SUPREME COURT NO. SUPREME COURT NO. 101576-3
COURT OF APPEALS NO. 82554-2-I

IN THE WASHINGTON SUPREME COURT

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STAN SCHIFF, M.D., PH.D,
on behalf of himself and a class of similarly situated providers,

Plaintiff-Respondent,

v.

LIBERTY MUTUAL FIRE INSURANCE CO. and LIBERTY MUTUAL INSURANCE COMPANY, foreign insurance companies,

Defendants-Petitioners.

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# RESPONSE OF RESPONDENT DR. SCHIFF TO LIBERTY MUTUAL'S PETITION FOR REVIEW

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## Table of Contents

## Table of Contents

### Cases

**Statutes**



**Codes**



**Treatises**

# I. INTRODUCTION

The legislature has declared the business of insurance affects the public interest. RCW 48.01.030. Regulations prohibiting unfair insurance claims handling practices have been adopted to protect consumers and insureds consistent with that decree. WAC 284-30-330. Violations of the regulations are unfair consumer practices as a matter of law that violate the Washington Consumer Protection Act, RCW 19.86.020 ("CPA"), which the legislature has declared must be broadly construed. RCW 19.86.920.

In *Folweiler Chiropractic, PS v. Am. Family Ins. Co.*, 5 Wn. App. 2d. 829, 429 P.3d 813 (2018) ("*Folweiler*"), Division I of the Court of Appeals held unlawful an auto insurer's attempt to limit and evade its legal duty under the Insurance Code to pay "all reasonable and necessary" medical expenses arising from accidents covered by the insurer's Personal Injury Protection ("PIP") policy through an automatic computer-generated denial

of a provider's bill based solely on a database of charges from a broad geographic area. Such a practice was inconsistent with the insurer's duty under Washington law to conduct a reasonable investigation of the insured's medical expenses *before denying payment.* Division I found such an arbitrary and automatic practice that failed to take into consideration any individualized assessment did not meet the insurer's duties under the fair claims regulations. Division I held the practice was an unfair CPA practice that caused injury to the insured and providers.[1]

Petitioner Liberty Mutual ("Liberty"), here, admits it has the identical automatic database practice as American Family. Just like American Family, Liberty has a computer automatically deny full payment of any bill for treatment covered by its PIP policy submitted by a Washington insured or provider that exceeds the 80$^{th}$ percentile of the charges in the Fair Health ("FH") database. Like American Family, there is no

[1] American Family sought review, which this Court denied. *See* March 7, 2019 Order Denying Petition for Review, No. 96561-7.

individualized review of the reasonableness of the charge or assessment of the provider's characteristics. As a result, the insured is left to pay the bill in full or the provider to absorb the loss of full payment.

Yet in this Petition, Liberty seeks permission from this Court to continue its illegal and unfair practice by evading Division I's holding in this case that its practice, like American Family's, violates Liberty's statutory duty to pay "all reasonable" covered expenses, the unfair claims handling regulations, and the CPA. *Schiff v. Liberty Mut. Fire Ins. Co.*, No. 82554-2-I slip op., __ Wn. App. 3d. __ 520 P.3d 1085 (Nov. 2022), https://www.courts.wa.gov/opinions/pdf/825542.pdf.

To accomplish this, Liberty argues that the "safe harbor" *exception* to the CPA's broad protection should be broadly construed for the benefit of insurance companies. In the same vein, Liberty argues the common law "reasonable interpretation of law" defense to a CPA claim based on a "bad faith" denial of insurance coverage should be dramatically expanded for the

insurer's benefit to include any practice affecting the payment of medical expenses, so long as a functionary in the Rates and Forms division of the Office of Insurance Commissioner ("OIC) has approved the policy.

But Division I correctly reasoned that such an unprecedented expansion of exceptions to PIP insurer violations of the Insurance Code and CPA would gut these protections and are unwarranted under existing precedent. In its well-researched and thorough opinion, Division I properly analyzed the regulations, CPA and Liberty's asserted defenses and concluded that Liberty's arguments run counter to Washington's strong public policy favoring instead broad protection against unfair insurance claims practices and broad construction of the CPA.

This Court should deny review.

