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No. 68594-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RYAN E. MILLER, individually,

Respondent/Cross-Appellant,

V.

PATRICK J. KENNY, individually

Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE MICHAEL RICKERT

REPLY BRIEF OF CROSS-APPELLANT MILLER

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I. INTRODUCTION

The trial court erred in allowing jury to decide whether Miller had standing to assert Kenny's claims for personal damages under Kenny's assignment of all his claims against Safeco. The trial court held on summary judgment that Miller was the real party in interest with the right to pursue "all assigned causes of action and all harm thereto" under CR 17. Safeco has neither assigned error to this order nor challenged it on appeal. The trial court's real party in interest order gave Safeco all the protection it could ask for by precluding multiple suits by Miller and Kenny on the same claim. Whether Miller and Kenny intended to split the right to sue Safeco became a moot issue. This court should hold that there could be no reversible error in Phase One because the trial court erred in allowing the jury to decide whether Miller and Kenny intended in their settlement for Miller to recover all of Kenny's damages.

II. REPLY RE STATEMENT OF THE CASE

Miller's Brief of Respondent and Cross/Appellant accurately cited to the record. In a nine-page, single-spaced "Appendix" to its reply brief, Safeco accuses Miller of misrepresenting the record. Safeco's appendix is itself misleading. For instance, Miller supported many of the challenged factual assertions with a series

of record citations. Safeco selects only one citation in the string cite, ignoring all others. Then, Safeco selectively paraphrases only a portion of that cherry-picked citation to demonstrate Miller's alleged failure to provide record support for statements that are supported by a different citation in the string cite.

Miller has attached as an Appendix to this brief the verbatim quotes of the portions of the brief challenged by Safeco, including the original record citations, along with quotes from each of those record citations.[1] In the event the court chooses to consider Safeco's Appendix, it should compare it to Respondent's Appendix to this Cross/Reply Brief.

III. REPLY ARGUMENT

A. Miller And Kenny's Intent Regarding The Scope Of The Assignment Of Kenny's Claims Became Moot Once The Trial Court Held On Summary Judgment That Miller Was The Real Party In Interest.

There could be no prejudicial error in Phase One because the matter at issue – the scope of Kenny's assignment of his claims to Miller – became moot after the trial court held that Miller was the real party in interest. Safeco concedes that this court's mandate in ***Miller v. Kenny***, 158 Wn. App. 1049, 2010 WL 4923873, No.

[1] Miller has also corrected five typographical errors in his Brief of Respondent by filing an errata with corrected pages.

64003-8-I (2010) ("***Miller I***") did not require the trial court to try the issue of Miller and Kenny's mutual intent to assign to Miller all of Kenny's claims against Safeco but argues that the trial court did not abuse its discretion in having the jury decide that issue. (Reply Br. 13-14) Safeco misses the point of Miller's cross-appeal: The real party in interest order made Phase One superfluous. This court need not address Safeco's numerous evidentiary challenges to the conduct of the Phase One trial or consider Safeco's argument that it was entitled to a parol evidence instruction because it should hold on Miller's cross-appeal that the trial court erred in allowing the jury to decide whether Miller had the right to pursue all of Kenny's damages.

1. Safeco Has Neither Assigned Error Nor Made Any Argument Challenging The Trial Court's Summary Judgment, Entered After Issuance Of The Mandate In *Miller I*, Establishing Miller As The Real Party In Interest.

Safeco in its opening brief did not assign error to the summary judgment order establishing Miller as the real party in interest. (CP 3184) The trial court held as a matter of law after return of the mandate in ***Miller I*** that Miller, as the real party in interest, had the right to "pursu[e] all assigned causes of action *and all harm thereto*." (CP 3184 (emphasis added)) Under this order,

the scope of the assignment, or as the jury was asked, whether Kenny assigned his "personal damages" to Miller (CP 6205), was no longer a relevant issue. As the trial court properly recognized in denying Safeco's motion for a new trial, the jury trial in Phase One was a superfluous exercise conducted as a "concession" to Safeco. (4/16/12 RP 36)

It is undisputed that Safeco failed to assign error to the trial court's real party in interest summary judgment order and made no argument in its opening brief that this order was erroneous. *See* RAP 10.3(a)(4) (requiring a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error."); ***Ang v. Martin***, 154 Wn.2d 477, 487, 114 P.3d 637 (2005). Because that order is dispositive of the issue tried in Phase One, Safeco's allegations of error in Phase One are as superfluous on appeal as they were in its motion for a new trial.

