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NO: 75633-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant / Cross-Respondent,

vs.

MYONG SUK DAY,
Respondent.

RESPONSE TO PETITION FOR REVIEW AND CROSS PETITION FOR REVIEW

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I. Identity of Respondent / Cross-Petitioner

The Respondent / Cross-Petitioner is Mutual of Enumclaw Insurance Company ("MOE"), which was the Plaintiff in the trial court and the Appellant / Cross-Respondent in the Court of Appeals.

II. Summary of Why Stop In's Petition should be Denied

In its Petition for Review, Stop In Grocery ("SIG"), and its sole-proprietor Ms. Day, attempt to frame the court of appeals' opinion as a radical departure from existing law. However the opinion is the correct rejection of claims, which are, themselves, radically outside the carefully established law of coverage by estoppel. Three illustrations of this fact: 1) it has been *undisputed* since SIG submitted its claim that the policy *unambiguously* excludes any coverage for the loss[1]; 2) no case in any jurisdiction featured an insured and *her attorney* moving to set aside a final dismissal with prejudice *in her favor* to replace it with a catastrophic judgment *against herself* in order to "prove" her insurer had harmed her; 3) in no case has an insured been entirely released of all liability to her tort victim, through a negotiated, paid, settlement, and subsequently alleged that the insurer owed *her* the amount by which she had injured *her victims*. This rare case revolves around an insured seeking enormous personal

[1] SIG's repeated, self-serving allegations of policy reformation in its Petition are not, nor have ever been, more than empty words; the trial court rejected them, court of appeals affirmed, and SIG does not seek review.

profit from harm she caused to others, while she pays them *nothing*.

Here, despite SIG's herculean efforts to manufacture a coverage by estoppel scenario, the highly atypical facts of this case cannot be alchemized into a windfall judgment through the calculated application of terms of art: "presumed harm" and "covenant judgment." Ultimately, those empty phrases are the entirety of SIG's estoppel case. All of the pillars that support coverage by estoppel jurisprudence fall by the wayside as SIG attempts to muscle its way past function to enrich itself through form. It is an elaborate but inauthentic façade, correctly rejected by the court of appeals. This Court should deny SIG's Petition for Review.

III. Restatement of the Case

In 2003, when Day purchased SIG, she bought a MOE liability insurance policy through her agent, Michael Huh. CP 3, 7. That policy had an express and unambiguous exclusion for any and all liquor liability. The policy was renewed without liquor liability for the next six years.

In May 2008, a teenager named David Pavolka successfully bought beer at SIG, the insured in this case. CP 131-139. He shared it with his friends, they went drag racing, lost control and seriously injured two pedestrians: Dawn Smith and William Lee. *Id*. In 2009, Smith and Lee sued the parties responsible for their injuries. *Id*.

When SIG received the Lee and Smith Complaint, Day sent it to

her insurance agent, Michael Huh in September 2009. RP 11/18/14 p. 132. There is no dispute that SIG's policy had an exclusion for liquor liability, negating any coverage for the allegations against SIG. CP 7. When Huh received the Complaint, he remembered that SIG had not purchase liquor coverage. RP 12/2/14, p. 104. Day claimed he told her she "should" have coverage. CP 384. The claim was assigned to MOE claims examiner Linda Johnston, who noted in the file that Day reported her agent said there "should" be coverage. RP 11/25/14, p. 90-91. Ms. Johnston was concerned enough about Day's claim that she ordered the underwriting file to ensure the policy had issued per the application. CP 1535. She found that it had. CP 385. She then called agent Huh who wrote the policy. *Id.*

Huh remembered this transaction because it was unusual that a grocery insured would decline liquor coverage. CP 391-392, RP 12/2/14, p. 99-100. Ms. Johnston noted Huh's memory of the events, but because of Day's contention there "should be coverage," MOE provided the only benefit then at issue – a full legal defense. RP 11/25/14 p. 91. On October 14, 2009, MOE appointed attorney Clement to defend, but stated that the liquor exclusion excluded coverage for any judgment. CP 852. Clement defended SIG vigorously until the case was settled. RP 12/24/14 p. 61-62. There is no claim the defense was improper in *any way*.