## II. FACTS

### A. Schiff's lawsuit alleges Liberty's practice is an unfair CPA practice

In September 2015 and October 2016, Dr. Schiff billed Liberty for treatment charges incurred by its insureds. CP 684-

685, 5560. Liberty determined the charges were covered under the insureds' PIP and MedPay policies. CP 26. The policy in effect for both bills was Liberty's 2006 policy, which was in effect from 2006 through Nov. 2016. CP 4927.

Liberty automatically reduced the payment to the 80th FH percentile without any individualized investigation. CP 1951-52, 5570-71, 6251-53, 6747.

In depositions, Liberty's adjusters did not know why the charges were not paid in full. CP 5582; 5585. Their actions were not based on any understanding of Washington law. CP 5576-77. The adjusters did no individualized investigation and made no conscious decision that the charges were not in fact reasonable. CP 5577-78; CP 5585-87, 5594-95.

Liberty *stipulated to these facts* in exchange for Plaintiff not conducting further depositions. CP 6747. As both the trial court and Division I concluded, these facts are undisputed.

In 2017, Schiff filed suit alleging Liberty's denials violated the PIP statute, WAC and public policy and were an

unfair CPA practice. CP 1.

### B. Liberty does not need to use FH; the majority of PIP insurers in WA do not use a database to pay claims

The majority of PIP insurers in Washington do not solely rely on a percentile of a database and instead individually investigate the reasonableness of bills. CP 5872, 5874, 5882. This belies Liberty's argument that it is impossible for insurers to adjust claims without such a database.

### C. Liberty's 2006 policy does not state Liberty's practice

LM refers to its practice as "OIC-approved," but this is attempt to obfuscate.

At the time Liberty reduced Schiff's bills in 2015-2016, the only action OIC had taken was routine approval by its Rates and Forms Division of Liberty's automobile policy in 2006. This policy does *not* specify Liberty's 80$^{th}$ percentile FH practice, as Liberty admitted in deposition. CP 6238. The policy has a PIP section stating it pays "reasonable" medical expenses from injuries in a covered accident and that ""Reasonable expenses" …means the least of":

> The charge determined by us based on a methodology using a database designed to reflect amounts charged by providers of medical services … within the same or similar geographic region...

CP 4934. Liberty's policy did not state its "methodology" meant *solely* relying on a database. CP 108.

In 2016, Liberty testified it had never told OIC it paid using the FH 80th percentile. CP 6238-39. In 2019, Liberty testified it had never asked OIC for a formal opinion about the practice's legality. CP 6238-39. The Insurance Commissioner was not involved in and had no knowledge of this routine approval of policy language. CP 5614 (Kreidler dec.).

### D. OIC's actions *after* the 2015-2016 reductions are not relevant to Liberty's defenses

As Division I properly noted, Schiff's patients had coverage under its 2006 policy and his 2015-2016 bills were under this policy, not the 2016 policy, which did not become effective until after Schiff's 2016 bill. CP 5927, 5617. OIC's 2020 declaration is irrelevant to whether Liberty had a safe harbor or good faith defense in 2015-2016.

## E. What Liberty knew before denying Schiff's bills defeats its defenses

In 2006, when Rates and Forms approved Liberty's policy language, the PIP statute and WAC "unequivocally" required individualized investigation. *Folweiler*, 5 Wn. App. 2d. at 14. [2]

In 2006, Liberty was using the Ingenix database, a predecessor to FH; FH did not exist yet. CP 6258. The 2006 policy could not have set out a FH 80th percentile practice.

Liberty started using FH in 2011 because Ingenix was removed from the market in 2010 based on a NY AG investigation that found it unfairly reduced provider charges below market value and was unreliable. Liberty had been told by multiple courts Ingenix was not reliable and could not be used to determine reasonable charges.[3] CP 6237.

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[2] Insurers are assumed to know the law when a court assesses their "good faith reasonableness" defense. *Nyugen v. Glendale Constr. Co*., 56 Wn. App. 196, 204, 782 P.2d 1100 (1989).

[3] *See N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co*., 466 Mass. 358, 362, n.4, 995 N.E.2d 57(2013); *Michael Davekos, P.C. v. Liberty Mut. Ins. Co.*, 2008 Mass. App. Div. 32 (Mass. Dist. Ct. 2008). *See also McCoy v. Health Net, Inc.,* 569 F.Supp.2d 448 (D.N.J. 2008).

In 2010, Washington provider Kerbs sued Liberty's subsidiary Safeco in Washington, alleging Safeco's automatic use of a percentile of Ingenix was an unfair CPA practice. Safeco moved to dismiss, asserting Ingenix was widely used and OIC had approved Safeco's policy. The trial court denied the motion, finding that OIC had approved the *policy language*, not Safeco's actual *practice*. The court held that if proven, the facts alleged showed violations of the PIP statute and WAC and an unfair CPA practice. CP 6223.[4]

In 2010, Kerbs sued Progressive for the identical practice. CP 6282. The court denied Progressive's motion to dismiss, holding, like *Safeco*, the alleged facts would prove an unfair CPA practice. *Id.;* CP 6286. In 2012, a unanimous King County jury found Progressive's practice violated the WAC, the PIP statute and was an unfair practice. CP 5704; 6505.

In April 2016, in an identical case against Liberty by

[4] In 2011, Division 1 denied Safeco's motion for review, finding no error. CP 6272.

Chan Healthcare Group, the King County Superior Court rejected Liberty's assertion that OIC's approval of its 2006 policy entitled Liberty to a "safe harbor" because the policy did not state the specific practice. CP 5611-12.

In October 2016, Liberty denied Schiff's second bill, submitted under Liberty's 2006 auto policy, based solely on its FH 80th percentile limitation. CP 6747.

At the time of Liberty's reductions to Schiff's bills, there were no cases or rulings in Washington *approving* Liberty's 80th percentile practice (nor are there now).[5]

**F. The court ruled Liberty's practice was an unfair practice under *Folweiler*, but erroneously held Liberty's affirmative defenses needed to be decided by a jury.**

In 2020, Schiff moved for summary judgment. The trial

[5] Liberty knew that neither Ingenix nor FH set reasonable fees. CP 6237. The FH licensing agreement and User Guide states that it does *not* "set forth a stated or implied reasonable and customary charge or allowed amount." CP 2047, 6471. *See, also, Verci v. High*, 161 N.E.3d 249, 256-257 (Ill. App. Ct. 2019) (FH database so unreliable it cannot be used to determine reasonable fees; expert's testimony on FH data properly excluded.). This is contrary to Liberty's assertion that FH is the "gold standard" and Liberty is using it as intended.

court ruled Liberty's practice is an unfair CPA practice based on *Folweiler*. VRP 2/28/2020. In its Order, the Court held, based on Liberty's deposition testimony and its stipulation that it did no individualized investigation before reducing payment to the 80th FH percentile, that:

> … it is undisputed that: (1) Liberty Mutual relied solely upon the 80th Percentile Methodology in processing and paying Dr. Schiff's October 2015 billing and his November 2016 billing; and (2) Liberty Mutual did not do individualized investigations with respect to those billings.

CP 4158.

The court denied Plaintiff's motion without prejudice, finding there were factual questions as to Liberty's affirmative defenses, including about OIC's actions. CP 4159-60.

After additional discovery into OIC's actions, the parties filed cross-motions for summary judgment. CP 5497. The court denied both, finding issues remained for a jury on Liberty's affirmative defenses. Those orders gave rise to this appeal.

### G. Division 1 issued a well-grounded, lengthy opinion finding liability and dismissing Liberty's defenses

On November 28, 2022, Div. I issued a lengthy, well-grounded decision holding there were no factual disputes preventing decisions in the case; granting Schiff summary judgment that Liberty's practice is an unfair CPA practice; and dismissing Liberty's safe harbor and good faith defenses.

## III. ARGUMENT

### A. Division I properly held CPA liability is clear under *Folweiler*

#### 1. Washington law requires payment of fully compensatory PIP benefits and individualized assessment before refusing to pay a bill in full

Washington law requires payment of "*all* reasonable and necessary expenses" incurred by or on behalf of the insured in an automobile accident. RCW 48.22.005(7) (emphasis added). *See also* RCW 48.22.095(1)(a). WAC 284-30-330 forbids an insurer from refusing to pay a bill in full unless it first investigates and determines that the amount is unreasonable.

In *Folweiler*, 5 Wn. App. 2d. 829, Division I held that:

> On their face, RCW 48.22.095(1)(a) and RCW 48.22.005(7) require payment of "all reasonable and necessary expenses incurred by or on behalf of the

> insured." *The statutes necessarily impose a duty to look at each claim individually* in order to determine the reasonable and necessary expenses for the insured. *The law requires an individualized assessment rather than substituting a formulaic approach that pays only 80 percent of the average charge for a large geographic area.*

*Id.* at 838 (emphasis added); *see also id*. at 839 ("WAC 284-30-330(3) and (4)… require[] an individualized assessment and not simply applying a geographic based formula to each claim regardless of the individual circumstances.").

Division I reiterated this ruling in *Eastside Physical Therapy, Inc., v. United Servs. Auto. Ass'n*, 10 Wn. App. 2d. 1031, *7 (2019) (unpublished).[6]

In 2018, this Court analyzed State Farm's "maximum medical improvement" auto policy requirement and held an insurer may not use policy language to cap or limit PIP payments and may not unilaterally define "reasonable" narrowly in its policy to mean something less than the ordinary dictionary

[6] *See Whitworth v. USAA*, No. C20-0315JLR, 2021 WL 2454007, at *6 (W.D. Wash. June 16, 2021).

meaning. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 11, 419 P.3d 400 (2018). The Court held that RCW 48.22.005(7) and WAC 284-30-395 set forth the terms for required PIP payments and that an insurer may not pay less than fully compensatory PIP benefits *even if* the denials are authorized by the express language of the insurer's policy that had been approved by OIC for decades. *Id.* at 12-13.

### 2. Division I correctly held Liberty's practice is identical to American Family's and an unfair CPA practice

Division I properly held Liberty's practice in this case is undisputed, identical to American Family's, and constitutes an unfair CPA practice under the applicable statutes, regulations, and caselaw. *Schiff*, No. 82554-2-I, slip op. at 5-12.

In its Petition, Liberty does not dispute its practice. Nor does it dispute the statutes and regulations or the holding in *Folweiler*. It argues *Folweiler* is distinguishable because the decision arose out of a 12(b)(6) dismissal.

Division I properly dismissed this argument. *Schiff* at *12. *Folweiler's* holding was not dependent on its 12(b)(6) posture or on taking the plaintiff's allegations as true. *Folweiler* was a legal determination about the plain meaning and requirements of the Insurance Code and WAC 284-30-330.

Liberty also attempts to distinguish this case from *Folweiler* by raising irrelevant facts about the reliability of the database and its widespread use and by arguing that not relying on a database is "impossible."

But nothing in *Folweiler* depended on how reliable the database was or on whether it can determine a "reasonable fee."[7] And the majority of PIP insurers in Washington do *not* use a database and instead individually investigate the reasonableness of bills. CP 5872, 5874, 5882. This shows that it *is* entirely possible, and reaffirms the harm to consumers and industry

[7] Although irrelevant here, neither are true. FH, and its predecessor, Ingenix, have been repeatedly excluded as unreliable and incapable of determining a "reasonable" charge. The FH user agreement and licensing agreement state it is *not* to be used to determine a reasonable fee. CP 2047, 6471.

competitors from Liberty's practices. Liberty has saved itself substantial sums on PIP payments from this practice, half of which it pockets and does not pass on to insureds. CP 6428. It has unfairly gained a competitive advantage.

### 3. Division 1 properly concluded Schiff has satisfied all other elements of proving an unfair CPA practice

#### a. Division I properly held Schiff has proven injury, in keeping with this Court's decision in *Peoples*

Liberty argues that its reduced payment to Schiff does not constitute CPA "injury" because Schiff has failed to prove his full bill was reasonable. Liberty is wrong.

As Division I properly held, looking to this Court's many cases on the subject, "injury" under the CPA is broadly defined and has been met here. *Schiff* at *13. It is met "upon proof the plaintiff's 'property interest or money is diminished,'" even if the diminishment is "minimal." *Panag v. Farmers*, 166 Wn.2d 27, 57-58, 204 P.3d 885 (2009).

Indeed, this Court has answered this exact question in *Peoples v. United Services Automobile Association*, 194 Wn.2d 771, 776-77, 425 P.3d 1218 (2019). In *Peoples*, this Court analyzed the identical practice and USAA's argument that denial of full payment of PIP benefits did not constitute CPA "injury to business or property." *Id.* This Court roundly rejected USAA's argument, holding that those "wrongfully denied PIP benefits are injured in their "business or property." *Id.* at 781.[8]

Further, under WAC 284-30-330 (4), it is an unfair claims handling practice to refuse to pay claims in full without first conducting a reasonable investigation. Division I properly held that because Liberty did not conduct this investigation, it cannot claim that the full amount of Schiff's bill was not reasonable. As Division I aptly noted, "were we to adopt [Liberty's] argument,

[8] Peoples was an insured, but the distinction is irrelevant for the purpose of analyzing CPA "injury."

the insurer would be permitted to rely on its own unlawful conduct to evade liability." *Schiff*, No. 82554-2-I, slip op. at 13.[9]

Nor does Liberty dispute that the other types of injury Schiff has proven, including administrative expense and inconvenience, CP 5886-87, 5892, constitute injury under the CPA. *Folweiler* clearly held, in keeping with Washington authority, that these types of harms constitute injury. 5 Wn. App. 2d at 839-840.

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[9] Liberty argues Schiff's bills are unreasonable because other non-auto-insurer payors reimburse him at a lower rate. This Court and Div. I have held that evidence that the physician accepts a lesser payment for services from Medicare or other payors is "not helpful to the jury" in determining whether the billed rate is reasonable, and should be excluded. *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 124, n.8, 471 P.3d 181 (2020). *See also Hayes v. Wieber Enterprises, Inc.*, 105 Wn. App. 611, 616, 20 P.3d 496 (2001). Medicare and L&I have fee schedules, and first-party healthcare payers have contracted rates with providers. They do not, like PIP insurers, have statutorily mandated duties to pay "*all* reasonable bills."

Liberty *knows* this evidence is inadmissible because its counsel was plaintiff's counsel in *Gerlach* who made and won the argument that the exact evidence Liberty submits here is irrelevant and inadmissible.

### b. Division I properly held Schiff has proven "public interest impact"

Liberty misconstrues the ways in which a plaintiff can establish a CPA claim, arguing to this Court, as it did to Division I, that because Schiff is not an insured and cannot bring a *per se* claim solely based on a violation of a statute or regulation, he is required to satisfy the "*Klem* test" to meet the public interest element (prove that the challenged practice violates the public interest and is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits). Div. I Reply at 15-16; PFR at 19-20.

But this test is only one of the ways of meeting the public interest element of the CPA. As this Court explained in *Panag*, an "unfair practice" can be shown by proving the practice offends public policy as established "by statutes [or] the common law." 166 Wn.2d at 54. The public interest impact prong is then met if the practice violates a statute that incorporates the CPA or that specifically declares a public

interest impact. *Id.* at 54-55*; see also* WPI 310.04. This is *not* limited to *per se* claims. *Panag*, 166 Wn.2d. at 54-55.

Division I applied this test in *Folweiler,* stating that "while Folweiler may not maintain a CPA action for a per se violation of the PIP statute and trade practice regulations, the statute and regulations may nonetheless guide our consideration of whether American Family's claim settlement practice is unfair and violates the public interest." 5 Wn. App. 2d. at 837. The court concluded that the 80th percentile practice constitutes an unfair act in violation of the CPA "based on a violation of the public interest embodied in RCW 48.22.091(1)(a) and RCW 48.22.005(7) … [and] WAC 284-30-300." 5 Wn. App. at 839.

Division I properly concluded that *Folweiler* "forecloses any argument that these elements [injury and public interest impact] have not been established." *Schiff*, No. 82554-2-I, slip op. at 13, n.9.[10]

[10] *Panag* addressed and rejected Liberty's argument that only insureds are protected under the CPA. 166 Wn.2d at 43-44.

## B. Division I properly dismissed Liberty's "safe harbor" affirmative defense

RCW 19.86.170 provides a statutory exemption to CPA coverage for certain regulated industries. This "safe harbor" exemption has been given an extremely narrow construction by Washington courts because it is inherently inconsistent with the strong public policy that the CPA be "broadly construed" to protect the public from unfair and deceptive practices. *See Vogt v. Seattle-First Nat. Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). As such, to prove the exemption, Liberty must prove that at the time of the acts in question, it had specific, affirmative and express permission by OIC of the *specific practice at issue* and that this practice is consistent with Washington law. *See Id.*; *In re Real Est. Brokerage Antitrust Litig.,* 95 Wn.2d 297, 301-03, 622 P.2d 1185, 1189 (1980).

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Further, WAC 284-30-330 is specifically targeted toward "unfair claims settlement practices…applicable to the settlement of claims." Claims settling practices involve and affect providers.

Liberty has admitted that its safe harbor affirmative defense is based *solely* on OIC's approval of its 2006 auto insurance policy. Div. I Reply at 27 n. 12; PFR at 23-26. Thus, Division I was called upon to decide whether OIC policy language approval *alone* qualifies an insurer for the exemption.

Division I – in a robust and comprehensive analysis of the history, text, purpose, and interpretive caselaw of the exemption, spanning more than 15 pages of its opinion – properly held "no." Its decision was based on the following legally and factually correct reasons:

First, given that nearly every insurance policy in Washington must be approved by OIC, Liberty's broad interpretation of the safe harbor to exempt basically all insurance policies would eviscerate CPA liability and conflict with a broad interpretation of the CPA. RCW 19.86.920. This would be contrary to the clear language of RCW 19.86.170, which holds that violations of insurance regulations *are* subject to CPA liability, and to decisions of this Court interpreting RCW

19.86.170 and affirming the same. *Schiff*, No. 82554-2-I, slip op. at 19 (citing *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn. 2d 907, 922, 792 P.2d 520 (1990); *Leingang v. Pierce Cty Med. Ctr.*, 131 Wn.2d 133, 152 930 P.2d 288 (1997) ("The general rule is that violations of insurance regulations are subject to the Consumer Protection Act")).[11]

Second, the standard in RCW 19.86.170 for an exemption to CPA liability under 19.86.020 for insurers "is limited to those actions *required or permitted* to be done.' *Schiff*, No. 82554-2-I slip op. at 17 (emphasis in original) (citing Martha V. Gross, *The Scope of the Regulated Industries Exemption under the Washington Consumer Protection Act*, 10 GONZ. L. REV. 415, 425 (1975)). "Required or permitted" means the agency must take "'overt affirmative actions specifically to permit the actions

[11] *See also Peoples*, 194 Wn.2d at 781 (holding that narrow definition of injury would "thrust violations of Washington's PIP regulations entirely outside the reach of the CPA's private enforcement provision" and would be contrary to RCW 19.86.170's mandate that illegal insurance actions "shall" be subject to the CPA).

or transactions engaged in.'" *Id.* at 24 (citing *In re Real Est.*, 95 Wn.2d at 301). And it applies only if the "particular practice" found to be unfair or deceptive is "specifically permitted, prohibited, or regulated." *Id.* at 24 (citing *Vogt*, 117 Wn.2d at 552 ("[o]verly broad construction of 'permission' may conflict with" CPA's broad construction).

Division I properly concluded that OIC's routine policy language approval does not meet the limited definition of "permission," given that nearly all insurance policies must be approved by OIC.

The brunt of Liberty's argument to the contrary is that OIC implicitly ruled on the legality of each and every policy language provision in administratively approving the policy. Division I properly rejected this argument, noting that in *Durant*, OIC had approved State Farm's MMI requirement for decades, yet this Court deemed this provision illegal. *Id.* at 22 (citing *Durant*, 191 Wn.2d at 12-13). Division I properly held Liberty's interpretation would undermine the authority of Washington

courts to determine the lawfulness of insurance industry practices. *Id.* at 28. *See also Durant*, 191 Wn.2d at 14, n.5; *Nyugen*, 56 Wn. App. at 204.

Third, Division I properly held that even if policy language approval *could* meet the safe harbor exemption in some circumstance, Liberty did not meet the standard here. Liberty's 2006 policy does not say it *solely* relies on a database percentile. Division I properly held this is not the kind of *specific approval* of a *specific practice* required for a narrow exemption from liability. *Schiff*, No. 82554-2-I slip op. at 27.

This Court should not disturb this ruling.

### C. Division I properly dismissed Liberty's "good faith" defense

Division I also carefully and closely analyzed, and properly rejected, Liberty's claim that it is shielded from CPA liability because it acted in "good faith based on an arguable interpretation of existing law." Division I properly held that 1) the "good faith" defense does not apply to a case of this nature, that is not a bad faith denial of coverage claim; and 2) in any

event, there are no cases supporting Liberty's contention that a "good faith" defense could be premised wholly on regulatory approval of an insurance policy. *Schiff*, No. 82554-2-I slip op. at 29-34. This Court should not disturb this ruling.

### 1. Division I properly held the good faith exception does not apply to denial of payment claims

Division I catalogued the relevant Washington cases and properly concluded that in the insurance context, the "good faith" defense is a valid defense only to two types of claims: 1) a "bad faith" claim in which bad faith is an element of the claim; and 2) a denial of *coverage* claim, which is different than a denial of *payment.*[12] *Id.* at 30-32. Schiff's claim is for a denial of *payment*, not coverage, and the claim does not have "bad faith" as an element.

Division I properly declined to extend the defense to an

[12] *See Lock v. Am. Fm. Ins. Co.*, 12 Wn. App. 2d. 905, 926, 460 P.3d 683 (2020) ("value disputes are not coverage denials").

entirely new type of claim. *Id.* at 32.[13]

Liberty provides no compelling response to this authority. Liberty parses the phrasing of *Leingang* and states that the Court used broad language to discuss the defense. PFR at 28. But Liberty admits *Leingang* was a coverage dispute. *Id.*

Liberty also argues that Washington Courts of Appeals have applied the good faith defense more broadly in contexts *other than* insurance, but does not dispute there are no Washington appellate cases in the insurance context applying the case beyond the bad faith denial of coverage. PFR at 29-30.

Liberty points to no erroneous application of existing law and no conflicting decisions justifying review. RAP 13.4(b).

**2. Division I properly held that OIC regulatory approval alone is not enough**

[13] It is undisputed Liberty's reductions were denials of payment, not coverage. CP 6250. Moreover, in *Leingang*, this Court directly rejected the identical argument – that a denial of full payment constitutes a denial of coverage. 131 Wn.2d at 143-144.

Liberty again here relies solely on OIC's 2006 policy language approval to support its defense. It does not identify a single case that has found a good faith exception based solely on OIC's administrative approval of policy language. Division I properly held that if this alone were enough, the exception would eviscerate the CPA's protections as they apply to the insurance industry. *Schiff*, No. 82554-2-I, slip op. at 33.

Indeed this Court, in *Panag*, held the contrary, ruling that even highly regulated industries like insurance remain fully subject to the CPA, and a "central purpose of the CPA is to provide an efficient and effective method of filling the gaps in the common law and statutes," often resulting in broader protection than in the statutes and regulations alone. 166 Wn.2d. at 54-55 (internal citations and quotations omitted). An expansive reading of the good faith exception, which is not supported by any caselaw, would directly undermine this goal.

Division I also aptly noted here that holding that OIC's regulatory approval insulates insurers from CPA liability would

undermine the authority of Washington courts to determine the lawfulness of insurers' conduct. *Id.* at 33-34. OIC itself admitted in deposition that the court, not OIC, decides what the law requires. CP 6014, 6061.

Liberty cites to *Leingang* for its argument, contending that this Court looked to OIC's approval there to support a good faith defense. PFR at 27-29. But as Division I noted, *Leingang* is clear that policy language approval *alone* is insufficient. In *Leingang*, this Court relied upon two prior Superior Court and two prior Appellate Court decisions holding the insurer's exclusion from UIM coverage consistent with Washington law as the basis for the insurer's "good faith." *Schiff*, No. 82554-2-I, slip op. at 32-33 (citing *Leingang*, 131 Wn.2d at 155).

Here, in contrast, at the time of the reductions (and to this day), there were no decisions approving Liberty's practice and there were numerous rulings holding the practice is or likely is unfair.

Division I properly held that this is not enough to support

a good faith defense, and its ruling should not be disturbed.

## IV. CONCLUSION

None of the bases for review in RAP 13.4 are applicable. Liberty asks this Court to accept review to overturn established CPA cases, and drastically broaden, without justification, exceptions to CPA liability. This Court should deny review.

I certify that this brief contains 4995 words.

DATED: February 10, 2023

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Court via the Washington State Appellate Courts' Portal which caused service of same on all counsel of record.

DATED this February 10, 2023, at Seattle, Washington.

*s/ Jesica A. McClure*
Jesica A. McClure, Paralegal

**BRESKIN, JOHNSON & TOWNSEND**

**February 10, 2023 - 4:38 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 101,576-3 |
| **Appellate Court Case Title:** | Stan Schiff, M.D., Ph.D. v. Liberty Mutual Fire Insurance Co. et ano. |

**The following documents have been uploaded:**

- 1015763_Answer_Reply_20230210163148SC168718_8101.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
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