Citing RAP 2.4(b), Safeco contends that the real party in interest ruling "is not an unchallenged order" because the order "prejudicially affects the decision designated in the notice of appeal" – the final judgment. (Reply Br. 15 & n.1) RAP 2.4(b) provides only that this court's scope of review is sufficiently broad to

encompass review of any order prejudicially affecting the final judgment. Safeco's reliance on RAP 2.4(b) is without merit because Miller's cross-appeal has nothing to do with the *scope* of this court's review, but is based instead upon Safeco's *waiver* of review. Safeco has failed to make *any* argument that Miller is not the real party in interest under CR 17. Because Safeco failed to preserve its challenge to the real party interest order in its opening brief, that order is the law of the case. ***Nordstrom, Inc. v. Tampourlos***, 43 Wn. App. 370, 375-76, 717 P.2d 293 (1986), *rev'd on other grounds,* 107 Wn.2d 735, 733 P.2d 208 (1987).

The unchallenged real party in interest order (CP 3184) disposes of Safeco's challenge to the "the scope of the assignment" (Reply Br. 15) and "the intent of the parties regarding the 2003 covenant judgment settlement" agreement, which assigned to Miller Kenny's claims against Safeco. (Reply Br. 16) Safeco's failure to assign error to the summary judgment order, standing alone, is reason enough to hold that Phase One was superfluous.

2. Miller, As The Real Party In Interest, Has Standing To Assert All Of Kenny's Claims As A Matter of Law.

The trial court, in any event, correctly held that Miller was the real party in interest as a matter of law. While the jury rejected on

the merits Safeco's argument that Miller and Kenny did not intend Miller to pursue all of Kenny's claims against Safeco (CP 6205), resolution of the issue of Miller's and Kenny's contractual intent became irrelevant in 2009, when Kenny expressly ratified Miller's standing as the real party in interest. (Ex. 9) Where a defendant argues as Safeco does here, that the named plaintiff has not been "effectively" assigned the right to sue for all or a portion of the assignor's damages (Reply Br. 15), CR 17, by its terms, requires ratification, joinder or substitution, and prohibits dismissal. CR 17(a) ("No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest . . .").

"The rule expressly permits a reasonable time 'for ratification' . . . by a real party in interest." ***Riverview Cmty. Group v. Spencer & Livingston***, __ Wn. App.__, 295 P.3d 258 (2013), quoting CR 17(a). That is why the Supreme Court in ***Kommavongsa v. Haskell***, 149 Wn.2d 288, 317-18, 67 P.3d 1068 (2003), allowed the parties to cure an ineffective assignment even after entry of judgment and issuance of the mandate on appeal.

Ratification is precisely what occurred here. Kenny certified that "Ryan may continue to pursue all causes of action and elements of damages arising or related to those causes of action

on my behalf. This includes but is not limited to the interest reserved for personal attorney fees, credit and other personal damages." (Ex. 9) Kenny not only expressly approved and ratified Miller's right to assert all claims and damages, but also remained a party to this litigation in order to assert in his own name any and all claims to personal damages in the event the court held that Miller lacked standing to do so. (*See* CP 3105, 3107-08)

Citing Kenny's and his attorney's testimony, Safeco asserts that the 2009 ratification "did not alter . . . the covenant judgment settlement." (Reply Br. 16) That argument is also meritless. Even if there were some question about the parties' original intent in entering into the May 2003 covenant judgment settlement, the parties were free to later modify the terms of that assignment, with no additional consideration.[2] *See* ***Carlile v. Harbour Homes, Inc.***, 147 Wn. App. 193, 210, ¶ 42, 194 P.3d 280 (2008), *rev. granted in part*, 166 Wn.2d 1015 (2009), *citing* ***S. Yamamoto v. Puget Sound Lumber Co.***, 84 Wash. 411, 414, 146 P. 861 (1915). The parties'

[2] The parties executed the ratification on February 7, 2009 (Ex. 9), *after* the trial court entered its order denying Safeco's motion for summary judgment, rejecting Safeco's argument that Miller and Kenny had improperly "split" the assigned claim. (CP 2402-04) The ratification, Ex. 9, therefore, was not before the Court of Appeals in its 2010 decision affirming the denial of summary judgment, which in any event, expressly refused to consider the real party in interest issue. (Opinion at 7, n.11)

2009 ratification expressly affirmed Miller's standing as the real party in interest to assert all of Kenny's claims against Safeco for all Kenny's damages, without limitation. (Ex. 9) Safeco's challenge to the "scope of the assignment" notwithstanding Kenny's ratification of Miller as the real party in interest (Reply Br. 15) ignores the plain language of CR 17(a).

Safeco's argument about "splitting" claims also ignores CR 17's policy – to promote a just and final adjudication on behalf of all persons interested in a cause of action while protecting a defendant from multiple claims based on the same transaction. The Supreme Court answered Safeco's argument over a century ago when it recognized that the legislature by statute abolished the rigid distinctions between law and equity and authorized the joinder of "all who are united in interest . . . as plaintiffs" in cases involving partial assignment. ***Barto v. Seattle & Int'l Ry.***, 28 Wash. 179, 182, 68 P. 442 (1902). *See* RCW 4.08.080 (assignee "may, by virtue of such assignment, sue and maintain an action or actions in his or her name . . . notwithstanding the assignor may have an interest in the thing assigned."). CR 17, which replaced the statutory real party in interest rule (former RCW 4.08.010), is intended "to expedite litigation by not permitting technical or narrow

constructions to interfere with the merits of legitimate controversies." ***Beal for Martinez v. City of Seattle***, 134 Wn.2d 769, 778, 954 P.2d 237 (1998); ***Fox v. Sackman***, 22 Wn. App. 707, 709, 591 P.2d 855 (1979).

Safeco, as a stranger to the assignment agreement, had an interest in protecting itself from duplicative claims brought by the two parties to the claimed "partial" assignment, but it had no standing to challenge the terms or the validity of the assignment between Kenny and Miller, particularly where the actual parties to the assignment agreed on what it meant and were both before the court. *See* ***Old Nat. Bank of Washington v. Arneson***, 54 Wn. App. 717, 722, 776 P.2d 145, *rev. denied*, 113 Wn.2d 1019 (1989) (stranger to assignment lacks standing to challenge it); ***Barker v. Danner***, 903 S.W.2d 950, 955-56 (Mo. App. 1995) (obligor lacks standing to assert that assignment lacks consideration, that assignment was fraudulently made or incomplete). Safeco's only interest was that of any defendant who is sued under what it claims is a partial assignment – to ensure that it would not be liable to both Miller and to Kenny in multiple lawsuits arising from the same transaction. *See* ***Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange***, 4 Wn. App. 49, 51, 480 P.2d 226 (1971) (partial

assignment of chose in action valid and enforceable against defendant).

Where, as here, however, both assignor and assignee are joined in the lawsuit, CR 17 provides all the protection Safeco could ask for. ***Hardware Dealers***, 4 Wn. App. at 51 ("Equity overcomes this objection, and brings all interested parties before the court, and metes out justice to all.") (*quoting* ***Barto*** 28 Wash. at 182). *See* 6A Wright & Miller, *Fed. Prac. & Proc.* § 1545 (3rd Ed.). Under the real party in interest rule, Kenny's joinder or ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." CR 17(a). Safeco cannot possibly face multiple suits because Kenny ratified Miller's standing to sue and because *both* Kenny and Miller are parties to this action and both are equally bound by the court's final judgment under principles of res judicata. "If they are . . . joined, they are bound." *Restatement (2nd) Judgments* § 55, comment c (both assignor and assignee are bound by judgment if they are joined in an action against the obligor).

The jury properly interpreted the assignment terms of the settlement agreement to find that both Miller and Kenny intended Miller to "pursue Kenny's claims for personal emotional distress,

attorney fees, personal damage to credit and reputation, and other non-economic damages" (CP 5051) (Resp. Br. 32-37) However, as the trial court recognized in finding that the entire Phase One proceeding was an unnecessary "concession" to Safeco's "split assignment" defense, any error in Phase One may not be grounds for a new trial.

IV. CONCLUSION

This court should affirm the judgment below in all respects and award Miller his fees on appeal. In the event of a remand, however, the court should hold that the trial court's unchallenged summary judgment order established Miller as the real party in interest with standing to assert all of Kenny's damages.

Dated this 16th day of May, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 16, 2013, I arranged for service of the foregoing Reply Brief of Cross-Appellant Miller, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger _X_ U.S. Mail ___ E-Mail
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DATED at Seattle, Washington this 16th day of May, 2013.

Victoria K. Isaksen

Comparison of Safeco's Challenged Assertions with Cited Report of Proceedings, Exhibits and Clerk's Papers

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
8	Kenny had his own liability insurance with State Farm with liability limits of $100,000 per person and $300,000 per accident. (12/6 RP 184; Ex. 63)	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.	Ex. 63: "Umbrella limits are $1 million, underlying 500, and State Farm 100/300." 12/6 RP 184: Bowman confirms Ex. 63
9	Safeco's $500,000 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. (Ex. 71)	Safeco Claims notes indicate State Farm policy is excess to Safeco policy. No discussion of UIM or Farmers.	Ex. 71: Safeco auto and umbrella policies come first, then State Farm's policy.
9-10	Bowman had talked with the RCMP investigating officer, who confirmed that Kenny was 100% responsible under any scenario, and that there was no evidence of drug or alcohol use by any of the four friends. (12/6 RP 153; 12/8 RP 220; Ex. 32)	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.	12/6 RP 153 (Bowman): Q: ". . . no drinking involved, no drugs . . .? A: . . . that would be correct." 12/8 RP 220 (Kenny): "I was a hundred percent responsible." Ex. 32: RCMP told Bowman "Pat Kenny would be at fault."
10	Safeco's adjusters evaluate claims not just to determine liability, but also to set reserves, by assessing the "most probable outcome" of a claim. (Exs. ~~194~~196, 212; 12/5 RP 187-88, 191; 12/6 RP 191)[1]	"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.	*See errata:* Ex. 196: "Safeco's philosophy on case reserving is, simply, 'Most Probable Outcome.'" Ex. 212: " make a priority of reserving claims to its <u>most probable outcome."</u>

[1] Strikeouts and underlined citations refer to corrections that are reflected in respondent's errata.

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
10	Each time Safeco determined that the most probable outcome left Kenny underinsured and required Safeco to pay its liability and UIM limits. (Ex. 186; 12/6 RP 136-37)	Full limits were posted for liability, umbrella and UIM on reserves throughout the claim.	Ex. 186 (Interrogatory response): listing 22 dates on which Safeco reviewed reserves. 12/6 RP 136-37 (Smith): "The reserves were set at the limits for the entire life of the claim."
11	Another gave adjusters increased pay for reducing payments to injured claimants by 5%. (12/8 RP 134-36)	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.	12/8 RP 134 (Hildebrand): the "target was "a reduction of 5 percent based upon prior year's audit score." 12/8 RP 135 (Hildebrand): "We paid too much."
11	Each Safeco employee responsible for the claims against Kenny had to meet their performance goals to be eligible for these bonuses. (12/8 RP 177-78, 181-83; 12/12 RP 90-92; CP 6711)	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.	CP 6711 (Hildebrand): "lost economic opportunity" bonus paid "based upon a national audit team's review of a number of your closed files." 12/8 RP 177: In January 2002, bonus program "linked employee performance to incentive awards" 12/8 RP 181: turnaround bonus paid in May 2002
		Every single Safeco employee was eligible for the turnaround bonus that allowed the employees to buy stock at $33 per share in 2001.	12/12 RP 90 (Bowman): "Q: . . . are you now qualifying for the bonus incentive . . . ? A: I qualified for it before . . .

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
11	But because the accident occurred in Canada, it explored the possibility of asserting a seat belt defense under Canadian law, which might reduce the claimants' recovery by at most a third, but could also significantly increase Safeco's UIM and PIP limits. (12/6 RP 100, 147-48; 12/~~7~~6 RP 153; Ex. 31)	Safeco adjuster Kim Smith testified that IME's were not conducted, and Safeco received no written IME reports.	Ex. 31: "if we can prove [seat belt defense] we can only get an offset of 33% max." 12/6 RP 100: acknowledging costs and benefits of Canadian law 12/6 RP 147: seat belt defense under Canadian law. *See errata:* 12/6 RP 153: experts needed for seat belt defense
12	Safeco never advised Ashley or Ryan that they had potential UIM claims under the policy (12/6 RP 33, 197)	Coverage was never accepted for $100,000 for either Ashley or Ryan under the UMBI coverage.	12/6 RP 33 (Hanson): Safeco should have been "conducting a timely investigation and advising Ashley and Ryan if they are or are not qualified for underinsured motorist" 12/6 RP 197 (Smith): Safeco never let Ryan or Ashley know "if they do or don't have UIM coverage under Cassie's policy."
13	The Petersons thought that disclosing the amount of the policy would help Ryan resolve his claim. But they felt constrained by Safeco's instruction to keep their umbrella limits secret, concerned that disclosing this information without Safeco's permission would jeopardize their coverage. (12/13 RP 31-32; 12/8 RP 200)	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.	12/8 RP 200 (M. Peterson): Felt it was wrong not to disclose limits to Miller, "But I went along with what they were requesting from me, because I didn't want to step on any toes" 12/13 RP 31-32: "They didn't want it out to hide that fact and that is one of the reasons it never got out forthwith."

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
13		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.	12/8 RP 200: Q: "you felt everything should have been told and put on the table, and that you and your wife should have been allowed to say what limits were; correct? A: Correct."
13	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. (12/9 RP 168, 182)	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.	12/9 RP 168 (Bowman): "I did some pre-sell on the structured settlement." 12/9 RP 182: Bowman "did some presell of structured settlement . . ."
15	Within several months, Safeco had the reports from the UW neuropsych rehabilitation program that Ryan had attended. (Exs. 94, 96, 407; 12/6 RP 236)	Bowman disagreed that the letter from Mr. Brindley included the most recent evaluation from the University of Washington regarding Mr. Miller.	Ex. 94: Cover letter enclosing "most recent evaluation . . . from the University of Washington." Ex. 407: Safeco summary of medical records including those from "U of W Brain." 12/6 RP 236: Acknowledging Brindley sent Safeco "most recent evaluation received from the University of Washington regarding Mr. Miller."

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
15-16	Safeco still made no affirmative efforts to settle in summer 2002 after it received demands and accompanying documentation from all three claimants, including a demand from Cassie Peterson of $350,000 (well within her $500,000 UIM limits), Ryan Miller's limits demand, which expired at the end of July 2002, and Ashley Bethard's proposal for a global settlement that could have fully protected its insured Kenny. (Exs. 117, 125, 127, 130, 134; 12/7 RP 81-82)	Bowman wrote Mr. Brindley in July 2002 to say once he's had a chance to review all packages (he had not yet received Barlow's settlement package), he would like to do a mediation.	Exs. 117, 125 (Peterson and Miller demands); 127 (Bowman solicits Bethards' demand); 130 (Miller demand expires August 1, 2002); 134 (Bethards' demand for tender of limits to all claimants to divide as they see fit). 12/7 RP 81-82: Safeco unwilling to put its $1.5 million limits on the table on July 24, 2002.
16	Ashley's lawyer recognized that the cumulative demands already exceeded limits, and asked Safeco (as its own standards of care suggested) to pay its limits into 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. (12/7 RP 213-14; 12/8 RP 218; 12/9 RP 84-85; 12/5 RP 160; Ex. 224)	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.	12/7 RP 213-14: Smith acknowledges that Barlow suggested that Safeco "put the money up" but Safeco "did not have enough information to put the money on the table."
		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.	Ex. 224; 12/5 RP 160: Q: "Option A is the insurance company should offer the policy limits to all the claimants in exchange for a settlement and release of its insured if it evaluates one or more claims as at or in excess of limits. Do you agree? A: Yes."
		Patrick Kenny testified he didn't have any interest in pursuing the bad faith claims or other claims individually. He just wanted	12/8 RP 218 (Kenny): "I wanted my friends to get paid. I wanted to move on."

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
16		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.	
		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."	12/9 RP 84-85 (Peterson): Safeco "knew what was available to us a month after the accident, and . . . if the three of us would have known that, maybe we wouldn't have even needed lawyers."
18	In truth, and as its witnesses acknowledged, Safeco was not interested in a global mediation to obtain a joint release of its insured Patrick Kenny if it meant tendering limits. (12/13 RP 121, 222-24; 12/7 RP 97-98)	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.	12/13 RP 121: Safeco rejected global mediation in August and September 2002 "until they had all the medicals" 12/13 RP 222-23: "As of October 23rd, 2002, with the information we had in the file, we did not believe that the value of the three claims was at or in excess of the $1.5 million limits." 12/7 RP 98: Safeco "simply didn't have enough information" in August 2002 to make a settlement offer.
19	Instead, Safeco retained a neuropsychiatric expert to review Ashley's and Ryan's medical records, using the same medical information	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	12/7 RP 139-40 (Smith): Doesn't recall if Safeco got any additional information between August 2002 and date of Powell's review.

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
19	that had been provided eight months earlier in the summer of 2002. (12/6 RP 99-101; 12/7 RP 139-40; 12/12 RP 37)	did not recall if they got anything between that August date and his review.	
		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.	12/12 RP 37 (Bowman): "[I]t did take us quite a while . . . to locate Dr. Powell."
		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.	12/6 RP 101 (Dietz): Safeco hired no experts for three years.
19	Facing what was sure to be an excess judgment at the imminent trial, Kenny, on Norris' advice, had considered bankruptcy and hired at his own expense attorney Jan Peterson to negotiate a global settlement. (11/30 RP 54-55; 12/12 RP 118, 170-71)	Mr. Beninger and Safeco witness Bowman debate whether Safeco got a release for Patrick Kenny when everybody agreed not to pursue Patrick.	11/30 RP 54: Kenny hired counsel because "[t]here was a trial looming . . . and Safeco wasn't settling the case." 12/12 RP 171 (Stardgarter): "any time an insured is going to enter into a consent judgment, it is in their best interest to get personal counsel involved." 12/12 RP 118 (Bowman): Kenny "chose[] to assign his bad faith rights."

Page	Challenged Statement	What Safeco Claims Record Says	What Record Actually Says
20	Safeco now stipulated that Ryan's damages were $3.45 million (more than two times his original settlement demand), that Ashley's were $2.1 million, and that Cassie's were at least $400,000, resulting in a reasonable total covenant judgment of $5.95 million. Safeco also agreed that the settlement was not the result of fraud or collusion. (CP 2735-36; 12/7 RP 103)	"Stipulated Order Re: Reasonableness of Settlements" "does not waive... any defenses Safeco may raise." No discussion of fraud or collusion.	CP 2736: "Safeco relinquishes its right to contest the reasonableness of the settlement amounts agreed to in paragraph A above." 12/7 RP 103: "Q: Safeco agreed that the value of these things was $6 million, at least . . .; Approved, negotiated, evaluated by Safeco; right? . . . A: Yes."
21	Under the settlement agreement, interest on the unpaid damages accrued at the statutory rate of 12% compounded annually. (Exs. 1, 15)	"Stipulated Order Re: Reasonableness of Settlements" does not include interest rate.	Ex:1 at p.6: "the parties agree that 12% statutory rate of interest shall accrue and compound annually on the unpaid damages . . ."
22	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~~ 3033-35)	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.	*See errata.* CP 3033-35: Amended complaint alleging claims against Safeco.
23	When Miller sought to have Brindley testify without waiving the privilege, Safeco successfully excluded him as a witness (CP ~~4984~~ 4964)	CP 4984 is a Jury Instruction on proximate cause.	*See errata.* CP 4964: Order Excluding Ralph Brindley From Testifying.

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25	In what it characterized as a "concession" to Safeco (4/16/12 RP 36), the trial court nonetheless granted Safeco's motion to bifurcate and to have the jury resolve in an initial trial the intent of the parties in assigning Kenny's claims to Miller. (11/22 RP 54-55)	The court suggested bifurcation; Safeco had moved for bifurcation on a different issue long before the trial, which motion had been denied.	4/16/12 RP 36: "Phase One really was a concession to Safeco." 11/22 RP 54-55: "Miller is the real party at interest. . . . The Court of Appeals, I will take their verbiage, the last sentence, that there are material issues of fact . . . so that issue has to be resolved."
39	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. (CP 455; 12/5 RP 172-78; 12/12 RP 62-66)	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.	CP 455: "Q: If there wasn't a waiver signed for the differential when they switched from the American States policy at $500-/$500- and . . . there was no waiver for the differential that dropped the UIM down to $100-, then what? A: Then in my mind . . . they would have the higher limit because there wasn't a signed waiver."
		After much debate, the witness, Jamie Bowman, the adjuster on the liability claim, insisted he thought they had a valid waiver.	12/5 RP 178: "Q: You know that if you're going from just – assuming it's the same policy, Safeco policy, and you are moving from one policy period to the next policy period, and you went from five hundred in UIM down to one hundred, you would need a new waiver to do that; right? A. I would expect that if there was a reduction in the limits, that there would be a waiver in place supporting the reduction. Q. Because otherwise, the policy would need to be reformed so it's in the same

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			amount as the liability limits, if there is not a valid waiver; correct? A. Correct." 12/12 RP 63: "[A]t the time I hadn't seen this [declarations page]. I checked the electronics system. We had a waiver from 1997, which the agent indicated . . . was the current waiver on file, and we accepted what the agent had to tell us." . . . . 12/12 RP 65-66: . . . . if we don't have a waiver, and they have, say, five hundred and no UIM, if we don't have a waiver, we will raise it up immediately. It's no question. It's very well known in Washington. You don't have a written rejection, you have to lift it up.
43	Safeco obtained in discovery all documents between Brindley, Safeco and the other claimants. Safeco deposed Ryan Miller and his father without restriction. (CP 6271; 7/20/07 RP 7-8)	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.	CP 6271: "Safeco deposed to completion Mr. Miller and Ryan Miller, the actual party. Safeco never requested the depositions of Jan Peterson or Pat Kenny." 7/20/07 RP 7: "Judge Needy: Why does it make his state of mind relevant . . . when you've got all that information through your adjusters . . . ?"

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45	As Safeco instructs its adjusters, and its supervisor acknowledged, "[t]he Insurer controls if there is bad faith." There can be "no set up." (Ex. 226; 12/7 RP 227)	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.	Ex. 226: "Insurer controls if there is bad faith, no set up." 12/7 RP 227 (Smith): "an insurance company controls its own actions."
47	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. (CP 6271; 7/20/07 RP 7-8).	Parker discusses posturing by Brindley that he cannot know without deposing Brindley.	CP 6271: "Miller produced all external correspondence and documents to Safeco." 7/20/07 RP 7 (Judge Needy): "you've got all that information through your adjusters . . ."
51	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. (12/6 RP 77-79; 12/8 RP 127-36, 164-72, 177-83; CP 6712-15)	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].	12/6 RP 77-79 (Dietz): cost cutting incentive program "creates a conflict where there is pressure on you to pay less, and you have a financial stake in it."
		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 th[a]n 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.	CP 6713 (Hildebrand): Safeco adopted "lost economic opportunity" program because "people were getting arguably a lot more than what they were fairly entitled to." 12/8 RP 128-29 (Hildebrand): "performance-based incentive bonuses." Describes "lost economic opportunity" as "based upon a national audit team's review of a number of your closed files."

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		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.	12/8 RP 165 (Tracy): "Part of my goals are linked to trying to reduce the amount of legal expense." 12/8 RP 177 (Tracy): In 2002, bonus program changed and linked employee performance to incentive awards and recognition bonuses.
		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	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. (12/8 RP 180-83)	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.	12/8 RP 180-81 (Tracy): "John Hildebrand and others are now in the leadership performance plan, and . . . at the time the claim was adjusted they were in the success sharing plan."
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	[Beninger impeaches Tracy with incorrect answers on 12/8 RP 174-176.]	4/16/12 RP 43: "I don't think she was – her testimony was collateral, to the point, if anything, I think the plaintiffs kind of understated the Quantum Leap position . . ."

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	impeachment purposes, but as evidence of Safeco's motive to ignore its duties of good faith. (12/8 RP 140-41)		12/8 RP 140-41: "The Court: "[T]here needs to be a showing why that is pertinent, relevant . . . . . . Mr. Beninger: . . . [Tracy] had answers that included Hildebrand, herself, Smith all involved in getting bonuses during the relevant time period here."
58-59	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. (12/6 RP 54-58; Exs. 222-226)	Mr. Dietz testified he provided Deborah Senn with a copy of the documents he, Dietz, put together.	12/6 RP 56 (Dietz): "I talked to her [Senn] about these. She's adopted these. I adopt them." Ex. 222: "Principles of Insurance" Ex. 223: "Standards for Good Faith, Fair Dealing & Reasonable Care" Ex. 224: "Special Standards for Handling Multiple Claims" Ex. 225: "Additional Standards for Handling UIM Claims" Ex. 226: "Safeco's 'Ten Commandment[]s of Bad Faith'"
59	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	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.	12/5 RP 118 (Hanson): "Yes, I would agree [they are part of the standards for good faith, fair dealing, and reasonable claims handling]" 12/5 RP 136 (Hanson): "I signed it [additional standards for handling UIM claims]"

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	insurance code. (*See, e.g.*, Exs.192, 200, 212, 218, 222, 223-26; 12/5 RP 118, 136; 12/7 RP 12, 54; 12/12 RP 77)		12/7 RP 12 (Smith): "Q: claims people must always make a priority of reserving claims to its most probable outcome. A: I would agree with that." 12/7 RP 54: "Q: . . . And so you were putting great effort and wisdom into helping determine the accuracy of these reserves each and every time they were being done; right? A: Great effort, wisdom -- I hope so." 12/12 RP 77: "Q: . . . do you agree those are the standards for reasonable care, good faith, and fair dealing in Washington? A: Yeah . . . ."
59	Safeco acknowledges that the trial court did not even admit into evidence the version of the "Principles of Insurance," that bore the signature of expert Senn. (Ex. 214; 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.	12/6 RP 62: "The Court: . . . I will sanitize it for you, and then you can use the [Principles of Insurance]"
60	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." (12/5 RP ~~135~~ 139)	Mr. Hanson agrees to sign every page of Standards and principles with which he agrees. [Court statement found on 12/5 RP 139]	*See errata* 12/5 RP 139: "The Court: I don't know what it is, because it went up there and off so quickly."

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60-61	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. (11/22 RP 86)	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	11/22 RP 86 (Court's ruling on Safeco's motion in limine to prevent "golden rule" or "send a message" arguments): "We will talk about that when we get there and see the instruction." . . . (RULING DEFERRED.)"
66	With Safeco's consent, the trial court corrected that omission before instructing the jury. (12/15 RP 37-38)	The court corrected to include "past and future economic damages."	12/15 RP 37 (Argument on damages Instruction No. 30): "The Court: Ms. Sweeney took out a whole bunch of stuff. Ms. Sweeney: I apologize."
75-76	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	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.	CP 995: "Plaintiff's motion is GRANTED. In accordance with the settlement contract, interest on the unpaid damages accrue at 12% compounded annually, from May 20, 2003."

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	judgment at 12% interest compounded annually, from May 20, 2003 under Kenny's 2003 settlement agreement with Miller, Peterson and Bethards. (CP 995; 2/15/08 RP 13)	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 -- yeah. But that's the -- paragraph 3 is the multiplier issue? MR. PALMER: 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	2/15/08 RP 13: "Judge Rickert: I agree. *Jackson* applies."