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No. 68594-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RYAN E. MILLER, individually,

Respondent,

v.

PATRICK J. KENNY, individually,

Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Appellant.

REPLY BRIEF OF APPELLANT SAFECO

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A. INTRODUCTION

Rather than respond directly to the contention in the opening brief of Safeco Insurance Company of Illinois ("Safeco") that it had been deprived of a fair trial by a series of erroneous trial court evidentiary and legal rulings and gamesmanship on the part of the attorneys for Ryan Miller,[1] Miller largely ignores the pattern of unfairness at trial. Instead, they offer broad rhetorical statements, often unsupported by record citations, and legal arguments punctuated all too often by baseless or hypertechnical claims that Safeco did not preserve error either at trial or on appeal. This appears to be a deflection argument -- to deflect this Court away from glaring errors and trial counsel misconduct by blaming Safeco, the intended victim of such misconduct.

This Court can see through Miller's smoke screen. Safeco was denied a fair trial, slammed for exorbitant damages in the amount of nearly $22 million (despite policy limits of only $1.5 million) after being set up for alleged bad faith by Miller's counsel. This Court should not tolerate such a blatantly unfair result. This Court should reverse the judgment and order a new trial.

B. RESPONSE TO MILLER STATEMENT OF THE CASE

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[1] Safeco here references Ryan Miller as the respondent throughout this brief, unless the context requires otherwise, even though Miller, Patrick Kenny, and Cassandra Peterson were effectively co-venturers against Safeco.

Rather than responding to the *numerous* misstatements or mischaracterizations of the record in Miller's brief, Safeco has responded to a selection of omissions or mischaracterizations here.[2] A more complete itemization of the factual mistakes or omissions in that brief is set forth in the Appendix.

Miller's statement of facts contends that within days after the underlying August 23, 2000 auto accident, Safeco claims adjuster Jamie Bowman obtained Monica Peterson's permission to disclose the Peterson's Safeco policy limits to the injured passengers, suggesting that Safeco improperly sat on this information and Miller was forced to sue to get the policy limit information. *See* Br. of Resp't at 12. Rather, Bowman believed, based on information from the Petersons' attorney's paralegal, that the Petersons did not want Safeco to disclose their policy limits. RP (12-9-11) at 132-33. When Miller's counsel, Ralph Brindley, subsequently wrote a letter to Bowman stating that Miller would initiate a lawsuit to get the policy limits, Bowman contacted Mrs. Peterson and

[2] A restatement of the case is not required in a reply brief. *See* RAP 10.3(c). However, Safeco is compelled to note that the Restatement of the Case contained in Miller's Brief of Respondent includes not only improper argument, *see* RAP 10.3(a)(5), but significant omissions and mischaracterizations of the record. Safeco urges this Court to review the Statement of the Case presented in the Brief of Appellant for a "fair" recitation of relevant facts as required by RAP 10.3(a)(5).

Patrick Kenny's father to get permission to disclose their policy limits.[3] *Id.* at 135. Upon doing so, Bowman called Brindley to inform him that policy limit information was forthcoming, but Brindley said suit had already been filed. *Id.* at 135-36. Brindley purportedly filed suit to obtain policy limits information, but he did not dismiss the suit after learning of the policy limits. CP 5830.

Similarly, Miller incorrectly states that Safeco "had forbidden" the Petersons from disclosing their policy limits, and that the Petersons were concerned that if they disclosed their policy limits information to anyone without Safeco's permission it "would jeopardize their coverage." Br. of Resp't at 12-13. *None* of the citations that Miller provides so state. In fact, Bowman testified that it is Safeco's policy to treat an insured's policy limits as their "private financial information" and that Safeco had no restriction whatsoever on insureds telling anybody they wanted about how much insurance they carried. RP (12-9-11) at 134. Bowman testified that Safeco would never tell a policy holder not to disclose their policy limits. *Id.* Further, the evidence showed that the Petersons' attorney, Monte Wolff, advised the Petersons to refer to him any inquiries from Ryan

[3] This also refutes Miller's misstatement of the facts asserting that "Safeco did not make any additional attempt to obtain the Petersons' permission to disclose limits in response to [Miller's] counsel's request at the end of 2001." Br. of Resp't at 14.

Miller about the Peterson's policy limits. RP (12-13-11) at 28. Miller *ignores* this evidence.

Miller also misrepresents Safeco's incentive programs, stating, for instance, that such programs "gave adjusters increased pay for reducing payments to injured claimants by 5%." Br. of Resp't at 11. But the trial testimony cited for that proposition actually says that "the discussion of underpayment of claims didn't take place." RP (12-8-11) at 136. Miller asserts that a goal of such incentive programs was to steer claimants to Safeco affiliates for annuities or structured settlements rather than lump sum settlements. Br. of Resp't at 11. Again, the record actually states that the availability of alternative payment options was noted only where appropriate, such as for young claimants, but use of such services was *not* presented as a condition for settlement. RP (12-6-11) at 203, 206. Miller claims that "Each Safeco employee responsible for the claims against Kenny had to meet their performance goals to be eligible for these bonuses." Br. of Resp't at 11. But the record cited notes that "the corporation had to meet specific goals before anybody got a bonus," and specifically that the turnaround bonus program was a stock purchase program available to *all* employees, and that such program was *not* performance based. CP 6711; RP (12-12-11) at 90-91.

Miller contends that "Safeco still made no affirmative efforts to settle in summer 2002 after it received demands and accompanying documentation from all three claimants." Br. of Resp't at 15. Miller's counsel's demand for policy limits in exchange for a release of Kenny expired on August 1, 2002, and on that day Brindley informed Safeco by letter that the only remaining course was litigation. CP 5891. By that date, *Safeco still had not received a demand or settlement package from Ashley Bethards' attorney.* CP 5884. Given Miller's expired offer and the absence of Bethards demand on that date, a global settlement was not possible.

One of the issues on appeal is whether the trial court erred in determining the appropriate limits of Cassandra Peterson's parent's UIM coverage with Safeco. Essential to this court's consideration of the matter, is the presence and effect of Monica Peterson's 1997 written waiver of UIM coverage. *See* CP 5790. But such written waiver is *not even mentioned* in Miller's statement of facts. *See* Br. of Resp't at 7, 8, 10 n.1. Instead Miller notes that after purchasing a vehicle in 1999, "the Petersons never requested nor signed a waiver to UIM coverage in the same amount as their liability coverage." Br. of Resp't at 8-9. While that statement is accurate as far as it goes, it is misleading in that it implies no written

waiver to UIM coverage amounts *ever* existed, and that is not the case. *See* CP 5790.

Miller contends that even after Safeco received Bethards's demand on August 8, 2002, Safeco "still took no steps to achieve a settlement." Br. or Resp't at 16. But the record shows that despite Brindley's refusal of Safeco's further efforts, Safeco still encouraged a settlement; Safeco's September 17, 2002 letter to Ashley Bethards's attorney explains that independent medical examinations of Bethards and Miller were needed due to the complexities of their injuries and thereafter "we would suggest mediation, with all parties in attendance." CP 5893. Miller's fact statement ignores these key relevant facts in the record.

C. ARGUMENT

(1) The Jury Should Not Have Been Permitted to Award Damages in Excess of the Covenant Judgment

Miller contends that the trial court properly instructed the jury on damages, raising an odd, "straw man" argument on excessive damages awarded by the jury when Safeco has not raised such an argument on appeal. Br. of Resp't at 64-75.[4] What is transparent from Miller's arguments on the effect of their covenant judgment is that they have *no*

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[4] Miller's strawman argument regarding sufficiency of the evidence was never argued in this appeal by Safeco. It fails entirely where fundamental instructional error is present in requiring the jury to award Miller duplicative damages.

answer to the effect of such a covenant judgment as the insured's presumed damages in a subsequent action for bad faith against an insurer like Safeco.[5] This issue is a vital one, particularly where Safeco is deprived under Washington law of any right to trial by jury on the reasonableness of such presumed damages. *Bird v. Best Plumbing Group LLC*, 175 Wn.2d 756, 767-73, 287 P.3d 551 (2012).

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[5] Miller makes yet another elaborate argument regarding Safeco's alleged failure to preserve any error relating to damages. Br. of Resp't at 65-67. He is wrong.

The parties and the trial court hammered out instructions over a full 1 and a half days. The damages instruction, which ultimately became Instruction number 30, was particularly contentious. Both sides offered proposed damages instructions. CP 5009-10 (Miller's proposed Number 32); 5301-02 (Safeco's proposed Number 22). The court worked from Miller's proposed instruction to which Emilia Sweeney, Safeco's trial co-counsel, objected. RP (12-14-11) at 131, 136. At the end of the day, the court delivered a proposed packet of instructions for both counsels' consideration; the court advised counsel as to which proposed instructions it had included. The court stated it included plaintiff's number 32 "with some modifications." *Id.* at 158. The court later also stated "And we gave [Defendant's] 22, the duty to instruct, damages, but that was Mr. Beninger's. That's the big issue." *Id.* at 161.

The next day, Sweeney stated, "We renew our objections that were stated at length yesterday on the record." RP (12-15-11) at 52. Thus, Safeco preserved the instructional error for review.

As for Miller's claim in his brief at 65 that Safeco proposed an instruction allowing them to recover damages beyond the covenant judgment, that is a reflection of the trial court's erroneous order on summary judgment to that effect. CP 4512. Miller asserts that Safeco did abandon any error relating to that order by not arguing that the order was erroneous. Br. of Resp't at 67. That contention is frivolous. Safeco assigned error to the order (Assignment Number 4) and Instruction Number 30 that reflected it (Assignment Number 16). Br. of Appellant at 3, 4. Safeco also argued the issue *extensively* in its brief. Br. of Appellant at 60-69.

Despite the trial court's indication that it was working from Miller's proposed Number 32, the court's final Instruction Number 30 as given to the jury is clearly a melding of both parties' proffered instructions. Much of Safeco's proposed Number 22 language appears in the court's Number 30, but the enumerated items in Number 30 are drawn from Miller's proposed Number 32.

A covenant judgment settlement is an artificial construct, no matter how Miller tries to contend otherwise. An insured tortfeasor will happily agree to just about any number the plaintiff demands in order to avoid liability. Both the insured and the plaintiff know the insured will never pay the covenant judgment. Any actual harm to the insured is avoided. A covenant judgment is merely a device designed to set the damages amount to be claimed against the insurer in the later bad faith action, a claim the insured gladly assigns to the plaintiff as part of the covenant judgment.

In theory, what does the covenant judgment represent? While, it is the harm experienced by the plaintiff as a result of the insured tortfeasor's conduct, our Supreme Court specifically recognized it is *more* than that. A covenant judgment also compensates the insured for such harm as "the potential effect on the insured's credit rating ... [and] damage to reputation and loss of business opportunities." *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992). Justice Dolliver's dissent recognized that the covenant judgment encompasses "an insured's emotional distress associated with the anxiety of an unsettled claim" and indeed "the whole penumbra of loss, including an unfavorable credit rating and damage to reputation, which emanates from the fact of liability." *Id.* at 406-07. The Court rejected Justice Dolliver's position that harm must be proved by the insured and not presumed. *Id.* at 406-07. The Court

again rejected the notion that these individual aspects of harm must be proved, rather than presumed, in *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007).

The critical point here is that the *Butler* court contemplated that the harm to an insured *included such items as emotional distress and the effect on credit rating and such damages were encompassed by the covenant judgment*. Miller misstates the effect of *Butler* in their brief at 70. The *Butler* court did not address whether the covenant judgment was the sole measure of the insured's harm because both the majority and dissent presumed that *such harm was encompassed in the covenant judgment*.

Miller asserts that a so-called "judgment rule" exists, br. of resp't at 68-69, but then offers little analysis as to how such a rule applies in the context of a covenant judgment settlement.[6] That is hardly surprising because the authorities that first provided that a covenant judgment is the insured's presumptive damages in a later bad faith action did not contemplate that an insured could recover damages *beyond* the covenant judgment amount. Br. of Appellant at 61-65.

