor] ruined the cabinets. He sprayed everything he could spray. Ruined all my floors, doors, and window sills and trim…[47]

Due to weather issues and road closures, the onsite inspection was delayed until January 15, 2022.[48] Following the inspection, Spinnaker determined that the alleged loss was caused by the faulty painting work by Mr. Scott.[49] Spinnaker issued a coverage declination letter on February 2, 2022.[50]

Plaintiff filed this lawsuit on December 5, 2022.[51] She alleges not only breach of contract, but also asserts extracontractual claims of bad faith and violation of Washington's Insurance Fair Conduct Act ("IFCA").[52] Spinnaker moves for summary judgment on all of these claims.

III. STATEMENT OF THE ISSUES

1. Whether the Court should find that the insurance claim falls within the exclusionary language of Policy that applies to property damage caused by "faulty, inadequate or defective…workmanship, repair, construction, renovation, remodeling" when Plaintiff voluntarily hired and paid Mr. Scott for painting work, and there is no evidence that Mr. Scott intentionally damaged any portion of the Vacation House?

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[45] Ex. 5 to Harris Decl. at SIC 000018.
[46] Ex. 5 to Harris Decl. at SIC 000012-13.
[47] Ex. 5 to Harris Decl. at SIC 000016.
[48] Ex. 5 to Harris Decl. at SIC 000007; 000264-265.
[49] Ex. 1 to Harris Decl. at 198:16-199:3.
[50] Coverage Letter as Ex. 7 to Harris Decl. at SIC 00041-42.
[51] Dkt. 1-2.
[52] *Id.*

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2. Whether the Court should dismiss Plaintiff's extracontractual claims for bad faith and IFCA violation when the Policy does not provide coverage, and Plaintiff cannot show that Spinnaker acted in an unreasonable manner?

IV. ARGUMENT AND AUTHORITY

A. Summary Judgment Standard

Summary judgment shall be granted if there are no genuine issues of material fact in dispute, such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is 'material' only if it might affect the outcome of the case, and a dispute is 'genuine' only if a reasonable trier of fact could resolve the issue in the non-movant's favor." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986)).

If the moving party demonstrates that there is no genuine issue of material fact, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Co., Ltd. V. Zenith Radio Corp.*, 457 U.S. 574, 586, 106 S.Ct. 1348 (1986) (citations omitted). "[T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*." *Id*. at 587 (citations omitted) (emphasis in original). Conclusory statements, speculation, opinions, or argumentative assertions are insufficient to carry this burden. *See, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1994).

If the nonmoving party lacks competent evidence to support even a single element of their claim, the moving party is entitled to summary judgment because "[a] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986).

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B. Washington Law Regarding Interpretation of an Insurance Policy

Washington courts construe insurance policies as contracts. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wash.2d 274, 282, 313 P.3d 395 (2013). It is the obligation of a court to enforce the terms and conditions of the policy as written. *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 378, 917 P.2d 116 (1996). Washington courts enforce clear policy language and will not create an ambiguity where none exists. *Mid-Century Ins. Co. v. Henault*, 128 Wash.2d 207, 213, 905 P.2d 379 (1995).

Language in an insurance policy is considered ambiguous only if it is susceptible to two or more reasonable interpretations. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005) (internal citation omitted). Washington courts "may not interpret a policy in such a way that it creates nonexistent ambiguities that result in the policy being construed in favor of the insured." *Int'l Marine Underwriters*, 179 Wash.2d at 283.

The Court gives undefined terms in an insurance policy their "plain, ordinary, and popular meaning." *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wash.2d. 171, 181-82, 400 P.3d 1234 (2017). This meaning is determined according to the "expectations of the average insurance purchaser" as, when "constru[ing] the language of an insurance policy, [the Court] give[s] it the same construction that an average person purchasing insurance would give the contract." *McLaughlin v. Travelers Com. Ins. Co.*, 196 Wash.2d 631, 641-42, 476 P.3d 1032 (2020). In determining ordinary meaning, the Court may make "reference to dictionary definitions." *Kut Suen Lui v. Essex Ins. Co.*, 185 Wash.2d 703, 713, 375 P.3d 596 (2016). As noted recently by this Court:

> Merely because a single word may have multiple dictionary definitions designed to help a reader understand its bounds, does not make the word ambiguous when used in a contract. If this were the case, ambiguity would abound as the English language is often a many, varied, and enigmatic thing. Instead, the Court uses context, meaning, and usage to determine the intent the parties ascribed when utilizing certain commonly understood language.

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Vita Coffee LLC v. Fireman's Fund Ins. Co., 2021 WL 3077922 at *2 (W.D. Wash., Jul. 21, 2021) (rejecting usage of a dictionary definition that results in unreasonable interpretation given the context of the term). Singular words and terms cannot be understood in isolation, as policies must be construed holistically. *Id.*

When the language is unambiguous, the Court cannot take the liberty of modifying the insurance contract to find or create ambiguity. *Terminal Freezers Inc. v. U.S. Fire Ins.*, 2009 WL 2905980 (9th Cir, 2009) (interpreting Washington law) (citing to *Kitsap County v. Allstate Ins. Co.*, 136 Wash.2d 567, 964 P.2d 1173 (1998)).

C. The Policy's Exclusion for Faulty, Inadequate, or Defective Workmanship Is Unambiguous

Washington Courts have long found that the faulty workmanship exclusion is unambiguous and enforceable. *See e.g.*, *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 14-16, 990 P.2d 414 (1999); *City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wn. App. 68, 76-78, 159 P.3d 422 (2007). The Washington Supreme Court has found it "difficult to reasonably interpret the policy exclusion for faulty construction and defective materials exclusion 3) as ambiguous." *McDonald v. State Farm Fire and Cas. Co.*, 119 Wash.2d 724, 734-35, 837 P.2d 1000 (1992). The *McDonald* Court went on to find that "[a] homeowners' insurance policy with an exclusion of the kind before us should not be interpreted as extending a warranty of fitness to materials used in construction or repair or as an extending coverage to property loss arising from the negligence of third parties." *Id.* at 735.

In this case, Plaintiff hired Mr. Scott to paint the interior of her Vacation House. Initially, she was pleased with his work. When it came time to pay, Plaintiff became dissatisfied with the quality of work. At that point, she refused to fully pay the contractual amount owed to Mr. Scott, and threatened to sue him. She never did.

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Instead, she sued her homeowner's insurer after it found that the claim fell within the faulty workmanship exclusion. By doing so, Plaintiff seeks to convert her homeowner's insurer into Mr. Scott's liability carrier, or more appropriately, a surety or guarantor of Mr. Scott's workmanship. This is not what the parties intended in the insurance contract. This case falls squarely within the faulty workmanship exclusion.

The Court should enter summary judgment in favor of Defendant as to the contractual issues of whether the alleged damage is covered by the Policy.

D. Plaintiff's "Vandalism" Theory is Unsupported by the Circumstances Presented in this Case

Washington Courts have weighed in interpretation of "vandalism" under an insurance policy. In this regard, Courts have required an insured to show "willful and malicious damage" and must result from "an intentional act from which damage was reasonably expected to result." *Frontier Lanes v. Canadian Indem. Co.*, 26 Wn. App. 342, 613 P.2d 166 (1980); *see also, Bowers v. Farmers Ins. Exch.*, 99 Wn. App. 41, 45, 991 P.2d 734 (2000) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2532, 1367 (1993)).

The majority of vandalism coverage cases in Washington involve elicit behavior (*e.g.*, illegal narcotic manufacturing) by any tenant that causes property damage. *See e.g., Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 806, 54 P.3d 1266, 1269 (2002) (finding that operation of a methamphetamine lab was intentional and resulting damage was willful as to constitute vandalism); *see also, Bowers*, 99 Wn. App. at 43 (finding same as to a marijuana growing operation in a rental house).

