

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 18, 2024

SEAN F. MCAVOY, CLERK

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON3  
4 JEFFREY WOOD,

5 Plaintiff,

6 v.

7  
8 THE CINCINNATI SPECIALTY  
9 UNDERWRITERS INSURANCE  
10 COMPANY, an Ohio corporation,

11 Defendant.

No. 2:23-CV-00099-ACE

ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

ECF No. 18

12 **BEFORE THE COURT** is Defendant's motion for summary judgment.  
13 ECF No. 18. Defendant is represented by Sarah E. Davenport. Plaintiff is  
14 represented by attorneys Casey M. Bruner and Michael B. Love. Having reviewed  
15 the pleadings and the file, the Court is fully informed and herein denies  
16 Defendant's motion for summary judgment.

17 **BACKGROUND**

18 As stated in Plaintiff's complaint, quoting the state courts, "[t]his case is  
19 about a 'dream house turned into a nightmare.'" ECF No. 1 at 3 (quoting *Wood v.*  
20 *Milionis Constr., Inc.*, 198 Wash.2d 105, 110 (2021) quoting dissent in *Wood v.*  
21 *Milionis Constr., Inc.*, 2020 WL 2042964 (Wash.Ct.App. 2020) (unpublished)  
22 (Fearing, J., dissenting)).

23 In July 2015, Plaintiff and Milionis Construction entered into a contract for  
24 the construction of a single-family home in Newman Lake, Washington.  
25 Following several issues, construction ceased in November 2016 with the home  
26 unfinished, and Plaintiff filed suit against Milionis Construction in the Spokane  
27 County Superior Court. Defendant, the commercial general liability insurer for  
28 Milionis Construction, agreed to defend Milionis Construction under a reservation

ORDER - 1

1 of rights, including the right to deny coverage. On September 29, 2017, Defendant  
2 filed an action in federal court (2:17-CV-00341-SMJ) seeking declaratory  
3 judgment that it was not obligated to provide insurance or coverage of the claims  
4 brought by Plaintiff against Milionis Construction. In response to the declaratory  
5 suit, Milionis Construction filed counterclaims for insurance bad faith, violations  
6 of the Insurance Fair Conduct Act, and violations of Washington’s Consumer  
7 Protection Act (“CPA”), Wash Rev. Code § 19.86, *et seq.* The federal court held  
8 that Defendant had a duty to defend Milionis Construction and ultimately  
9 determined that Milionis Construction’s insurance bad faith and CPA claims  
10 remained viable.

11 With respect to the state court litigation, Milionis Construction and Plaintiff  
12 eventually entered into a settlement agreement. As a part of the settlement  
13 agreement, Milionis Construction assigned to Plaintiff all claims it had against  
14 Defendant. In this case, Plaintiff asserts the remaining assigned claims: insurance  
15 bad faith and violation of the CPA.

16 On November 1, 2023, Defendant filed a motion for summary judgment.  
17 ECF No. 18. Defendant argues Plaintiff’s claims of insurance bad faith and  
18 violations of the CPA should be dismissed because there is no evidence  
19 Defendant’s conduct was “unreasonable, frivolous, or untenable” or “unfair or  
20 deceptive” and caused damages to Milionis Construction. ECF No. 18 at 2-3.  
21 Plaintiff filed a response to the summary judgment motion arguing there is  
22 sufficient evidence in the record to support a jury finding that Defendant’s conduct  
23 regarding its duties to Milionis Construction was in bad faith. ECF No. 21.

#### 24 **LEGAL STANDARD**

25 Federal Rule of Civil Procedure 56(a) states that a party is entitled to  
26 summary judgment in its favor if “the movant shows that there is no genuine issue  
27 as to any material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A  
28 fact is “material” if it might affect the outcome of the suit under the governing law.

1 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986). A dispute is  
2 “genuine” as to a material fact if there is sufficient evidence for a reasonable jury  
3 to return a verdict for the nonmoving party. *Id.* at 248.

4 Once the moving party has carried the burden under Rule 56, the party  
5 opposing the motion must do more than simply show there is “some metaphysical  
6 doubt” as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*  
7 *Corp.*, 475 U.S. 574, 586 (1986). The party opposing the motion must present  
8 facts in evidentiary form and cannot rest merely on the pleadings. *Anderson*, 477  
9 U.S. at 248. Genuine issues are not raised by mere conclusory or speculative  
10 allegations. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990).