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[6] Safeco is not challenging *whether* the covenant judgment here is the insured's presumptive damages, it is addressing the proper measure of the insured's damages in such an action. It is for this reason, Miller's argument regarding a rebuttal of the presumptive damages is so odd. Br. of Resp't at 68 n.31. Safeco could concede that a court would likely find the settlement reasonable, as it did, CP 5898, but that did not deprive Safeco of the right to challenge whether Miller was actually harmed.

Miller's so-called judgment rule is nothing more than the principle articulated in *Butler* that the relief for an insurer's bad faith is coverage by estoppel. 118 Wn.2d at 392-94.[7] But coverage by estoppel predicated upon the amount of the covenant judgment does not mean that Miller can recover other damages beyond the amount of that covenant judgment.

Miller cites a single case, *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000), *review denied,* 142 Wn.2d 1017 (2001), in which an appellate court recognized that an insured may recover noneconomic damages in a bad faith action because such an action sounds in tort. *Id.* at 333.[8] *Anderson was not a covenant judgment case* so the key question of whether such damages could be recovered beyond a covenant judgment or whether, as the *Butler* court indicated, the covenant judgment encompassed such damages, never arose.

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[7] Cases such as *Kibler v. Maryland Casualty Co.*, 74 Wash. 159, 132 Pac. 878 (1913), *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952), *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960), *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 743 P.2d 1244 (1987), *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 49 P.3d 887 (2002), *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) and *Bird v. Best Plumbing Group LLC,* 175 Wn.2d 756, 287 P.3d 551 (2012), all address coverage by estoppel.

[8] Emotional distress damages may not be recovered for the distress of the accident, but only because of the insurer's actions. *Werlinger v. Clarendon Nat'l Ins. Co.* 129 Wn. App. 804, 809, 120 P.3d 593 (2005), *review denied,* 157 Wn.2d 1004 (2006).

More significantly, in *Bird,* our Supreme Court's most recent and detailed discussion of covenant judgments, the Court described the effect of such covenant judgments:

> If the amount of the covenant judgment is deemed reasonable by a trial court, it becomes the presumptive measure of damages in a later bad faith action against the insurer. The insurer still must be found liable in the bad faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion.

175 Wn.2d at 765. *Nowhere* does the Court say additional damages beyond the covenant judgment may be recovered. Indeed, in the face of an argument that an insurer had a right to a jury on damages in a later, post-covenant judgment bad faith case, the Court's majority said there was no jury right, implying that the covenant judgment amount was the *only* recoverable damages so that a jury right did not attach:

> The reasonableness hearing is an equitable procedure to which no jury right attaches. The presumption of damages that arises from that equitable hearing measures the harm suffered by the insured and eliminates any need for a factual determination of damages in the later bad faith claim. This procedure does not "take[] the determination of damages in a bad faith claim out of the hands of the jury," dissent at 564, because, unlike in *Sofie,* that determination was never in a jury's hands to begin with.

Id. at 772 n.1.[9]

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[9] Indeed, if the plaintiff can recover damages beyond the covenant judgment amount, an insurer should have a right to have *all* such damages in the bad faith action assessed by the jury. Wash. Const. art. I § 22.

Miller also contends that the jury's verdict was not duplicative in allowing them to recover damages encompassed within the covenant judgment because the jury was instructed not to award duplicative damages and negligence and bad faith are distinct claims. Br. of Resp't at 72-74. He is wrong. The jury was specifically instructed in Instruction Number 30 to award what amounted to duplicative damages. CP 5405. No general instruction on duplicative damages could avoid the trial court's direct invitation in Instruction Number 30 to award them.

> As for the negligence and bad faith claims, they are *both torts*. A plaintiff is not entitled to recover duplicative damages in tort merely because different torts are alleged. *See, e.g., Brink v. Griffith*, 65 Wn.2d 253, 259, 396 P.2d 793 (1964) (no duplicative recovery for defamation, invasion of privacy counts arising out of same occurrence). Miller has not offered anything documenting the difference between his bad faith tort claim and his general negligence claim here. It is a basic public policy in Washington that there cannot be a double recovery for the same injury. *Eagle Pt. Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898 (2000). The trial court erred in permitting multiple recoveries for the same wrong here.

(2) The Trial Court Did Not Err in Bifurcating the Trial on Remand but It Did Err in Handling the Parol Evidence Issues

(a) Bifurcation Was Within the Trial Court's Discretion

Miller's conditional cross-appeal first contends that the trial court erred in bifurcating the trial, thereby taking evidence and submitting the issue of the meaning of the 2003 settlement agreement's assignment and

reservation provisions for determination by the jury in Phase I of the trial. Br. of Resp't at 4, 29. But the trial court did not err in so doing.

Whether to bifurcate a trial is a matter entrusted to the sound discretion of the trial court under CR 42(b). *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990); *In re Detention of Mines*, 165 Wn. App. 112, 124, 266 P.3d 242 (2011), *review denied,* 173 Wn.2d 1032 (2012). The trial court did not abuse that discretion here as the court's decision was not manifestly unreasonable. *Id.* at 124-25.

In *Miller* I, this Court affirmed the trial court's denial of Safeco's summary judgment motion based on the settlement agreement's reservation provision, holding that "the record demonstrates genuine material fact issues related to the meaning of the settlement agreement's assignment and reservation provisions. And the essential question on Miller and Kenny's intent depends, in part, on disputed extrinsic evidence, which leads to two or more reasonable but competing interpretations." *Miller* I at *7. The trial court interpreted this language as a directive to submit the discrete question of who had the right to bring claims in this case, as determined by the underlying question of the parties' intent in executing the 2003 settlement agreement, to the jury and proceeded to do so in Phase I of the trial. *See, e.g.*, RP (4-16-12) at 35-36. This Court's

Miller I decision did not contain an express directive to bifurcate the trial, but the trial court did not abuse its discretion in doing so.[10]

Miller I determined that interpretation of the settlement agreement was an open question. *Miller* I at *7. On remand, the trial court submitted to the jury the discrete issue of the mutual intent of Miller and Kenny as to the assignment of Kenny's claims to Miller and what claims, if any, Kenny reserved under the settlement agreement. CP 5051. Lacking an express directive from this Court on how to proceed, the trial court properly exercised its authority to decide an issue necessary to resolve the case, and it was not error for the trial court to put the threshold issue concerning the scope of the assignments in the settlement agreement, an open question as determined in *Miller* I, to the jury.

(b) Phase I Was Not Moot

Miller also argues that it was not necessary to seek the jury's determination of the parties' intent because the issue was rendered moot when the trial court, after remand in *Miller* I, ruled in part that Miller was

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[10] While a superior court "must strictly comply with directives from an appellate court which leave no discretion to the lower court," appellate courts often resolve cases on grounds that do not address every issue a trial court must decide on remand. *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), *review aff'd*, 163 Wn.2d 664 (2008) (citing *Harp v. Am. Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957)). Thus, when the appellate court "remand[s] 'for further proceedings,' or instruct[s] a trial court to enter judgment 'in any lawful manner' consistent with [the appellate] opinion, [the appellate court] expect[s] the trial court to exercise its authority to decide any issue necessary to resolve the case on remand." *Schwab*, 134 Wn. App. at 645 (citing RAP 12.2).

the real party in interest. CP 3184 (8-1-2011 order). Miller contends that this ruling is unchallenged and, thus, it is the law of the case, and, thus, dispositive of the issue of who may bring claims. Br. of Resp't at 32. But the order on which Miller relies is not dispositive of the issues addressed in Phase I. The order states in relevant part, "Plaintiffs' Cross Motion establishing Miller as the real party in interest to continue pursuing all *assigned* causes of action and all harm *thereto* is GRANTED." CP 3184 (emphasis added). The separate issue addressed in Phase I was, in light of the covenant judgment settlement's assignment clause and its reservation clause, what was the scope of the assignment? That is, what was the parties' intent regarding the covenant judgment settlement and, *which claims were effectively assigned* and what matters, if any, were effectively reserved by Kenny. CP 6205. The order concerning Miller's status as to *assigned* claims did not render the Phase I proceedings moot.[11]

Miller next contends that Kenny's subsequent 2009 assignment, which purported to "clarify and/or modify" the 2003 assignments also resolves the issue of who may bring claims rendering the Phase I proceeding superfluous. Ex. 9; Br. of Resp't at 30. But the jury heard

[11] Alternatively, if the August 1, 2011 order does indeed impact Phase I and the jury's Phase I verdict, it is not an unchallenged order binding the parties as Miller contends. RAP 2.4(b) provides that the scope of this court's review will include an order that was not designated in the notice of appeal where such order "prejudicially affects the

testimony from Jan Peterson, Kenny's counsel who drafted the 2003 settlement, to the effect that the 2009 document did not change in any respect the 2003 settlement agreement. RP (12-1-11) at 112-13. Accordingly, the issue before the jury in Phase I was the intent of the parties regarding the 2003 covenant judgment settlement and what was that document's effect. Miller's cross-appeal concerning Phase I fails.[12]

(c) The Trial Court Erred in Refusing to Give Safeco's Parol Evidence Instruction

Miller contends that the trial court did not err in refusing Safeco's proposed parol evidence instruction. Br. of Resp't at 32. Miller is wrong.[13]

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decision designated in the notice" of appeal. Safeco's notice of appeal included the Phase I jury verdict and the subsequent judgment entered thereon. CP 6199, 6205.

[12] Miller's additional assertion that the 2009 document rendered the admission of any parol evidence harmless also fails. Like Jan Peterson, Kenny testified that the 2009 document did not alter and had no effect (no change) on the covenant judgment settlement. *See* RP (12-1-11) at 134. Accordingly, (again) the issue before the jury in Phase I remained what was the intent of the parties regarding the 2003 settlement agreement and what was that document's effect. As explained herein, the admission of parol evidence contradicting the language of the agreement was improper, prejudicial to Safeco and reversible error.

[13] As usual, Miller contends that Safeco failed to preserve any alleged error on the matter because its objection was insufficient, citing *Bitzan v. Parisi*, 88 Wn.2d 116, 124-25, 558 P.2d 775 (1977), for the proposition that a general objection to an instruction is not sufficient to preserve error for review. Br. of Resp't at 33. But *Bitzan* addressed the sufficiency of counsel's objection to an instruction that the trial court gave. Here, the trial court refused to give a proposed instruction and error preservation in that circumstance is more properly reviewed under *Trueax v. Ernst Home Center, Inc.*, 124 Wn.2d 334, 341-42, 878 P.2d 1208 (1994). *Trueax* directs that when considering the sufficiency of an objection to a trial court's refusal to give a proposed instruction, an appellate court is to consider both the content of the objection as well as the context of the trial at the time the objection is made. *Id.* at 340-41.

Miller contends that no parol evidence instruction was warranted. He acknowledges that the only issue in Phase I was the interpretation of the covenant judgment settlement's terms. Br. of Resp't at 33. He also acknowledges that there was no dispute that the covenant judgment settlement was an integrated contract. *Id.* at 33-34.[14]

The parol evidence rule restricts attempts to add unwritten terms to an integrated writing. If an agreement is fully integrated, extrinsic evidence is not admissible "to add to, subtract from, vary, or contradict

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After including Safeco's proposed instruction in the court's proposed packet of instructions, without warning and just prior to closing argument, the trial court abruptly announced, "I'm going to pull jury instruction 6 . . . [t]hat's the parol evidence [instruction]." RP (12-2-11) at 61. The court stated, "I didn't like it yesterday, and that's why I asked about it. I think it's confusing. I don't think it applies here." *Id.* Safeco's co-counsel "vigorously object[ed]." *Id.* The trial court restated that it did not think the instruction applied and it would be confusing to the jury. *Id.* at 61, 62.