Here, Plaintiff does not demonstrate that the act of painting a home is reasonably expected to result in damage. In fact, Mr. Scott's work was not intended to damage her house. Initially, Plaintiff was pleased with his work. She offered to have Mr. Scott complete more work at the

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Vacation House based on his initial performance. No reasonable person would interpret Mr. Scott's work (even assuming it was faulty) as being intentional and a willful act to cause damage.

As such, the Court should find that the claim does not constitute "vandalism" as no reasonable jury could make such a finding based on the undisputed evidence.

E. Spinnaker's Denial of Coverage Does Not Amount to an IFCA Violation

In order to maintain an IFCA claim, the plaintiff must show either an unreasonable denial of coverage or payment of benefits. RCW 48.30.015(1). Violation of the applicable WAC provision is insufficient, by itself, to support an IFCA claim. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wash.2d 669, 389 P.3d 476 (2017). Here, Plaintiff is unable to show an IFCA violation.

As discussed above, Spinnaker's denial of coverage was correct—the Policy does not provide coverage for faulty workmanship, which is the situation presented here. Moreover, even if the Court finds that the loss is covered, Spinnaker's denial of coverage was reasonable because it was based on a fair and sensible interpretation of the available coverage under the Policy based on the facts of the claim.

The Washington Supreme Court has defined "reasonable" in the insurance context to mean "not conflicting with reason;" "not absurd;" "not ridiculous;" "being or remaining within the bounds of reason;" "not extreme;" and "not excessive." *Durant v. State Famr Mut. Auto. Ins. Co.*, 191 Wash2d 1, 12, n.3, 419 P.3d 400 (2018) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (2002)). Based on the facts of this case, Spinnaker's covered determination falls well within the definition of "reasonable." No reasonable jury could find otherwise

Accordingly, Spinnaker asks this Court to dismiss Plaintiff IFCA claim.

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F. The Court Should Dismiss Plaintiff's Bad Faith Claim Because Spinnaker's Actions Were Not Unreasonable, Frivolous, or Unfounded.

A claim for insurance bad faith under Washington law is recognized as a tort. *Safeco Ins. Co. v. Butler*, 118 Wash.2d 383, 389, 823 P.2d 499, 503 (1992). The plaintiff must establish all of the following essential elements: duty, breach, causation, and damages. *Cardenas v. Navigators Ins. Co.*, C11-5578 RJB, 2011 WL 6300253, at *7 (W.D. Wash. Dec. 16, 2011). In order to establish a claim for insurance bad faith, an insurer must be found to have acted in an unreasonable, frivolous, or unfounded manner. *Id*. The reasonableness of the insurer's actions can be determined by the Court as a matter of law if reasonable minds could not differ. *See Smith v. Safeco Ins. Co*., 150 Wash.2d 478, 484 (2003*); see also Lakehurst Condo. Owners Ass'n v. State Farm Fire and Cas. Co*., 486 F. Supp. 2d 1205, 1213 (W.D. Wash. 2007). If the insurer can point to a reasonable basis for its action, this reasonable basis is significant evidence that it did not act in bad faith and may even establish that reasonable minds could not differ that its action was justified. *Smith*, 150 Wn.2d at 486.

Plaintiff's bad faith claim fails for the same reasons as the IFCA claim. The basis for her bad faith claim is that Spinnaker determined that the loss is not covered under the Policy because it was caused by faulty workmanship. There is no evidence that Spinnaker based its coverage decision on "unreasonable, frivolous, or unfounded" grounds. To the contrary, Spinnaker's coverage decision was correct, or at the very least, reasonable based on the undisputed facts giving rise to the insurance claim.

As such, Spinnaker ask this Court to dismiss Plaintiff's bad faith claim.

V. CONCLUSION

This is a case of a contractor/homeowner relationship gone bad. The Policy simply does not provide coverage when a homeowner hires a contractor that performs purportedly inadequate or deficient work. Plaintiff has a remedy available—she could seek recovery from the contractor

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that she hired and allowed to paint her Vacation House. The Policy does not place the risk of poor contractor performance on Spinnaker. This Court should not do so either.

If the Court finds coverage for this loss, it would transform the homeowner's property insurance policy into a liability policy for the homeowner's contractors, or worse a surety or guarantee of adequate and complete performance (as judged by the homeowner) of their own contractor's performance.

Spinnaker respectfully requests that the Court finds no coverage for the loss, and dismisses all of Plaintiff's claims in this case.

DATED this 7th day of March, 2024.

s/ Eliot M. Harris
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Attorneys for Defendant Spinnaker Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all CM/ECF participants.

DATED this 7th day of March, 2024.

s/ Eliot M. Harris
Eliot M. Harris, WSBA # 36590

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Hon. Marsha J. Pechman

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA

KAREN CARR Plaintiff, v. SPINNAKER INSURANCE COMPANY Defendant.	No. **23-cv-05252-MJP** OPPOSITION TO SPINNAKER'S MOTION FOR SUMMARY JUDGMENT and MOTION TO STRIKE; or MOTION TO CONTINUE SUMMARY JUDGMENT HEARING Noted for: 3/29/24

I. Motion to Strike

Carr requests that the Court strike Spinnaker's Motion for Summary Judgment as having being filed when Spinnaker's counsel was formally unavailable (due to a Notice of Unavailability having been filed with the Court).

On 10/27/23, at document number 13, Spinnaker's attorney filed a Notice of Unavailability that covered the period 2/26/24 to 3/8/24.

> **Dkt#13 NOTICE of Unavailability of counsel Eliot M Harris for Defendant Spinnaker Insurance Company from 11/20/23 - 11/24/23, 12/26/23-01/03/24, 01/19/24 - 01/23/24, 02/16/24 - 02/23/24, 02/26/24 - 03/08/24, 04/01/24 - 04/12/24. (Harris, Eliot)**

But, on March 7, 2024, despite being unavailable to receive a Motion, which means also filing one, Spinnaker's counsel filed a Motion for Summary Judgment. For Notices of

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Unavailability to be respected by an opposing counsel, they must, at the very least, be respected by the filing party.

After David Scott's deposition (and his counsel's request that Plaintiff set Mr. Scott's deposition, separate from the deposition set by Spinnaker), Carr was prevented from filing a Motion to Extend the Discovery cut-off before the actual cut-off date because of Spinnaker's Counsel Notice of Unavailability. (*Davis Decl*.)

The remedy for violation of a Notice of Unavailability should either be to strike the pending Motion, or (recognizing that the deadline to file a dispositive motion has passed), to continue it out 4 weeks (which would allow time for David Scott's deposition to be taken). After reading this, hopefully, Spinnaker will recognize its mistake (which caused prejudice to Carr) and agree to the continuance remedy. If they don't, then the Court should just strike its motion.

II. FRCP 56(d) Motion to Continue

In addition to the foregoing, Carr requests that the Court continue the hearing on summary judgment so that Carr may depose a material witness. That material witness - Mr. David Scott- is the contractor who pretended to be another person (i.e. another person with a similar name who held a license as a contractor).

The deposition took place on 2/21/24 just days before the discovery cut-off and Scott's attorney objected to Plaintiff's questioning of David Scott unless Plaintiff had set the deposition on her own. (*Davis Decl. Scott Dep.* p.45-46) This, of course, came after Scott willingly cooperated with Spinnaker's counsel's line of questioning (without a single 5th amendment assertion) but then asserted the 5th Amendment to Carr's

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questions before threatening to get up and walk out. (*Davis Decl, Scott Dep. Tr. p.44*)

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A. Yes.
Q. How many residential paint jobs did you engage in as an unlicensed contractor?
A. I'm going to take the fifth on that one as well.
Q. For how many months did you work as an unlicensed paint contractor?
A. I'm going to take the fifth on that one as well.
Q. Had Labor & Industries cited you for working as an unlicensed contractor?
A. I'm going to take the fifth on that one as well.
Q. You're not able to answer whether or not --
A. I'm going to leave here in a minute.
Q. You're not able to answer whether or not Labor & Industries cited you for working as an unlicensed contractor?
A. Yeah, I'm not able to do that.
Q. Why are you unable to answer that question?
A. Because I'm not doing that.
Q. Why are you --
A. Self-incrimination. I'm not answering those questions.
Q. Well -- and maybe your counsel can help, too.
But how does it incriminate you as to whether or not Labor & Industries issued a citation for you working as an unlicensed contractor?