MOE filed this declaratory judgment action on February 2, 2010.

CP 1. When SIG filed its Answer on April 13, 2010, it admitted that there was no coverage under the policy. CP 6. SIG crystalized its claim that there "should be coverage" into the theory of "reformation" based on alleged mutual mistake. *Id*. A year after the declaratory action was filed, SIG amended its Answer to allege bad faith against MOE. CP 194.

In June 2011, the case settled on the following terms: MOE paid $125,000 on behalf of Day; Day agreed Smith and Lee could enter judgment against her for $8 million, but they covenanted not to execute it against any asset other than SIG's claim *against agent Huh*, which Day assigned to them. CP 304. She did not assign any claims against MOE – Smith and Lee did not want them. RP 11-6-14, p. 22. Day paid nothing to extinguish her liability. CP 304. MOE agreed that the amount was reasonable. CP 936. Day agreed that it had *nothing* to do with MOE[2].

A crucial provision of the June 2011 settlement was the following:

> As soon as the assigned claims have concluded (whether by settlement, final judgment, or exhaustion of all appeals and the time for further action has expired), Day may enter a full satisfaction of judgment signed by Plaintiffs [Lee & Smith] in favor of Day, which full satisfaction shall be signed by Plaintiffs when this settlement is executed. ***The full satisfaction is to be entered regardless of the amount of any judgment award or settlement accepted and regardless of whether the result is less than the judgment agreed in this settlement.***

[2] Day's attorney confirmed during the negotiations: "Any reasonableness hearing the plaintiffs bring will be adverse to Michael Huh and his insurer, not MOE." CP 270.

CP 305 (emphasis added).

Armed with this assignment, Lee and Smith settled with Huh, without entering judgments against Day, for $600,000. CP 963, 1788. Lee and Smith dismissed their assigned claims against Huh. CP 226. Instead of entering judgment against Day (there was no need), Smith and Lee dismissed *all* of their claims *with prejudice* on October 12, 2011. CP 622. As of that date, the case against Day was over and her liability had been compromised, settled, paid, and extinguished. *Id. Nothing* over the ensuing six years has had anything to do with Day's liability to Smith or Lee, because none remained. Since that time, the history of this case has been about Day working to turn Smith and Lee's loss into her personal profit.

Apropos of this goal, Day and her attorney perceived that it was important that she have "judgment" entered against herself. She first brought a Motion to set aside the Order of Dismissal with Prejudice in her favor. CP 625, 704. Her lawyer declared he would hold Smith and Lee's "feet to the fire" to make them enter judgment *against his own client*. CP 646. He did so (CP 801), they did so, and over MOE's objection, the court entered the pre-satisfied, meaningless judgments[3]. CP 1045, 1048.

At trial, Day focused entirely on whether MOE's alleged "delay"

[3] MOE appealed the trial court's entry of those judgments on the basis that the controversy between Day and Smith and Lee had terminated, and was thus legally moot. The court of appeals did not reach that issue.

in investigating her claim to coverage-through-reformation caused her anxiety. The court sharply limited evidence, offered by MOE, of how the case settled – by MOE voluntarily paying $125,000, Day paying nothing, and Smith and Lee's claims being resolved. RP 11/17/14, p. 8. MOE objected that if the jury's verdict would be used as a basis for coverage by estoppel, it should be entitled to present real evidence that nothing of which Day complained had anything to do with her ultimate (lack of) liability. RP 11/13/14, p. 18-21.

At the end of the trial, the court also refused to give instructions on the legal standards that apply to a reformation claim - the very standards that governed MOE's evaluation of the claim as it was being handled: namely that reformation requires a *mutual* mistake, and it is the *reformer's* burden to prove it by clear and convincing evidence. However, the court allowed Day's claims handling expert to assert an incorrect and much lower standard, based on "agent error." RP 12/3/14 p. 19, 54, 57-58, 62, 11/24/14, p. 146-147.