In the context of the trial up to that point, there can be no doubt that the trial court was aware that Safeco wanted a parol evidence instruction. Safeco had repeatedly objected during Phase I to witnesses' testimony regarding their unilateral subjective intent as to the settlement agreement's meaning, objected to testimony that added terms to the agreement, and objected to testimony that contradicted the terms of the settlement agreement. *See* Br. or Appellant at 24-26 (discussing the relevant testimony). Moreover, the trial court acknowledged that Safeco's proposed instruction sought exclusion of extrinsic evidence under the parol evidence rule by describing the proffered instruction at various times as "the parol evidence [instruction]," RP (12-2-11) at 61, the WPI "301.06" instruction, RP (12-1-11) at 213, and the "*Berg v. Hudesman* instruction." RP (12-1-11) at 213. Under these circumstances, it cannot be said that the trial court was left to guess at the basis of Safeco's objection. Safeco's vigorous objection, when the trial court "pull[ed] jury instruction 6" at the last moment, RP (12-2-11) at 61, was consistent with Safeco's numerous, consistent, and vigorous objections throughout Phase I concerning parol evidence testimony as discussed above. Safeco's objection in the context of the case was sufficient to preserve for review the propriety of the trial court's failure to give Safeco's proffered parol evidence instruction.

[14] The trial court also later acknowledged that integration was not at issue. RP (4-16-12) at 38.

written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake." *Berg v. Hudesman,* 115 Wn.2d 657, 670, 801 P.2d 222 (1990) (internal quotation marks and citation omitted); *see also,* WPI 301.06. As noted, there is no dispute that the covenant judgment settlement was fully integrated.

The purpose of the parol evidence rule is to protect the integrity of written contracts. *City Nat'l Bank of Anchorage v. Molitor*, 63 Wn.2d 737, 747, 388 P.2d 936 (1964). It is not a rule of evidence but one of substantive law, under which the act of embodying the complete terms of an agreement in writing creates the complete contract of the parties. *Id.* By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments. *Id.*[15]

Having admitted this parol evidence, it was particularly important for the trial court to give the jury guidance on its usage. It did not. The trial court erred in not giving Safeco's proposed parol evidence

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[15] Safeco *repeatedly* objected during Phase I to witnesses' testimony regarding their unilateral subjective intent as to the covenant judgment settlement's meaning, objected to testimony that added terms to the agreement, and objected to testimony that contradicted its terms. *See* Br. or Appellant at 24-26 (discussing such testimony).

instruction.[16] That instruction was a correct statement of the law based on a WPI. Although testimony regarding subjective intent should have been excluded, the proposed instruction at least would have directed the jury, under the parol evidence rule, not to consider such evidence to contradict the terms of the covenant judgment settlement. The proposed instruction would have allowed Safeco to argue to the jury, consistent with the parol evidence rule, that it must not consider extrinsic evidence that would add to, subtract from, vary, or contradict an integrated writing.

The omission of Safeco's proposed instruction prejudiced Safeco by allowing the jury to consider extrinsic evidence for the purpose of changing, contradicting, or adding terms to the covenant judgment settlement. The jury decided, consistent with the extrinsic evidence, that Miller had the exclusive right to pursue all of Kenny's claims notwithstanding the reservation provision. The trial court's refusal to give Safeco's proffered parol evidence instruction was reversible error.

(d) Parol Evidence Was Improperly Admitted

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[16] Jury instructions must allow each party to argue its theory of the case and must not mislead the jury or misstate the applicable law. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004) (reversing jury verdict where instructions misstated the law and misled the jury). "Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error." *Id.* at 266-67. Similarly, "a court's omission of a proposed statement of the governing law will be reversible error where it prejudices a party." *Id.* at 267 (internal quotation marks and citation omitted).

As to Safeco's argument that the trial court improperly admitted parol evidence of unilateral subjective intent that contradicted the express language of the covenant judgment settlement, Miller contends that Safeco waived any such argument as to Jan Peterson's testimony because Safeco allegedly did not object to every instance of such testimony. But that is not true. In the context of the trial court's rulings to Safeco's objections, Safeco repeatedly and consistently objected to Peterson's testimony. *See* RP (11-30-11) at 82, 87, 90-95.[17]

Miller also argues that Peterson's testimony was properly admitted as extrinsic evidence explaining the context in which Kenny signed the settlement agreement, citing Peterson's testimony at RP (12-1-11) at 23-26. Br. of Resp't at 35-36. While Safeco did not object to Peterson's testimony at the cited pages, that testimony is not at issue. The improperly admitted testimony addressed Peterson's unilateral subjective intent as to

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[17] Miller again misrepresents the record, stating in a footnote that "Safeco did not object when Kenny's attorney [Jan] Peterson first testified to "my understanding of the agreement." (11/30 RP 90). *See* Br. of Resp't at 35 n.12. First, the language as quoted does not appear on the transcript page cited by Miller. Next, the cited testimony does not concern the settlement's assignment or reservation provisions at issue in Phase I. The testimony addressed the injured passengers sharing the amount of the policy limits, and did not amount to a waiver, as Miller contends. *See* RP (11-30-11) at 89-90. Nor do any of the remaining passages that Miller cites amount to waivers when read in context.

Similarly unavailing is Miller's contention that "Safeco also failed to object when Miller was asked "what you understood the purpose of these provisions of the settlement agreement to be." (12/1 RP 133). *See* Br. of Resp't at 35 n.12. Safeco *repeatedly* objected to questions regarding Miller's unilateral intent. *See* RP (12-1-11) at 132-33.

the meaning of the covenant judgment settlement's assignment and reservation provisions. *See, e.g.*, RP (11-30-11) at 90-95. The fully integrated agreement spoke for itself and the admission of any testimony from Peterson or anyone else that contradicted the covenant judgment settlement's express terms or evidenced a unilateral or subjective intent as to the contract's terms was inadmissible. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Miller* I at *7 n.17.

(3) The Trial Court Failed to Properly Address the Repeated, Prejudicial Misconduct of Miller's Trial Counsel

Notwithstanding *repeated* instances of misconduct in interrogating witnesses and in giving closing arguments by Miller's trial counsel, discussed at length in Safeco's opening brief at 43-54, Miller contends that such misconduct was either waived (yet another failure to preserve error contention) or the misconduct, often admitted on appeal by Miller, was not prejudicial. Br. of Resp't at 54-64. In so doing, he minimizes or ignores controlling precedent, relegating our Supreme Court's key recent case on attorney misconduct to a mere footnote.

As noted in Safeco's opening brief and in this reply, it was entitled to a fair trial in which the trial court acted impartially to ensure both sides acted appropriately. Instead, the trial court abdicated this control of the

courtroom to attorney Beninger allowing him to run roughshod in his witness interrogation and closing. This was wrong.

(a) Repeated, Improper Interrogation of Witnesses

Miller hopes to cloak the trial court's abdication of its role as the impartial arbiter at trial in the trial court's discretionary authority at trial. Br. of Resp't at 54-55. They assert that objections at trial are necessary and that a curative instruction must be requested. *Id.* at 56.[18] They miss the point of *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012).

In *Teter*, our Supreme Court held that a new trial was required in a case in which attorney persistently asked objectionable questions of witnesses. The trial court determined that the cumulative effect of trial counsel's misconduct warranted a new trial even where objections to the questions were sustained. The Court was very practical about objections and motions for a mistrial. The Court rejected the notion that the opposing party did not sustain prejudice where its objections were sustained:

> Even where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. These repeated objections, even if sustained, leave the jury with

[18] Miller cites *Strandberg v. Northern Pac. Railway Co.*, 59 Wn.2d 259, 367 P.2d 137 (1961) for the proposition that a curative instruction is required. That case, pertaining to misconduct in closing argument, actually states that a curative instruction is necessary unless the misconduct is so flagrant that a curative instruction would not be useful. Here, attorney Beninger's misconduct in interrogating witnesses so permeated the trial court proceedings that no curative instruction could usefully address his interrogation practices.

> the impression that the objecting party is hiding something important. Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.

Id. at 223 (citations omitted). Similarly, the Court rejected the requirement of a mistrial motion where the party objected and sought curative instructions. *Id.* at 226. The Court also noted, though, that such curative instructions were unnecessary if the misconduct was so flagrant no instruction would cure it. *Id.* at 225.

Here, Beninger's interrogation techniques were *persistently* improper. This Court only need review the record to see just how often he testified in the form of preambles to questions or asked leading questions of witnesses, provoking *150 objections* by Safeco's trial counsel. *See* Br. of Appellant at 46-47. A "curative" instruction could not address the flagrant violation of the rules because the trial court could not eliminate each and every effort by counsel to testify in lieu of the witnesses. Moreover, Safeco's trial counsel was placed in the unenviable position of repeated objections implying that Safeco had something to hide, a position that would play right into Beninger's hands given his effort to paint Safeco as hiding policy limits and otherwise acting in a malevolent fashion.

(b) Improper Use of Exhibits

Miller *admits* that Beninger showed documentary evidence to the jury that implied that his insurance "principles" had the imprimatur of

Washington's former Insurance Commissioner, Deborah Senn. Br. of Resp't at 59, 60 n.28. But he again asserts Safeco somehow did not preserve this error for review or the harm was de minimis. Neither assertion is true.

For Miller to assert that Ms. Senn's signature was only "briefly" referred to by Beninger before the jury is *false*. The document, with Senn's signature, was *repeatedly* shown to the jury over Safeco's objection. RP (12-15-11) at 109-17, 136-38, 138-40; CP 5357. Moreover, Beninger told the jury the principles were approved by Senn, RP (12-5-11) at 109, and then told the jury *5 times* she was the former Insurance Commissioner. RP (12-5-11) at 109-11. Senn was not a witness. She never authenticated the document in any fashion. Plainly, Beninger wanted to cast the weight and imprimatur of the Insurance Commissioner's Office over the "principles" he concocted to Safeco's prejudice. This was entirely improper -- a *deliberate* attempt to misuse evidence. The jury should not have had such evidence. *Magana v. Hyundai Motor America*, 123 Wn. App. 306, 315, 94 P.3d 987 (2004).[19]

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[19] Safeco cited two further incidents in its own opening brief documenting just how out of control the trial court permitted Beninger to be. Miller tries to belittle the first situation as a "funny" winking episode toward Safeco's female trial counsel. Br. of Resp't at 58 n.27. That issue was part of a larger problem of Beninger's belittling conduct toward female counsel in the jury's presence, RP (12-5-11) at 207, about which the trial court only told him to "be careful." *Id.* at 207-08.

(c) Improper Closing Arguments

Miller does not deny that his counsel was subject to an order in limine barring him from making a Golden rule argument. RP (11-22-11) at 83.

Although he concedes that the difference between a Golden Rule argument and a "conscience of the community" argument "may not be clear cut," br. of resp't at 63, Miller asserts that Beninger's blatant appeals to local prejudice of Skagit County jurors against Safeco was the latter, and that such a jury argument was permissible.[20] However, Miller is simply wrong. Conscience of the community arguments are legitimate in criminal, but not civil, cases in Washington.

Miller also addresses the incident discussed in Safeco's opening brief at 49-51 of Beninger grabbing papers from Safeco's trial counsel and threatening to fight him. RP (12-7-11) at 251-52. But Miller asserts in his brief at 57 that only Safeco's counsel was sanctioned by the trial court. That is utterly *false.* Beninger was sanctioned $500. *Id.* at 256. The point here is that this is but further evidence of how out of control Beninger was at trial, particularly where he denied he did anything wrong, *id.* at 256-57, a contention he now carries over to his appellate brief.

[20] Of course, yet again, despite the blatant quality of Beninger's appeal to local prejudice, Miller contends Safeco failed to preserve any error by not objecting to Beninger's argument. Not so. As explained in Safeco's opening brief, Beninger's improper closing argument was but one instance of his continuing misconduct throughout the trial. *See* Br. of Appellant at 43-54. The cumulative effect of his repeated, insidious, and prejudicial misconduct was so pervasive that no instruction or series of instructions could have cured it. *See State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976). Because any instruction would have been inadequate in light of Beninger's flagrant and prejudicial misconduct, the absence of an objection by Safeco's trial counsel to Beninger's closing argument does not waive Safeco's present appeal. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967). Moreover, Beninger's argument was flagrant, in violation of an order in limine. An objection could not unring the bell. Safeco properly brought this issue to the trial court in its motion for a new trial.