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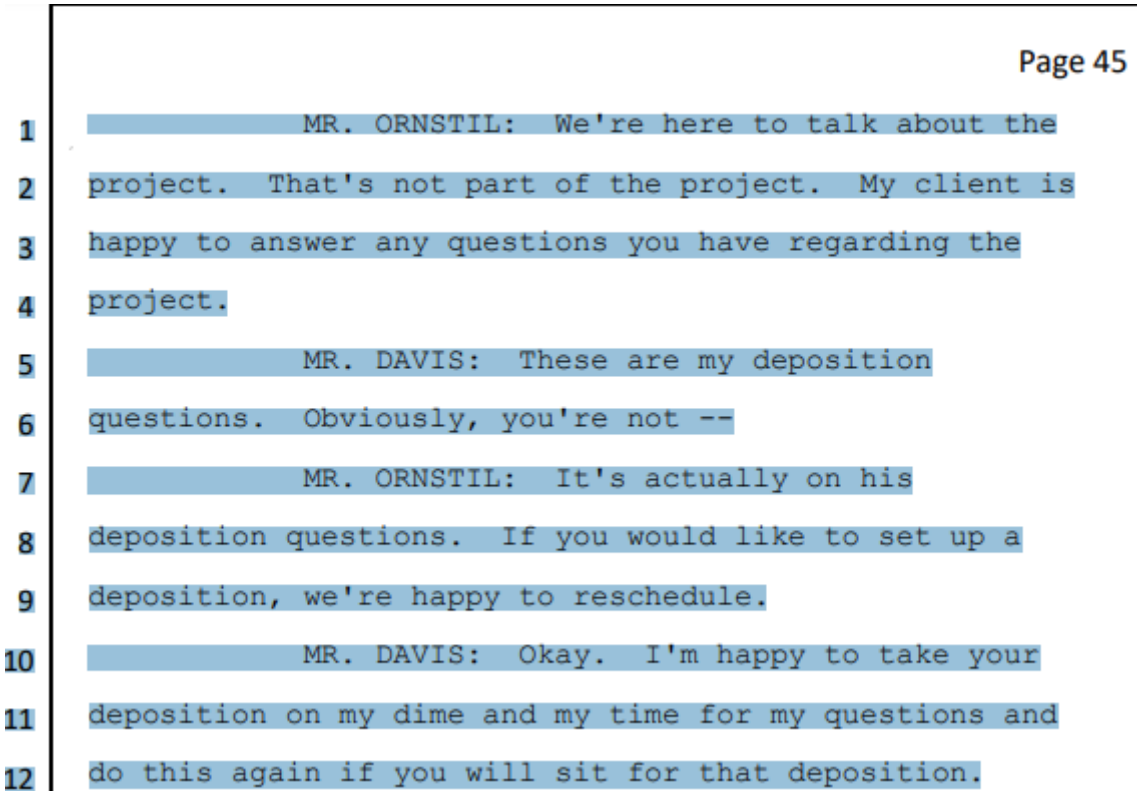
Although the situation became tense, Carr's attorney attempted to press on. (*Davis Decl.*) But, when the 5th Amendment defense didn't seem to remotely applicable to the next posed question, Carr's attorney asked Scott's attorney to explain how the 5th Amendment applied. (*Davis Decl, Scott Dep.Tr 44-45*). But, instead of explaining how the 5th Amendment applied, Scott's attorney objected to Carr being able to ask questions of the witness (other than the parameters they were willing to talk about) because Carr had not set the deposition. (*Id.*)



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MR. ORNSTIL: We're here to talk about the project. That's not part of the project. My client is happy to answer any questions you have regarding the project.

MR. DAVIS: These are my deposition questions. Obviously, you're not --

MR. ORNSTIL: It's actually on his deposition questions. If you would like to set up a deposition, we're happy to reschedule.

MR. DAVIS: Okay. I'm happy to take your deposition on my dime and my time for my questions and do this again if you will sit for that deposition.

With Spinnaker's motion attempting to rely on David Scott's testimony without the opportunity for Carr to cross-examine him (by the normally completely unnecessary extra set deposition), then Carr would respectfully request that the Court continue the summary judgment hearing and allow Carr to depose Scott on his impeachable assertions, including, most importantly:

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1. Scott's representations to Carr of being a licensed contractor (which contradicts his testimony);
2. The fact that Scott never lived in Winthrop, where he had represented that he had moved from;
3. Scott's intent to trick Carr and have her rely on his fraudulent representations that he was somebody else (who had a contractor's license);
4. All of the damage that Scott caused (room by room, picture by picture, frame by frame), including his "intent";
5. His plan/motive/scheme of operating in this manner with other homeowners to take money with no repercussions.

"Pausing" the deposition and re-setting Mr. Scott's deposition (ostensibly after a ruling from the Court on the applicability, effect or scope of the 5th Amendment objections) was agreed to by the lawyers present (and not objected to). (*Davis Decl. Scott Dep.* at 46-47)[1] Now, Carr respectfully requests an extension of discovery and/or a short continuance of the trial date to permit the agreed upon deposition to take place.

III. OPPOSITION TO SPINNAKER'S MOTION FOR SUMMARY JUDGMENT

Should the Court proceed to address the Motion, this memorandum will now turn to the substantive opposition.

Karen Carr is a homeowner who made a claim against her homeowner's policy. Spinnaker denied the claim. Carr then filed suit in the Pierce County Superior Court to obtain the benefit of the coverage she believes she is entitled. After enduring a deposition, Carr now

[1] While a discussion concerning the propriety or effect of Mr. Scott's refusal to answer based on the 5th Amendment need to be addressed at some point, it would appear that that discussion requires a separate motion (with an opportunity for Mr. Scott's counsel to respond).

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faces a motion to dismiss. To say that this hasn't been easy for Ms. Carr is an understatement.

For its part, Spinnaker frames this case as one where the Court, as a matter of public policy, should decline to interpret a homeowner's policy to include "negligent contractor's work" as this would be bad for insurance companies like Spinnaker.[2]

But is that really what this case is about?

We think this case is about whether coverage exists for case of a trespasser entering a home and intentionally or recklessly causing damage. It would seem that common sense and Washington public policy would support not just any homeowner's insurance policy covering that type of loss, but the homeowner's policy in this case.

In her original State Court Complaint, Karen Carr (Carr) brought claims for Breach of Contract ("A"), Breach of the Insurance Fair Conduct Act ("B") and Common Law Bad Faith ("C"). (Dkt#1, Notice of Removal) Although Spinnaker seeks to dismiss each of these claims on summary judgment, there exist factual disputes that prevent dismissal. Those factual disputes center on the "intent to cause damage", to the extent that that is a material element of vandalism. And to the extent reckless indifference or gross negligence replaces "intent" then the factual dispute centers on that conduct. Some of the key factual disputes include:

1. Whether Carr was lied to about the licensing and insurance by David Scott, an individual who claimed to be a lawful, licensed contractor, but who wasn't.
2. Whether Carr asked for the insurance information of David Carr (she did, he says she never did until she sought to sue him)
3. Whether there was damage caused (and whether that equates to vandalism or malicious mischief of theft)

While David Scott's statements about an unlicensed handyman or one of Carr's kids

[2] Spinnaker also strives to focus on Carr's home purchase as a vacation home. But is that fact relevant to whether or not there is coverage?

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performing "electrical work" without a license are a red herring and irrelevant to the Court's determination on summary judgment, attempting to paint Carr as a bad actor or someone who didn't require licensed contractors to work at her house (therefore excusing the fraudulent, unlicensed contractor's damages), Carr nevertheless objects to the inadmissible hearsay statements of David Scott that she "told" him that the handyman was an "unlicensed" contractor performing unlicensed work. (*Carr Decl*, ¶76) And, not only does Carr deny such a statement, Carr's son Zachary Vandersluis is a licensed electrician (s*ee Vandersluis Decl.*) So why would he tell Scott otherwise?

A. Statement of Facts

While some of the basic facts can be agreed to, not all are.

On or about 10/22/21 Carr signed a purchase and sale agreement to buy the property located at 262 S. Sekiu Airport Rd, Sekiu, WA (Clallam County) ("Sekiu home"). (*Carr Decl*.¶2) The property sale closed on or about 11/30/21 (*Id*. at ¶3) In advance of the closing, Carr purchased homeowner's insurance (policy#HWA-7291391-00) from Spinnaker Insurance (via a company called "Hippo") to insure the Sekiu home. The policy began 11/19/21 at 12:01am. (*Id ¶4-5*). Carr made the premium payments when due and never failed to pay any premium due. (*Id* at ¶6)

The insurance policy insuring Carr's Sekiu home includes Dwelling (Coverage A), Personal property (Coverage C), Personal Property Replacement Cost Loss Settlement (HO290), Loss of use (Coverage D) as well as an additional "Personal Property Replacement Cost Loss Settlement (HO290) and Personal Injury (HO082A). (*Carr Decl. Exhibit 1*)

SECTION I – PROPERTY COVERAGES

A. Coverage A – Dwelling

1. We cover:

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> **a.** The dwelling on the "residence premises" shown in the Declarations, including structures attached to
> the dwelling; and
> **b.** Materials and supplies located on or next to the "residence premises" used to construct, alter or repair the dwelling or other structures on the "residence premises".
>
> **C. Coverage C – Personal Property**
>
> **1. Covered Property**
>
> We cover personal property owned or used by an "insured" while it is anywhere in the world.

So, from those "coverages", it would appear that damage to Carr's home and personal property are covered. But from what perils?

> **SECTION I – PERILS INSURED AGAINST**
>
> **A. Coverage A – Dwelling And Coverage B – Other Structures**
>
> **1.** We insure against direct physical loss to property described in Coverages **A** and **B.**

A later exclusion clarifies that the dwelling is covered for an act of "vandalism" or an act of "malicious mischief" so long as it hasn't been vacant for 30 or more consecutive days immediately before the loss.[3] The property here wasn't vacant, as Carr stayed multiple overnights in the dwelling within the 30 days[4] prior to the loss. (See Carr Decl.¶9-10).

So, this makes clear that vandalism and malicious mischief are covered perils.

And, Personal property is also covered.

> **B. Coverage C – Personal Property**
>
> We insure for direct physical loss to the property described in Coverage **C** caused by any of the following perils unless the loss is excluded in Section **I** – Exclusions.

The policy goes on to expressly provide that those "perils" include:

> **8. Vandalism Or Malicious Mischief**
> **9. Theft (..includ[ing] "attempted theft**").

(*Carr Decl. Ex. 1*)

---

[3] This exclusion appears in Section I, A(2)(c)(3).
[4] The policy language is extended to 60 days of continuance vacancy by an Amendment in paragraph X of that Amendment..

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The Sekiu home was livable in at the time she purchased it, and in fact she did stay there for multiple overnights after closing; but Carr had wanted to make updates to some of the interior, including updating the paint on walls and cabinets (which were an old, stained wood color). (*Carr Decl* ¶9-11) Although it was possible for her to do the painting herself, she acknowledged that was going to be a lot of work so she chose to hire a professional – a licensed painting contractor. (*Id* at ¶12). However, there was a problem. Sekiu isn't exactly on the beaten path. So, Carr put an ad out on Facebook in hopes of a response. (*Id* at ¶13) And, there was only one response to the Facebook ad – a David Scott.

Now comes the disputed part.

David Scott represented to Karen Carr that he was a licensed contractor. (*Carr Decl. ¶17-18*). That seems clear to everyone except Spinnaker's star witness, David Scott.

> 10 You represented to Ms. Carr that you were a
> 11 licensed contractor, didn't you?
> **12 A. No, I did not.**

(*Davis Decl, Scott Dep*. p.41, Lns.10-12)

But, wait a minute. The record is going to support Carr here. It's pretty clear that David Scott began his introduction by stating that he was a painting contractor.

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4 And this is a message initiated by you to
5 Ms. Carr; correct?
6 A. Yes.
7 Q. And the first line of the message that you
8 initiate to Ms. Carr, you say, "I'm a paint contractor";
9 correct?
10 A. Yes.
11 Q. Okay. But you were an unlicensed paint
12 contractor at that time, November 13, 2021; is that 13
correct?
14 A. Yeah, I just want to remain silent on that one.
15 Q. So you're taking the Fifth Amendment in
16 answering the question whether you were a licensed
or 17 unlicensed contractor at the time that you wrote: "Hi
18 Karen, I'm a paint contractor"?
19 A. Yes.
20 Q. Had you been working as an unlicensed paint
21 contractor on prior jobs prior to November 13, 2021?
22 A. I'm going to remain silent on that one as well.
23 Q. So you're taking the Fifth Amendment with

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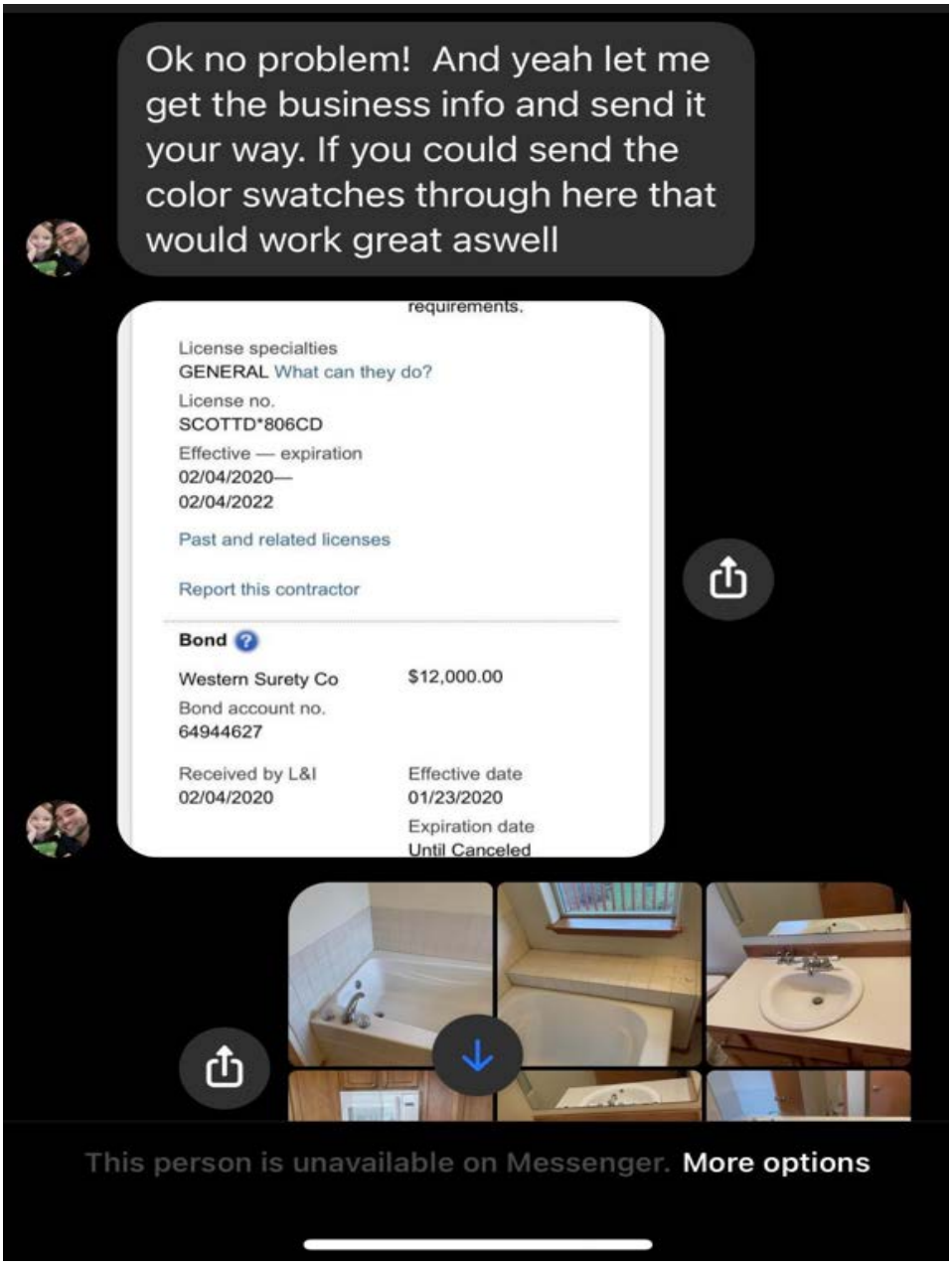
24 respect to the question of whether you worked as an

25 unlicensed contractor prior to November 13, 2021?

(*Carr Decl, Scott Dep.*¶4-25)

And he followed the representation of being a "painting contractor" by providing what he represented as his business information which was state contractor's licensing information – information Carr had requested. (Carr Decl. ¶18)



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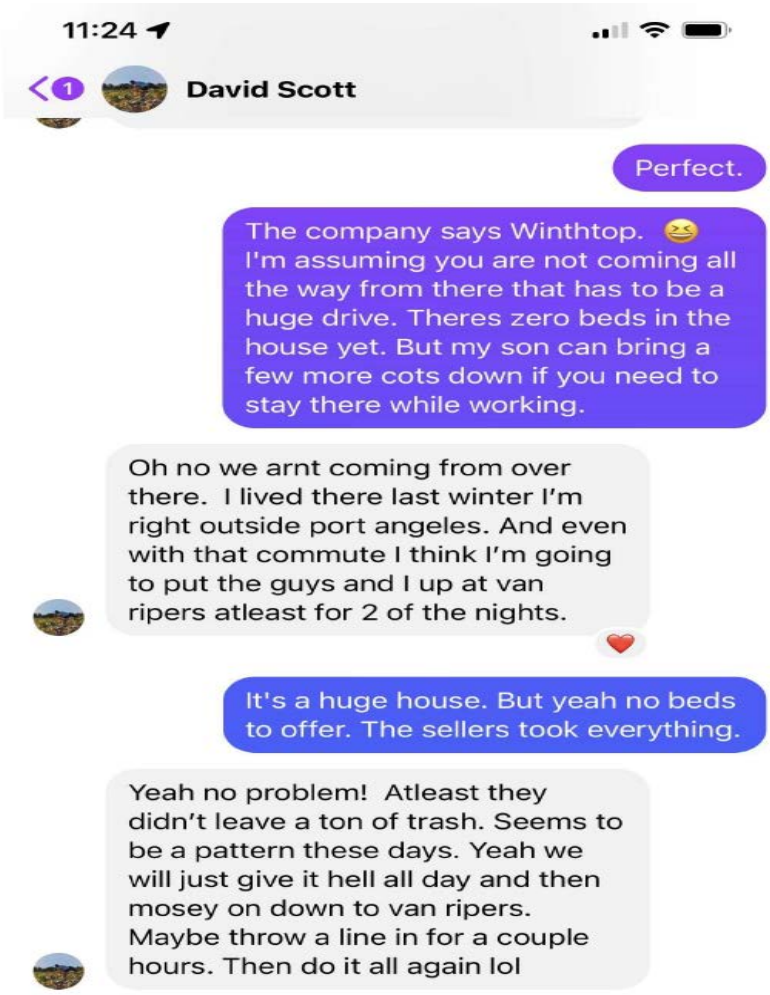
David Scott even went so far as to say he had moved from Winthrop, *doubling down* on his fraudulent impersonation of a licensed contractor – David Scott Dinham). (Carr Decl. ¶20-21 and p. 7)[5]



After David Scott provided Carr the license and insurance information (which Carr looked up to verify), then in reliance on the representations made to her, Carr hired Scott (whom she 100% believed to be David Scott Dinham, a licensed contractor) just as he intended. (*Carr Decl*. ¶27)

[5] Although the names appeared to be off slightly, Carr took that as David Scott using middle name or nickname for his lawful, legal name, as she knew people to do. *Carr Decl*. Never one did Carr doubt that David Scott was the person he represented himself to be: David Scott Dinham- a licensed, insured, bonded painting contractor. (*Carr Decl* at ¶22-28) And not once did David Scott ever come "clean" that he was a fraud/imposter. (*Id*)

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After signing the bid Scott provided (and hiring the imposter Scott), Carr paid him half the contract fee up front and continued to lay out the work that she would like done. (*Carr Decl* ¶30-35). That work included painting the cabinets and certain walls. (*Id* at ¶35). It did not include ruining her personal property, or her fixtures or her flooring. However, the imposter Scott damaged Carr's personal property by completely disregarding instructions and her personal property and fixtures and just painting them – haphazardly spraying paint in the house which included painting a ceiling fan, and a carpeted floor that Carr had no intention of replacing. (*Carr Decl*.¶35-38, ¶43, ¶60)

It wasn't just a "poor job" but Scott's actions in the house were so reckless that they appeared to be intentional. (*Carr Decl*. ¶35, ¶41-43, *Bjerke Decl*, *S. Carr Decl*., *Vandersluis Decl*.) The actions of Scott were so destructive, that Carr had to completely replace the carpeting in a room, then a ceiling fan, tools, and the cabinets (which couldn't be repainted). (*Carr Decl*.¶35-38, ¶43, ¶60)

Scott also tried to get paid before Carr could come back and inspect. (*Carr Decl*. ¶31-34) He sent her photos that didn't' reveal the damage and tried to get out before she knew what he had ruined. (*Carr Decl.* ¶30, ¶44, ¶46) Carr believes that that was his plan all along. (*Carr Decl* ¶33, ¶41) So when Carr did return and saw what Scott had ruined, she asked him to leave and not return. (*Carr Decl* ¶49) There is no question (despite what Spinnaker's conclusory investigation found), Scott's reckless and intentional acts caused damage to Carr. (*Carr Decl*. ¶35-38, ¶41-43, *Bjerke Decl*, *S. Carr Decl*., *Vandersluis Decl*.)

In addition to the damage, Scott stole money from Carr (under the false pretense of being someone else), the dollar amount of damage caused by Scott's reckless or

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intentionally destructive actions inside the house amounted to $4816.50. (*Carr Decl*. ¶39)

After discovering the damage, Carr called WA Labor and Industries to make a claim, but she soon learned from WA LNI that the license/bond number that she was reporting to them was not the contractor who had worked on the job at her house. (*Id*. ¶50-51) So Carr called the contactor (she thought was David Scott) and learned that he (David Scott Dinham) was really in Winthrop, wasn't working on any contracting projects, and didn't know where Sekiu was. (*Id* at ¶52)

Not only had her home been vandalized, but she had been defrauded. (*Id* at ¶53)

As a result, Carr filed a claim with her homeowner's insurance (Spinnaker, via Hippo insurance[6]) on 12/9/21 (with a date of loss of 12/6/21). (Carr Decl, ¶56). After receiving the claim, Hippo/Spinnaker replied that it would give Carr's claim "prompt attention and fair consideration". (*Carr Decl*, Ex. 12) But it didn't. Carr repeatedly called Spinnaker to ask someone to come out and inspect the damage before she replaced it. (Carr ¶64) But it wouldn't come out until January 15, 2023 (more than 30 days after the claim had been filed). (Carr¶64-66) Spinnaker then denied Carr's claim quickly thereafter, on February 2, 2022, on the basis that the policy didn't cover faulty/inadequate workmanship. (*Carr Decl*. ¶67, Ex13 2-2-22 letter) It was as if the denial letter was ready and just waiting for the site report.

For her part, Carr couldn't fix the damage until Spinnaker had inspected and that caused her additional damage in not being able to offer a short term rental on the home. (Carr Decl. ¶68)

[6] Hippo acted as an agent or broker for Spinnaker insurance (and/or as "program administrator"; see Davis Decl. Ex___3-28-22 denial)

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Then, in its 3-28-22 follow-up denial, Spinnaker *painted* its own story as one involving a breach of contract dispute with a contractor, whom it was not only seemingly not recognizing as an unauthorized intruder, but who (Spinnaker also asserted) did not cause damage.

> The Complainant presented a vandalism claim for damage caused to her property by a deceptive contractor. There was no evidence of forced entry or damage due to vandalism. Rather, our investigation determined that the insured hired and paid a contractor to perform work in her home. The work was performed by the contractor but not to the Complainant's satisfaction. The contractor did not cause damage to the home. The insured invited the contractor into her home to perform the work and paid him via Venmo without inspecting his work. Thus, coverage was denied. The Complainant requested that Hippo reconsider but did not provide any new information. Therefore, Hippo maintained the coverage denial. Dissatisfied with this decision, the Complainant filed this Complaint.
>
> Upon receipt of the above-referenced Complaint, the claim was reviewed at multiple levels of management. No new information was provided with the Complaint. In WA, the covered peril must be the cause of the loss. Here, the Complainant entered into a contractor the with contractor who breached the contract. The cause of the loss was faulty work by a deceptive contractor not the covered peril of vandalism. Moreover, the faulty work of a contractor is not a covered peril, and claims for breach of contract are specifically excluded. Therefore, Hippo stands on its denial of coverage.

(*Carr Decl*. ¶72, Ex. 14)

B. Evidence Relied

Declarations of Karen Carr (with attachments)

Declarations of Byron Bjerke, Zachary Vandersluis, Shelton Carr

Declaration of Noah Davis with Dep. Transcript of David Scott

C. Legal Bases

FRCP 56

RCW 48.01.030; RCW 48.030.015

WAC 284-30-330; WAC 284-30-380

Attendant Case Law

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D. ARGUMENT

Spinnaker seeks summary dismissal of each of Carr's three causes of action. These causes of actions are addressed the order of appearance in the Complaint. However, if the IFCA claim is dismissed by the Court, the Court would seemingly be deprived of jurisdiction with a claim that is below $75,000 (and without an attorney fee trigger or punitive provision) and could remand to the Pierce County Superior Court for decision on the Breach of Contract and Common Law bad faith claims.

1. Breach of Contract

Carr had a valid contract with Spinnaker – there was an offer of a policy, acceptance of the policy and payment of policy premiums by Carr (and Spinnaker does not dispute that the Sekiu home was insured or that Carr had paid all premiums). Instead, the dispute is over whether there was coverage (i.e. the contract of insurance was breached).

"A breach of contract is actionable where the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw. Indep. Forest Mfrs. v. Dep't of Lab. &Indus.*, 78 Wn.App. 707, 712, 899 P.2d 6 (1995). The duty under an insurance contract is to pay claims that are covered by the policy.

Resolution of that dispute would appear to involve questions of both fact and law. What happened? And, is there coverage for what happened?

For the "what happened?" part, Spinnaker spins this case as a "bad contractor" case – where a homeowner isn't happy about the work that was done but where homeowners' insurance is not intended to cover such a loss. However, that isn't Carr's claim. Carr's claim is premised on the damage done by a trespasser (someone who gained entry to her home under false pretenses, a charlatan, who intended to steal funds under an alias and didn't care about the work being performed because he didn't

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have a license, contract or bond). He just wanted money and in the fastest way he could (Carr could see what he had done).

So, in this case, does the policy cover the situation of a trespasser causing damage inside the home? David Scott was not who he pretended to be instead was a trespasser (because he did not have authority to enter). That trespasser caused damage to Carr's home.

Of course, if there is a factual dispute over the "what happened", then is that something that should be resolved by the court, now, on summary judgment? Or is that something that should be resolved by the trier of fact at trial?

If there is no factual dispute and we can agree that Carr was tricked by a David Scott who impersonated a licensed contract in order to gain access to Carr's home (to take her money) and damage her property, then we turn to whether or not the policy covers claims involving such "trespasses" and damaging conduct. Of course, one would think so, wouldn't they? Why are these policies written in such a way that it's impossible for a layperson to understand. Common sense would tell us that when a person insures their home and the policy says it covers theft, vandalism and/or malicious mischief that this is the type of conduct that would be covered.

Here, the policy itself expressly provides the following coverages (or so it would appear):

SECTION I – PROPERTY COVERAGES

A. Coverage A – Dwelling

1. We cover:
a. The dwelling on the "residence premises" shown in the Declarations, including structures attached to
the dwelling; and

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b. Materials and supplies located on or next to the "residence premises" used to construct, alter or repair the dwelling or other structures on the "residence premises".

C. Coverage C – Personal Property

1. Covered Property

We cover personal property owned or used by an "insured" while it is anywhere in the world.

So, from those "coverages", it would appear that damage to Carr's home and personal property are covered, right? But from what perils. Again, a reasonable person would think that a trespasser's damage to the home is vandalism and is a covered peril. Let's see if we can find that in the policy.

SECTION I – PERILS INSURED AGAINST

A. Coverage A – Dwelling And Coverage B – Other Structures

1. We insure against direct physical loss to property described in Coverages **A** and **B.**

There it is. The dwelling is covered. And that is further clarified that it is covered for theft as well as an act of "vandalism" or act of "malicious mischief" so long as it hasn't been vacant for 30 or more consecutive days immediately before the loss.[7] (And here it wasn't vacant, as Carr stayed in the dwelling within the 30 days[8] prior to the loss. (*Carr Decl.*¶9-10).

And, personal property is also covered.

B. Coverage C – Personal Property

[7] This exclusion appears in Section I, A(2)(c)(3) of Exhibit 1 (to the Carr Decl.)
[8] The policy language is extended to 60 days of continuance vacancy by an Amendment in paragraph X of that Amendment.. (*Id*)

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> We insure for direct physical loss to the property described in Coverage **C** caused by any of the following perils unless the loss is excluded in Section **I** – Exclusions.

Since Carr suffered direct physical loss to her property (flooring, ceiling fan, tools, cabinets, curtains) she has suffered a direct physical loss to either or both the dwelling (i.e. fixtures) and/or personal property inside the dwelling (or located anywhere—i.e. theft of money by an imposter), she has coverage, doesn't she?

The personal property covered specifically includes coverage for "Vandalism or Malicious Mischief" ¶B(8) and "Theft" ¶B(9). And, the home wasn't under construction and wasn't being rented, so there is no exclusion, right?

> Washington courts interpret language in insurance policies as a matter of law. If the policy language is clear and unambiguous, we must enforce it as written. When interpreting an insurance contract, we consider the policy as a whole, according to the entirety of its terms and conditions. The policy is given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance. And any potentially conflicting clauses will be harmonized to give effect to all of the contract's provisions. Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC, 200 Wn.2d 315, 320, 336, 516 P.3d 796 (2022); Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co., 183 Wn.2d 485, 489, 352 P.3d 790 (2015).

Pac. Lutheran Univ. v. Certain Underwriters at Lloyd's of London, Case No. 100752-3, citating pending (Wash. Decided Jan 18, 2024)

"Where a term is undefined, we assigned it its ordinary meaning." *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash.2d 501, 512, 276 P.3d 300 (2012). **Ambiguities** and exclusions are construed against the insurer. *Id*. (emphasis added)

How has Spinnaker not covered these losses? Is it because of their narrative? But their narrative is not what happened here.

First of all, Carr's money was stolen by a David Scott by his pretending to be someone else for the purpose of taking Carr's money (under the guise he was a licensed/bonded/insured contractor). She has suffered a loss by theft.

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Merriam-Webster's on-line dictionary defines theft[9] as

1 a: the act of stealing
specifically **:** the felonious taking and removing of personal property with intent to deprive the rightful owner of it
b: an unlawful taking (as by embezzlement or burglary) of property

Wasn't Carr's money stolen by David Scott? He pretended to be someone else and Carr testifies through her declaration that she would never have let David Scott in to her home if she knew he wasn't who he had pretended to be and would never have hired him (and with that, paid him). Isn't that an unlawful taking? A theft?

It would seem that this first part is easy. Carr is entitled to the $4816.15 she paid David Scott under the theft provision (as Scott effectively stole her personal property (money) by pretending to be someone else). Case closed.

But, in addition to the theft of monies, Carr's home was damaged by the fraudulent contractor. So is that damage also covered under the policy. Now the question there, it seems to be, is whether or not the actions of Daivd Scott rise to the level of "vandalism" and/or "malicious mischief") -- which is why Spinnaker's counsel asked David Carr whether he "intended" to vandalize Carr's home. Of course, he answered no to that softball before shielding himself by the 5th amendment on the tougher questions from Carr's counsel) But that becomes a question of fact. If we took every criminal's word on whether they committed a crime, we'd surely have no criminals. Did David Carr intend to cause damage. Or, is "recklessly" causing damage enough under the vandalism or malicious mischief perils?

While this may seem like an issue of first impression (that perhaps would be fittingly certified to the Washington Supreme Court), there is actually a case on point: *Graff v. Allstate Insurance Co.*, 113 Wn.App. 799, 804, 54 P.3d 1266 (2002)

[9] https://www.merriam-webster.com/dictionary/theft

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Now, Spinnaker is fully aware of this case and fully aware that Carr intends to rely on it. So Spinnaker tries to be dismissive of it as the drug lab type of cases. But, we don't have to be dismissive or to distinguish the *Graff* case. We would only have to distinguish if we were looking for a reason to decline coverage, not try apply coverage in good faith.

In *Graff*, methamphetamine contamination was found to be vandalism. There, just like here, the insurance company cried foul. That couldn't be vandalism. The renters there intended to create the drug lab. And they did.

In the *Graff* case, the insured's tenant manufactured methamphetamine on the property but did not cause any visible damage. *Graff*, 113 Wn.App. at 801. However, the City of Tacoma determined that the house was uninhabitable due to methamphetamine residue and could not be occupied until it was decontaminated. *Id*. After the insurer denied the insured's claim because contamination was an excluded peril under the policy (just like here, where Spinnaker asserts that negligent contractor work is specifically excluded), the *Graff* insured/homewoner sued for breach of contract, arguing that vandalism was the proximate cause of loss. *Id.* at 801-03. The court held that because "[t]he tenant's acts were intentional, in disregard of Graff's property interest, and the resulting damage was almost a certainty," the insured's loss was covered under the vandalism provision of the policy. *Id*. at 806.

Vandalism, not contamination, was the proximate cause of loss, although the tenant did not cause any visible damage to the property and the property was contaminated by emission of hazardous chemicals before any physical repairs became necessary. *Id*.

The same situation exists here. The fraudulent contractor intentionally sprayed paint on curtains, floors, a ceiling fan, tools and dishes. No doubt it was quicker to just

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spray everything. But, that intentional act of spray painting in an indiscriminate way would certainly result in the damage that it did cause. Thus, it was the act of the indiscriminate spraying by a person who tricked the homeowner to gain entry and who did not care about the effects of his actions that caused the damage – and why would he, he didn't have insurance, a license or a bond. He just had to do enough to get 90% of the payment and get out (or, keep asking the homeowner for more money to fix the damage the fraudulent contractor had intentionally done).

What this case and claim wasn't, is the situation where a homeowner hires a licensed contractor who did poor job, resulting in a "breach of contract" or "faulty contractor's work" claim. This wasn't a poor job, this was intentional or reckless destruction. And, if that's in dispute, let's let the jury decide.

The dispositive issue here, as it was in *Graff* is whether the "[contractor] acted in conscious or intentional disregard for Graff's property rights." *Id.* at 805.

The same result was reached in *Bowers*, an earlier case involving an indoor marijuana grow operation, this court similarly emphasized that vandalism is the cause of loss if "'the damage results from an intentional act from which damage was reasonably expected to result.'" *Bowers v. Farmers Ins. Exch.*, 99 Wn.App. 41, 44, 991 P.2d 734 (2000). Although the existence of a methamphetamine laboratory provided evidence of an intentional, destructive act in *Graff*, it was not strictly necessary for coverage under the vandalism provision. 113 Wn.App. at 806.

So here, does a material issue of fact remain as to whether the fraudulent contractor's actions were willful or malicious such as to equate to vandalism or malicious mischief?

Washington courts have previously defined vandalism as used in an insurance policy as "'willful, wanton, or reckless damage or destruction of another's property."

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Bowers, 99 Wn.App. at 45 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY).

Was David Scott's conduct willful, wanton or reckless? If there is any dispute over that, summary judgment should be denied.

But, isn't pretending to be someone else, having no insurance, no license, no bond and a complete disregard of the care or well being of others and their property (such that the paint is sprayed indiscriminately through the house) rise to the level of wanton disregard or recklessness?

2. Insurance Fair Conduct Act

Next, Carr alleges that, Spinnaker unreasonably denied her claim.

Under IFCA, any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs. RCW 48.30.015(1). IFCA claims require that the insurer's unreasonable act result in the unreasonable denial of the insured's claim, and any damages must be caused by that denial. The regulations referenced in RCW 48.30.015(5) "broadly address unfair practices in insurance, not just unreasonable denials of coverage or benefits." *Perez-Crisantos v. State Farm Fire &Cas. Co.*, 187 Wn.2d 669, 672, 389 P.3d 476 (2017)

To succeed on an IFCA claim, the insured must prove that the insurer acted unreasonably, or, that the insurer violated certain insurance regulations, including those set forth in WAC 284-30-330. WAC 284-30330 defines "[s]pecific unfair claims settlement practices," and that an insurer engages in unfair methods of competition and unfair or deceptive acts or practices in the context of claims settlement by:

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(1) Misrepresenting pertinent facts (such as that Carr had not suffered any damage; or that this was simply a breach of contract dispute);

(2) Failing to act reasonably promptly with ….respect to claims (taking more than a month (5 weeks) before an adjuster or agent of the adjuster would come out and inspect the damage at Carr's Sekiu home), despite repeated requests from Carr;

(5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documents have been submitted (Carr submitted proof of loss by 12/9/21 and yet a denial didn't take place until February 2022 (almost 60 days later), held up by the failure to reasonably investigate (by waiting 5 weeks to come to the Sekiu home which in turn caused Carr to incur more loss rental income as opposed to a prompt investigation which would have allowed her to remedy herself and recoup the short term rental income that was being lost);

(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings. ....

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area.

WAC 284-30-330.

In addition, WAC 284-30-380(1) provides in pertinent part that,

(1) Within **fifteen** working days after receipt by the insurer of fully completed and executed proofs of loss, the insurer must notify the first party claimant whether the claim has been accepted or denied. The insurer must not deny a claim on the grounds

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of a specific policy provision, condition, or exclusion unless reference to the specific provision, condition, or exclusion is included in the denial. . . .

Waiting 5 weeks to conduct an in-person investigation was unreasonable (especially in light of the repeated communications from Carr). And, it caused damages to Carr by delaying her short term rental income. Spinnaker realized that it had acted unreasonable when ***after*** denying Carr's claim on February 2, 2022, it asked for additional evidence of proof of loss on February 10th. But that request was contrary to its formal statements not only that there was no coverage, but that Carr had not suffered a loss.

And, Spinnaker never considered theft (by deception) as a basis of Carr's loss. Instead, it looked for exclusions and reasons to deny coverage. In it's reply, no doubt Spinnaker will want to address its oversight on the theft provision and failure to investigate the theft that occurred here by the imposter contractor, but Washington courts have recognized a form of equitable estoppel that applies when an insurer shifts its grounds for denying an insurance claim after submitting an initial denial letter. *Hayden v. Mut. of Enumclaw Ins. Co*., 141 Wn.2d 55, 63, 1 P.3d 1167 (2000). Where "an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds." *Bosko v. Pitts & Still Inc*., 75 Wn.2d 856, 864, 454 P.2d 229 (1969). Spinnaker had all the necessary facts available to raise all grounds before it denied Carr's claim. *Id*. Spinnaker sought to decline coverage, not find it. And, Carr will have been prejudiced by any new basis for the denial of coverage by wasted litigation efforts. *See Karpenski v. American General Life Cos., LLC*, 999 F.Supp.2d 1235, 1245-46 (W.D. Wash. 2014). (The application of estoppel "precludes

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Defendants from changing their grounds for rescission from those that they stood on prior to the onset of litigation.")

USAA was aware of the facts necessary to deny coverage on these grounds prior to issuing the denial letter, and its failure to raise these grounds for denial until it moved for summary judgment prejudiced the Cummings. See id.

At a minimum, does there not exist a genuine issue of material fact regarding whether Spinnaker unreasonably delayed its investigation of Carr's claim? And whether it's failure to find theft as a covered peril, and failure to acknowledge the damages suffered by Carr amount to an unreasonable denial. Couldn't reasonable finds find that Spinnaker failed to fully, fairly and timely investigate Carr's claim, and to properly determine the source of her loss?

3. Common Law Bad Faith

If Carr's claims are not actionable under IFCA, then they are still actionable under a claim of common law bad faith. This is because an insurer's duty to act in good faith is separate from its duty to indemnify a covered loss. *Coventry Assocs. v Am. States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998). And, an insured may maintain an action for bad faith even if the insurer was ultimately correct in determining that the insured's claim was not covered. Id.

A Washington statute confirms this duty of good faith:

> 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; *see also Smith v. Safeco Insurance Co.*, 150 Wn.2d at 484 (2003).

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To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded. *Smith v. Safeco Insurance Co.*, 150 Wn.2d at 484. When an insured claims the insurer unreasonably denied coverage, the insured possesses the initial burden of showing that the insurer acted unreasonably. *Id* at 484. In response, the insurer has the opportunity to identify reasonable grounds for its action. *Smith v. Safeco Insurance Co.*, 150 Wn.2d at 484-85. While an insurer's denial of coverage based on a reasonable interpretation of the insurance policy does not lead to bad faith liability, *Kirk v. Mount Airy Insurance Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998), Carr asserts that Spinnaker's failure to recognize that Carr suffered damage from the acts of the imposter contractor and failed to find that she had coverage for reckless acts or theft were unreasonable interpretations of the policy – interpretations made by those defending against coverage, not by an insurance company with a duty to its insured to find coverage.

"Whether an insurer's conduct amounts to bad faith is a question of fact. **Smith**, 150 Wn.2d at 484."

E. CONCLUSION

Karen Carr's case is not a "negligent contractor" case. This isn't a case that opens the proverbial floodgates. This is a unique case where someone engages in an unlawful act to trick a homeowner to gain entry and money, and who, in doing so, caused damage.

Respectfully submitted,

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So certified this 25th day of March 2024

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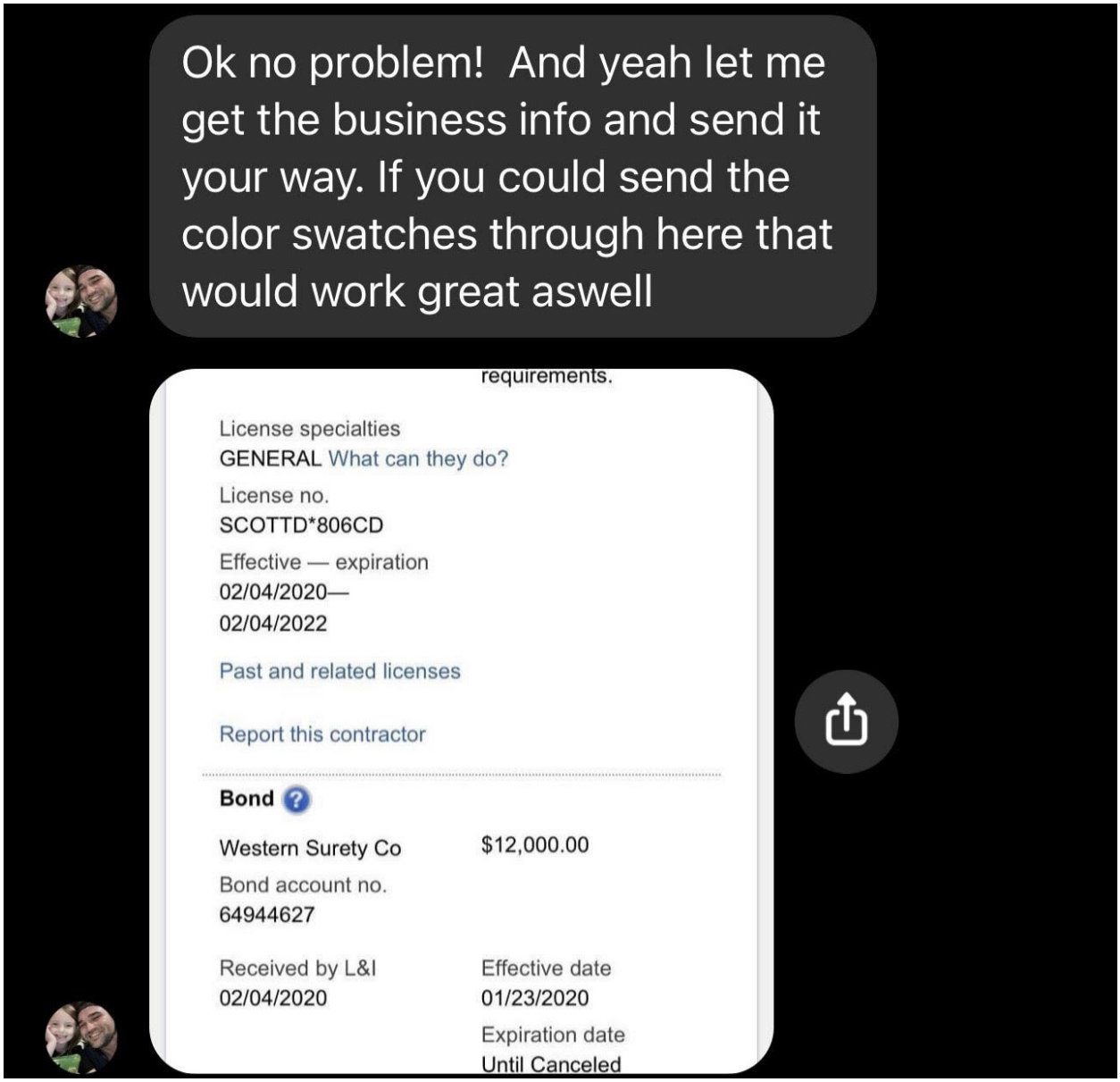

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