Based on limited evidence and deficient instructions on reformation, the jury determined that MOE had failed to investigate SIG's reformation claim in good faith, and awarded $300,000 purely for emotional distress. CP 1675. Day moved for a determination that the verdict created a presumption that the judgments she had entered against

herself were caused by bad faith, and that MOE was liable to her for their face value: $10,160,366.14. CP 1766. That was the reasonable amount to compensate *her victims*. It is not an amount she will ever have to pay them, because she has a complete release. However, the trial court used Lee and Smith's damages as a proxy for SIG's damages, and awarded that amount. On Day's motion (CP 1956), the court also trebled $300,000 of the award under the Insurance Fair Conduct Act. CP 2127.

Post-verdict the trial court addressed SIG's reformation argument. The court applied the correct "clear and convincing evidence" standard, ruled that SIG had failed to prove reformation; there was never any liquor coverage at all – no duty to defend, and no duty to indemnify. CP 2153.

The Court of Appeals reversed the portion of the trial court's judgment based on coverage by estoppel, but affirmed the portion based on the jury's verdict for emotional distress, and affirmed the application of the Insurance Fair Conduct Act multiplier to that figure. The court of appeals affirmed the trial court's non-reformation of the policy.

IV. Argument Why Stop-In's Petition Should be Denied

SIG presents two arguments why this Court should accept review. First, that the court of appeals improperly failed to apply the "bad faith

trifecta": the *Tank*[4] "equal consideration" mandate, the *Butler*[5] bad faith presumption of harm, and the use of *Butler-Besel*[6] "coverage by estoppel" to measure harm. SIG's second argument is that the court of appeals erred by concluding that MOE had rebutted the presumption of harm related to the "judgment" against Day. MOE addresses each argument below.

1. The Opinion Assumed SIG Won the Bad Faith Trifecta Argument

The court of appeals assumed without deciding that a presumption of harm *did* arise, and the remedy *would be* coverage by estoppel if that presumption went unrebutted. "Other issues are presented, but even assuming that a presumption of harm applies here, such a presumption is rebutted, precluding any application of coverage by estoppel. . . Because we reverse the judgment based on coverage by estoppel, we need not address MOE's additional arguments related to coverage by estoppel." *Opinion at 12*. Nowhere does SIG's trifecta dissertation identify an aspect of the opinion that *violates* any trifecta principle. The opinion does not conflict with any of SIG's *Tank, Butler-Besel* estoppel arguments.

2. The Court of Appeals Correctly Determined that MOE Rebutted the Presumption of Harm and Damages in the Amount of the Settlement.

SIG's second argument is that the opinion erred in holding that it

[4] *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133(1986).
[5] *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992).
[6] *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002).

suffered no harm from the settlement of the Smith and Lee claims. SIG's Petition identifies three species of "harm," which it claims would justify the imposition of coverage by estoppel. One is Day's emotional distress related to MOE's investigation of the reformation issue. Another is its "loss" of its claims against its agent. Finally, SIG reiterates that MOE harmed it in the amount of the judgments SIG entered against itself.

a. Emotional Distress Harm does Not Implicate Estoppel

The first "harm" - emotional distress - was entirely compensated by the jury, and resulted in a $300,000 verdict. The fact the trial court *prohibited* the jury from hearing evidence of how the case against SIG was settled and resolved is proof positive that there was never any connection between the verdict and SIG's settlement with Smith and Lee. However, citing *Bird v. Best Plumbing Grp., LLC,* 175 Wn.2d 756, 287 P.3d 551 (2012), Day argues that if the insurer cannot prove the insured suffered *no* harm, then harm is conclusively measured by the value of the insured's settlement. *Petition at 18*. SIG's argument that emotional distress leads to estoppel is unsound, with absurd results. Even the insurer's full payment of a tort "judgment" to the tort victim could not "rebut harm" under this analysis. There are cases describing coverage by estoppel as the consequence of the insurer's failure to rebut "harm," but in every one of them, including all cited by SIG, the *only* harm at issue *is the covenant*

judgment. SIG's "any harm" premise was rejected in *Werlinger v. Clarendon Nat'l Ins. Co.,* 129 Wn. App. 804, 120 P.3d 593(2005), *rev. den*. 157 Wn.2d 1004, 136 P.3d 759 (2006). The court held that the insured would have been entitled to any emotional distress damages it could prove, but was *not* entitled to coverage by estoppel because the bankruptcy laws prevented the insured's liability, eliminating harm[7]. Here, as in *Werlinger*, the issues of emotional distress related to claims handling and the imposition of coverage by estoppel are entirely isolated. The "harms" are distinct, and the opinion correctly rejected this approach.

b. "Giving up a claim against the agent" was Not Harm.

SIG also claims the court of appeals erred in failing to recognize harm in giving up the "value" of its assigned claim against its agent. Its theory is that this was an asset of SIG's, worth $600,000. This theory is unsound. This was an indemnification "asset" without any independent value. It existed only because of her liability to Smith and Lee, and pursuant to the settlement agreement, *exactly* offset that liability. Additionally, SIG claims Huh and MOE were tortfeasors, jointly and severally liable to indemnify it for the harm caused to Smith and Lee. SIG is a plaintiff demanding reimbursement *for itself* from Tortfeasor A for a

[7] Coincidentally, in *Werlinger* the court also declined to reach the issue of whether an estoppel remedy was appropriate, skipping to the final analysis that any presumption of harm that might have arisen was rebutted (and regardless of emotional distress). *Id*.

payment *made by* Tortfeasor B to the parties Day injured. Again, Day is attempting to personally profit from the harm she caused others. The court of appeals correctly rejected the premise the assignment was "harm" to SIG. But even if it were, it would have been quantifiable harm, isolated in the same way as emotional distress damages, unrelated to any "harm" done by the judgments, and insufficient to implicate coverage by estoppel.

c. SIG was not harmed by the "judgments" it entered against itself.

The insured's damages in a bad faith case have *never* been measured by how much the insured damaged a third party; they are measured by the insured's *debt* – legal obligation to pay – the tort victim. Insurers have argued, unsuccessfully, that the covenant not to execute in a traditional covenant judgment releases the insured from that liability, and thus eliminates harm. Courts have consistently rejected that premise:

> This type of settlement agreement. . . is simply an agreement to seek recovery only from a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured.
>
> *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d at 765.

SIG is attempting to frame its settlement agreement as a "traditional" covenant judgment, and MOE as just another insurer repeating the argument that the covenant not to execute eliminates harm. But that is emphatically *not* what MOE is arguing, nor was it the holding of the court of appeals. SIG's protection from liability in this case comes

not from any covenant, but from the *discharge* of liability through negotiation, settlement, and payment to Smith and Lee, all occurring before SIG entered meaningless, pre-satisfied judgments against itself.

The only case in which an insured sought coverage by estoppel for a covenant judgment, where the insured's liability had been legally discharged rather than limited to a particular asset, was *Werlinger v. Clarendon Nat'l Ins. Co.,* 129 Wn. App. 804. In that case, the bankruptcy discharge rebutted the presumption of harm. Here, the settlement agreement grants Day absolute absolution by providing for satisfaction of the judgments. Just as was true for Werlinger's estate, it is legally impossible that Day's victims will ever be able pursue *any right* under the judgments. *Werlinger* negates the possibility that Day was harmed by the judgments she had entered against herself.

SIG argues that *Werlinger* is distinguishable based on the timing of the discharge - that the insured in *Werlinger* was protected from liability from the outset, whereas SIG's liability was not ultimately discharged until Smith and Lee settled with Huh (two years before SIG entered the judgments against itself). But this is a distinction without a difference. If the "specter" of potential liability is a compensable harm, it is because specters can cause emotional distress; specters have nothing to do with whether a judgment can be executed against an insurance asset, or whether

it has been entirely discharged. The "harm" of a covenant judgment is the liability it represents, not the fear of liability in the future. When the liability is gone, so too is that "harm." *Id*. The court of appeals correctly ruled that settlement, payment and satisfaction of SIG's liability to Smith and Lee rebutted any presumption that might have arisen.

V. Issues Presented in Cross Petition

1. Is an insurance company that is charged with bad faith in investigating a claim for reformation of an insured's policy entitled to jury instructions that fairly characterize the nature of a reformation claim? (Yes.) RAP 13.4(b)(4).

2. Do "actual damages" under the Insurance Fair Conduct Act, RCW 48.30.015, include damages for emotional distress? (No.) RAP 13.4(b)(1)

3. As a conditional Cross-Petition issue, in the event that the Court grants SIG's Petition for Review, does bad faith that does not touch on the insured's defense raise a presumption of harm and coverage by estoppel? (No.) And if so, is the insurer entitled to present evidence rebutting the presumption of harm to the finder of fact? (Yes.) RAP 13.4(b)(4).

VI. Argument in Support of Cross Petition

1. A jury evaluating an insurer's investigation of a reformation claim should be instructed on the law of reformation.

SIG's entire claim is based on the contention that its policy provided liquor coverage, in spite of the written exclusion, because Day alleges her agent told her so. The jury was charged with determining whether MOE had investigated this issue correctly, and in good faith.

Washington has tightly regulated this issue by statute and case law. Insurance policies must be in writing, and only in writing. RCW 48.18.190 provides, "No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy." The *only* basis for altering the content of a policy of insurance is reformation. "Reformation is only appropriate when there is clear, cogent and convincing evidence that the mutual intention of the parties is not properly reflected in the policy." *Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am.*, 189 Wash. 329, 339,65 P.2d 689, 693 (1937)[8]. And that heavy burden is on the party urging reformation. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*,148 Wn.2d 654,669, 63 P.3d 125 (2003).

Here, the trial court allowed SIG's expert to give extensive testimony that the question MOE *should have been investigating* was whether Huh had binding authority, and whether there had been "agent error." MOE proposed a number of instructions that elucidated the true

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[8] It is not clear that the doctrine of reformation could have survived the 1947 enactment of RCW 48.18.190, although there are no cases that address of the applicability of the statute to reformation claims.

nature of a reformation claim and the law of agent binding authority, but the trial court refused to give them[9]. Without these, the jury was unaware of the actual standards governing the question MOE was investigating.

The trial court here allowed the jury to judge MOE's investigation of the insured's reformation claim according to the standards of any other coverage investigation. No court has ever placed the burden of investigating and proving an insured's reformation claim on the insurer. The real legal standards are remarkably different. Reformation is a legal cause of action belonging to the insured, who is required to prove it by clear, cogent and convincing evidence of *mutual* mistake. When Day told MOE that her agent said she should have coverage, MOE immediately got in touch with that agent, who confirmed he had *not* made a mistake when he ordered the policy without liquor liability coverage. CP 385. MOE's decision to defend was an extreme example of resolving the defense obligation in favor of the insured, but it should not have resulted in shifting to it the burden of *dis*proving the insured's reformation claim.

The effect of the appellate court's affirmance of the trial court's decisions dramatically and incorrectly reshapes the scope of the insurers' obligations under Washington law. By including reformation claims in the insurer's investigation obligations, and requiring insurers to resolve doubts

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[9] See Appendix A for a list of the proposed, rejected instructions.

about them in the insured's favor, the court has eviscerated the intention of RCW 48.18.190, by which everyone is entitled to rely on the policy as actually written. It also undoes the well-established burden, on the party proposing reformation, of proving mutual mistake by clear cogent and convincing evidence. It establishes a regime under which any insured who professes having heard there "should be coverage" for "this kind of loss," despite clear language in the policy, becomes entitled to coverage unless and until the insurer can *disprove* reformation. No matter how presented, reformation should remain the burden of the reformer. MOE's proposed instructions would have informed the jury of these legal facts, but the generic "investigation" instructions that were actually given made the investigation of a reformation claim just like any other investigation. This issue is particularly acute, where, as here, the judge ultimately determined that the reformation claim *failed*, and that SIG had never been entitled to any coverage under the policy in the first place. The court of appeals erred in affirming on this issue, and this Court should accept review and reverse.

2. Emotional Distress is Not Actual Damage under the IFCA.

Our courts have read some statutory provisions for "actual damages" to include emotional distress, and others, under identical language, not to. "'[A]ctual damages' has a chameleon-like quality because the precise meaning of the term changes with the specific statute

in which it is found." *Segura v. Cabrera*, 184 Wn.2d 587, 595, 362 P.3d 1278, 1282 (2015) (citations omitted). The case of *Pendergrast v. Matichuk,* 186 Wn.2d 556, 567, 379 P.3d 96, 101 (2016) emphasizes that "modern statutes," specifically including the Insurance Fair Conduct Act (RCW 48.30.015), use the phrase "actual damages" to exclude emotional distress.

The court of appeals did not consider this issue, determining that it had not been squarely presented below. MOE recognizes that the application of this prohibition is discretionary, however, there are good reasons why this Court should accept review and decide the issue. First, at the time the IFCA issue was presented to the trial court, there was *no* authority regarding what qualified as "actual damages" under the IFCA. The first case that addressed it was *Schreib v. Am. Family Mut. Ins. Co.*, 2015 WL 5175708 (W.D. Wash. 2015), decided in September 2015. Judgment against MOE was entered five months earlier. The second case, *Pendergrast v. Matichuk,* 186 Wn.2d 556, came out after briefing was complete at the court of appeals, and just before oral argument.

Additionally, because the trial court had already applied coverage by estoppel, the prospective "damages" subject to trebling included the entire $10,460,366.14, and the issue of culling out damages that were only related to emotional distress for trebling was not directly presented at the

trial court. Because the IFCA allows the court to award damages "up to" three times actual damages, the trial court could have used emotional damages as a point of reference, but added the $600,000 as a fractional multiplier of the $10,160,366.14. The pure trebling of emotional distress damages, standing alone, was not an issue at the trial court, where SIG requested more than $2 million as multiplied damages. But after the appellate decision, the multiplier sits *solely* atop emotional distress damages. The Court need not perpetuate this incorrect result.

Finally, the discretionary ban on appellate consideration of issues not raised at the trial court does not apply where they affect the right to maintain the action, particularly where the right depends upon a statute that the court is "duty bound to know does not govern the case." *Maynard Inv. Co. v. McCann,* 77 Wn.2d 616, 621-22, 465 P.2d 657, 660-61 (1970). Here, because the IFCA does not apply to emotional distress, Day had no cause of action under the statute.

3. As a conditional Cross-Petition issue, bad faith that is completely unrelated to the defense of the insured should not raise a presumption of harm or coverage by estoppel. And the insurer should be allowed to present factual evidence rebutting a presumption of harm.

Because the court of appeals determined that MOE had rebutted any presumption of harm in the face amount of the settlement, it did not reach the issue of whether a presumption of harm and coverage by

estoppel should arise in this case, where the alleged bad faith investigation was entirely distinct from the defense of the insured, and had nothing to do with any aspect of investigating the insured's potential liability to the tort victim. Here, there is no dispute that the defense was aggressive, well-performed, and free of any coverage conflict. The allegedly bad faith investigation concerned only facts that transpired between the insured and its agent, six years before the accident.

SIG has extensively relied on the dicta in *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383 that a presumption of harm and estoppel apply every time an insurer acts in bad faith. But this broad dicta was rejected in *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.,* 161 Wn.2d 903, 169 P.3d 1 (2007). There, this Court recognized that bad faith only related to indemnification issues, and not interfering with the insured's defense, was outside the scope of *Butler*. The *Paulson* recited that it expressed no opinion as to whether an insurer that "fully and satisfactorily discharges its duty to defend" but commits bad faith with regard to indemnification would suffer coverage by estoppel. *Id. at 924*. Since *Paulson*, this Court in *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,* 165 Wn.2d 122, 196 P.3d 664 (2008) held that a liability insurer who delayed investigating coverage of an insured's tender for nine months, but correctly determined there was none, was not subject to estoppel. The Court reasoned that because no

defense was provided, the potential conflicts of interest between the insured and the insurer that support the estoppel remedy were absent, and the insured was required to prove actual damages. *Id. Paulson* recognized that this was an unresolved point of law. *Onvia* held that where there is structurally no conflict between the insurer's coverage position and the insured's defense, there is no estoppel. That is this case.

But even if a presumption did arise as a matter of law, there is universal agreement in all of these cases that the insurer is entitled to rebut it. Here, MOE was deprived of that opportunity by the trial court's exclusion of evidence that MOE had fully investigated the reformation claims prior to its indemnity decision, and of MOE's role in terminating the litigation against SIG. If this Court accepts SIG's Petition and re-evaluates the court of appeals determination of whether the presumption of harm was rebutted, it should not do so without also reaching the issue of whether the presumption of harm arose in the first place, and how it can be factually rebutted if it did.

VII. Conclusion

MOE respectfully requests that the Court deny SIG's Petition for Review, and grant MOE's Cross Petition. In the event the Court grants SIG's Petition, MOE respectfully requests that it also grant MOE's conditional Cross Petition.

Respectfully submitted this 7th day of April 2017.

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APPENDIX A

A "binder" is used to bind insurance temporarily pending the issuance of the policy. No binder shall be valid beyond the issuance of the policy as to which it was given, or beyond ninety days from its effective date, whichever period is the shorter.[10]

No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.[11]

An insurer has a duty to investigate whether the claims against its insured are covered by the policy as actually written by the insurer. However, an insurer has no duty to investigate an insured's claim that the policy should mean something other than the policy that was written by the insurer.[12]

Neither prior oral negotiations nor an expired binder can be the basis for changing the terms of a written insurance policy. If the true agreement was expressed in the oral contract or in the binder, and either varies from the written policy, the only remedy is reformation of the written contract to make it conform to the true intent of the parties. Reformation is only appropriate when there is clear, cogent and convincing evidence that the mutual intention of the parties is not properly reflected in the policy.[13]

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[10] Proposed Ins. No. 1, CP 1715, RCW 48.18.230

[11] Proposed Ins. No. 2, CP 1716, RCW 48.18.190

[12] Proposed Ins. No. 5, CP 1719, *Jones v. Reliable Sec. Incorporation, Inc.*, 29 Kan.App.2d 617 (2001)

[13] Proposed Ins. No. 13, CP 1731. *Carew, Shaw & Bernasconi v. Gen. Cas. Co. o f Am.*, 189 Wash. 329, 339,65 P.2d 689,693 (1937)

CERTIFICATE OF SERVICE

I, Linda Voss, declare that on the date noted below, I caused to be delivered Mutual of Enumclaw's Response to Petition for Review and Cross Petition for Review to:

Richard B. Kilpatrick
KILPATRICK LAW P.C.
1408 140th Place N.E., Suite 150
Bellevue, WA 98007
Via email and post

Timothy A. Bearb
OLIVE|BEARB LAW GROUP PLLC
1218 Third Avenue, Suite 1000
Seattle, WA 98101-3290
Via email and ABC Messenger

Howard M. Goodfriend
SMITH GOODFRIEND
1619 8th Avenue N.
Seattle, WA 98109
Via email and ABC Messenger

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

Signed in Seattle, Washington this 7th day of April 2017.

/s/*
Linda Voss
*Original Signature on File