The principal authorities offered by Miller for his position that a "conscience of the community" closing may be advanced are criminal cases.[21] Our Supreme Court in cases like *State v. Rice,* 110 Wn.2d 577, 607 n.17, 757 P.2d 889 (1988), *cert. denied,* 491 U.S. 910 (1989); *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967, *cert. denied,* 528 U.S. 922 (1999); or *State v. Borboa*, 157 Wn.2d 108, 123-24, 135 P.3d 469 (2006) has indicated that conscience of the community arguments are acceptable if not employed to enflame the jury. In *Borboa*, the Court indicated that Golden Rule arguments may not be prohibited in the criminal setting. 157 Wn.2d at 124 n.5. Indeed, in the criminal setting a jury *does* act as the community conscience. Such a role is not present for a jury in a civil case.

Beninger's closing argument was a transparent appeal to local prejudice, and specifically referenced the jury as the "conscience of the community." RP (12-15-12) at 63. Beninger effectively asked the jury to place themselves in the shoes of their fellow Skagit County residents and to punish Safeco, the outsider, just like the argument in *Adkins v.*

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[21] Miller cites *Collins v. Clark County Fire Dist. No. 5,* 155 Wn. App. 48, 231 P.3d 1211 (2010) on this point but the misconduct in closing argument that was alleged there related to an appeal to jurors as taxpayers and a veiled reference to liability insurance. *Id.* at 95-96. Division II did address a claim that plaintiff's counsel made a "send a message" closing argument, but the court upheld the trial court's ruling that the argument was indirect and certainly did not enflame the jury. The *Collins* court did not *approve* a "send a message" or "community conscience" closing argument as Miller implies.

Aluminum Corp. of America, 110 Wn.2d 128, 140-41, 750 P.2d 1257 (1988) our Supreme Court found impermissible. His appeal was improper, designed to enflame the jury to act as the "guardian for the community" in protecting his clients. His was a Golden Rule argument prohibited by the trial court's order in limine. RP (11-22-11) at 83. As such, it is only further evidence of conduct by counsel unconstrained by court rules or rulings of the trial court.

In sum, this Court should reverse the trial court judgment for counsel misconduct. Safeco knows that this Court often hears complaints from losing parties on appeal about the conduct of counsel for the prevailing party. This case is different. Safeco respectfully requests that the Court review the record cites of counsel misconduct cited in detail in its opening brief. This was a case in which trial counsel was out of control. He testified through his interrogation of witnesses. He used illicit exhibits. He appealed to jury prejudice. Unlike the trial judge in *Teter*, the trial court here did not stop counsel. But the principles of *Teter* speak loudly. To ensure the fairness and impartiality of the trial process, a new trial should have been awarded here.

(4) Safeco Did Not Unilaterally Reduce The Petersons' UIM Coverage Without A Written Waiver

Miller further contends that when Safeco issued the Petersons a Safeco renewal policy in February 2000,[22] Safeco violated RCW 48.22.030(3) by adjusting the UIM coverage on the Petersons' Passat to comport with Monica Peterson's 1997 written waiver, which limited UIM bodily injury coverage to $100,000 per person and $300,000 per accident. *See* Br. of Resp't at 37. CP 5790. Miller acknowledges that RCW 48.22.030(3) requires insurers in Washington to offer UIM coverage "in the same amount as the insured's third party liability coverage *unless* the insured rejects all or part of the coverage" in writing. *Id.* (emphasis added); *see also*, RCW 48.22.030(4). *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 250, 850 P.2d 1298 (1993) ("All insurers are required to make underinsured coverage available to Washington policyholders but insured is free to waive UIM coverage once it has been offered.").

Miller argues that Safeco could not rely on Monica Peterson's 1997 written waiver. Miller first contends that Safeco may not rely on the waiver because "it is undisputed[23] that Safeco did not even know the waiver existed until it reviewed the broker's files *after* the August 2000 accident." Br. of Resp't at 37, 39. That is untrue. Safeco's February 24,

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[22] Safeco acquired American States Insurance and issued Safeco renewal policies to American States customers. CP 5819.

[23] Again, Miller mischaracterizes the record.

2000 letter to the Petersons, informing them of the transition of American States' customers to Safeco renewal policies, specifically notified the Petersons that the amount of UIM coverage they had "previously selected" was less than the bodily injury liability coverage that they had selected, and that those selections were reflected in the Safeco replacement policy.[24] CP 5822.

Miller also dismisses Monica Peterson's 1997 waiver as "irrelevant," asserting that Safeco was nevertheless required to obtain a written waiver when it reduced the UIM coverage on the Passat in 2000 commensurate with the UIM limits stated in the 1997 waiver. Br. of Resp't at 40; CP 5790, 5826. Miller similarly argues, based on nothing more than the absence of any evidence, that the Petersons had

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[24] Miller describes Safeco's February 24, 2000 letter as "nine pages of forms and declarations," implying that any notice to the Peterson's regarding their replacement policy could have been overlooked. Br. of Resp't at 40. But the notice appears in a separate section with a label in all caps announcing "CHANGES SPECIFIC TO YOUR POLICY," and states:

> The amount of coverage you previously selected for protection against uninsured and/or underinsured motorists was less than the bodily injury liability coverage you selected, or you rejected the coverage altogether. The choice you made has been reflected on this replacement policy. Other limits and prices are available.

CP 5822. *See also,* CP 5826 (accompanying policy declarations page showing UIM coverage of $100,000/$300,000 for the Passat). Similarly, Safeco's February 24, 2000 letter and enclosures refutes Miller's contention that Safeco "did not disclose" to the Peterson's that Safeco's renewal/replacement policy would reflect the $100,000/$300/000 UIM limits as selected in their 1997 written waiver. Br. of Resp't at 38; CP 5822, 5826.

subsequently requested higher UIM coverage limits, Safeco could not reasonably have concluded that the higher UIM limits, which appeared on the last amended American States policy declaration page, were in error.[25] Br. of Resp't at 39. In both of these arguments, Miller presumes that Safeco's burden--to obtain a written waiver before reducing UIM coverage below liability limits--trumps all other concerns. But Miller's argument ignores RCW 48.22.030(4), which provides that once UIM coverage has been waived or limited in writing by a named insured or spouse, "such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing." *See also*, *Clements*, 121 Wn.2d at 250. Here, the insurer obtained a written waiver reducing the UIM coverage. CP 5790. That waiver remains in effect until the insured in writing requests otherwise. RCW 48.22.030(4); *Johnson v. Farmers Ins. Co. of Washington*, 117 Wn.2d 558, 575, 817 P.2d 841 (1991).

Moreover, renewal of policies by an acquiring company does not result in a new policy and the new insurer may rely on a UIM rejection obtained by the previous insurer. *See, e.g., Bell v. Progressive Specialty Ins. Co.*, 744 So.2d 1165, 1165-67 (Fla. Ct. App. 1999); *Nationwide Mut.*

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[25] The American States amended declarations page (effective 11-3-99) reflected the addition of the Passat to the policy and indicated $500,000 UIM coverage for the Passat only. CP 5816.

Fire Ins. Co. v. Markow, 720 So.2d 322, 323 (Fla. Ct. App. 1998); *Merastar Ins. Co. v. Wheat*, 469 S.E.2d 882, 884 (Ga. App. 1996), *cert. denied* (1996). Accordingly, Safeco properly issued the Petersons a renewal Safeco policy in 2000 reflecting Monica Peterson's 1997 waiver.[26] Under these circumstances, the trial court erred in concluding that a $500,000 UIM limit applied.[27]

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[26] Miller also erroneously contends that when "confronted with the evidence," Safeco personnel "agreed the contract must be reformed to restore the $500,000 limits." Br. of Resp't at 39 (citing CP 455, RP (12-5-11) at 172-78, and RP (12-12-11) at 62-63). The cited record contains *no such admission*. Safeco personnel responding to a general question or a hypothetical acknowledged that a valid waiver was needed to reduce UIM coverage amounts. *See* CP 455; RP (12-5-11) at 172-73. They also indicated they believed that they had a valid waiver. RP (12-5-11) at 175; RP (12-12-11) at 63-64.

[27] Miller also asserts that Safeco cannot claim it was correcting a scrivener's error (i.e. the $500,000 UIM coverage amount for the Passat only) on the American States amended declaration, when Safeco issued its renewal policy in 2000, and informed the Peterson's that the renewal policy reflected their prior waiver. Br. of Resp't at 39; CP 5816, 5822, 5826. Citing *Gattavara v. General Ins. Co. of America*, 166 Wash. 691, 697, 8 P.2d 421 (1932), Miller contends that Safeco is barred from asserting it was correcting a mistake because Safeco did not return the $4.30 difference in the UIM premium reflected in the American States November 1999 amended declarations page and Safeco's 2000 renewal policy (effective April 4, 2000). CP 5816, 5826. But WAC 284-30-590(7)(c) allows an insurer to retain an incorrect premium until remedied at the end of the policy term because the insured receives the benefit of the coverage until then. CP 5816, 5826.

Moreover, *Gattavara* does not assist Miller. *Gattavara* held that an insurer could not take advantage of its own mistake and neglect to the damage of the insured. 166 Wash. at 697. There, when the insured made oral application for insurance, he informed the insurer's agent that his interest in the vehicle was as a mortgagee rather than an owner, the insured did not discover that the policy had been issued to him as owner until after the collision, and the insurer did not return the insured's premiums. *Id.* Under those circumstances, reformation of the policy was not warranted. By contrast, here Safeco's renewal policy applied Monica Peterson's 1997 waiver and further resulted in a premium reduction for the Passat alone of $59.60. CP 5816, 5826. The facts here do not show the insurer's neglect, but in fact demonstrate Safeco's attempts to comply with the Peterson's written wishes. Those written directives remained in effect until the insured

(5) The Trial Court Erred In Quashing Safeco's Deposition of Ralph Brindley

Miller argues that the trial court did not err in quashing the deposition of Ralph Brindley, Miller's attorney in his underlying personal injury action against Kenny, and thereby denying discovery of Brindley's file relating to settlement. Miller contends that Safeco did not preserve this issue for review because, although Safeco assigned error to the order granting the motion to quash, it did not assign error to a companion order issued at the same hearing. Br. of Resp't at 42. The error, however, was properly preserved.[28]

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instructs their insurer otherwise in writing. RCW 48.22.030(4). *Johnson*, 117 Wn.2d at 575.

[28] At the March 28, 2008 hearing, the trial court granted Miller's motion to quash the deposition of Ralph Brindley, and also signed an order denying Safeco's motion to compel production and/or privilege logs of documents between Miller and his counsel and other mediation materials. CP 1163-66. Both motions and orders addressed "the same essential issue," waiver of the attorney-client privilege and work product protections in the context of the bad faith claim asserted against Safeco. RP (3-28-08) at 4; CP 1154. Safeco's briefing in support of its motion to compel discovery referenced its briefing in opposition to Miller's motion to quash the deposition of Ralph Brindley. *See* CP 1153-54, 1156. Both sets of briefing argued waiver urging application of a California case, *Merritt v. Superior Court*, 9 Cal. App.3d 721, 88 Cal. Rptr. 337 (1970). *See* CP 1151, 1156; RP (3-28-08) at 3-4.

Safeco contended that in light of Miller's briefing at that time, which indicated that Miller would rely on Brindley's testimony in the bad faith action, Safeco contended it was entitled to an order finding a waiver of the attorney-client and work-product privilege. RP (3-28-08) at 4-5. Safeco also argued that if the court would not find waiver, it should issue an order in limine excluding any plaintiff attorney from the underlying case from testifying in the bad faith case because Safeco would not be able to prepare for trial. RP (3-28-08) at 4-5. *Id.* at 11 ("if the gentleman [Brindley] is going to be a witness I want the opportunity to get his documents and depose him."). The trial court rejected the *Merritt* case, found that there had not been a waiver, but also excluded Brindley as a witness. It accomplished this by signing the two above noted orders, the first (denial of Safeco's motion to compel production) ruled that no waiver had occurred,

Miller also claims Safeco waived any error because Brindley's testimony was excluded by Safeco. In so doing, Miller mischaracterizes the record, arguing that when Miller sought to present Brindley as a witness, Safeco successfully excluded his testimony, so that Safeco cannot now claim error based on the exclusion of evidence that Safeco objected to when Miller sought to introduce the evidence at trial. Br. of Resp't at 43-44. Miller notes that a court order provided that Safeco could "seek leave" to depose any attorney listed as a witness, implying that Safeco either neglected to do so or made a strategic decision not to seek such depositions. Br. of Resp't at 43. Miller fails to acknowledge that the July 18, 2008 order from which he plucks the "seek leave" language modified the court's prior order barring Brindley as a witness and permitted Brindley to be presented as Miller's witness *provided* that "60 days before trial (unless extended due to discovery issues) P[laintiff] shall disclose if attorney will be a witness and subject areas. Safeco can seek leave for

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and the second quashed Brindley's deposition but barred him from testifying. RP (3-28-08) at 12; CP 1163-66. Judge Needy's subsequent July 18, 2008 order (discussed *infra*) would permit Brindley to testify provided he was disclosed sixty days before trial commenced. CP 1781.

The two March 28, 2008 orders are sufficiently intertwined, as argued and as resolved by the trial court that review is not barred by Safeco's failure to assign error to the companion order when both orders turned on the same underlying issue. Moreover, even if there is a technical noncompliance with the appellate rules, the nature of this appeal is clear, the relevant issues are argued in the parties' briefing with appropriate citations to authorities, and no party nor this Court is inconvenienced by any such

deposition of these witnesses." CP 1781. The purpose of the 60-day period was to permit Safeco a sufficient opportunity to depose and seek records from Brindley. RP (11-29-11) at 36-38. But Brindley was never disclosed as a witness by Miller until the first day of trial. *Id.* at 33-34. Because such late disclosure directly violated the July 18, 2008 order, Brindley was not permitted to testify. *Id.* at 38. Safeco only sought exclusion of Brindley within the parameters of the trial court's orders to which Safeco was bound.[29]

Miller next contends that Safeco's argument that the attorney-client privilege was waived under the facts of the bad faith claim here is not supported. Br. of Resp't at 45. But the point made in Safeco's opening brief is that the trial court erred in its blanket refusal to permit Safeco to depose Brindley regarding the settlement negotiations. *See* Br. of Appellant at 34. Safeco cited cases, including *Meritplan Insurance Co. v. Superior Court*, 124 Cal. App. 3d 237, 177 Cal. Rptr. 236 (Cal. App. 1981), for the proposition that an insurer in a bad faith case is *entitled* to discovery from the attorney who represented the claimant in the underlying action. Notably, Miller's response does not mention

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technical failure. This Court should consider the matter on the merits. *See Havlina v. Wash. State Dep't of Transp.*, 142 Wn. App. 510, 515 n.1, 178 P.3d 354 (2007).

[29] Miller admits that under the trial court's orders "Brindley could be deposed only if Miller called him as a witness." Br. of Resp't at 47.

Meritplan. There, concerning an analogous case, the California Court of Appeals opined "in a case of alleged bad faith refusal to settle, the circumstances and content of the various negotiations and communications between the involved individuals are clearly relevant." *Meritplan*, 124 Cal. App. 3d at 241, 177 Cal. Rptr. at 238-39. The *Meritplan* court explained:

> The trial court was in no position to determine in advance of the depositions the existence of privilege or the relevancy of the questions to be asked. Needless to say, the single fact that the proposed deponents are lawyers rather than lay witnesses provides no basis per se for preventing the taking of their depositions.

Meritplan, 124 Cal. App. 3d at 242, 177 Cal. Rptr. at 239. The *Meritplan* court concluded, "We can conceive of many relevant questions which would not violate the privilege . . . [i]t was therefore an abuse of discretion for the trial court to completely frustrate [the insurer's] attempt to depose these witnesses." *Id.* The same is true here.

Miller also argues that because Safeco's conduct is the proper focus of a bad faith claim, Brindley's conduct and motivations are irrelevant and, thus, Safeco's inability to depose Brindley did not prejudice Safeco. Br. of Resp't at 48. The above discussion answers this contention. Moreover, Safeco's conduct can only be assessed in the context of Brindley's manipulation of events. In the bad faith action,

Safeco was blamed for the lack of a settlement in the underlying case between Kenny and his three passengers. Safeco made a concerted effort to eliminate Kenny's exposure. But Safeco, faced with Brindley's demand for all policy proceeds for Miller *alone*, was placed in the position of either paying all liability insurance to one of three injured claimants, thereby leaving Kenny, its insured, with no coverage for the remaining two claims, or declining to pay the full limit to Miller alone. Safeco chose the latter option in an attempt to protect Kenny and was sued in bad faith for an alleged failure to settle. Brindley's conduct and motivations were clearly relevant to the bad faith claim. Because Safeco was wrongfully denied in discovery access to relevant and material information, a new trial is required because it cannot be determined what impact the evidence would have had on the outcome of the trial. *Cf. Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984), *affirmed*, 104 Wn.2d 613, 707 P.2d 685 (1985) (ordering a new trial because the impact full disclosure in response to discovery requests would have on the outcome could not be known). The trial court's order quashing Safeco's deposition of Brindley was prejudicial error warranting a new trial.

(6) The Trial Court Should Not Have Admitted Evidence of Safeco's Loss Reserves

In reply to Miller's argument that the trial court properly admitted evidence of Safeco's loss reserves, Safeco relies upon and incorporates its discussion of the appropriate role of such reserves as presented in its Brief of Appellant at 35-40. As discussed therein, because such reserves are statutorily required, and merely estimates based on conservative accounting principles for the purpose of ensuring the financial integrity of the insurer, they are irrelevant in a bad faith case. Moreover, even if considered relevant, loss reserves evidence is more prejudicial that probative; and, in any event, for policy reasons should not be admitted in bad faith actions so as to ensure that such reserves continue to be set at appropriate levels and for the purposes for which they were intended. For all these reasons, Safeco urges this Court to follow those courts which bar evidence of loss reserves in bad faith litigation as discussed in the Brief of Appellant at 35-40.

(7) Maryle Tracy's Deposition Testimony In A Different Case Was Improperly Admitted Here

The trial court abused its discretion in allowing the use of Maryle Tracy's deposition testimony. Br. of Appellant at 40-42. As usual, Miller contends the issue is not properly before this Court.[30]

[30] Miller contends that Safeco waived any challenge to the jury's consideration of Tracy's testimony because Safeco made no proper assignment of error. Br. of Resp't at 51. That is not so. Safeco specifically assigned error to the admission of Tracy's

Miller disputes Safeco's description of Tracy's testimony as "collateral" to the present matter. But the trial court itself determined that "her testimony was collateral." RP (4-16-12) at 43. While Tracy's deposition testimony admits that she changed her answers to interrogatory questions to admit the existence of incentive programs for Safeco claims adjusters, that conduct occurred in a different case.[31] There is no evidence

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testimony. *See* Br. of Appellant at 3 (Assignment of Error No. 8); *see also*, *id.* at 7 (Issue No. 4, referencing assignments of error 8, 17, and 29).

Miller next contends that Safeco now argues beyond the scope of its objections at trial. Br. of Resp't at 52. Miller is again incorrect. Safeco objected at trial that the admission of Tracy's testimony from another case was irrelevant, confusing, misleading, violative of a motion in limine, improper because it concerned other litigation, and, thus, was prejudicial to Safeco. *See* CP 5061; RP (12-8-11) at 139-41. On appeal Safeco argues that the admission of Tracy's videotaped deposition testimony from another case was "irrelevant" and "unduly prejudicial to Safeco," that "the [deposition] excerpt was collateral, and should have been excluded," and that the testimony was likely confusing, misleading, or otherwise improperly relied upon by the jury because it addressed and referenced a South Dakota case, *Peterson v. Safeco*. Br. of Appellant at 40-42. The jury could have confused the "Peterson" in the South Dakota case's name with one of the assignors in this case. RP (12-8-11) at 140. There is nothing improper about Safeco's objections at trial or argument on appeal.

[31] Miller's contends that Tracy's testimony was necessary to demonstrate the incentive programs that Safeco utilized also fails. Br. of Resp't at 51, 53. As Miller's own brief acknowledged, John Hildebrand testified regarding such programs. *Id.* at 51; RP (12-8-11) at 128-34. Thus, Tracy's testimony was not needed to introduce evidence of Safeco's incentive practices. Moreover, because Tracy's testimony addressed her changed interrogatory answers in another case it was both highly prejudicial and irrelevant to the present case. Thus, Tracy's deposition, which was admitted despite Safeco's vigorous objection, should have been excluded. *See* Br. of Appellant at 40-42.

that Tracy changed answers to interrogatories in this case.[32] Such irrelevant, collateral evidence should have been excluded.[33]

(8) The Trial Court Erred in Its Allowance of Post-Judgment Interest at the Contract Rate

Although the jury's decision was based on claims sounding in tort -- bad faith and CPA violations,[34] the trial court awarded post-judgment interest to Miller on the basis of RCW 4.56.110(1), RP (6-14-12) at 12-13, even though the judgment on the jury's verdict is silent on the applicable rate. CP 5698-5700. This was error.

Miller now contends that this Court should not look to the jury's verdict here, but should instead focus on their settlement agreement that established a 12% rate of interest, CP 5833, *an agreement to which Safeco was not even a party*. Yet again, Miller repeats his mantra that Safeco

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[32] Safeco additionally argued that Tracy's deposition, which admitted that she changed interrogatory answers, would not be admissible even as impeachment evidence because extrinsic contradictory evidence cannot be used to impeach a witness on a collateral issue. Br. of Appellant at 41. This additional argument does not impair Safeco's other noted challenges.

[33] Miller notes a trial court comment describing Safeco's Quantum Leap incentive program as a "smoking gun." Br. of Resp't at 53 n.24. *See also*, RP (4-16-12) at 43. But the court was actually describing its perception of Safeco's incentive program "[a]t first blush," and acknowledged that the incentive program "really wasn't talked about very much" at the trial. RP (4-16-12) at 43.

[34] Bad faith in Washington is a tort. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). Similarly, a CPA violation is a statutory claim that bears more resemblance to a tort claim than a breach of contract action. *Woo v. Firemen's Fund Ins. Co.*, 150 Wn. App. 158, 167-75, 208 P.3d 557, *review denied,* 167 Wn.2d 1008 (2009) (judgment based in part on CPA violation founded on tortuous conduct).

waived the right to claim error on the post-judgment interest rate. He is, again, wrong.[35]

Miller fails to understand the difference between the covenant judgment that bears interest at 12% and the final judgment in the tort action. The former is but an *item of damages* in the tort action. That is precisely what the covenant judgment as presumptive *damages* in the bad faith/CPA action means.

Miller's treatment of the applicable case law also fails to appreciate this distinction. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007) states that a covenant judgment bears interest at the contract rate, even though the underlying settled claims were tortuous in nature; the settlement contract controlled. No later judgment on the jury's verdict in a bad faith/CPA case was at stake there. The insurer intervened in the underlying action, the case settled, and the insurer moved for reconsideration of the interest on the covenant judgment. *Id.* at 144.

By contrast, both *Woo* and *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 250 P.3d 121 (2011) involve the proper rate of post-judgment interest on the judgment of the verdict of the jury in a

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[35] Miller is in error in his zeal to claim error was not preserved. Miller and Kenny could agree in their covenant judgment settlement to which Safeco was not a party, that their deal bore interest at 12%. That does not bind Safeco with respect to the *post-judgment* interest rate in the tort action in which Safeco was a party.

later bad faith/CPA case in which the covenant judgment was the presumed damages of the insured, the precise issue present here. In *both cases*, this Court held that the tort interest rate in RCW 4.56.110(3) applied to the final judgment. The *Woo* court specifically noted that courts look to the nature of the claims tried to the jury in deciding the interest issue, not the categories of damages underlying the judgment. *Id.* at 167. Similarly, in *Unigard*, a prejudgment interest case, the same rule applied in a case involving claims of breach of contract, bad faith, and CPA violations brought against an insurer after a covenant judgment settlement; the Court distinguished *Jackson*. *Id.* at 926-28.

Here, any interest that accrued upon the underlying covenant judgment between Miller and Kenny was part of their presumptive damages in the later bad faith/CPA action. They could agree to that covenant judgment, essentially a contract, bearing interest at 12%. *Jackson, supra*. However, once Miller sued Safeco for bad faith and violation of the CPA, that covenant judgment represented only his presumptive damages in such an action against Safeco. The claims they asserted sounded in tort and once a judgment was entered on the jury's verdict interest on the underlying covenant judgment ceased and the judgment in the bad faith/CPA action earned interest at the tort rate of RCW 4.56.110(3). *Woo, supra; Unigard, supra*.

The trial court erred in employing a 12% interest rate on the judgment here.

(9) The Trial Court Abused Its Discretion by Awarding Excessive Attorney Fees and Costs to Miller

The trial court here awarded Miller's counsel $1.7 million in attorney fees and costs, CP 5724, which they now *admit* were based on non-contemporaneous time records created long after the fact and included expenses that exceeded the recoverable costs allowed by RCW 4.84.010. Br. of Resp't at 78-87. In lieu of a serious lodestar analysis, Miller simply reiterates his opinion about the reasonableness of his counsel's fees. That is not enough to overcome the trial court's errors.[36] This Court should reverse the trial court's fee and costs award.

(a) Inadequate Time Records/Excessive Hours

Miller twice asserts that Safeco did not contest the reasonableness of the hours claimed by their counsel. Br. of Resp't at 78, 81. That is simply *false*. Safeco, in fact, *did* contest the hours as excessive, noting the trial court's failure to segregate hours spent on the CPA from time spent on tort theories where fees were not recoverable. The court also failed to

[36] Miller's broad assertion that there was no payment to his counsel for eight years does not seemingly comport with the record. Miller received $1.5 million in payments from Safeco as part of the covenant judgment settlement in 2003. CP 5984-85. Presumably, his counsel was, or could have been, paid from those funds.

account for duplicative or wasteful time. Br. of Appellant at 77-79.[37] The trial court here did not address *any* of these issues, choosing not to reduce Miller's counsel's hours *by even a single hour*. CP 5691, 5699, 5721, 5724.[38]

More critically, it is virtually impossible for Safeco, the trial court, or this Court to reliably know if the claimed hours accurately reflect the real work performed by Miller's counsel on the actual tasks claimed. The time records are very general with undifferentiated blocks of time. They are not contemporaneously made by counsel. They are reconstructed after the fact with an eye toward the fee award.

Washington law requires adequate documentation of attorney time. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Our Supreme Court *specifically* stated this means

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[37] For example, Miller claims that Safeco made no argument in response to his opinion that his fees related to a common nucleus of facts and could not be segregated. *Id.* at 78. To simply repeat the trial court's erroneous determination is not analysis. It is Miller who has *no answer* to Safeco's argument that the trial court failed to segregate fees on theories where fees were not recoverable from those that were, or to address wasteful or duplicative time. Safeco actually cites facts and legal authorities in its brief in support of its position, unlike Miller. Surely the trial court, at a minimum, should have excised time their counsel spent on their unsuccessful IFCA claim. Plainly, Miller presented *both* general tort claims *and* a CPA claim. Time spent on the former should have been excised.

[38] This is but further evidence of the trial court adopting any argument by Miller at face value.

contemporaneous time records. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Federal authorities, referenced in Safeco's opening brief at 74-75, penalize parties seeking a fee award based on reconstructed hours.

The reason our Supreme Court in *Mahler mandated* contemporaneous time records is that memories fade over time. How can Miller's counsel "reconstruct" alleged time entries involving matters occurring as long as eight years ago? Further, once a court has ruled, there is a tendency for such reconstructed time entries to be edited, deliberately or unintentionally, so that they apply to theories for which fees may be recovered. For example, time spent on tort theories where fees are not recoverable may, in retrospect, become entries pertaining to the CPA where fees are recoverable. Reconstructed, non-contemporaneous time entries are inherently unreliable. How can this Court really know that Miller was "conservative" in their effort to maximize his fees, as the trial court determined? CP 5682. Indeed, there is *nothing* in the pleadings submitted by Miller that suggests how the time spent by his attorneys up to 8 years ago was "reconstructed." CP 5424, 5422-83.

Miller's principal response to the requirement of contemporaneous time records is to assert that no Washington court has ever reversed a fee award for the failure to provide contemporaneous time records. Br. of

Resp't at 82. That statement borders on misleading this Court. First, it ignores the Supreme Court's holding in *Mahler*. Second, it ignores the Court's decision in *International Union of Operating Engineers, Local 286 v. Port of Seattle*, 164 Wn.2d 307, 264 P.3d 268 (2011), *review granted,* 173 Wn.2d 1026 (2012) which upheld a trial court's decision to exclude any fee award for any in-house counsel who did not keep contemporaneous time records and provided only an estimate of time spent on the case. The Court, citing *Mahler*, stated:

> Without contemporaneous time records documenting Roberts's hours, the superior court lacked the documentation required to make an adequate determination about the reasonableness of the fees requested. Therefore, the trial court did not abuse its discretion in denying part of the Union's request.

Id. at 326.

In sum, the hours sought by Miller below were excessive and unsustainable on this record. The trial court abused its discretion by accepting, *without any alteration*, Miller's counsel's claim as to hours spent on the case based on "reconstructed" time records going back eight years. The trial court neglected its responsibility under cases like *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007) to segregate time spent on theories of recovery on which fees may not be recovered or

wasteful time on unsuccessful actions.[39] The trial court abused its discretion.

(b) Excessive Hourly Rates

The trial court also abused its discretion in allowing inflated hourly rates for the reasons set forth in Safeco's opening brief at 76. Miller asserts that these "historic" rates are reasonable and try to argue his usual refrain that Safeco somehow waived the issue. Br. of Resp't at 79-81.[40]

First, they have *no answer* to the point raised by Safeco in its brief that Miller's attorneys never actually charged a soul in Skagit County the inflated hourly rates they have "constructed" for this case. *See* CP 5653, 5723, 5725. The fees charged in the locality *is* a factor that must be assessed in deciding if a fee is reasonable, as Miller acknowledges. RPC 1.5(a)(3). There was no basis in the record for the trial court's conclusion

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[39] Miller contends that there was no duplication in the trial court's award of the same fees for addressing the Peterson UIM sanction and UIM coverage generally. Br. of Resp't at 84 n.36. But the February 15, 2008 fee award order, which Miller cites as demonstrating that fees were awarded and paid for only one of two UIM-related motions, is equivocal as to its scope. The February 15, 2008 award order was entered well after the two UIM motions in question were decided on December 11, 2006 and May 29, 2007 respectively. The summarized time entries attached to the order contains no dates, and the references in the time entries to "UIM limits," "UIM claim," and "UIM coverage mtn," in context suggest that the order covers matters broader than merely UIM coverage as Miller contends. *See* CP 999. Accordingly, the February 15, 2008 order does not bolster Miller's contention that he was awarded fees for only one UIM motion and not the other.

[40] Miller claims that Safeco is "bound" by the trial court's ruling on Cassandra Peterson's fees in the UIM claim that $400 per hour for Beninger was reasonable. Br. of Resp't at 80. Miller fails to appreciate that Safeco has appealed all of the trial court's fee rulings and is not bound by its determination on hourly rates in that narrow setting.

that the relevant market was all of Puget Sound or that other firms could not handle such a case. CP 5682.

Finally, it is important to note that the hourly rates sought by Miller's counsel were historic, not contemporaneous rates. The lead counsel's rate of $400 applied from the inception of the case to 2010 and grew to $450 thereafter. CP 5723, 5725. Washington law does not recognize historic rates for attorneys in fee-shifting situations, in effect permitting counsel to retroactively apply current rates to past work. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375-77, 798 P.2d 799 (1990). This policy is particularly important here where, like their hours, Miller's attorneys' rates are an artificial construct.

The trial court abused its discretion in setting the hourly rates.

(c) A Multiplier Here Was Improper

As if the inflated lodestar based on excessive and unsupported hours and historic rates was not enough, the trial court compounded its abuse of discretion on fees by awarding a 1.5 multiplier based on contingency.[41]

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[41] Miller seems to confuse the actual basis for the multiplier. The trial court relied on the contingency of any fee to award a multiplier. CP 5690. They now seem to assert the award should be based on exceptional work quality. Br. of Resp't at 85. Washington courts have not awarded a multiplier on that basis in any reported appellate decision. The "quality" of the attorney's work is rewarded in the attorney's hourly rate. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983); *Wash.*

Miller has *no answer* to the case law in Washington stating that multipliers are *disfavored*, *Bowers*, 100 Wn.2d at 599, and that the lodestar fee is *presumed* to adequately compensate counsel. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000); *Fiore v. PPG Industries*, 169 Wn. App. 325, 355, 279 P.3d 972, *review denied,* 175 Wn.2d 1027 (2012).

Miller simply ignores the *requirement* in *Pham* that a party seeking a contingent risk multiplier must demonstrate that contingent risk was not already adequately addressed in the hourly rates charged by counsel. *Pham,* 159 Wn.2d at 542. Neither they nor the trial court addressed this requirement below. Nor could they. Miller's counsel's fees were already historic in nature and were inflated.

The trial court abused its discretion in awarding a multiplier.

(d) Miller's Cost Recovery Should Have Been Limited to Statutory Costs

Miller simply *ignores* the Supreme Court's holding in *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987), that only statutory costs may be recovered in a CPA case. Br. of Resp't at 86-87. Nevertheless, that is precisely what the trial court did here. *Panorama*

State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 335-36, 858 P.2d 1054 (1993).

Village Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 26 P.3d 910 (2001) does not alter the *Nordstrom* rule.

The Supreme Court's treatment of costs in its decisional law is difficult to follow. But the Legislature has determined what are recoverable costs in civil litigation in RCW 4.84.010. *Nordstrom* plainly states that only statutory costs are recoverable in a CPA case by the prevailing consumer. This case is, in part, a CPA case. *Panorama Village* creates a judicially-established exception to that rule in the context of *insurance coverage litigation* where the Supreme Court created an *equitable* exception to the American Rule to permit recovery of fees. *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995). This is *not* an insurance coverage case because Safeco never denied coverage to Kenny, its insured. It is a tort case with a CPA facet to it. As such, *Nordstrom* controls. Only costs under RCW 4.84.010 are recoverable here.

D. CONCLUSION

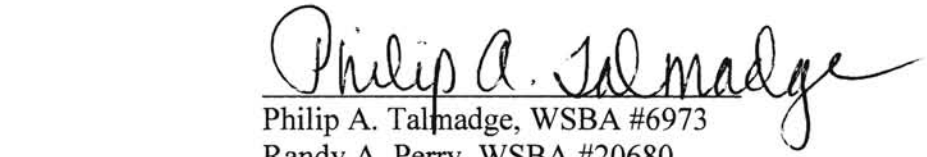
Nothing presented in Miller's brief should dissuade this Court from the main point presented in Safeco's opening brief: Safeco did not receive a fair trial in this case.

This Court should reverse the judgment and remand the case to the trial court for a new trial, a recalculation of damages, fees, and costs, or

other disposition as this Court deems fair. Costs on appeal should be awarded to Safeco.

DATED this 25th day of February, 2013.

Respectfully submitted,



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APPENDIX

INSTRUCTION NO. 30

It is the duty of the Court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on Patrick Kenny's or Cassandra Peterson's claim for negligence, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If your verdict is for the plaintiff on Patrick Kenny's claim that Safeco failed to act in good faith, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by Safeco's Failure to act in good faith.

If you find for the plaintiff on Patrick Kenny's claim for failure to act in good faith your verdict must include the following undisputed items:

The net amount of the Stipulated Order Re: Reasonableness of Settlements for $4,150,000.

In addition, you should consider the following past and future elements of damages:

1. Lost or diminished assets or property, including value of money;
2. Lost control of the case or settlement;
3. Reasonable value of expert or other costs or reasonable attorney fees incurred for the private counsel retained by Patrick Kenny;
4. Damage to credit or credit worthiness;
5. Effects on driving or business insurance or insurability;
6. Emotional distress or anxiety.

The burden of proving Patrick Kenny did not suffer damages rests upon Safeco. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

5405

If you find for the plaintiff on Cassandra Peterson's claim for failure to act in good faith then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's failure to act in good faith.

The burden of proving damages on Cassandra Peterson's claim rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Consumer Protection Act, then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's violation.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Washington Consumer Protection Act, you must consider injuries to business or property.