11 The Supreme Court has ruled that Federal Rule of Civil Procedure 56(c)  
12 requires entry of summary judgment “against a party who fails to make a showing  
13 sufficient to establish the existence of an element essential to that party’s case, and  
14 on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at  
15 322. “A complete failure of proof concerning an essential element of the  
16 nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323.  
17 Therefore, the question on summary judgment is “whether the evidence is so one-  
18 sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251-  
19 252. Where there is no evidence on which a jury could reasonably find for the  
20 nonmoving party, summary judgment is appropriate. *Id.* at 252.

## 21 **DISCUSSION**

22 As stated above, the Complaint asserts the remaining claims assigned to  
23 Plaintiff by Milionis Construction: insurance bad faith and violation of the CPA,  
24 *see* ECF No. 1 at 8-9, and Defendant’s motion for summary judgment seeks  
25 dismissal of these claims, ECF No. 18. Plaintiff’s response argues Defendant’s  
26 motion for summary judgment should be denied because Defendant already  
27 brought this motion before Judge Mendoza and lost. ECF No. 21 at 1-2 (citing  
28 2:17-CV-00341-SMJ; ECF No. 123).

1 Plaintiff is correct that the issues before the undersigned in Defendant's  
2 motion for summary judgment have been previously addressed in this district by  
3 the Honorable Salvador Mendoza, Jr. Here, the Court relies greatly on Judge  
4 Mendoza's findings and conclusions as no known significant change has occurred  
5 in the interim.

6 **A. Expert Disclosure**

7 Defendant's briefing initially points out that the Court's deadline for expert  
8 witness disclosures, September 22, 2023, has passed without Plaintiff disclosing an  
9 expert. ECF No. 18 at 7. Defendant argues that without an expert, Plaintiff has no  
10 basis to establish that Defendant could have acted in bad faith or in violation of the  
11 CPA. *Id.* at 11, 15.

12 Plaintiff responds that, consistent with the parties' joint statement, ECF No.  
13 11 at 2-3, and representations made at the telephonic scheduling conference, the  
14 parties agreed to rely upon the discovery propounded in the prior federal case.  
15 ECF No. 21 at 3. That is the Court's recollection as well.

16 Although Plaintiff did not re-disclose their expert as directed by the Court's  
17 scheduling order, ECF No. 14 at 3, given the likelihood of confusion regarding  
18 discovery,<sup>1</sup> the Court would permit the parties to rely on their prior discovery to  
19 satisfy the Court's scheduling order or, in the alternative, the Court would entertain  
20 a motion for a continuance of the deadlines provided in the initial scheduling order,  
21 both expired and unexpired.

22 Plaintiff's response requests that Defendant be sanctioned for making false  
23 representations regarding this issue. ECF No. 21 at 3. The Court believes  
24 confusion regarding discovery obligations is the culprit and that Defendant did not

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25  
26 <sup>1</sup>As noted by Plaintiff, Defendant's motion relies on an expert report that it  
27 also failed to re-disclose in compliance with the Court's scheduling order. ECF  
28 No. 21 at 3.

1 make knowing, false statements. Therefore, the Court is not inclined to impose  
2 sanctions at this time.

3 **B. Bad Faith Claim**

4 As stated in Judge Mendoza’s prior order regarding insurance bad faith  
5 claims, an insurer in Washington has a duty of good faith to its policyholder and  
6 violating that duty may give rise to a tort action. *Smith v. Safeco Ins. Co.*, 150  
7 Wash.2d 478, 484 (2003). To establish a breach of the common law duty of good  
8 faith, a plaintiff must prove a defendant’s action “was unreasonable, frivolous, or  
9 unfounded.” *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161  
10 Wash.2d. 903, 916 (2007). Reasonableness is assessed in light of all the facts and  
11 circumstances of the case. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App.  
12 323, 329-330 (2000). Moreover, because Defendant defended Millionis  
13 Construction in the underlying action under a reservation of rights, Defendant had  
14 an “enhanced obligation” of fairness as part of its duty of good faith. *Tank v. State*  
15 *Farm Fire & Cas. Co.*, 105 Wash.2d 381, 387 (1986).

16 This enhanced obligation is fulfilled by meeting specific criteria. First, the  
17 company must thoroughly investigate the cause of the insured’s accident and  
18 the nature and severity of the plaintiff’s injuries. Second, it must retain  
19 competent defense counsel for the insured. Both retained defense counsel  
20 and the insurer must understand that only the insured is the client. Third, the  
21 company has the responsibility for fully informing the insured not only of  
22 the reservation-of-rights defense itself, but of all developments relevant to  
23 his policy coverage and the progress of his lawsuit. Information regarding  
24 progress of the lawsuit includes disclosure of all settlement offers made by  
the company. Finally, an insurance company must refrain from engaging in  
any action which would demonstrate a greater concern for the insurer’s  
monetary interest than for the insured’s financial risk.

25 *Id.* at 388.

26 As noted by Judge Mendoza, although the record reflects Defendant  
27 continued to engage in the mediation proceedings, raised the amount it offered to  
28 contribute toward settlement, was not obliged to accept the settlement amount

1 demanded, and ultimately split the file between a liability representative and a  
2 coverage counsel when a bad faith claim was asserted, Plaintiff has propounded an  
3 expert that opined Defendant acted improperly in handling the claim by failing to  
4 timely split the file, allowing direct communications between the representative  
5 and counsel, and failing to consider the recommendations or analyses of counsel  
6 prior to the mediation conferences. *See* 2:17-CV-00341-SMJ; ECF No. 123 at 6-7.  
7 Plaintiff's expert noted Defendant was focused at the outset only on its "no  
8 coverage" position and did not consider its "enhanced" duty of good faith to  
9 *Milionis Construction. Id.*

10 As previously determined by Judge Mendoza, Defendant is not entitled to  
11 summary judgment on the bad faith claim because there are disputed material facts  
12 pertaining to the reasonableness of Defendant's conduct. The Court finds that a  
13 reasonable jury could conclude that Defendant acted in bad faith; therefore,  
14 Defendant's motion for summary judgment on the insurance bad faith claim is  
15 denied.

### 16 **C. Consumer Protection Act Claim**

17 The CPA prohibits unfair or deceptive acts or practices in the conduct of  
18 trade or commerce. Wash. Rev. Code § 19.86.020. A prima facie CPA claim  
19 requires a plaintiff to show: (1) an unfair or deceptive act or practice; (2) occurring  
20 in trade or commerce; (3) impacting the public interest; (4) an injury to the  
21 business or property; (5) that is proximately caused by the unfair or deceptive act  
22 or practice. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105  
23 Wash.2d 778, 784-785 (1986). "[A]n insurer's breach of its duty of good faith,  
24 [Revised Code of Washington §] 48.01.030, constitutes a per se violation" of the  
25 CPA. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wash. App. 424, 433 (1990) (citing  
26 *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash. 2d 355, 359 (1978)).

27 On reconsideration, Judge Mendoza decided that because the CPA claim  
28 was closely related to the bad faith claim, the CPA claim premised on bad faith

1 would be allowed to proceed to trial. *See* 2:17-CV-00341-SMJ; ECF No. 149 at 4-  
2 5. The undersigned agrees.

3 Since an insurer's breach of its duty of good faith is a per se violation of the  
4 CPA, and Defendant is not entitled to summary judgment on Plaintiff's insurance  
5 bad faith claim, the CPA claim shall remain viable. Defendant's motion for  
6 summary judgment on the CPA claim is denied.

7 **D. Damages**

8 Defendant's briefing argues that Plaintiff has failed to set forth sufficient  
9 facts to support the necessary element of damages for the bad faith and CPA  
10 claims. ECF No. 18 at 14; ECF No. 24.

11 As determined above, Plaintiff has presented sufficient facts to establish  
12 prima facie insurance bad faith and CPA claims and survive summary judgment.  
13 Plaintiff shall be permitted to prove damages at trial.

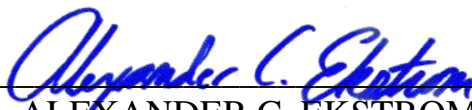
14 **CONCLUSION**

15 Based on the foregoing, **IT IS HEREBY ORDERED** Defendant's Motion  
16 for Summary Judgment, **ECF No. 18**, is **DENIED**.

17 **IT IS SO ORDERED.** The District Court Executive is directed to file this  
18 Order and provide copies to counsel.

19 DATED January 18, 2024.



  
A horizontal line is drawn below the signature.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE