No. 101972-6

SUPREME COURT
OF THE STATE OF WASHINGTON

PHILLIP A. TRAULSEN;
RICHARD AND CAROL TRAULSEN,

Respondents,

v.

CONTINENTAL DIVIDE INSURANCE COMPANY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals followed settled law in reversing the trial court's dismissal of statutory and common law bad faith claims against petitioner Continental Divide Insurance Company (CDIC). Division One's unpublished decision correctly directs entry of judgment for CDIC's inexcusable breach of its duty to pay its policy's liability limits in partial satisfaction of its insureds' $10.6 adjudicated liability, and remands for a trial on the insureds' assigned claims for breach of the duty to pay interest and to investigate and settle liability claims against its insureds for the catastrophic injuries Traulsen suffered when the insureds' tractor-trailer ran a red light and struck Traulsen in a marked cross-walk.

CDIC refused to disclose its liability limits (without consulting its insureds), failed to investigate other coverage (as required by its own adjusting standards), and failed to attempt to settle after repeatedly acknowledging

that its insureds were exposed to claims far exceeding their $1 million limits. CDIC still refused to unconditionally tender its limits even after its insureds were found liable to Traulsen for $10.6 million in damages in an arbitration in which CDIC participated to protect its own interests. CDIC then refused to pay interest on the adjudicated award, as required by its policy's supplemental payment provision. As a result of CDIC's bad faith, its insureds lost the covenant protection from execution that their initial agreement with Traulsen conditioned on prompt payment of CDIC's liability limits. CDIC's insureds became liable to Traulsen for the entire $10.6 million arbitration award, incurring interest at 12 percent, under an assignment agreement that leaves each insured personally exposed.

The Court of Appeals remanded to the trial court for a determination of damages caused by CDIC's bad faith breach of its duty to indemnify, breach of contract, and violation of the Consumer Protection Act and Insurance

Fair Conduct Act, correctly rejecting CDIC's contention that it was absolved of any liability because it eventually paid its $1 million liability limits into the court registry—only after multiple orders compelling it to do so. The Court of Appeals also remanded for trial on the remaining claims the insureds assigned to Traulsen, holding that a jury could find CDIC acted in bad faith in failing to pay interest under its policy, and that its refusal to disclose limits and failures to investigate or promptly attempt to settle caused its insureds' unprotected, adjudicated liability to Traulsen for $10.6 million.

CDIC does not even attempt to show a conflict with case law or an issue of public interest that would justify further review of the unpublished decision under RAP 13.4(b), relying instead on a revisionist version of "facts" that ignores the governing standard of review, is unsupported by the record, and is instead a post hoc justification for putting its own interests ahead of its duties

to its insureds. This Court should deny review and award Traulsen his fees in answering the petition.

II. RESTATEMENT OF ISSUES

1. Whether this Court should review the Court of Appeals' unpublished opinion holding that insureds are entitled to a "presumption of harm" if, following remand, the insurer is found to have acted in bad faith in refusing to investigate settle, or pay amounts due under its liability policy, exposing its insureds to an adjudicated $10.6 million liability to which the insureds have no protection?

2. Whether this Court has any basis to review CDIC's contention that a final order confirming a $10.6 million arbitration award is not a "judgment" triggering the insurer's obligation to pay interest under its policy, where CDIC has failed to challenge the lower courts' application of judicial estoppel after CDIC successfully argued that the confirmed arbitration award *was* a final judgment that

precluded the injured plaintiff from asserting additional claims?

3. Whether an injured party can pursue IFCA claims assigned to them by first party insureds after the insureds' liability insurer failed without any reasonable justification to pay its $1 million limits in partial satisfaction of a $10.6 million liability adjudicated against its insureds?

III. RESTATEMENT OF FACTS

CDIC's unsupported, defiantly unprofessional quibbling with the facts recited and relied upon by the Court of Appeals is typical of the approach it has taken throughout this litigation. CDIC's argumentative statement of the case grossly misstates the procedural history and evidentiary record, ignoring the standard for review of the trial court's dismissal of Traulsen's assigned claims for bad faith on CDIC's motion for summary

judgment. The Court of Appeals' unpublished opinion properly recited the largely undisputed facts:

Samy Zewdu, the operator of a commercial semitruck and trailer, struck Phillip Traulsen as he walked across South 212th Street in Kent on his way to work on April 10, 2017. Traulsen sustained head trauma and multiple broken bones, requiring months of hospitalization and resulting in severe permanent injuries. (CP 88-89, 2216-17)

Ephrata Trucking, LLC owns the commercial truck that Zewdu, one of the LLC's members, was driving. CDIC insured Ephrata under a commercial liability policy providing $1 million in liability coverage. (CP 153) The trailer attached to the truck at the time of the accident was owned, not by Ephrata, but by Mack Trucking, LLC, and separately insured under a policy issued by State National Insurance Company. (CP 2221)

CDIC hired Evergreen Adjustment Service to investigate the accident. (CP 2228-30) Contrary to CDIC's

imaginative reconstruction of the collision (Pet. 2-3 & n.2), within 23 days of the accident Evergreen reported to CDIC that two witnesses thought the light was red, and that Zewdu was travelling at 40 miles per hour when the truck struck Traulsen. Evergreen concluded that CDIC's insureds had no defense to liability. (CP 2217)

As part of a detailed investigative checklist, CDIC specifically instructed Evergreen to identify the owner of the trailer, thoroughly investigate all potential insurance coverage, and "do not assume other insurance does not apply." (CP 2228-30, 1529-30) Evergreen did not report to CDIC that the trailer was separately owned, and separately insured by State National. (CP 1535, 1548)

On May 11, 2017, over a month after the accident, Traulsen's attorney asked CDIC to disclose all insurance coverages and liability limits. (CP 1570-71) By then, CDIC determined that its insureds faced significant excess exposure. (CP 1505-09) Yet despite knowing that refusing

to disclose limits could foreclose settlement, CDIC did not even consult its insureds before rejecting Traulsen's request. (CP 2266, 2296-97)

Lacking knowledge of not only the amount of insurance available under the CDIC policy, but of State National's additional coverage, Traulsen sued Ephrata and Zewdu in King County Superior Court on May 27, 2017. (CP 930-34) Only then did CDIC advise its insureds that they faced liability beyond the $1 million policy limits, suggesting they hire personal counsel. (CP 2232-33)

CDIC finally disclosed its policy limits on August 3, 2017. (CP 2037) Shortly thereafter, Traulsen's underinsured motorist insurer State Farm promptly paid its UIM limits. (CP 2238) CDIC, however, still did not offer its limits, or even authorize defense counsel to discuss settlement, and continued to avoid any inquiry into other insurance. (CP 1491, 2296-2302)

On February 16, 2018, CDIC finally made a settlement "offer," conditioning payment of its policy liability limits on "a release of all claims for all insureds under the policy and dismissal of the lawsuit." (CP 2013) Traulsen rejected that offer. (CP 2034) On March 16, 2018, CDIC advised its insureds to retain their own counsel, because "[i]t appears likely that a jury will award [Traulsen] more than $1 million in damages." (CP 2234)

After expiration of the discovery cutoff, the parties attended a mediation on April 13, 2018. Assigned defense counsel reported to CDIC that the mediation failed in part because of "confusion" over the ownership and availability of insurance coverage for use of the trailer, which CDIC had still not investigated. (CP 2240, 2339)

With no resolution, Zewdu signed a policy limits settlement agreement, in which he and Ephrata assigned any claims they had against CDIC and others to Traulsen and agreed to entry of a "partial judgment against them for

all insurance limits," including CDIC's $1 million in liability limits, plus interest. With CDIC's knowledge and consent, Traulsen, Zewdu and Ephrata agreed to arbitrate "all remaining issues." In exchange, Traulsen agreed not to execute on any verdict, award, or judgment, except for the insurance policies or assigned assets. (CP 2250-51)

Without waiting for the conclusion of arbitration, CDIC filed a declaratory judgment action in the U.S. District Court against Zewdu, Ephrata, and Traulsen. Acknowledging Traulsen's covenant settlement, CDIC sought to limit its liability to the $1 million policy limit, and asked for a determination that it had not breached the policy, acted negligently, in bad faith, or in violation of the CPA or IFCA. (CP 2684-2702) Judge Coughenour stayed the federal suit pending the outcome of the state proceedings. (CP 2729)

CDIC participated in the arbitration, in which the arbitrator determined that Traulsen was not contributorily

negligent for his injuries as a matter of law. (CP 563-70, 573-75) Following an evidentiary hearing, the arbitrator then issued a final award to Traulsen of $10,608,092 in damages. (CP 578-80)

The superior court confirmed the award on August 31, 2018. (CP 584) Rather than unconditionally paying its $1 million liability limits in partial satisfaction of the award, CDIC again attempted to condition any payment on Traulsen's "release and full and final settlement of [his] claims . . . against any and all insureds." (CP 600)

Traulsen, having now received an award of over $10.6 million, refused to fully settle "all claims," and refused to release "any and all insureds," which would have included the trailer owner Mack Trucking, its principals (including Zewdu) and the trailer's insurer—and which

would have also extinguished the insureds' assigned claims against CDIC—their only viable asset.[1] (CP 2344)

Faced with CDIC's refusal to pay its liability limits as they had contemplated in their original agreement, Ephrata, Zewdu and Traulsen lost their covenant protection and were forced to enter into a new agreement dated March 5, 2019. Zewdu and Ephrata again assigned their rights against CDIC, but in the new agreement Ephrata received *no* covenant from execution; Traulsen agreed only to first proceed against CDIC's policy and the assigned claims before enforcing the unsatisfied award against Ephrata. Zewdu received only conditional protection for his personal assets, contingent upon payment to Traulsen of all applicable insurance limits. (CP 2254-55)

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[1] *See Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, 765-67, ¶¶28-33, 393 P.3d 786 (2017) (claimant's release of insured conclusively rebutted presumption of harm, barring bad faith claim), *rev. denied*, 188 Wn.2d 1016 (2017).

In return, Traulsen agreed to assume primary responsibility for the defense of CDIC's federal declaratory judgment action and to share any money collected exceeding the arbitration award. To partially compensate Traulsen for CDIC's delay in paying anything on his injury claims, the parties agreed the unpaid arbitration award would bear interest at 12 percent from the date of the accident. (CP 2254-55) On April 9, 2019, Traulsen, Ephrata and Zewdu stipulated to amendment of Traulsen's original complaint to assert the assigned claims against CDIC and Evergreen, and new claims against Mack Trucking and its insurer, State National. (CP 2731-39)

CDIC joined in Evergreen's motion to dismiss the amended complaint, arguing that Traulsen's "claims were fully litigated in the arbitration, the arbitrator's Final Award was confirmed at Plaintiffs' request, and judgment was entered . . . " (CP 592, 1726-27) CDIC ignores the only "material fact" regarding Judge Michael Scott dismissal of

the first lawsuit (Pet. 3, n.3; 11)—Judge Scott agreed with CDIC's and Evergreen's argument that the arbitration of Traulsen's claims (in which CDIC participated) had resulted in a "final determination of all claims against all parties then pending," precluding amending that complaint unless "the judgment is first reopened" under CR 59 or 60. (CP 595-97)

Traulsen then brought this new action. (CP 1-11) Mack Trucking and State National settled with Traulsen, but CDIC still refused to unconditionally pay its liability limits. (CP 3412-15, 3505-11) CDIC instead contested the superior court's jurisdiction, unsuccessfully seeking discretionary review after Judge Regina Cahan denied CDIC's motion that asserted the federal district court had exclusive jurisdiction over the parties' dispute. (CP 270-77)

Judge Cahan then granted partial summary judgment that the confirmed arbitration award triggered CDIC's contractual duty to indemnify, ordering CDIC to

unconditionally pay its $1 million in liability limits "as credit to money owed by Zewdu & Ephrata." (CP 280-81) Rather than "unconditionally pay," CDIC placed its $1 million limits in the court registry on January 27, 2020, while it pursued a second unsuccessful motion for discretionary review. (CP 345, 606-12)

In a June 19, 2020 summary judgment order, Judge Averil Rothrock concluded that CDIC's continuing unreasonable failure to pay policy benefits violated IFCA. The court reserved for trial "a determination of the actual damages from the unreasonable failure to pay the policy benefits toward the July 31, 2018 arbitration award."(CP 623) Judge Rothrock also concluded that CDIC was judicially estopped from arguing that the court's confirmation of the arbitration award was not a final judgment triggering the accrual of interest, because CDIC had successfully argued before Judge Scott in obtaining dismissal of the personal injury lawsuit "that the order of

confirmation was entry of a final judgment." (CP 678-79) (emphasis in original)

On September 21, 2020, newly assigned Judge Mary Roberts ("the trial court"), directed the court clerk to disburse the funds in the court registry to Traulsen and granted assignee Traulsen's motion for partial summary judgment establishing CDIC's liability for bad faith, breach of contract, and violation of the CPA for failing to timely pay its limits on behalf of its insureds following the July 2018 arbitration. (CP 1056-58, 1061) The trial court then entered a partial summary judgment that CDIC owed post-judgment interest on the arbitration award at the statutory rate of seven percent from August 31, 2018, when it was confirmed, until October 2, 2020, when, following denial of interlocutory review, the clerk disbursed the $1 million in liability benefits to Traulsen. (CP 1809)

The trial court also granted CDIC's motion for partial summary judgment dismissing Traulsen's claim that CDIC

violated its duty of good faith by refusing to disclose its insureds' policy limits. (CP 1809) The trial court then entered summary judgment dismissing *all* of Traulsen's assigned claims. (*See* CP 2421-25) The trial court concluded as a matter of law that none of CDIC's conduct—its refusal to timely indemnify, its failure to investigate or settle—caused its insureds any injury or damages. (CP 2423) The trial court also denied any award of fees under *Olympic Steamship*, the CPA, or IFCA. (CP 2652)

The Court of Appeals reversed in an unpublished opinion. Division One held that CDIC's refusal to pay policy limits after confirmation of the arbitration award constituted a violation of IFCA and the CPA and breached its duty of good faith as a matter of law, and that the trial court erred in refusing to award damages for CDIC's breach of its duty to pay policy limits. (Op. ¶¶45, 156)[2] The Court

[2] Citations are to the numbered paragraphs in the LEXIS version of the unpublished opinion ("Op. ¶_"), attached to the Petition.

of Appeals concluded that the trial court did not abuse its discretion in applying judicial estoppel to bar CDIC from contesting that confirmation of the award was a final judgment triggering its contractual duty to pay interest. (Op. ¶¶54-66, 156)[3]

Division One concluded that issues of fact required a trial on whether CDIC's nonpayment of interest for two years was an unreasonable denial of benefits under IFCA, as well as whether CDIC acted in bad faith in refusing to disclose to Traulsen its insureds' policy information and in refusing to offer policy limits until its conditional February 2018 offer. (Op. ¶91) Finally, the Court of Appeals held CDIC's wrongful failure to pay policy benefits mandated an award of fees under *Olympic Steamship*, IFCA, and the CPA. (Op. ¶104)

[3] CDIC does not raise the lower courts' application of judicial estoppel as an issue for review. (Pet. 1)

IV. ARGUMENT IN OPPOSITION TO REVIEW

Without addressing RAP 13.4(b), CDIC challenges only three aspects of the Court of Appeals' 58-page unpublished decision. None of the issues raised by CDIC merit further review.

A. The Court of Appeals followed settled law in holding that CDIC's liability for bad faith will entitle its insureds to a presumption of harm.

CDIC's contention that its insureds should not "get a presumption of harm" (Pet. 14) ignores decades of precedent establishing the burden of proof when a liability insurer is sued for bad faith. As to CDIC's breach of its good faith duty to pay interest, to investigate and to settle Traulsen's claims against its insureds, the Court of Appeals did nothing more than remand for trial, holding that Traulsen established triable issues of fact. Its unpublished decision does not finally adjudicate anything and presents no basis for this Court's review.

This Court has consistently imposed a presumption that an insured is harmed by its liability insurer's bad faith, shifting to the insurer the burden to prove that its insureds were not "demonstrably worse off" as a result of the insurer's breach of its duty of good faith. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 920, ¶34, 169 P.3d 1 (2007) (quoting *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 390, 823 P.2d 499 (1992)). Because the insurer controls whether it acts in good faith or bad, placing the burden on the insurer recognizes that the "course cannot be rerun." *Id.* at 391.

"When a carrier acts in bad faith, it is in no position to argue that the steps the insured took to protect [them]self should inure to the insurer's benefit." *Besel v. Viking Ins. Co. of Wisconsin,* 146 Wn.2d 730, 737, 49 P.3d 887 (2002); *Greer v. N.W. Nat'l Ins. Co.,* 109 Wn.2d 191, 204, 743 P.2d 1244 (1987). Yet that is exactly what CDIC argues here.

CDIC concedes that this Court has "imposed a 'rebuttable presumption of harm'" when a liability breaches its duty of good faith, but asserts the presumption should not apply here because CDIC defended Zewdu and Ephrata against Traulsen's claims, arguing that its actions did not "substantially conflict" with its insureds' interests. (Pet. 15-16) But this Court has repeatedly rejected that argument, holding that the rebuttable presumption of harm "do[es] not depend on how an insurer acted in bad faith. Rather, the principles apply whenever an insurer acts in bad faith, whether by poorly defending a claim under a reservation of rights, refusing to defend a claim, or failing to properly investigate a claim." *Schmidt v. Coogan,* 181 Wn. 2d 661, 677, ¶37, 335 P.3d 424 (2014) (quoting *Besel*, 146 Wn.2d at 737).

Thus, a liability insurer that unreasonably fails to investigate and refuses to disclose policy limits to a claimant without consulting its insured, knowing it may

thereby foreclose settlement, engages in bad faith justifying a presumption of harm. *See Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 78 P.3d 1274 (2003); *Miller v. Kenny,* 180 Wn. App. 772, 806, ¶73, 325 P.3d 278 (2014).[4] So does a liability insurer that refuses to unconditionally put its limits on the table when it is in its insureds' interests to do so. *See Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 507-08, ¶¶20-21, 245 P.3d 939 (2011) (insurer's duty "to ascertain the most favorable terms available to settle"), *rev. denied*, 173 Wn.2d 1022, *cert. denied*, 568 U.S. 929 (2012).

Traulsen's assigned claims allege each of these bad faith acts by CDIC. But CDIC will be subject to a rebuttable presumption of harm for this conduct only if Traulsen establishes CDIC's bad faith at trial. "Whether an insurer acted in bad faith remains a question of fact." *Smith,* 150

[4] CDIC quotes only the Court of Appeals decision in *Smith*. (Pet. 17, 19) This Court *reversed* that decision in the cited opinion.

Wn.2d at 485. The Court of Appeals correctly held that a jury *could* find that "CIDIC's decision to withhold policy limits information . . . was company policy to avoid a policy limits demand rather than an analysis of whether disclosure would be in the insureds' best interest." (Op. ¶119)

CDIC also takes issue with the Court of Appeals' conclusion that a jury should resolve Traulsen's claims for bad faith failure to settle, arguing that it "offered policy limits" three times. (Pet. 7, 19-20) In fact, CDIC conditioned each limits "offer" on a full release and dismissal of the lawsuit, which would have foreclosed Traulsen's recovery against "any and all" other insureds or their coverages, including the State National policy insuring the trailer owned by Mack Trucking, LLC, which its investigation failed to disclose. (CP 600, 2013, 2287) CDIC's "offers" also would have also barred Traulsen from

pursuing the assigned claims against CDIC itself. *See Day*, 197 Wn. App. at 765-67, ¶¶28-33. (§III at 12, n.1, *supra*)

CDIC's fact-bound arguments in advance of a final adjudication of its liability posit no issue for this Court's review under RAP 13.4(b). And the few inapposite cases cited by CDIC that reject a presumption of harm do not establish any conflict justifying further review in this Court. *See* RAP 13.4(b)(1).

CDIC claims *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008), is not "substantially different" from this case. (Pet. 18) But the Court itself described *Onvia* as involving "bad-faith claims handling that is not dependent on the duty to indemnify, settle, or defend" because the liability insurer had "no duty to defend, indemnify, or settle," as a matter of law. 165 Wn.2d at 132, ¶¶21, 23.

CDIC also glosses over the fact that *Coventry Associates v. American States, Ins. Co.*, 136 Wn.2d 269,

961 P.2d 933 (1998) (Pet. 15-16, 18) involved a first-party property insurer, not a liability insurer. The *Coventry* Court confirmed that "a rebuttable presumption of harm exists as a result of an insurer's bad faith act in the third party context . . . because insurers have a heightened duty of good faith in such situations" that first party property insurers do not have. 136 Wn.2d at 281.

The Court of Appeals applied this Court's settled precedent. Like its fanciful version of the facts, CDIC's inapposite authority provides no basis for review, particularly in the absence of a final judgment.

B. The Court of Appeals correctly remanded for trial on whether CDIC acted in bad faith in unreasonably delaying payment of interest on the confirmed arbitration award.

The Court of Appeals properly held that CDIC's "duty to pay interest was triggered by confirmation of the award" in superior court. (Op. ¶66) CDIC's argument that the "award" is not a "judgment" within the meaning of its Supplementary Payments coverage, which mandates

payment on "[a]ll interest on the full amount of any judgment . . ." (CP 517, 799), ignores that the Court of Appeals held that Judge Rothrock did not abuse her discretion in applying judicial estoppel after Judge Scott had accepted CDIC's argument that "the arbitration award was a final determination of all claims . . . equivalent to a judgment." (Op. ¶59; *see also* CP 596, 678-79)

CDIC argues that a "confirmed arbitration award is not a 'judgment'" under CR 54(a) (Pet. 20), but does not raise as an issue, or cite any authority challenging the Court of Appeals' affirmance of "the trial court's application of the doctrine [of judicial estoppel] . . . based on undisputed facts." (Op. ¶¶57-58) (citing *Arkison v. Ethan Allen, Inc.,* 160 Wn.2d 535, 538, ¶7, 160 P.3d 13 (2007)). "Issues not raised in a petition for review will not be considered by this court." *Wood v. Postelthwaite*, 82 Wn.2d 387, 388, 510 P.2d 1109 (1973).

Moreover, the Court of Appeals correctly held that Judge Rothrock did not abuse her discretion in holding that CDIC would have derived an unfair advantage by arguing contrary to its earlier position that no judgment was ever entered in Traulsen's original lawsuit that was resolved by arbitration. (CP 678-79) CDIC joined in Evergreen's motion to dismiss Traulsen's amended complaint, arguing that Traulsen's underlying case was "over" when the court confirmed the arbitration award and that "judgment was entered pursuant to RCW 7.04A.250(1)." (CP 592, 1726-27) Judge Scott accepted this argument in dismissing the second amended complaint. (CP 596)[5]

[5] Characterizing this portion of its decision as a "comment," CDIC argues Division One's opinion is "contrary to what Judge Scott actually said." (Pet. 24) Not true. The Court of Appeals quoted verbatim from Judge Scott's Order Dismissing Traulsen's Second Amended Complaint. (Op. ¶59) CDIC's assertion (Pet. 24) that Judge Scott's August 2 order of dismissal (CP 595-98) predates CDIC's July 29 joinder in Evergreen's motion (CP 1726-27) is similarly incorrect.

In any event, CDIC's interpretation of its policy's Supplementary Payment language is meritless. CDIC concedes that Washington courts define "judgment" as "the final determination of the rights of the parties in the action . . ." CR 54(a)(1) (Pet. 20); *see Denney v. City of Richland,* 195 Wn.2d 649, 654, ¶6, 462 P.3d 842 (2020). An order confirming an arbitration award meets that definition. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, n.6, 961 P.2d 350 (1998) (arbitration award need not "be reduced to judgment" for purposes of finality).

Division One properly remanded for trial on Traulsen's claim that CDIC acted unreasonably in refusing to pay any interest for two years even "after acknowledging that interest was due." (Op. ¶91) CDIC's argument that it owed its insured no duty to pay any interest at all presents no ground for review.

C. Traulsen, as the insureds' assignee, had standing to assert their claims that CDIC "unreasonably denied a claim for benefits" under IFCA.

Traulsen stood in the shoes of CDIC's insureds under a valid assignment of the insureds' rights against CDIC, which included the right under IFCA of "any first party claimant . . . who is unreasonably denied a claim . . . for benefits by an insurer" to sue for damages. RCW 48.30.015(1). CDIC's contention that the Court of Appeals "create[d] a private cause of action for third party claimants" (Pet. 25) is meritless.

The Traulsens were suing not as "third party claimants" (Pet. 26), but as assignees of Zewdu and Ephrata, the "first party claimants" under CDIC's liability policy. The insureds assigned to Traulsen their "right to payment as a covered person under an insurance policy." RCW 48.30.015(4). (Op. ¶38). As Judge Cahan noted, CDIC's payment of its limits would benefit its insureds by

partially satisfying their adjudicated liability to Traulsen. (CP 280-81).

Washington courts have long approved assignments, such as this one:

> An insured may assign its bad faith claims to a third party. . . . An assignee steps into the shoes of the assignor and has all the rights of the assignor. . . . The assignee's cause of action is then direct, not derivative.

Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 200-01, ¶29, 312 P.3d 976 (2013) (internal citations omitted), *rev. denied*, 179 Wn.2d 1010 (2014). "The typical settlement agreement involves . . . an assignment to the plaintiff of the insured's coverage and bad faith claims against the insurer." *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764–65, ¶15, 287 P.3d 551 (2012). That is exactly what occurred here.

CDIC admits (Pet. 7) that its insureds signed the first assignment in May 2018 (CP 2243-51)[6], and signed the second assignment in March 2019 (CP 2254-55) because even though its insureds "had been adjudicated liable . . . to the tune of $10.6 million," CDIC failed to pay anything on their behalf. (Op. ¶51) Zewdu and Ephrata continue to personally owe Traulsen interest at 12 percent on the unpaid balance of the award under an assignment agreement that provides them no covenant protection against execution.

Essentially, CDIC argues that it may, without consequence, refuse to partially satisfy its insureds' liability pursuant to its contract of insurance, depriving

[6] Ignoring its concession in the declaratory action (CP 2690), CDIC now complains the first assignment is invalid because Traulsen did not sign it. (Pet. 7) CDIC offers no argument that an assignment signed only by the assignor is void. An assignment is not subject to the statute of frauds, RCW 19.36.010, and need not even be in writing. *Koch v. Aetna Life Ins. Co. of Hartford, Conn.*, 165 Wash. 329, 343, 5 P.2d 313 (1931).

these first party insureds of a benefit under their liability policy, because after years of litigation and multiple court orders, it finally paid its limits into the court registry. The Court of Appeals' rejection of that argument under IFCA's plain language provides no basis for review under RAP 13.4(b).

D. The Court should award Traulsen his fees.

In holding that CDIC's "nonpayment of policy limits" violated IFCA, the Court of Appeals held that Traulsen was entitled to his attorney fees under (among other grounds) RCW 48.30.015(3), which mandates a fee award "after a finding of unreasonable denial of a claim for coverage or payment of benefits." (Op. ¶104) This Court should award Traulsen his fees in answering CDIC's petition for review, RAP 18.1(j), which challenges that IFCA ruling and wrongfully seeks to deprive its insureds of their insurance benefits. *See Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

V. CONCLUSION

The Court should deny review and award Traulsen attorney fees in responding to CDIC's petition for review.

I certify that this brief is in 14-point Georgia font and contains 4,931 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 10th day of July, 2023.

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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 July 10, 2023, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 10th day of July, 2023.

*/s/ Victoria K. Vigoren*_____
Victoria K. Vigoren

SMITH GOODFRIEND, PS

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