The burden of proving damages on the Consumer Protection Act claim rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for breach of contract, you should determine the sum of money that would put Patrick Kenny and/or Cassandra Peterson in as good a position as they would have been if the parties had performed all their promises.

The burden of proving breach of contract rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

5406

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

5407

INSTRUCTION NO. ____

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on Patrick Kenny's or Cassandra Peterson's claim for negligence, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If your verdict is for the plaintiff on Patrick Kenny's claim that Safeco failed to act in good faith, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by Safeco's failure to act in good faith.

If you find for the plaintiff on Patrick Kenny's claim for failure to act in good faith your verdict must include the following undisputed items:

The net amount of the Stipulated Order Re: Reasonableness of Settlements.

In addition you should consider the following future economic damages elements:

The reasonable value of business opportunities, loans, and preferred interest rates on loans with reasonable probability to be lost in the future.

The burden of proving Patrick Kenny did not suffer damages rests upon Safeco. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Defendant's Proposed Instruction No. 22

5301

If you find for the plaintiff on Cassandra Peterson's claim for failure to act in good faith then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's failure to act in good faith.

The burden of proving damages on Cassandra Peterson's claim rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Consumer Protection Act, then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's violation.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Washington Consumer Protection Act, you must consider injuries to business or property.

The burden of proving damages on the Consumer Protection Act claim rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

[WPI 30.01.01, as modified, with modified WPI 30.08.02]

5302

INSTRUCTION NO. ___

It is the duty of the court to instruct you as to the measure of damages. You must determine the amount of money that will reasonably and fairly compensate Plaintiff for such injury and damages as you find were proximately caused by the Defendant's action.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate them for such damages as you find were proximately caused by the defendant's actions.

If you find for the plaintiff, your verdict must include the amount of the covenant judgment of $4,150,000 plus the interest.

In addition, you should consider the following past and future elements of damages:

1. Lost or diminished assets or property, including value of money;
2. Lost control of the case or settlement;
3. Reasonable value of expert or other costs or reasonable attorney fees incurred for the private counsel retained by Patrick Kenny;
4. Damage to credit or credit worthiness;
5. Costs to investigate or monitor credit;
6. Effects on Driving license;
7. Effects on Driving or Business Insurance or insurability;
8. Emotional Distress or Anxiety;
9. Costs of cooperation

The judgment and interest is the minimal amount of harm and damages if the insurer is liable. The burden of proving the other damages rests upon the plaintiff. It is for you to

determine, based upon the evidence, whether any other particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 30.01.01 modified; Court summary judgment on Harm; *Safeco Ins. v. Butler*, 118 Wn.2d 383 (1992)(general damages to credit and credit worthiness, reputation etc are compensable under bad faith); *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 149 (2001) (bad faith failure to defend may entitle insured to expenses of coverage experts and damages for loss of use of money before tender of defense accepted); *Anderson v. State Farm*, 101 Wn. App 323 (2000)(bad faith, as a tort, carries broad tort remedies, including emotional distress damages); *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842 (1990)(injury by delay in payment is sufficient harm to support action under CPA); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App 553 (1992) (lost time or expense in pursuing claim sufficient harm under CPA); WPI 310.06.

Plaintiff's Proposed Instruction No. 32

Miller v. Kenny and Safeco, No. 68594-5-I

Comparison of Select Respondent's Assertions with Report of Proceedings, Exhibits and Clerk's Papers

Page/Cite	Claim Supporting Citation	What Record Says	
8 12/6 RP 184	Kenny had his own liability insurance with State Farm.	Bowman told Mr. Barlow that because this was a Canadian case, must settle with all the same time; debate over application of Washington or Canadian law. No discussion of State Farm.	
9 Ex. 71	Safeco's $500,000 UIM coverage, as well the Millers' $100,000 UIM coverage with Farmers and the Bethards' UIM coverage (also with Safeco), provided additional insurance to the injured passengers once the third party coverage under the Safeco and State Farm policies had been depleted.	Safeco Claims notes indicate State Farm policy is excess to Safeco policy. No discussion of UIM or Farmers.	
10 Ex. 194	Safeco's adjusters evaluate claims not just to determine liability, but also to set reserves, by assessing the "most probable outcome" of a claim.	"Policy limit and time limit demands" paper discusses considerations and actions to take with policy and time limits demands. No discussions of evaluation of claims or reserves.	
10 12/8 RP 220	Bowman talked with RCMP who confirmed Kenny 100% responsible but no evidence of drug or alcohol use (implying conversation within 2 days of accident). .	Kenny testified he remembered everyone had their seatbelts on, and that he told the RCMP officer that on day 2 in a hotel room in Canada.	
10 12/6 136-37	Each time Safeco determined most probable outcome left Kenny underinsured and required Safeco pay its liability and UIM limits.	Full limits were posted for liability, umbrella and UIM on reserves throughout the claim.	
11 12/8 RP 134-36	Another goal gave adjusters increased pay for reducing payments to injured claimants by 5%.	An audit determined that in the prior year Safeco was paying more than what was fair and equitable and so set a target for 2004 (the year after the claim was settled) to recapture lost economic opportunities of 5%. No discussion of increased pay.	
11 12/8 RP 177-78	Each Safeco employee responsible for the claims against Kenny had to meet their performance goals to be eligible for these bonuses.	If Maryle Tracy received a bonus, it was a percentage of her salary, which was dependent upon a range based upon her title in the claims operation.	
11	Each Safeco employee responsible for the claims against	Every single Safeco employee was eligible for the turnaround bonus that	

Page/Cite	Claim Supporting Citation	What Record Says	
12/8 RP 181-83	Kenny had to meet their performance goals to be eligible for these bonuses.	allowed the employees to buy stock at $33 per share in 2001.	
11 12/7 RP 153	Because the accident occurred in Canada, Safeco explored the possibility of asserting a seatbelt defense under Canadian law, which could reduce the claimant's recovery but could also significantly increase Safeco's UIM and PIP limits.	Safeco adjuster Kim Smith testified that IME's were not conducted, and Safeco received no written IME reports.	
12 12/6 RP 197	Safeco never advised Ashley or Ryan that they have potential UIM claims under the policy.	Coverage was never accepted for $100,000 for either Ashley or Ryan under the UMBI coverage.	
12 12/13 RP 31-32	The Petersons thought disclosing the amount of the policy would help Ryan, but they felt constrained by Safeco's instruction to keep their limits secret and concerned that disclosing this information would jeopardize their coverage.	Mrs. Peterson testified that she didn't give the Millers the amount of the policy limits because she considered it her own family business, although Mr. Peterson interjected that he thought they were advised by someone not to bring that out, and he thought it was Safeco. All along, Mrs. Peterson thought that it was up to the insurance company to reveal the policy. No discussion of jeopardized coverage.	
13 Ex. 58	Instead, Bowman in November 2001 attempted to "pre-sell" the injured claimants a structured settlement, expressing to his superiors his hope that they would settle without obtaining legal counsel.	Bowman spoke with Karen Graham of Peterson's attorney's office, who stated that although Dr. Miller was pushing for information regarding the Peterson's umbrella policy, they have not given it to him and will not.	
13 12/8 RP 200	Petersons felt constrained by Safeco's instruction to keep their umbrella limit secret to avoid jeopardizing their coverage.	Mr. Peterson didn't know the reason why, but it seemed that Safeco wanted to hide the amount of the insurance limits so that there wouldn't be any settlement involving the policy limits. It was Mr. Peterson's understanding that the umbrella policy would cover all of his auto policies, all of his home, all of his boat, everything. No discussion of jeopardized coverage.	
15 12/6 RP 236	Within several months, Safeco had the reports from the UW neuropsych rehabilitation program that Ryan had attended.	Bowman disagreed that the letter from Mr. Brindley included the most recent evaluation from the University of Washington regarding Mr. Miller.	
16	Safeco made no affirmative efforts to settle in summer of	Bowman wrote Mr. Brindley in July 2002 to say once he's had a chance to	

Page/Cite	Claim Supporting Citation	What Record Says	
12/7 RP 81-82	2002 after received demands from Cassie Peterson of over $350,000, Ryan Miller's limits demands, and Ashley Bethard's proposal for a global settlement that could have fully protected its insured Kenny.	review all packages (he had not yet received Barlow's settlement package), he would like to do a mediation.	
16 12/7 RP 213-14	Ashley's lawyer asks Safeco to pay its limits and do a fund on behalf of all claimants in exchange for a release, as the injured passengers would likely release Kenny and amicably agree to divide the proceeds.	Bowman understood that Barlow was throwing out an idea, but he didn't see anything by any of the other attorneys that said they would do that.	
16 12/5 RP 160	Ashley's lawyer asks Safeco to pay its limits and do a fund on behalf of all claimants in exchange for a release, as the injured passengers would likely release Kenny and amicably agree to divide the proceeds.	Greg Hanson discusses theoretical options an insurance company could take, including offering the policy limits to all claimants in exchange for a settlement and release of its insured and discussing the option of an interpleader if one of the claimants is "really greedy" and wants all of the limits.	
16 12/8 RP 218	Ashley's lawyer asks Safeco to pay its limits and do a fund on behalf of all claimants in exchange for a release, as the injured passengers would likely release Kenny and amicably agree to divide the proceeds.	Patrick Kenny testified he didn't have any interest in pursuing the bad faith claims or other claims individually. He just wanted his friends to get paid and he wanted to move on, as Ryan's had to go through a lot, and it has been difficult on their friendship.	
16 12/9 RP 84-85	Ashley's lawyer asks Safeco to pay its limits and do a fund on behalf of all claimants in exchange for a release, as the injured passengers would likely release Kenny and amicably agree to divide the proceeds.	Cassie Peterson testified that if Safeco called, her mother would want Cassie to talk because her mother didn't really understand what was going on. She felt that if the three of them (friends) would have known the money available to them the month after the accident, "Maybe we wouldn't even have needed lawyers . . . I think the three of us might have been able to sit down, because we were such good friends, and just figure something out."	
18 12/7 RP 97-98	In truth, Safeco was not interested in a global mediation to obtain a joint release of its insured if it meant tendering limits.	There had not been any offers made as of "that time" because Safeco didn't have enough information, and while there had been discussion of an IME, an IME was not needed when they got the verbal from Dr. Powell, and at that point decided to tender the limits.	
19 12/7 RP 139-40	Safeco retained a neuropsychiatric expert to review Ashley's and Ryan's medical records using the same medical information that had been provided eight months earlier in the summer of 2002.	Mr. Beninger asked if Dr. Powell had anything new that Safeco didn't have by August 29, 2002, but the witness, who was not the primary claims adjuster, testified he did not recall if they got anything between that August date and his review.	

Page/Cite	Claim Supporting Citation	What Record Says	
19 12/12 RP 37	Safeco retained a neuropsychiatric expert to review Ashley's and Ryan's medical records using the same medical information that had been provided eight months earlier in the summer of 2002.	In questioning the primary claims adjuster, Jamie Bowman, Mr. Beninger asserted Dr. Powell looked at the same information Brindley gave Bowman in March, May, June, July of the prior year. Bowman disagreed and said Safeco had received the last bit of information in September 2002.	
19 12/6 RP 99-101	Safeco retained a neuropsychiatric expert to review Ashley's and Ryan's medical records, using the same medical information that had been provided eight months earlier in the summer of 2002.	Miller's insurance expert Dietz testified that injuries were waxing and waning, and one could expect that the reserves would be set lower as a consequence; he saw that Safeco had investigated whether or not Canadian law could reduce the amount of claims somehow.	
19 12/12 RP 118	Kenny had considered bankruptcy and hired at his own expense attorney Jan Peterson to negotiate a global settlement.	Mr. Beninger and Safeco witness Bowman debate whether Safeco got a release for Patrick Kenny when everybody agreed not to pursue Patrick.	
20 CP 2735-36	Safeco also agreed that the settlement was not the result of fraud or collusion.	"Stipulated Order Re: Reasonableness of Settlements" "does not waive… any defenses Safeco may raise." No discussion of fraud or collusion.	
21 Ex. 15	Under the settlement agreement, interest on the unpaid damages accrued at the statutory rate of 12% compounded annually.	"Stipulated Order Re: Reasonableness of Settlements" does not include interest rate.	
22 CP 30, 33-53	In June 2005, Miller amended his complaint to seek as assignee all of Kenny's economic and noneconomic damages against Safeco under theories of negligence, bad faith, and breach of contract, fiduciary duties, and regulations and statute, including the CPA.	CP 30, 33-53 include portions of several cases, a treatise, copied statutes, and Beninger's Declaration re: UIM. Does not include amended complaint or discuss the amended complaint.	
23 CP 4984	When Miller sought to have Brindley testify without waiving the privilege, Safeco successfully excluded him as a witness.	CP 4984 is a Jury Instruction on proximate cause.	
25	In a concession to Safeco, the trial court granted Safeco's motion to bifurcate.	The court suggested bifurcation; Safeco had moved for bifurcation on a different issue long before the trial, which motion had been denied.	

