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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 IDS PROPERTY AND CASUALTY  
9 INSURANCE COMPANY,

10 Plaintiff,

11 v.

12 CHARLES H. FELLOWS,

Defendant.

C15-2031 TSZ

MINUTE ORDER

13 The following Minute Order is made by direction of the Court, the Honorable  
14 Thomas S. Zilly, United States District Judge:

15 (1) Plaintiff's oral motion pursuant to Federal Rule of Civil Procedure 50(a) is  
16 GRANTED in part and DENIED in part as follows:

17 (a) Defendant's fifth counterclaim for constructive fraud is DISMISSED  
18 with prejudice. Defendant has not pleaded or identified in his trial brief or  
19 proposed jury instructions the requisite fiduciary duty or interested or sinister  
20 motive to proceed forward with this counterclaim. *See Green v. McAllister*, 103  
21 Wn. App. 452, 467-68, 14 P.3d 795 (2000); *see also Hunter v. Ferebauer*, 980 F.  
22 Supp. 2d 1251, 1265 (E.D. Wash. 2013) ("Washington case law on constructive  
23 fraud is underdeveloped, but it appears that there must be a breach of a fiduciary  
duty in order for a [party] to prevail on a constructive fraud claim."). Moreover,  
the doctrine of constructive fraud is "inherently and exclusively in equity," *Dexter  
Horton Bldg. Co. v. King Cnty.*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941), and  
even if Fellows could pursue such counterclaim, its resolution would be for the  
Court, not the jury. Thus, the jury will not be instructed as to this counterclaim.  
In addition, the Court concludes, as a matter of law, that defendant has not  
presented sufficient evidence to demonstrate that he is entitled to relief in equity.

1 (b) Defendant's sixth counterclaim for negligence is DISMISSED with  
2 prejudice. Defendant has not pleaded or identified in his trial brief or proposed  
3 jury instructions the requisite duty independent of the insurance policy. *See*  
4 *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010).  
5 The duties described in defendant's objections, docket no. 186, to the discussion  
6 draft of jury instructions circulated on March 24, 2017, and any objections made  
7 during trial arise solely from the contract between the parties and cannot be the  
8 basis of a claim in negligence.

9 (c) With regard to the lost business attire and formal wear, the Court  
10 concludes that coverage is not owed. If Michaela Osborne committed theft of the  
11 business attire and formal wear, then the theft is not a covered peril because it was  
12 committed by an insured person. If Osborne did not commit theft, then the loss of  
13 the business attire and formal wear does not appear to have been caused by any of  
14 the perils named in the policy. The only peril other than theft that Fellows asserts  
15 might apply to the loss of his business attire and formal wear is vandalism, which  
16 involves the "destruction or defacement" of property. *See* Webster's 3d New Int'l  
17 Dictionary 2532 (1981). No evidence has been offered concerning what happened  
18 to the business attire and formal wear or showing that it was destroyed or defaced,  
19 and the Court concludes that no basis exists to allow any counterclaim relating to  
20 such items.

21 (d) Except as granted, plaintiff's Rule 50(a) motion is denied.

22 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of  
23 record.

Dated this 4th day of April, 2017.

William M. McCool  
Clerk

s/Karen Dews  
Deputy Clerk