Page/Cite	Claim Supporting Citation	What Record Says	
11/22 RP 54-55			
39 12/5 RP 172-78	When confronted with the evidence, Safeco's adjusters, its CR 30(b)(6) representative, and the supervisor who set Cassie's limits at $100,000 agreed the contract must be reformed to restore the $500,000 limits.	When confronted with the hypothetical that if there was not a valid waiver, Safeco's 30(b)(6) witness agreed that the contract would need to be reformed so it's in the same amount as the liability limits.	
39 12/12 RP 62-66	When confronted with the evidence, Safeco's adjusters, its CR 30(b)(6) representative, and the supervisor who set Cassie's limits at $100,000 agreed the contract must be reformed to restore the $500,000 limits.	After much debate, the witness, Jamie Bowman, the adjuster on the liability claim, insisted he thought they had a valid waiver.	
43 7/20/07 RP 7-8	Safeco deposed Ryan Miller and his father without restriction.	Oral argument before Judge Needy: Mr. Parker described why he wanted to take the deposition of Ralph Brindley. Neither Ryan Miller nor his father were mentioned.	
45 12/7 RP 227	The insurer controls if there is bad faith; there can be "no setup."	Safeco witness Kim Smith agreed that an insurance company controls its own actions, but indicated that an insurance company can't control correspondence and things done by folks that it's dealing with.	
47 7/20/07 RP 7-8	Safeco's own files, as well as the non-privileged documents produced by Miller and his counsel, contained each of Brindley's communications with Safeco and the other claimants. This was all the evidence Safeco needed to defend against the claim that Safeco acted in bad faith toward its insureds by refusing to disclose or offer their policy limits.	Parker discusses posturing by Brindley that he cannot know without deposing Brindley.	
51 12/6 RP 77-79	Safeco's bonus and incentive programs, including its $1.2 billion "turnaround" program in 2001 under "Quantum Leap," gave its adjusters an incentive to refuse to offer policy limits, to refuse to hire experts for defense of insureds, and to limit UIM coverage despite the absence of a valid written waiver. Several Safeco witnesses, including Maryle Tracy, Safeco's senior claims analyst who became responsible for Kenny's claim in 2003, senior supervisor Hildebrand, as well as plaintiff's expert	Mr. Dietz testified about the conflict inherent in a bonus program but no specifics given [an objection was sustained to this line of testimony as beyond the purview of the expert witness p. 79-81].	

Page/Cite	Claim Supporting Citation	What Record Says	
	Rob Dietz, testified that Safeco in 2002 implemented a series of defense cost and claims cutting programs that linked employee bonuses to "performance," and paid "turnaround bonuses" to eligible employees, including those who were responsible for handling these UIM and liability claims.		
51 12/8 RP 127-36 CP 6712-15	Safeco's bonus and incentive programs, including its $1.2 billion "turnaround" program in 2001 under "Quantum Leap," gave its adjusters an incentive to refuse to offer policy limits, to refuse to hire experts for defense of insureds, and to limit UIM coverage despite the absence of a valid written waiver. Several Safeco witnesses, including Maryle Tracy, Safeco's senior claims analyst who became responsible for Kenny's claim in 2003, senior supervisor Hildebrand, as well as plaintiff's expert Rob Dietz, testified that Safeco in 2002 implemented a series of defense cost and claims cutting programs that linked employee bonuses to "performance," and paid "turnaround bonuses" to eligible employees, including those who were responsible for handling these UIM and liability claims.	Hildebrand testified the first year he received a bonus was in 2004. The corporation had to meet certain goals before anyone got a bonus; then each department had to meet goals, then each region had to meet goals, then it would trickle down to operating units. Hildebrand had a LEO goal of less then 5% in 2004 [the year after the claim settled]. They tried to assess the fair amount owed. No discussion of "turnaround bonus," "Quantum Leap," or any mention of UIM.	
51 12/8 RP 164-72	Safeco's bonus and incentive programs, including its $1.2 billion "turnaround" program in 2001 under "Quantum Leap," gave its adjusters an incentive to refuse to offer policy limits, to refuse to hire experts for defense of insureds, and to limit UIM coverage despite the absence of a valid written waiver. Several Safeco witnesses, including Maryle Tracy, Safeco's senior claims analyst who became responsible for Kenny's claim in 2003, senior supervisor Hildebrand, as well as plaintiff's expert Rob Dietz, testified that Safeco in 2002 implemented a series of defense cost and claims cutting programs that linked employee bonuses to "performance," and paid "turnaround bonuses" to eligible employees, including those who were responsible for handling these UIM and liability claims.	Maryle Tracy testified one of her goals was to contact agents when a large claim came in and that she was able to earn a bonus by meeting several goals that were not specifically tied to the resolution of any one claim. She had a goal to reduce legal expenses, but did not have a goal to reduce payout on claims. Nobody has a goal to reduce payments of claims. No discussion of "turnaround bonus," Quantaum Leap or any mention of UIM.	

Page/Cite	Claim Supporting Citation	What Record Says	
51 12/8 RP 177-83	Safeco's bonus and incentive programs, including its $1.2 billion "turnaround" program in 2001 under "Quantum Leap," gave its adjusters an incentive to refuse to offer policy limits, to refuse to hire experts for defense of insureds, and to limit UIM coverage despite the absence of a valid written waiver. Several Safeco witnesses, including Maryle Tracy, Safeco's senior claims analyst who became responsible for Kenny's claim in 2003, senior supervisor Hildebrand, as well as plaintiff's expert Rob Dietz, testified that Safeco in 2002 implemented a series of defense cost and claims cutting programs that linked employee bonuses to "performance," and paid "turnaround bonuses" to eligible employees, including those who were responsible for handling these UIM and liability claims.	Maryle Tracy testified her bonus was a percentage of her salary. Her testimony regarding other individuals eligible for bonuses was based upon interrogatory answers she gave in Peterson v. Safeco, an entirely different matter altogether. See, 12/8 RP 176.	
53 12/8 RP 180-83	Tracy's interrogatory answers confirmed that senior adjusters received incentive bonuses that increased their base salaries while they were responsible for supervising the claims against Kenny.	In answer to interrogatories propounded in the Peterson v. Safeco matter, an altogether different case, Tracy answered that John Hildebrand and (unnamed) others were in the leadership performance plan and success sharing plan. No discussion of how that impacted compensation.	
53	As the trial court found in denying Safeco's motion for a new trial (4/16/12 RP 43) there was nothing "collateral" about Tracy's testimony, which was offered not for impeachment purposes, but as evidence of Safeco's motive to ignore its duties of good faith.	[Beninger impeaches Tracy with incorrect answers on 12/8 RP 174-176.]	
58/59 12/6 RP 54-58	Miller had two insurance experts, former Insurance Commissioner Deborah Senn and Rob Dietz. Both were deposed, both gave declarations, and both were disclosed as potential trial witnesses. As Mr. Dietz testified, both worked together to compile the exhibits on Principles and Standards of Care, which were based on industry standards and Safeco's own internal claims handling rules and testimony.	Mr. Dietz testified he provided Deborah Senn with a copy of the documents he, Dietz, put together.	

Page/Cite	Claim Supporting Citation	What Record Says	
59 12/7 RP 54	Safeco had no objection to admission of the principles of good faith conduct for insurers, as well as Safeco's own standards of conduct, including those it called "The Ten Commandments of Bad Faith," each of which was espoused by Safeco's own witnesses and reflected in the insurance code.	Kim Smith testifies he puts great effort into evaluating cases and that if in the hypothetical given, the 5.5 million is documented, the UIM money would be owed.	
59 12/6 RP 62	Clerk directed to redact signature before displaying document to jury	Mr. Beninger's technical assistant had already redacted the signature; the court clerk was not directed to redact the signature.	
60 12/5 RP 135	Safeco complains that Ms. Senn's signature on the document was briefly shown to the jury, but Judge Rickert noted that the exhibit "went up there [on the screen] and went off so quickly" that he "didn't know what it was."	Mr. Hanson agrees to sign every page of Standards and principles with which he agrees. [Court statement found on 12/5 RP 139]	
61 11/22 RP 86	The trial court refused to grant Safeco' s broad motion in limine to preclude "send a message" arguments, recognizing that Miller should not be barred from arguing that the public policy of deterring insurer misconduct underlies both a claim for breach of the duty of good faith as well as a claim under the Consumer Protection Act.	MR. BENINGER: But the send-a-message one is completely wrong on a bad faith case that involves, the whole purpose being deterrence. I'm going to be asking for an instruction that says that the purpose of a bad faith action is to deter and to provide a disincentive to the insurance company. And mind you, they can't cite a single case on that because it doesn't exist. THE COURT: We will talk about that when we get there and see the instruction. MR. BENINGER: Okay. (RULING DEFERRED.) [Court held Beninger cannot send a message and refused to give instruction proffered.] 12/14 RP 99	
66 12/15 RP 37-38	With Safeco's consent, the trial court corrected that omission [Safeco's proposed instruction omitted non-economic damages] before instructing the jury.	The court corrected to include "past and future economic damages."	

Page/Cite	Claim Supporting Citation	What Record Says
76 2/15/08 RP 13	Safeco takes issue with the trial court's award of post-judgment interest, but has failed to assign or argue error in the trial court's February 2008 order establishing pre-judgment interest on the covenant judgment at 12% interest compounded annually, from May 20, 2003 under Kenny's 2003 settlement agreement with Miller, Peterson and Bethards.	The cases are on all four. There's no legitimate good faith argument to be made. We believe our motion should be granted and the Court should actually consider whether or not terms are appropriate for making this argument that is absolutely unfounded. JUDGE RICKERT: I agree. *Jackson* applies. MR. PARKER: Here's the order on the first one, Your Honor. JUDGE RICKERT: Okay. MR. PARKER: I've stricken paragraph 5, and 3, I -- I don't agree to paragraph 3. JUDGE RICKERT: Okay. Is that the one with the -- MR. PARKER: That's the first matter. JUDGE RICKERT: -- with the -- is that the -- that the -- yeah. But that's the -- paragraph 3 is the multiplier issue? MR. PARKER: No. Excuse me. Paragraph -- there's two numbered paragraphs here. The first paragraph, 5, said a multiplier is appropriate. I've stricken that and initialed it. JUDGE RICKERT: Yeah. MR. PARKER: There's another paragraph 3 that says, "This award will accrue interest of 12 percent until paid," that's prejudgment interest and there is no reason for that. This should -- interest should run from the Roger D. Flygare & Associates, Inc. Professional Court Reporters 1.800.574.3414 10

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service true and accurate copies of the Motion for Leave to File Over-Length Reply Brief and Reply Brief in Court of Appeals Cause No. 68594-5-I to the following parties:

Timothy Parker Emilia Sweeney Jason Anderson Carney Badley Spellman 701 5th Avenue, Suite 3600 Seattle, WA 98104-7010	David M. Beninger Deborah L. Martin Cathy Galfano Luvera, Barnett, Brindley, Beninger 701 5th Avenue, Suite 6700 Seattle, WA 98104
Howard M. Goodfriend Law Offices of Smith Goodfriend, P.S. 1109 1st Avenue, Suite 500 Seattle, WA 98101-2988	

Originals filed with:

Court of Appeals, Division I
Clerk's Office
Seattle, WA 98101

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

Dated this 26h day of February, 2013, at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick