No. 94246-3

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75633-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

MYONG SUK DAY, dba STOP IN GROCERY,

Petitioner.

PETITION FOR REVIEW

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A. Identity of Petitioner and Court of Appeals Decision.

Myong Day, defendant in the trial court and respondent in the Court of Appeals, petitions for review of the Court of Appeals December 12, 2016 published decision in *Mutual of Enumclaw Ins. Co. v. Day*, 197 Wn. App. 47, 387 P.3d 1084 (2016) (Appendix A). The Court of Appeals amended its published decision on reconsideration by Order dated February 6, 2017 (Appendix B).

B. Issue Presented for Review.

1. Is an insured entitled to a presumption of harm and the remedy of coverage by estoppel when an insurer defending under a reservation of rights breaches its duty of good faith by failing to inform its insured of the basis for determining coverage?

2. Did the Court of Appeals err in holding as a matter of law that the presumption of harm and harm proved to an insured from an insurer's bad faith was rebutted by the insured's right, much later, to satisfaction of covenant judgments when the insurer 1) shifted the cost and burden of investigation of coverage to the insured, 2) avoided any coverage decision in order to take advantage of the higher burden of proof for the insured to prove reformation of the policy, 3) caused the insured significant delay and mental anguish for years before she was entitled to satisfaction

of the judgments, and 4) required the insured to give up a claim against the insurance agent to obtain the right to satisfaction of the judgments?

C. Statement of the Case.

These facts are supported by the jury's special verdict that Mutual of Enumclaw acted in bad faith while defending petitioner Day under a reservation of rights.

1. When purchasing her store, Day asked MOE's agent for the same liability coverage her seller had, including liquor liability, but MOE issued a policy that excluded that coverage.

Myong Day purchased the Stop-In Grocery in Tacoma from a fellow Korean American in 2003. (11/20 RP 117-20; 2/1 RP 104) Day had never owned or run a business before and could not speak English well. (11/20 RP 99-101, 128) Because she had known and trusted him for decades, Day ran everything the way her seller did, using his accountant, vendors and insurance agent and insurer, respondent Mutual of Enumclaw. (11/19 RP 55, 60; 11/20 RP 112, 123-26, 128; CP 2378)

MOE had provided its insurance agent Huh complete authority – if an insured requested coverage that MOE wrote, including liquor liability coverage, MOE was legally bound when the agent was requested and agreed to provide the coverage. (11/24 RP 139; 11/25

RP 35-36) As MOE characterized it, dealing with its agent Huh was the same as dealing with someone working in the home office. Huh assured Day that the coverage would be the same. (11/19 RP 55, 64-65, 75, 80; 11/20 RP 128-29; 11/24 RP 22, 40; CP 2378, 2381)

2. MOE initially denied coverage of a liquor liability lawsuit, accepting its agent's claim that Day had declined coverage without investigating Day's assertion that she asked for coverage or disclosing its agent's authority to bind MOE.

In May 2008, William Lee and Dawn Smith while walking in Point Defiance Park were critically injured by a teenage drunk driver. The driver had been drinking beer obtained from another teenager, who claimed he had purchased the alcohol at Day's grocery store. (Op. ¶7) When Lee and Smith sued and served Day with their personal injury lawsuit in 2009, Day called Huh. (11/20 RP 132-33) Huh told Day she had insurance that covered the lawsuit and tendered the claim to MOE for Day on September 18, 2009. (Op. ¶9) Huh said nothing about there being no liquor liability coverage in the policy to Day, or to MOE. (11/25 RP 143-44; 12/1 RP 31; Exs. 16, 29)

In fact, the policy as initially written by MOE six years earlier did not include the liquor liability endorsement that Day's seller's policies with MOE had contained. (Op. ¶8; Ex. 30, CP 2378) Thereafter the policy was auto renewed by MOE; an insured could not

have determined from the coverage summary or declarations that the policy did not include liquor liability. (11/18 RP 130: Exs. 29, 30)

On September 23, 2009, MOE's claims adjuster told Day she probably didn't have coverage and she should get her own lawyer. (Op. ¶9; Ex. 16 at 3; 11/19 RP 88) Although MOE's claim activity log confirms that Day told the adjuster "she was told by the agent that the[re] should be coverage" (Ex. 16 at 3; 11/19 RP 88), MOE did not investigate why Day thought she had coverage, did not ask Day if she had originally asked agent Huh to include liquor liability coverage, and did not inform Day that Huh had authority to bind MOE in 2003 – or that the real coverage question was what coverage Day had requested from Huh six years earlier. (11/19 RP 89-94)

Because MOE had told Day to get her own defense lawyer, Day hired a private lawyer to defend the injury claim, and paid him a retainer. (11/18 RP 126, 131; 11/20 RP 136) Only on October 14, 2009, weeks later, did MOE tell Day that it would defend her under a reservation of rights – while continuing to maintain that there was no liquor liability coverage under its policy. (Op. ¶10; Ex. 19 at 4)

MOE still did not interview Day about Huh's representation to her that she would have the same coverage as her seller. MOE did not obtain or review its agent Huh's file. Instead, MOE blindly

accepted Huh's self-serving contention[1] that Day had "declined" liquor liability coverage. (11/19 RP 89, 93-94, 98-99, 135, 139; 11/25 RP 58; Ex. 16)

MOE's Claims Director admitted at trial that MOE should have investigated the coverage issue, and that MOE's failure to follow up on the issue was "inadequate." (11/19 RP 97, 99, 103; 11/20 RP 11) MOE's Claims Director conceded at trial that had MOE investigated, MOE very well could have removed the reservation of rights and covered the claim. (11/20 RP 33-36, 68)

3. MOE consented to Day's reasonable settlement with plaintiffs, who agreed Day could later enter satisfaction of their consent judgments after they settled her assigned claim against the agent. Day retained her bad faith claim against MOE.

Instead of investigating Day's claims for coverage, MOE filed a declaratory judgment action against Day claiming there was no coverage, no further obligation to defend the injured plaintiffs' claim, and no further duty to investigate. (Ex. 16 at 6) Once again, neither MOE's "boilerplate" October 2009 reservation of rights letter nor its February 2010 declaratory action or any other communication advised Day of the real coverage issue – whether MOE was bound

[1] Huh had agreed to indemnify MOE for any "error or omission in handling of business placed with or intended to be placed with" MOE. (CP 431; Ex. 31 at 5; 11/20 RP 27)

to indemnify Day for liquor liability because Day had asked MOE's agent Huh for that coverage in late 2003. (11/19 RP 122-23; 11/20 RP 75, 83-84; 11/24 RP 118; 11/25 RP 79)

Day was now a defendant in two lawsuits – including the declaratory judgment action MOE filed instead of investigating and resolving the coverage question. MOE thus improperly shifted to Day all the expense of the coverage investigation and the burden of proving coverage.[2] Advised by her defense lawyer that she might have to file bankruptcy, Day was consumed by anxiety and hopelessness. Day could not sleep, stopped exercising, gained weight, and developed diabetes. Day cut off contact with her friends and became suicidal. (11/18 RP 150-51; 11/19 RP 66-69; 11/20 RP 138; 11/24 RP 117-18)

Only eighteen months later, in January 2011, did Day learn for the first time through discovery in the declaratory judgment action that Huh could immediately bind MOE to liquor liability coverage when orally requested by an insured. (CP 37-38, 424-25)

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[2] By failing to investigate and decide about coverage on the more-probable-than-not basis that MOE conceded should have been used, and instead suing Day for a declaration of no coverage, MOE in effect required Day to prove mutual mistake by "clear and convincing" evidence in order to reform the policy to include liquor liability coverage. As argued below (§ D.1), this Court has never required an insured to prove reformation of the policy to obtain coverage by estoppel when an insurer acts in bad faith.

In an amended answer, Day alleged bad faith, CPA and IFCA violations, and coverage by estoppel, and brought in Huh as a third party defendant. (Op. ¶12; CP 194-200)

After MOE turned down a policy limits offer from the plaintiffs (CP 345, 365, 393, 527, 531), Day settled separately with Lee and Smith in June 2011. The plaintiffs required a payment of $125,000 from MOE and required Day to assign her rights against Huh as a condition of settlement. Day consented to judgments totaling over $7,900,000, while Lee and Smith granted Day a covenant not to execute from Day. (Op. ¶13; CP 304-07) Lee and Smith agreed to satisfy the consent judgments upon conclusion of the assigned claims against Huh. (CP 306)

MOE initially tried to condition its cash payment to Lee and Smith on Day dropping her bad faith claims. (CP 299, 304, 453-54) When Day would not agree, MOE made the payment anyway. Day retained her claims against MOE. (CP 305) Day's settlement with Lee and Smith provided that their agreement was "not intended to benefit any other person or entity, and shall not be construed in any way to release Michael Huh, or MOE, for any liability either may have to Day or to Plaintiffs." (CP 305-06)

In their June 2011 settlement with Day, Lee and Smith also had agreed to conduct a hearing to establish the reasonableness of the settlement, which included judgments against Day. (Op. ¶13; CP 304) When MOE was apprised of the settlement, MOE conceded that the settlement was reasonable, and represented that "if a reasonableness hearing and judgment can be avoided that would be a good thing." (CP 652, 656, 660, 672) As a consequence, Lee and Smith did not seek a reasonableness determination or formal entry of the judgments. (3/7 RP 11-12; CP 300) After Lee and Smith settled Day's assigned claim against broker Huh for $600,000 (CP 627, 963-64), their underlying case against Day was dismissed at the request of other defendants who had previously settled, with notice only to the defense lawyer MOE had retained for Day under its reservation of rights. (Op. ¶15; CP 622-23)

In July 2013, MOE's moved for summary judgment in this declaratory judgment action, arguing that even though it had affirmatively represented that the settlement was reasonable and that judgments in the underlying personal injury action should be avoided if possible, the failure to enter a judgment against Day and in favor of Lee and Smith precluded MOE's liability for bad faith. (CP 204-12) MOE's motion was denied. (CP 314-15) But because

Lee and Smith were at risk under their settlement with Day for not conducting the reasonableness hearing, they moved to reopen the underlying action to conduct a reasonableness hearing and enter the judgments mandated in the settlement. (CP 625) Those judgments have never been satisfied. (Op. ¶14)

MOE once again admitted the settlement was reasonable, but now it opposed entry of judgments. (CP 786-96) The trial court found the settlement and the covenant judgments to be reasonable, found MOE had agreed both to foregoing a reasonableness hearing and the judgments, and entered judgments against Day and in favor of Lee and Smith on June 27, 2014. (CP 1038-50)

4. The Court of Appeals reversed a judgment of coverage by estoppel against MOE based on a jury's bad faith verdict, holding that Day's right to a later satisfaction of the consent judgments eliminated any "harm."

Based on the facts recited above, a jury after a 9-day trial found that MOE had acted in bad faith and damaged Day, awarding her $300,000 in emotional distress damages. (CP 1758, 1764) MOE did not except to any of the instructions on the tort of bad faith or to the verdict form. (*See* Op. ¶35) Based on the jury's finding of bad faith and damages, the trial court then confirmed Day's right to coverage by estoppel for the amount of her reasonable

settlement with the plaintiffs. (*See* 2/9/15 RP 79, 85; Op. ¶17) In separate findings, the trial court awarded Day an additional $600,000 in exemplary damages under IFCA, but refused to reform the policy to include liquor liability because Day had not proven by clear and convincing evidence "a clear mutual mistake in coverage terms." (CP 2381)

In a published decision, the Court of Appeals affirmed the IFCA judgment of $900,000, but reversed the judgment against MOE for coverage by estoppel of the injury claims as valued in the settlement agreement and consent judgments. The Court of Appeals held that even if Day was entitled to a presumption of harm due to MOE's bad faith conduct, MOE fully rebutted the presumption because "Day was legally insulated from any exposure based on the agreed judgments" because the settlement entitled Day "to a full satisfaction of those judgments." (Op. ¶¶30-31) The Court of Appeals affirmed the trial court's refusal to reform the policy on the grounds "that Day failed to meet the burden of clear, cogent and convincing evidence." (Op. ¶45)

Day petitions for review.

D. Argument Why Review Should Be Granted.

1. The Court of Appeals' published decision conflicts with this Court's decisions requiring the insurer to rebut a presumption of harm and imposing the remedy of coverage by estoppel upon an insurer acting in bad faith.

This Court should accept review under RAP 13.4(b)(1) because the Court of Appeals' published decision allows MOE to escape the consequences of its breach of its good faith duties to an insured, in conflict with case law establishing three bedrock principles of insurance bad faith law.

First, an insurer breaches its duty of good faith by violating any of the *Tank* requirements, including failing to give equal consideration to its insured's financial risks and interests while defending under a reservation of rights. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986).

Second, there is a presumption that an insurer's bad faith has caused the insured harm, *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 391-92, 823 P.2d 499 (1992); *American Best Foods, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 411-12, ¶18, 229 P.3d 693 (2010), which may only be rebutted by **proof** that the insurer did no harm to its insured. *Mutual of Enumclaw Ins. Co. v. Dan*

Paulson Const., Inc., 161 Wn.2d 903, 920, ¶33; 169 P.3d 1 (2007); *Butler*, 118 Wn. 2d at 394.

Third, if the presumption of harm is not rebutted, the amount of the insured's settlement of the underlying case becomes the measure of damages for the insurer's bad faith absent proof that the settlement is the product of fraud or collusion. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 739, 49 P.3d 887 (2002); *Dan Paulson*, 161 Wn.2d at 919, ¶30; *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764-65, ¶¶ 14-16, 287 P.3d 551 (2012). The insurer is estopped from denying coverage for the claim against the insured including any reasonable settlement of the underlying claim. *Butler*, 118 Wn.2d at 392 ("where an insurer acts in bad faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage."); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 759, 58 P.3d 276 (2002) ("an insurer that, in bad faith, refuses or fails to defend in bad faith is estopped from denying coverage."); *Dan Paulson*, 161 Wn.2d at 924, ¶ 41 (MOE "estopped from denying coverage" where it breached duty of good faith while defending its insured under reservation of rights).

The Court of Appeals' published decision violates all of these legal principles governing an insurer's liability for acting in bad faith.

First, it is now a verity that while defending Day under a reservation of rights, MOE failed to advise Day that its agent had the authority to bind MOE to provide liquor liability coverage, failed to investigate her assertion that the agent had agreed to provide that coverage to her, failed to protect Day by exploring settlement with the plaintiffs, and placed her at risk of multi-million dollar claims and personal bankruptcy that she was forced to settle by giving up a valuable claim against the agent. The insurer's core duty of good faith includes, as the jury was instructed here (Instr. 10, CP 1753), the obligation to advise its insured "of *all* developments relevant to his policy coverage" and to *"refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk."* *Tank*, 105 Wn.2d at 388 (second emphasis added). The jury in this case found, based on overwhelming evidence, unchallenged instructions, and a verdict form accepted by MOE, that MOE breached its good faith duties under *Tank* and acted in bad faith.

Further, MOE could not rebut the presumption that its bad faith had harmed its insured Day, as the jury found by awarding her emotional distress damages. Recognizing the "almost impossible burden of proving that [the insured] is demonstrably worse off

because the insurer's actions," this Court in *Butler* recognized "no amount of evidence will prove what might have occurred if a different route had been taken" by an insurer that, while defending under a reservation of rights, put its own interests above its insured's. *Butler,* 118 Wn.2d at 390-91; *see also Dan Paulson,* 161 Wn.2d at 921, ¶36. The Court of Appeals disregarded that presumption, and the jury's verdict, in this case, where without fully informing Day of the issue or the key fact generating the coverage issue – the scope of its agent's authority to verbally bind coverage for liquor liability – MOE in effect placed the "almost impossible burden" on its insured Day to establish the existence of coverage by clear and convincing evidence in a counterclaim for reformation.

Finally, the Court of Appeals' refusal to impose the remedy of coverage by estoppel in this case conflicts with *Butler*, *Dan Paulson* and, most recently, *Bird.* MOE's bad faith made the question whether Day would have obtained that coverage – and the peace of mind liability insurance is designed to provide – if MOE had properly investigated and decided coverage, impossible to determine under the proper standard and at the proper time, when it would have mattered. This is precisely the consequence the remedy of coverage of estoppel was created to address.

Even without the ability to marshal contemporaneous evidence, the trial court found that Day proved in 2015 that she "probably did, at least indirectly, request liquor liability coverage by asking Mr. Huh to write the same policy for her as he had done for Mr. Kim." (CP 2381) This more-probable-than-not burden is what MOE, acting in good faith, should have applied in 2009 to determine whether Day probably requested liquor liability coverage. Had it acted in good faith, it would have probably lifted its reservation of rights, extended coverage, and accepted plaintiffs' subsequent offer to settle the underlying case for limits. This Court should accept review because by instead imposing upon Day the "almost impossible burden" of reforming the insurance contract with clear and convincing evidence of mutual mistake, the Court of Appeals flipped the presumption of harm in bad faith cases on its head, in contravention of established precedent.

2. The Court of Appeals' published decision immunized MOE from the consequences of its bad faith by holding that Day's right to a satisfaction of judgment, in an agreement that was not intended to benefit the insurer, eliminated any "harm" as a matter of law.

This Court should also accept review under RAP 13.4(b)(1) because the Court of Appeals' holding in its published decision that "MOE rebutted any presumption of harm" as a matter of law

because "Day was legally insulated from any exposure based on the agreed judgments" (Op ¶ 31), conflicts with this Court's precedent and is not supported by *Werlinger v. Clarendon National Insurance Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005), *rev. denied*, 157 Wn.2d 1004 (2006), the Court of Appeals decision upon which it relies. In allowing MOE to escape the consequences of its bad faith that had already been visited upon its insured, the Court of Appeals wrongly relied upon Day's purely fortuitous right to a later satisfaction of consent judgments in the underlying case because her assignees settled the assigned case against the agent before Day resolved her retained claims against MOE. This Court should reject the Court of Appeals' conclusion that the protection that Day negotiated to reduce some of the later continuing harm caused by MOE "is equivalent to the insured's bankruptcy in *Werlinger*." (Op. ¶30)

Once there is harm to an insured, the damages for an insurer's bad faith are measured by the insured's reasonable settlement of the underlying claims. *Bird*, 175 Wn.2d at 764-65, ¶¶ 14-16. Just as a covenant judgment "constitutes real harm" even though "the agreement insulates the insured from liability," *Butler*, 118 Wn.2d at 399, Day's 2011 settlement agreement, under which she consented to entry of judgments totaling $7.9 million, did not provide any

protection to Day at all until Lee and Smith concluded their lawsuit against agent Huh – an event over which she had no control.

The Court of Appeals erred in holding as a matter of law that MOE could benefit from the later protections against the ongoing harm from MOE's bad faith that Day negotiated in her settlement agreement with Lee and Smith. *Butler,* 118 Wn.2d at 397, and *Besel,* 146 Wn.2d at 738-39, each upheld the insured's right to negotiate favorable terms in covenant settlement agreements to limit the consequences of an insurer's bad faith conduct; those terms do not inure to the benefit of the insurer. The proper focus is whether the agreements preserved the right to sue for the insurer's bad faith, *see Butler,* 118 Wn.2d at 398; *Besel,* 146 Wn.2d at 737, not whether the insured is "legally insulated" from liability to the injured party. Consistent with the holdings of *Butler* and *Besel,* Day's settlement agreement with Lee and Smith expressly provided that Day retained all claims, preserved Day's continued right to sue MOE (CP 304-05), and stated that the agreement was not to benefit MOE. (CP 306-07)

Day's settlement agreement with Lee and Smith, including her right to a satisfaction of covenant judgments at an unknown later date, did nothing to eliminate the harm that she had already

suffered, and continued to suffer, for the two years until Lee and Smith settled the claim with the insurance agent. MOE's bad faith refusal to disclose the basis for coverage left Day hopeless, consumed by the prospect of bankruptcy and losing her business. Day stopped sleeping and exercising; she gained weight, developed diabetes, and cut off contact with her friends. Suicidal, Day drove to a remote rural road and put a gun to her head – changing her mind at the last moment because, as the oldest daughter, she felt an obligation to her aged mother. (11/19 RP 66-69; 11/20 RP 138) As defendant in MOE's declaratory judgment action, Day also was forced to bear the costs of investigating coverage (CP 1983-84) – costs that MOE itself should have incurred had it in good faith resolved the coverage issue months earlier.

This was "real harm," all of which Day suffered long *before* her lawyers succeeded in negotiating a covenant settlement in which Lee and Smith demanded covenant judgments secured by an assignment of Day's claim against agent Huh. But that is not all the "harm" that Day suffered. Contrary to MOE's contention below that "Day paid nothing to extinguish her own multi-million dollar liability" (App. Br. 6-7), Day had to give up her claim against agent Huh, which was

worth at least the $600,000 for which the litigation-weary plaintiffs settled the claim in 2011. (CP 304)

Because Day was not "insulated" from the consequences of MOE's bad faith for years, the Court's reliance on *Werlinger* is particularly misplaced. In *Werlinger*, the insured was under the protection of the bankruptcy court when he was initially sued for negligence. The bankruptcy court allowed the lawsuit to proceed on the condition that collection was limited to the $25,000 limits of his liability policy. The insured, who was thus *never* exposed to any personal liability whatsoever, failed to prove any other compensable harm. As a consequence, Division One concluded the insurer's bad faith while defending under a reservation of rights could not have caused its insured harm at any point in time. *Werlinger*, 129 Wn. App. at 808.

The reasoning of *Werlinger* is inapplicable here because Day was exposed to and never immunized from the devastating consequences of a financially ruinous lawsuit. "MOE's conduct caused significant uncertainty and increased risk" for Day – the very type of harm that the bad faith breach of *Tank* duties is designed to redress. *Dan Paulson*, 161 Wn.2d at 922, ¶38. The Court of Appeals erred in holding that MOE rebutted the presumption

that its bad faith harmed Day as a matter of law, allowing MOE to escape the very consequences of its misconduct that the tort of bad faith for breach of an insurer's heightened duties while defending under a reservation of rights is designed to redress.

E. Conclusion.

This Court should accept review, reverse the Court of Appeals, and reinstate the trial court's judgment.

Dated this 8th day of March, 2017.

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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 March 8, 2017, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 8th day of March, 2017.

Patricia Miller

197 Wash.App. 47
Court of Appeals of Washington,
Division 1.

Mutual of Enumclaw Insurance Company, Appellant/Cross Respondent,
v.
Myong Suk Day, Respondent/Cross Appellant.

No. 75633-8-I
|
FILED: December 12, 2016

Synopsis

Background: Liability insurer brought action against insured grocery store owner for declaratory judgment that insurer owed no duty to defend or indemnify owner against injured pedestrians' claim arising from alcohol sale since policy did not include liquor liability coverage. Owner sought reformation of policy to include such coverage, alleged bad faith by insurer, claimed coverage by estoppel, and added agent as third-party defendant. Pedestrians entered into settlement agreement, agreeing not to execute settlements except as to insured's claims against agent. Trial court found settlement to be reasonable and consolidated personal injury action with declaratory judgment action. Following jury trial, the Superior Court, Pierce County, Stanley J. Rumbaugh, J., awarded insured emotional distress damages and attorney fees, denied insured's claim to reform insurance contract, but applied coverage by estoppel to award insured amount agreed to in settlement agreement with pedestrians. Insurer appealed, and insured cross-appealed.

Holdings: The Court of Appeals, Verellen, C.J., held that:

[1] any presumption of harm from insurer's alleged failure to investigate claim was rebutted by insulation of insured from liability, and, thus, coverage by estoppel was precluded, and

[2] reformation of policy was an issue for the court, not the jury, and, thus, liability insurer was not entitled to proposed instructions.

Affirmed in part and reversed in part.

West Headnotes (19)

[1] **Insurance**
Insurer's settlement duties in general
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3346 Settlement by Liability Insurer
217k3349 Insurer's settlement duties in general
A liability insurer has an enhanced obligation of fairness toward its insured that imposes a duty beyond that of the standard contractual duty of good faith.

Cases that cite this headnote

[2] **Insurance**
Presumptions
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(2) Presumptions
In order to relieve an insured of the almost impossible burden of proving he or she is demonstrably worse off because of the liability insurer's bad faith, a rebuttable presumption of harm arises once the insured establishes bad faith.

Cases that cite this headnote

[3] **Insurance**
Presumptions
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(2) Presumptions
Courts presume harm from an act of bad faith because, even though requiring the liability insurer to prove the absence of harm is an almost impossible burden, the insurer controls whether it acts in good faith.

Cases that cite this headnote

[4] **Insurance**
Presumptions
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(2) Presumptions
A liability insurer can rebut the presumption of harm, which stems from an act bad faith, by showing by a preponderance of the evidence its acts did not harm or prejudice the insured.

Cases that cite this headnote

[5] **Insurance**
Refusal, or breach of duty, to defend
Insurance
Presumptions
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3111 Defense of Action Against Insured
217k3111(3) Refusal, or breach of duty, to defend
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3126 Evidence
217k3128 Presumptions
If a liability insurer does not rebut the presumption of harm, which stems from an act of bad faith while defending claim under reservation of rights, the insured is entitled to coverage by estoppel.

Cases that cite this headnote

[6] **Insurance**
Presumptions
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(2) Presumptions
If a settlement between the insured and tort victim has been determined to be reasonable, then the amount of the agreed judgment is the presumptive recovery for the tort victim on insured's assigned bad faith claim against liability insurer.

Cases that cite this headnote

[7] **Insurance**
Presumptions
Insurance
Presumptions
217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3126 Evidence
217k3128 Presumptions
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3378 Actions
217k3381 Evidence
217k3381(2) Presumptions
Any presumption of harm from liability insurer's alleged failure to investigate claim to reform policy to include liquor liability coverage was rebutted by insulation of insured from liability once agreed judgments were satisfied by tort victims' resolution of insured's assigned claims against agent, and, thus, coverage by estoppel was precluded on insured's bad faith claim against insurer; covenant judgment between insured and victims precluded any execution on the agreed judgments except on insured's claim against agent, claim against agent had already been resolved when judgments were entered against insured, and because insured's right to full satisfaction of judgment was unrelated to resolution of claims against insurer, insured was insulated from liability.

Cases that cite this headnote

[8] **Damages**
Claims and settlement;bad faith
Insurance
Amount and Items Recoverable

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.44 Insurance Practices
115k57.46 Claims and settlement;bad faith
217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties;Bad Faith
217k3373 Amount and Items Recoverable
217k3374 In general

Even without a presumption of harm and coverage by estoppel, an insured is entitled to damages personal to the insured that resulted from the liability insurer's bad faith, such as emotional distress damages.

Cases that cite this headnote

[9] **Trial**
Issues and Theories of Case in General
Trial
Confused or misleading instructions
Trial
Construction and Effect of Charge as a Whole

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k203 Issues and Theories of Case in General
388k203(1) In general
388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k242 Confused or misleading instructions
388 Trial
388VII Instructions to Jury
388VII(G) Construction and Operation
388k295 Construction and Effect of Charge as a Whole
388k295(1) In general

Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and, when taken as a whole, inform the jury of the applicable law.

Cases that cite this headnote

[10] **Appeal and Error**
Conduct of trial or hearing in general

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k969 Conduct of trial or hearing in general

The Court of Appeals reviews the trial court's decision whether to give a particular jury instruction for an abuse of discretion.

Cases that cite this headnote

[11] **Trial**
Duty to give requested instruction; erroneous requests

388 Trial
388VII Instructions to Jury
388VII(E) Requests or Prayers
388k261 Duty to give requested instruction; erroneous requests

If the trial court's jury instructions are otherwise sufficient, the court does not need to give a party's proposed instruction, though that instruction may be an accurate statement of the law.

Cases that cite this headnote

[12] **Trial**
Confused or misleading instructions

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k242 Confused or misleading instructions

The trial court may decide which instructions are necessary to guard against misleading the jury.

Cases that cite this headnote

[13] **Insurance**
Actions
Insurance
Instructions

217 Insurance
217XIII Contracts and Policies

217XIII(K) Reformation
217k1891 Actions
217k1892 In general
217 Insurance
217XXXI Civil Practice and Procedure
217k3579 Instructions

Reformation of insurance policy to include liquor liability coverage was an issue for the court, not the jury, and, thus, liability insurer was not entitled to instructions on binders, the need for a written agreement to modify the policy, and insurer's duty to investigate the claim that the policy should mean something other than the written terms.

Cases that cite this headnote

[14] **Appeal and Error**
Amount of recovery or extent of relief

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k221 Amount of recovery or extent of relief

Insurer's claim that emotional distress damages were not actual damages subject to trebling under Insurance Fair Conduct Act (IFCA) was not preserved for appeal; insurer did not raise the claim to the trial court. Wash. Rev. Code Ann. § 48.30.015; Wash. R. App. P. 2.5(a).

Cases that cite this headnote

[15] **Appeal and Error**
Necessity of presentation in general

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 Necessity of presentation in general

To afford the trial court an opportunity to correct any error and avoid unnecessary appeals and retrials, failure to raise an issue before the trial court generally precludes a party from raising it on appeal.

Cases that cite this headnote

[16] **Reformation of Instruments**
Mutuality of Mistake

Reformation of Instruments
Contracts in general

328 Reformation of Instruments
328I Right of Action and Defenses
328k15 Grounds for Reformation
328k19 Mutuality of Mistake
328k19(1) In general
328 Reformation of Instruments
328II Proceedings and Relief
328k42 Evidence
328k45 Weight and Sufficiency
328k45(2) Contracts in general

Mutual mistake supporting reformation of a contract must be proved by clear, cogent, and convincing evidence, and if doubts exist as to the parties' intent, reformation is not appropriate.

Cases that cite this headnote

[17] **Reformation of Instruments**
Nature and scope of remedy

Reformation of Instruments
Form of remedy

328 Reformation of Instruments
328I Right of Action and Defenses
328k1 Nature and scope of remedy
328 Reformation of Instruments
328II Proceedings and Relief
328k30 Form of remedy

Reformation of a contract is an equitable remedy employed to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement.

Cases that cite this headnote

[18] **Equity**
Grounds of jurisdiction in general

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General
150k3 Grounds of jurisdiction in general

In matters of equity, the trial court has broad discretionary power to fashion an equitable remedy.

Cases that cite this headnote

[19] **Appeal and Error**
Nature or form of remedy
30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k171 Nature and Theory of Cause
30k171(2) Nature or form of remedy
Insured's claim that trial court should have reformed insurance contract based on inequitable conduct by insurer that deprived insured of the full benefits of the policy to which she believed she was entitled was not preserved for appeal; insured did not raise such theory to trial court.

Cases that cite this headnote

**1086 Appeal from Pierce County Superior Court, No. 09-2-12395-6, Honorable Stanley J. Rumbaugh.

Attorneys and Law Firms

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Opinion

Verellen, C.J.

*50 ¶1 Instead of a more traditional covenant judgment, Myong Suk Day gave agreed judgments to tort victims William Lee and Dawn Smith but retained her claims against her insurer, Mutual of Enumclaw (MOE). Day assigned only her claims against an independent agent. Lee and Smith agreed not to execute against any of Day's assets except her claims against the agent. Lee and Smith also agreed to fully satisfy their agreed judgments against Day once the assigned claim against the agent was resolved.

¶2 In a more traditional covenant judgment, the insured gives the tort victim an agreed judgment and assigns her claims against her own insurer in exchange for the tort victim's covenant not to execute on any asset of the insured except the insured's claims against her insurer. If the insurer has engaged in bad faith while defending the tort victim's personal injury claim under a reservation of rights, then the tort victim pursuing the assigned bad faith claim against the insurer is entitled to a rebuttable presumption of harm and coverage by estoppel. If the settlement is *51 reasonable, then the amount of the agreed judgment is the tort victim's presumptive recovery on the assigned bad faith claim. The covenant judgment is not a release of the tort victim's claims against the insured. But if the insured is legally insulated from any exposure to the tort victim, then the presumption of harm is rebutted, precluding any coverage by estoppel.

¶3 Here, the trial court concluded that a presumption of harm supported coverage by estoppel, resulting in a judgment for Day against MOE in the amount of the tort victims' agreed judgments against Day.

¶4 Because Day's right to full satisfaction of the agreed judgments is unrelated to the resolution of any claims (retained or assigned) against Day's insurer, Day is legally insulated from any exposure on the agreed judgments. Even assuming a presumption of harm applies, the presumption would be rebutted by Day's absolute right to a full satisfaction of the agreed judgments. There is no coverage by estoppel. We reverse the judgment in favor of Day based on coverage by estoppel.

¶5 We also affirm the trial court's denial of Day's claim to reform the insurance contract.

¶6 We affirm the judgment in favor of Day for the $300,000 emotional distress damages awarded by the jury, together with the IFCA [1] multiplier and attorney fees awarded by the trial court. We also award Day her reasonable attorney fees on appeal on the issues she has prevailed upon.

FACTS

¶7 In May 2008, a teenager purchased alcohol at Day's grocery store and shared it with his underage friends. The teenagers raced through Point Defiance Park and injured two pedestrians, William Lee and Dawn Smith, who sued Day in 2009.

*52 ¶8 Day contacted her independent insurance agent, Michael Huh. Day met Huh when she purchased the grocery store in **1087 2003. Although Day and Huh have different versions of their November 2003 meeting and whether Day asked for liquor liability coverage, it is undisputed that the insurance contract did not provide for liquor liability coverage. Subsequent automatic annual policy renewals occurred without any coverage review. All renewed policies lacked liquor liability coverage.

¶9 Day claims Huh told her she had insurance that covered the lawsuit and that she should contact her insurer, MOE. Huh tendered the claim to MOE for Day. MOE instructed Day "to contact her personal attorney."[2] The MOE claims adjustor had no explanation why MOE did not interview Day about the coverage issue or ask Day what she had discussed with Huh or why she thought she had liquor liability coverage. MOE did not tell Day that Huh claimed she had declined liquor liability coverage.

¶10 MOE notified Day that it would appoint an attorney to defend her, but because she did not have liquor liability coverage in her contract, MOE would defend under a reservation of rights. MOE also informed Day that it might bring a declaratory judgment action to determine its obligations under the policy.[3]

¶11 MOE filed a declaratory judgment action (the coverage case) to determine its obligation to defend or indemnify Day for Lee and Smith's personal injury claims. In her answer, Day sought reformation of the contract to include liquor liability coverage or to otherwise provide Day coverage.

*53 ¶12 Day amended her answer to allege bad faith, CPA[4] and IFCA violations, and coverage by estoppel.[5] The amended answer also added Huh as a third-party defendant.

¶13 The parties in the personal injury lawsuit reached a settlement in June 2011. MOE paid Lee and Smith $125,000 on Day's behalf. Day agreed to entry of judgments for Lee and Smith against Day totaling $7,986,222. Lee and Smith agreed not to execute on the agreed judgments, except as to Day's claims against Huh. Day assigned Lee and Smith all rights, privileges, claims, and causes of action that she may have against Huh, but retained her claims against MOE. The 2011 settlement included an obligation to fully satisfy the judgments against Day once the claims against Huh were concluded:

> In consideration for the assignment and cooperation as described herein, Plaintiffs do hereby covenant not to execute or attempt to enforce any judgment obtained against any assets of Day other than Day's rights, privileges, claims, and causes of action assigned. Plaintiffs' sole remedy is to pursue the assigned claims against others. 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 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 awarded or settlement accepted and regardless whether the result is less than the judgment agreed in this settlement.[6]

The agreement also contemplated a hearing to determine the reasonableness of the settlement.

*54 ¶14 The trial court dismissed the personal injury lawsuit with prejudice as "fully settled and compromised" including all claims against Day.[7] But the agreed judgments **1088 were not entered, there was no reasonableness hearing, and the plaintiffs did not sign and

deliver a satisfaction of the agreed judgments to be filed when claims against Huh were resolved.

¶15 Lee and Smith, as assignees of Day, later reached a settlement with Huh in the coverage lawsuit. Huh paid Lee and Smith $600,000, and the court dismissed all claims against Huh with prejudice.

¶16 Almost a year later, the trial court granted an agreed motion in the personal injury action to reopen "for the limited purpose of permitting the Court to conduct a hearing to determine the reasonableness of the Stipulated Settlements and Judgment amounts in favor of Plaintiffs, William R. Lee and Dawn Smith, against [Day], as was agreed in the Stipulated Settlement among Plaintiffs Lee and Smith and Defendant Day." [8] The trial court also consolidated the personal injury action with the coverage case. The trial court entered an order on June 27, 2014 finding the settlement reasonable and entered the agreed judgments in favor of Lewis and Smith against Day.

¶17 The remaining claims in the coverage case were scheduled for trial. Before trial, the court ruled the jury would determine whether MOE breached its duty of good faith and would assess any damages for Day's emotional distress; the trial judge would decide whether to impose the remedy of coverage by estoppel and whether to reform the insurance contract.

¶18 The jury found that MOE's bad faith caused Day emotional distress damages in the amount of $300,000. Based on the IFCA multiplier, the trial court awarded Day *55 an additional $600,000 in damages. The court also awarded attorney fees to Day.

¶19 The trial court denied Day's claim to reform the insurance contract, [9] but applied coverage by estoppel to award Day a judgment against MOE in the amount of the agreed judgments for Lee and Smith, with interest, totaling $10,460,366.14.

¶20 MOE appeals. Day cross appeals.

ANALYSIS

I. Presumption of Harm and Coverage by Estoppel

¶21 MOE argues Day was not entitled to a presumption of harm and coverage by estoppel. For the reasons set forth below, we conclude that even if a presumption of harm applies here, such presumption is rebutted because of the settlement provision to fully satisfy the agreed judgments once the claims against Huh were resolved in any manner. We need not define the exact limits for the presumption of harm and coverage by estoppel in bad faith cases.

[1] ¶22 An insurer has an "enhanced obligation of fairness toward its insured." [10] That enhanced obligation imposes a duty beyond that of the standard contractual duty of good faith. [11] Tank v. State Farm Fire & Casualty Co. recognized *56 the two forms of bad faith at issue here: "the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries," and "the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit." [12]

**1089 ¶23 In a more traditional covenant judgment, the tort victim takes an agreed judgment against the insured in exchange for a covenant by the tort victim not to execute on any of the insured's assets except the insured's claims against its own insurer, and the insured assigns those claims to the tort victim. [13] Such covenant judgments do not release the insured from liability; rather, they limit recovery to " 'a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured.' " [14]

¶24 Several cases hold that if the insurer has engaged in bad faith while defending the tort victim's personal injury claim under a reservation of rights, then the tort victim pursuing the assigned bad faith claim against the insurer is entitled to a presumption of harm and coverage by estoppel.

[2] [3] [4] [5] [6] ¶25 In Safeco Insurance Co. of America v. Butler, our Supreme Court emphasized that harm is an essential element of an action for an insurer's bad faith handling of a claim under a reservation of rights. [15] In order to relieve an insured of the "almost impossible burden" of proving he or she is demonstrably worse off because of the insurer's bad faith, a rebuttable presumption of harm arises once the *57 insured

establishes bad faith. [16] Although requiring the insurer to prove the absence of harm is also an "almost impossible burden," the insurer controls whether it acts in good faith; therefore, courts presume harm from an act of bad faith. [17] "[T]he insurer can rebut the presumption by showing by a preponderance of the evidence its acts did not harm or prejudice the insured." [18] If the insurer does not rebut the presumption, the insured is entitled to coverage by estoppel. [19] And if the settlement has been determined to be reasonable, then the amount of the agreed judgment is the presumptive recovery for the tort victim on the assigned bad faith claim. [20]

¶26 In Coventry Associates v. American States Insurance Co., our Supreme Court held the presumption of harm does not extend to bad faith in first-party coverage settings. [21] The court reasoned that, unlike third-party coverage claims defended under a reservation of rights, there is no potential conflict of interest in first-party scenarios. [22]

¶27 Ten years later, in St. Paul Fire and Marine Insurance Co. v. Onvia, Inc., our Supreme Court extended Coventry to a third-party coverage setting where an insurer did not defend under a reservation of rights and bad faith consisted ***58** solely of "procedural missteps." [23] Reading Onvia broadly, MOE argues that its failure to promptly investigate Day's claim for reformation and promptly communicate with her about that investigation "[did] not trigger the policy concerns that have led courts to apply" coverage by estoppel. [24] But Onvia rejected a presumption of harm and coverage by estoppel because, as in Coventry, neither a failure ****1090** to defend nor a defense under a reservations of rights was at issue. [25] The policy concerns the court referred to in Onvia were those that attach when an insurer fails to defend or defends under a reservation of rights, [26] as announced in Butler [27] and acknowledged in Coventry. [28] Onvia did not eliminate the presumption of harm and coverage by estoppel for bad faith claims alleging a failure to investigate. Onvia merely acknowledged that the presumption and coverage by estoppel were not appropriate when the insurer did not fail to defend nor defend under a reservation of rights. [29]

[7] ***59** ¶28 Against this backdrop, we analyze the atypical "covenant judgment" used here. Smith and Lee took agreed judgments of more than $10,000,000 against Day, but unlike a traditional covenant judgment, Day retained her claims against her insurer and assigned only her claim against Huh. The covenant precluded any execution on the agreed judgments except on Day's claims against Huh. And, most importantly, the settlement giving rise to the agreed judgments expressly provided that once the claims against Huh were resolved in any manner, the agreed judgments against Day would be fully satisfied.

¶29 Werlinger v. Clarendon National Insurance Co. is instructive. [30] Michael Warner caused a car collision that killed Dean Werlinger. Warner was protected from personal liability due to a discharge in bankruptcy, but the bankruptcy court allowed the Werlinger estate to sue Warner for the $25,000 limits of his automobile insurance policy with Clarendon National Insurance Company. [31] Clarendon defended under a reservation of rights. [32] In exchange for Warner settling for $5,000,000, the Werlingers agreed not to hold Warner personally liable. [33] Warner assigned the Werlingers their bad faith claims against Clarendon. The Werlingers, as Warner's assignees, filed a bad faith lawsuit against Clarendon, and on motions for summary judgment, the court ruled in favor of Clarendon because "there was no injury to Mike Warner or his marital community." [34] On appeal, this court recognized that the discharge in bankruptcy insulated Warner from any personal liability, rebutting the presumption of harm:

> Werlingers argue that there is a presumption of harm once an insured establishes that the insurer acted in bad faith. Although ***60** this is true, the presumption of harm is rebuttable. Clarendon established that there was no harm. [35]

¶30 Day attempts to distinguish Werlinger because, unlike here, the insured in Werlinger had filed for bankruptcy before the auto collision and was insulated from liability before the claim had been tendered to the insurer. But that distinction is not compelling. ****1091** Day's insulation from liability is equivalent to the insured's bankruptcy in Werlinger. When the judgments were entered against Day in 2014, the claim against Huh had been resolved. Under

the 2011 settlement agreement, Day was entitled to a full satisfaction of those judgments.

¶31 Day also argues that this is just another variation on lack of harm arguments rejected in covenant judgment decisions for decades. But unlike the rights created in a traditional covenant judgment, Day's right to full satisfaction of the agreed judgment is unrelated to the resolution of any claims (retained or assigned) against Day's insurer. As a consequence, Day was legally insulated from any exposure based on the agreed judgments.

¶32 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.[36] We reverse the $10,460,366.14 judgment in favor of Day against MOE based on coverage by estoppel.

¶33 Because we reverse the judgment based on coverage by estoppel, we need not address MOE's additional arguments related to coverage by estoppel.

*61 II. Jury Instructions

[8] ¶34 The coverage trial addressed whether MOE engaged in bad faith by failing to adequately investigate Day's claim and by failing to keep Day advised about that claim.[37] MOE challenges the trial court's refusal to give its proposed instructions on the legal standards related to policy reformation.

¶35 It appears MOE's challenge is limited to four proposed instructions.[38] Two recite legal standards governing an agent's authority to issue a binder for insurance and the expiration of a binder.[39] One states a written agreement is required to modify the terms of a policy.[40] The last one is based on a Kansas case which provides there is no duty to investigate a claim that a policy should mean something other than its written terms.[41]

[9] **[10]** **[11]** **[12]** ¶36 Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and when taken as a whole, inform the jury of the applicable law.[42] We review the trial court's decision whether to give a particular jury instruction for an abuse of discretion.[43] If the trial court's jury instructions are otherwise sufficient, the court does not need to give a party's proposed instruction, though that instruction may be an *62 accurate statement of the law.[44] The trial court may decide which instructions are necessary to "guard against misleading the jury."[45]

[13] ¶37 MOE focuses on Day's expert testimony regarding when coverage extends beyond a written policy, when an agent has "binding authority," and whether MOE should have reformed the contract to conclude **1092 the claim was covered.[46]

¶38 When arguing the instructions, the parties presented very different versions of the issues before the jury. For example, Day's counsel argued, "We're not trying reformation to the jury.... so it would be completely misleading to give them an instruction on reformation that they're not deciding."[47] MOE's counsel asserted that reformation is "the basis of the bad faith claim."[48] The court concluded, "I see the case as being a tort claim related to bad faith, not a contract claim related to reformation," and noted the reformation of the contract was a theory reserved to the trial court.[49]

¶39 We agree that the issue whether to reform the contract was reserved to the trial court. It was within the discretion of the trial court to conclude the jury may be misled or confused by instructions focusing on the legal standards governing binders, limits on modifying insurance policies, and no duty to investigate any claim that the policy means something other than its written terms. To the extent MOE suggests a theory that there was no bad faith failure to investigate or advise because, as a matter of law, there could be no reformation of the contract, that was not an issue for the jury.

*63 ¶40 MOE's arguments are not persuasive. The trial court adequately instructed the jury on the requirements for a showing of bad faith and the elements Day was required to prove to establish bad faith. The trial court focused on the instructions necessary to argue the theories presented.[50] MOE does not establish that the court's instructions were inadequate or that the trial court abused its discretion.

¶41 We affirm the jury award of emotional distress damages resulting from MOE's bad faith.

III. IFCA Treble Damage Award

[14] [15] ¶42 For the first time on appeal, MOE argues that emotional distress damages are not "actual damages" subject to trebling under IFCA.[51] "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.... The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials."[52] Because this issue was not preserved for appeal, we decline to address it.[53]

IV. Contract Reformation

¶43 On cross appeal, Day challenges the denial of her claim to reform the insurance contract. She argues the trial *64 court erred as a matter of law and should have inquired "whether clear and convincing evidence of *inequitable conduct* by the insurer deprived the insured of the full benefits of the policy to which she believed she was entitled."[54]

[16] [17] [18] ¶44 Mutual mistake supporting reformation of a contract must be proved by clear, cogent and convincing evidence, "and if doubts exist as the parties' intent, reformation is not appropriate."[55] "Reformation is an **1093 equitable remedy employed to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement."[56] In matters of equity, the trial court has broad discretionary power to fashion an equitable remedy.[57]

¶45 Here, the trial court reserved the equitable remedy of contract reformation for the court, not the jury. The parties presented conflicting testimony about Day's intent or desire to purchase liquor liability coverage. The trial court's decision that Day failed to meet the burden of clear, cogent, and convincing evidence was largely a credibility determination.

[19] ¶46 Our review of the record does not reveal that Day offered a separate theory of reformation based on "inequitable conduct." We decline to consider this theory raised for the first time on appeal.

¶47 We conclude the trial court did not commit an error of law, rely on insufficient evidence, or abuse its discretion when it concluded that Day had not met her burden of clear, cogent, and convincing evidence.

*65 V. Attorney Fees

¶48 IFCA authorizes an award of "reasonable attorneys' fees and actual and statutory litigation costs" to the prevailing insured.[58] We affirm the trial court award of attorney fees.

¶49 We also award Day her reasonable attorney fees on appeal on the issue she prevailed upon.

CONCLUSION

¶50 We affirm the judgment in favor of Day for $300,000 for emotional distress damages, the $600,000 of multiplied damages under IFCA, and the attorney fees awarded by the trial court.

¶51 We affirm the trial court's denial of Day's claim for contract reformation.

¶52 We reverse the judgment in favor of Day against MOE based on coverage by estoppel.

¶53 Finally, we award Day her reasonable attorney fees on appeal on the issues she prevailed upon.

WE CONCUR:

Mann, J.

Appelwick, J.

All Citations

197 Wash.App. 47, 387 P.3d 1084

Footnotes

1 Insurance Fair Conduct Act, ch. 48.30 RCW.

2 Report of Proceedings (RP) (Nov. 19, 2014) at 88.

3 See Clerk's Papers (CP) at 144 ("This reservation of rights includes the right to file an action for declaratory relief in a Washington court seeking a determination of Mutual of Enumclaw's obligations under the policy with respect to plaintiffs' claims.")

4 Consumer Protection Act, ch. 19.86 RCW.

5 See CP at 198 ("MOE failed to advise Day of all developments relevant to coverage, failed to advise her of all developments relevant to her defense, failed to properly handle settlement of the claims against Day, and failed to ascertain the best terms on which the claims against her could be settled.").

6 CP at 3045.

7 CP at 622-24.

8 CP at 704 (emphasis omitted).

9 The trial court concluded: "In this case, considering all of the evidence admitted at trial, and in light of the parties extensive briefing on the subject, this Court is persuaded that Ms. Day probably did, at least indirectly, request liquor liability coverage by asking Mr. Huh to write the same policy for her as he had done for Mr. Kim. However, when applying the higher clear, cogent and convincing standard of proof, the Court does not believe the evidence supports reformation. In particular, there is not clear, cogent and convincing evidence of a clear mutual mistake in coverage terms, as opposed to a unilateral mistake on the part of Ms. Day, or potentially no mistake at all if Mr. Huh's version of events is accepted." CP at 2381 (Conclusion of Law 7).

10 Safeco Ins. Co. of Am. v. Butler, 118 Wash.2d 383, 393, 823 P.2d 499 (1992) (quoting Tank v. State Farm Fire & Cas. Co., 105 Wash.2d 381, 383–85, 715 P.2d 1133 (1986)).

11 Tank, 105 Wash.2d at 387, 715 P.2d 1133.

12 105 Wash.2d 381, 387, 715 P.2d 1133 (1986) (emphasis omitted).

13 Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co., 160 Wash.App. 912, 919, 250 P.3d 121 (2011).

14 Besel v. Viking Ins. Co. of Wis., 146 Wash.2d 730, 737, 49 P.3d 887 (2002) (quoting Butler, 118 Wash.2d at 399, 823 P.2d 499).

15 118 Wash.2d 383, 823 P.2d 499 (1992).

16 Id. at 390, 823 P.2d 499.

17 Miller v. Kenny, 180 Wash.App. 772, 798–99, 325 P.3d 278 (2014); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wash.2d 903, 920, 169 P.3d 1 (2007); Butler, 118 Wash.2d at 390–91, 823 P.2d 499.

18 Butler, 118 Wash.2d at 394, 823 P.2d 499.

19 Id. at 393, 823 P.2d 499.

20 See, e.g., Miller, 180 Wash.App. at 800–01, 325 P.3d 278; Dan Paulson Constr., 161 Wash.2d at 924–25, 169 P.3d 1.

21 136 Wash.2d 269, 281, 961 P.2d 933 (1998).

22 Id. at 277, 961 P.2d 933 ("This issue is one of first impression in the context of a first party action. In the context of a third-party reservation of rights case, once an insured meets the burden of establishing an insurer's bad faith, a rebuttable presumption of harm arises.").

23 165 Wash.2d 122, 126 & 133, 196 P.3d 664 (2008) ("[N]o rebuttable presumption of harm can arise here, and the measure of damages offered in Coventry should apply here also. The remedy of coverage by estoppel is not recognized in this context.").

24 Appellant's Br. at 14.

25 Onvia, 165 Wash.2d at 133, 196 P.3d 664.

26 Id. ("As in Coventry, a reservation of rights or failure to defend in any capacity is not at issue. Therefore, no rebuttable presumption of harm can arise here, and the measure of damages offered in Coventry should apply here also. The remedy of coverage by estoppel is not recognized in this context.").

27 Butler, 118 Wash.2d at 392, 823 P.2d 499 ("In Tank we did not address what remedy is available for an insurer's bad faith handling of a claim under a reservation of rights. We now hold that where an insurer acts in bad faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage.").

28 Coventry, 136 Wash.2d at 281, 961 P.2d 933 ("Because the potential conflict of interest does not exist in the first-party context, we do not think a rebuttable presumption of harm is warranted.").

29 Onvia, 165 Wash.2d at 133, 196 P.3d 664. Day points to Moratti v Farmers Insurance Co. of Washington, 162 Wash.App. 495, 254 P.3d 939 (2011) for the proposition that Butler applies whenever an insurer acts in bad faith, including a failure to investigate. But the significance of Moratti here is limited because, unlike Day's settlement with the tort victims, Moratti involved a traditional covenant judgment where the insured assigned its claims against its insurer to the tort victim.

30 129 Wash.App. 804, 120 P.3d 593 (2005).

31 Id.

32 Id. at 807, 120 P.3d 593.

33 Id.

34 Id. at 807–08, 120 P.3d 593.

35 Id. at 809–10, 120 P.3d 593.

36 No reported Washington decision has applied the presumption of harm and coverage by estoppel to award the amount of an agreed judgment between the insured and the tort victim to an insured as damages for a bad faith claim retained by the insured. Because any presumption of harm is rebutted, we need not address that question.

37 Even without a presumption of harm and coverage by estoppel, an insured is entitled to those damages personal to the insured that resulted from the insurer's bad faith, such as emotional distress damages. Miller, 180 Wash.App. at 787–88, 325 P.3d 278.

38 MOE did not take formal exception to the refusal to give instructions and did not identify specific proposed instructions in its assignments of error. RAP 10.3(g).

39 See CP at 1715 & 1731.

40 See CP at 1716.

41 See CP at 1719 (citing Jones v. Reliable Sec. Incorporation, Inc., 29 Kan.App.2d 617 28 P.3d 1051 (2001)).

42 City of Bellevue v. Raum, 171 Wash.App. 124, 142, 286 P.3d 695 (2012).

43 Clark County v. McManus, 185 Wash.2d 466, 470, 372 P.3d 764 (2016).

44 City of Seattle v. Pearson, 192 Wash.App. 802, 821, 369 P.3d 194 (2016).

45 Gammon v. Clark Equip. Co., 104 Wash.2d 613, 617, 707 P.2d 685 (1985).

46 Appellant's Br. at 46.

47 RP (Dec. 3, 2014) at 14.

48 Id. at 16.

49 Id. at 16–18.

50 For example, regarding the proposed instruction based on a Kansas case, the court stated, "I'm not willing to add to our growing body of law by importing Kansas law when I believe that the instructions already provide you with an opportunity to argue that: 'We did our investigation. We found that the policy as written was excluding liquor liability coverage. Mr. Huh said it was specifically excluded.' You can make your case without this instruction." RP (Dec. 3, 2014) at 62.

51 MOE acknowledges it did not raise this argument to the trial court, but asks this court to reach this issue because Schreib v. Am. Family Mut. Ins. Co., 129 F.Supp.3d 1129 (W.D. Wash. 2015) had not been decided when judgment was entered. However, the Washington authority the court relied on in Schreib was in existence when MOE brought its motion opposing the treble damage award.

52 Smith v. Shannon, 100 Wash.2d 26, 37, 666 P.2d 351 (1983).

53 RAP 2.5(a).

54 Respondent's Br. at 48 (emphasis added).

55 Denny's Resis., Inc. v. Security Union Title Ins. Co., 71 Wash.App. 194, 212, 859 P.2d 619 (1993).

56 Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wash.2d 654, 669, 63 P.3d 125 (2003).

57 Arzola v. Name Intelligence, Inc., 188 Wash.App. 588, 596, 355 P.3d 286 (2015).

58 RCW 48.30.015(2), (3); Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co., 176 Wash.App. 185, 201, 312 P.3d 976 (2013); Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wash.2d 37, 52–53, 811 P.2d 673 (1991).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MUTUAL OF ENUMCLAW INSURANCE COMPANY, Appellant/Cross Respondent, v. MYONG SUK DAY, Respondent/Cross Appellant.	)	No. 75633-8-I ORDER DENYING DAY'S MOTION, FOR RECONSIDERATION, GRANTING MOE'S MOTION FOR RECONSIDERATION IN PART, AND WITHDRAWING AND REPLACING OPINION

Appellant and respondent have each filed motions for reconsideration of the court's December 12, 2016 opinion and each have filed answers. The panel has considered the motions and answers and determined that Day's motion should be denied, that MOE's motion should be granted in part, and the opinion should be amended as follows:

Page 2, last paragraph, delete the phrase "and attorney fees awarded by the trial court" at the end of the first sentence.

Page 6, delete the last sentence in the second paragraph and replace it with "The trial court authorized the entry of a supplemental judgment for attorney fees to Day, but no supplemental judgment has been entered."

Page 17, delete the last sentence in the first paragraph.

Page 17, delete the word "also" in the second paragraph.

Page 17, change the first sentence of the second paragraph to read "We affirm the judgment in favor of Day for $300,000 for emotional distress damages and the $600,000 of multiplied damages under IFCA awarded by the court." Add a footnote at the end of that sentence which reads, "On reconsideration in this court, the parties debate whether a supplemental judgment may yet be entered for Day's attorney fees in the trial court. Because this question was not meaningfully addressed in the parties' briefs, we express no opinion."

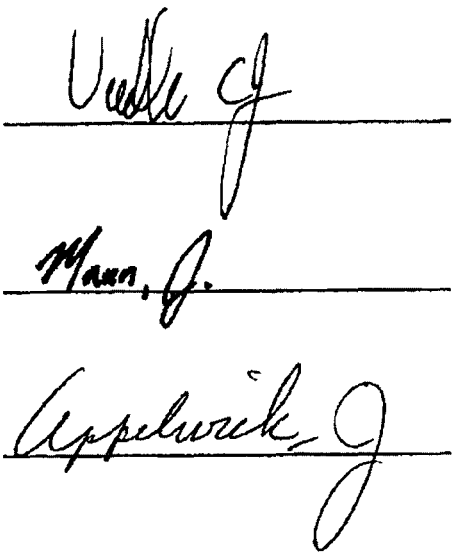
Now therefore, it is hereby

ORDERED that Day's motion for reconsideration is denied. It is further

ORDERED that MOE's motion for reconsideration is granted in part and changes are made to the opinion as outlined above. It is further

ORDERED that the December 12, 2016 opinion be withdrawn and replaced with a revised opinion reflecting the changes herein.

Done this 6th day of January 2017.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MUTUAL OF ENUMCLAW INSURANCE COMPANY, Appellant/Cross Respondent, v. MYONG SUK DAY, Respondent/Cross Appellant.	)	No. 75633-8-I PUBLISHED OPINION FILED: February 6, 2017

VERELLEN, C.J. — Instead of a more traditional covenant judgment, Myong Suk Day gave agreed judgments to tort victims William Lee and Dawn Smith but retained her claims against her insurer, Mutual of Enumclaw (MOE). Day assigned only her claims against an independent agent. Lee and Smith agreed not to execute against any of Day's assets except her claims against the agent. Lee and Smith also agreed to fully satisfy their agreed judgments against Day once the assigned claim against the agent was resolved.

In a more traditional covenant judgment, the insured gives the tort victim an agreed judgment and assigns her claims against her own insurer in exchange for the tort victim's covenant not to execute on any asset of the insured except the insured's claims against her insurer. If the insurer has engaged in bad faith while defending the tort victim's personal injury claim under a reservation of rights, then the tort victim

pursuing the assigned bad faith claim against the insurer is entitled to a rebuttable presumption of harm and coverage by estoppel. If the settlement is reasonable, then the amount of the agreed judgment is the tort victim's presumptive recovery on the assigned bad faith claim. The covenant judgment is not a release of the tort victim's claims against the insured. But if the insured is legally insulated from any exposure to the tort victim, then the presumption of harm is rebutted, precluding any coverage by estoppel.

Here, the trial court concluded that a presumption of harm supported coverage by estoppel, resulting in a judgment for Day against MOE in the amount of the tort victims' agreed judgments against Day.

Because Day's right to full satisfaction of the agreed judgments is unrelated to the resolution of any claims (retained or assigned) against Day's insurer, Day is legally insulated from any exposure on the agreed judgments. Even assuming a presumption of harm applies, the presumption would be rebutted by Day's absolute right to a full satisfaction of the agreed judgments. There is no coverage by estoppel. We reverse the judgment in favor of Day based on coverage by estoppel.

We also affirm the trial court's denial of Day's claim to reform the insurance contract.

We affirm the judgment in favor of Day for the $300,000 emotional distress damages awarded by the jury, together with the IFCA[1] multiplier. We also award Day her reasonable attorney fees on appeal on the issues she has prevailed upon.

[1] Insurance Fair Conduct Act, ch. 48.30 RCW.

FACTS

In May 2008, a teenager purchased alcohol at Day's grocery store and shared it with his underage friends. The teenagers raced through Point Defiance Park and injured two pedestrians, William Lee and Dawn Smith, who sued Day in 2009.

Day contacted her independent insurance agent, Michael Huh. Day met Huh when she purchased the grocery store in 2003. Although Day and Huh have different versions of their November 2003 meeting and whether Day asked for liquor liability coverage, it is undisputed that the insurance contract did not provide for liquor liability coverage. Subsequent automatic annual policy renewals occurred without any coverage review. All renewed policies lacked liquor liability coverage.

Day claims Huh told her she had insurance that covered the lawsuit and that she should contact her insurer, MOE. Huh tendered the claim to MOE for Day. MOE instructed Day "to contact her personal attorney."[2] The MOE claims adjustor had no explanation why MOE did not interview Day about the coverage issue or ask Day what she had discussed with Huh or why she thought she had liquor liability coverage. MOE did not tell Day that Huh claimed she had declined liquor liability coverage.

MOE notified Day that it would appoint an attorney to defend her, but because she did not have liquor liability coverage in her contract, MOE would defend under a reservation of rights. MOE also informed Day that it might bring a declaratory judgment action to determine its obligations under the policy.[3]

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[2] Report of Proceedings (RP) (Nov. 19, 2014) at 88.

[3] See Clerk's Papers (CP) at 144 ("This reservation of rights includes the right to file an action for declaratory relief in a Washington court seeking a determination of Mutual of Enumclaw's obligations under the policy with respect to plaintiffs' claims.")

MOE filed a declaratory judgment action (the coverage case) to determine its obligation to defend or indemnify Day for Lee and Smith's personal injury claims. In her answer, Day sought reformation of the contract to include liquor liability coverage or to otherwise provide Day coverage.

Day amended her answer to allege bad faith, CPA[4] and IFCA violations, and coverage by estoppel.[5] The amended answer also added Huh as a third-party defendant.

The parties in the personal injury lawsuit reached a settlement in June 2011. MOE paid Lee and Smith $125,000 on Day's behalf. Day agreed to entry of judgments for Lee and Smith against Day totaling $7,986,222. Lee and Smith agreed not to execute on the agreed judgments, except as to Day's claims against Huh. Day assigned Lee and Smith all rights, privileges, claims, and causes of action that she may have against Huh, but retained her claims against MOE. The 2011 settlement included an obligation to fully satisfy the judgments against Day once the claims against Huh were concluded:

> In consideration for the assignment and cooperation as described herein, Plaintiffs do hereby covenant not to execute or attempt to enforce any judgment obtained against any assets of Day other than Day's rights, privileges, claims, and causes of action assigned. Plaintiffs' sole remedy is to pursue the assigned claims against others. 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 in favor of Day, which full satisfaction shall be signed by Plaintiffs when this

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[4] Consumer Protection Act, ch. 19.86 RCW.

[5] See CP at 198 ("MOE failed to advise Day of all developments relevant to coverage, failed to advise her of all developments relevant to her defense, failed to properly handle settlement of the claims against Day, and failed to ascertain the best terms on which the claims against her could be settled.").

> settlement is executed. The full satisfaction is to be entered regardless of the amount of any judgment awarded or settlement accepted and regardless whether the result is less than the judgment agreed in this settlement.[6]

The agreement also contemplated a hearing to determine the reasonableness of the settlement.

The trial court dismissed the personal injury lawsuit with prejudice as "fully settled and compromised" including all claims against Day.[7] But the agreed judgments were not entered, there was no reasonableness hearing, and the plaintiffs did not sign and deliver a satisfaction of the agreed judgments to be filed when claims against Huh were resolved.

Lee and Smith, as assignees of Day, later reached a settlement with Huh in the coverage lawsuit. Huh paid Lee and Smith $600,000, and the court dismissed all claims against Huh with prejudice.

Almost a year later, the trial court granted an agreed motion in the personal injury action to reopen "for the limited purpose of permitting the Court to conduct a hearing to determine the reasonableness of the Stipulated Settlements and Judgment amounts in favor of Plaintiffs, William R. Lee and Dawn Smith, against [Day], as was agreed in the Stipulated Settlement among Plaintiffs Lee and Smith and Defendant Day."[8] The trial court also consolidated the personal injury action with the coverage case. The trial court entered an order on June 27, 2014 finding the settlement reasonable and entered the agreed judgments in favor of Lewis and Smith against Day.

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[6] CP at 305.

[7] CP at 622-24.

[8] CP at 704 (emphasis omitted).

The remaining claims in the coverage case were scheduled for trial. Before trial, the court ruled the jury would determine whether MOE breached its duty of good faith and would assess any damages for Day's emotional distress; the trial judge would decide whether to impose the remedy of coverage by estoppel and whether to reform the insurance contract.

The jury found that MOE's bad faith caused Day emotional distress damages in the amount of $300,000. Based on the IFCA multiplier, the trial court awarded Day an additional $600,000 in damages. The trial court authorized the entry of a supplemental judgment for attorney fees to Day, but no supplemental judgment has been entered.

The trial court denied Day's claim to reform the insurance contract,[9] but applied coverage by estoppel to award Day a judgment against MOE in the amount of the agreed judgments for Lee and Smith, with interest, totaling $10,460,366.14.

MOE appeals. Day cross appeals.

ANALYSIS

I. Presumption of Harm and Coverage by Estoppel

MOE argues Day was not entitled to a presumption of harm and coverage by estoppel. For the reasons set forth below, we conclude that even if a presumption of harm applies here, such presumption is rebutted because of the settlement provision to

[9] The trial court concluded: "In this case, considering all of the evidence admitted at trial, and in light of the parties extensive briefing on the subject, this Court is persuaded that Ms. Day probably did, at least indirectly, request liquor liability coverage by asking Mr. Huh to write the same policy for her as he had done for Mr. Kim. However, when applying the higher clear, cogent and convincing standard of proof, the Court does not believe the evidence supports reformation. In particular, there is not clear, cogent and convincing evidence of a clear mutual mistake in coverage terms, as opposed to a unilateral mistake on the part of Ms. Day, or potentially no mistake at all if Mr. Huh's version of events is accepted." CP at 2381 (Conclusion of Law 7).

fully satisfy the agreed judgments once the claims against Huh were resolved in any manner. We need not define the exact limits for the presumption of harm and coverage by estoppel in bad faith cases.

An insurer has an "enhanced obligation of fairness toward its insured."[10] That enhanced obligation imposes a duty beyond that of the standard contractual duty of good faith.[11] Tank v. State Farm Fire & Casualty Co. recognized the two forms of bad faith at issue here: "the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries," and "the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit."[12]

In a more traditional covenant judgment, the tort victim takes an agreed judgment against the insured in exchange for a covenant by the tort victim not to execute on any of the insured's assets except the insured's claims against its own insurer, and the insured assigns those claims to the tort victim.[13] Such covenant judgments do not release the insured from liability; rather, they limit recovery to "'a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured.'"[14]

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[10] Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 393, 823 P.2d 499 (1992) (quoting Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 383-85, 715 P.2d 1133 (1986)).

[11] Tank, 105 Wn.2d at 387.

[12] 105 Wn.2d 381, 387, 715 P.2d 1133 (1986) (emphasis omitted).

[13] Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co., 160 Wn. App. 912, 919, 250 P.3d 121 (2011).

[14] Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 737, 49 P.3d 887 (2002) (quoting Butler, 118 Wn.2d at 399).

Several cases hold that if the insurer has engaged in bad faith while defending the tort victim's personal injury claim under a reservation of rights, then the tort victim pursuing the assigned bad faith claim against the insurer is entitled to a presumption of harm and coverage by estoppel.

In Safeco Insurance Co. of America v. Butler, our Supreme Court emphasized that harm is an essential element of an action for an insurer's bad faith handling of a claim under a reservation of rights.[15] In order to relieve an insured of the "almost impossible burden" of proving he or she is demonstrably worse off because of the insurer's bad faith, a rebuttable presumption of harm arises once the insured establishes bad faith.[16] Although requiring the insurer to prove the absence of harm is also an "almost impossible burden," the insurer controls whether it acts in good faith; therefore, courts presume harm from an act of bad faith.[17] "'[T]he insurer can rebut the presumption by showing by a preponderance of the evidence its acts did not harm or prejudice the insured."[18] If the insurer does not rebut the presumption, the insured is entitled to coverage by estoppel.[19] And if the settlement has been determined to be reasonable, then the amount of the agreed judgment is the presumptive recovery for the tort victim on the assigned bad faith claim.[20]

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[15] 118 Wn.2d 383, 823 P.2d 499 (1992).

[16] Id. at 390.

[17] Miller v. Kenny, 180 Wn. App. 772, 798-99, 325 P.3d 278 (2014); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 920, 169 P.3d 1 (2007); Butler, 118 Wn.2d at 390-91.

[18] Butler, 118 Wn.2d at 394.

[19] Id. at 393.

[20] See, e.g., Miller, 180 Wn. App. at 800-01; Dan Paulson Constr., 161 Wn.2d at 924-25.

In Coventry Associates v. American States Insurance Co., our Supreme Court held the presumption of harm does not extend to bad faith in first-party coverage settings.[21] The court reasoned that, unlike third-party coverage claims defended under a reservation of rights, there is no potential conflict of interest in first-party scenarios.[22]

Ten years later, in St. Paul Fire and Marine Insurance Co. v. Onvia, Inc., our Supreme Court extended Coventry to a third-party coverage setting where an insurer did not defend under a reservation of rights and bad faith consisted solely of "procedural missteps."[23] Reading Onvia broadly, MOE argues that its failure to promptly investigate Day's claim for reformation and promptly communicate with her about that investigation "[did] not trigger the policy concerns that have led courts to apply" coverage by estoppel.[24] But Onvia rejected a presumption of harm and coverage by estoppel because, as in Coventry, neither a failure to defend nor a defense under a reservation of rights was at issue.[25] The policy concerns the court referred to in Onvia were those that attach when an insurer fails to defend or defends under a reservation of rights,[26] as

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[21] 136 Wn.2d 269, 281, 961 P.2d 933 (1998).

[22] Id. at 277 ("This issue is one of first impression in the context of a first party action. In the context of a third-party reservation of rights case, once an insured meets the burden of establishing an insurer's bad faith, a rebuttable presumption of harm arises.").

[23] 165 Wn.2d 122, 126 & 133, 196 P.3d 664 (2008) ("[N]o rebuttable presumption of harm can arise here, and the measure of damages offered in Coventry should apply here also. The remedy of coverage by estoppel is not recognized in this context.").

[24] Appellant's Br. at 14.

[25] Onvia, 165 Wn.2d at 133.

[26] Id. ("As in Coventry, a reservation of rights or failure to defend in any capacity is not at issue. Therefore, no rebuttable presumption of harm can arise here, and the measure of damages offered in Coventry should apply here also. The remedy of coverage by estoppel is not recognized in this context.").

announced in Butler[27] and acknowledged in Coventry.[28] Onvia did not eliminate the presumption of harm and coverage by estoppel for bad faith claims alleging a failure to investigate. Onvia merely acknowledged that the presumption and coverage by estoppel were not appropriate when the insurer did not fail to defend nor defend under a reservation of rights.[29]

Against this backdrop, we analyze the atypical "covenant judgment" used here. Smith and Lee took agreed judgments of more than $10,000,000 against Day, but unlike a traditional covenant judgment, Day retained her claims against her insurer and assigned only her claim against Huh. The covenant precluded any execution on the agreed judgments except on Day's claims against Huh. And, most importantly, the settlement giving rise to the agreed judgments expressly provided that once the claims against Huh were resolved in any manner, the agreed judgments against Day would be fully satisfied.

Werlinger v. Clarendon National Insurance Co. is instructive.[30] Michael Warner caused a car collision that killed Dean Werlinger. Warner was protected from personal

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[27] Butler, 118 Wn.2d at 392 ("In Tank we did not address what remedy is available for an insurer's bad faith handling of a claim under a reservation of rights. We now hold that where an insurer acts in bad faith in handling a claim under a reservation of rights, the insurer is estopped from denying coverage.").

[28] Coventry, 136 Wn.2d at 281 ("Because the potential conflict of interest does not exist in the first-party context, we do not think a rebuttable presumption of harm is warranted.").

[29] Onvia, 165 Wn.2d at 133. Day points to Moratti v Farmers Insurance Co. of Washington, 162 Wn. App. 495, 254 P.3d 939 (2011) for the proposition that Butler applies whenever an insurer acts in bad faith, including a failure to investigate. But the significance of Moratti here is limited because, unlike Day's settlement with the tort victims, Moratti involved a traditional covenant judgment where the insured assigned its claims against its insurer to the tort victim.

[30] 129 Wn. App. 804, 120 P.3d 593 (2005).

liability due to a discharge in bankruptcy, but the bankruptcy court allowed the Werlinger estate to sue Warner for the $25,000 limits of his automobile insurance policy with Clarendon National Insurance Company.[31] Clarendon defended under a reservation of rights.[32] In exchange for Warner settling for $5,000,000, the Werlingers agreed not to hold Warner personally liable.[33] Warner assigned the Werlingers their bad faith claims against Clarendon. The Werlingers, as Warner's assignees, filed a bad faith lawsuit against Clarendon, and on motions for summary judgment, the court ruled in favor of Clarendon because "there was no injury to Mike Warner or his marital community."[34] On appeal, this court recognized that the discharge in bankruptcy insulated Warner from any personal liability, rebutting the presumption of harm:

> Werlingers argue that there is a presumption of harm once an insured establishes that the insurer acted in bad faith. Although this is true, the presumption of harm is rebuttable. Clarendon established that there was no harm.[35]

Day attempts to distinguish Werlinger because, unlike here, the insured in Werlinger had filed for bankruptcy before the auto collision and was insulated from liability before the claim had been tendered to the insurer. But that distinction is not compelling. Day's insulation from liability is equivalent to the insured's bankruptcy in Werlinger. When the judgments were entered against Day in 2014, the claim against Huh had been resolved. Under the 2011 settlement agreement, Day was entitled to a full satisfaction of those judgments.

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[31] Id.

[32] Id. at 807.

[33] Id.

[34] Id. at 807-08.

[35] Id. at 809-10.

Day also argues that this is just another variation on lack of harm arguments rejected in covenant judgment decisions for decades. But unlike the rights created in a traditional covenant judgment, Day's right to full satisfaction of the agreed judgment is unrelated to the resolution of any claims (retained or assigned) against Day's insurer. As a consequence, Day was legally insulated from any exposure based on the agreed judgments.

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.[36] We reverse the $10,460,366.14 judgment in favor of Day against MOE based on 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.

II. Jury Instructions

The coverage trial addressed whether MOE engaged in bad faith by failing to adequately investigate Day's claim and by failing to keep Day advised about that claim.[37] MOE challenges the trial court's refusal to give its proposed instructions on the legal standards related to policy reformation.

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[36] No reported Washington decision has applied the presumption of harm and coverage by estoppel to award the amount of an agreed judgment between the insured and the tort victim to an insured as damages for a bad faith claim retained by the insured. Because any presumption of harm is rebutted, we need not address that question.

[37] Even without a presumption of harm and coverage by estoppel, an insured is entitled to those damages personal to the insured that resulted from the insurer's bad faith, such as emotional distress damages. Miller, 180 Wn. App. at 787-88.

It appears MOE's challenge is limited to four proposed instructions.[38] Two recite legal standards governing an agent's authority to issue a binder for insurance and the expiration of a binder.[39] One states a written agreement is required to modify the terms of a policy.[40] The last one is based on a Kansas case which provides there is no duty to investigate a claim that a policy should mean something other than its written terms.[41]

Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and when taken as a whole, inform the jury of the applicable law.[42] We review the trial court's decision whether to give a particular jury instruction for an abuse of discretion.[43] If the trial court's jury instructions are otherwise sufficient, the court does not need to give a party's proposed instruction, though that instruction may be an accurate statement of the law.[44] The trial court may decide which instructions are necessary to "guard against misleading the jury."[45]

MOE focuses on Day's expert testimony regarding when coverage extends beyond a written policy, when an agent has "binding authority," and whether MOE should have reformed the contract to conclude the claim was covered.[46]

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[38] MOE did not take formal exception to the refusal to give instructions and did not identify specific proposed instructions in its assignments of error. RAP 10.3(g).

[39] See CP at 1715 & 1731.

[40] See CP at 1716.

[41] See CP at 1719 (citing Jones v. Reliable Sec. Incorporation, Inc., 29 Kan. App. 2d 617, 28 P.3d 1051 (2001)).

[42] City of Bellevue v. Raum, 171 Wn. App. 124, 142, 286 P.3d 695 (2012).

[43] Clark County v. McManus, 185 Wn.2d 466, 470, 372 P.3d 764 (2016).

[44] City of Seattle v. Pearson, 192 Wn. App. 802, 821, 369 P.3d 194 (2016).

[45] Gammon v. Clark Equip. Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

[46] Appellant's Br. at 46.

When arguing the instructions, the parties presented very different versions of the issues before the jury. For example, Day's counsel argued, "We're not trying reformation to the jury. . . . so it would be completely misleading to give them an instruction on reformation that they're not deciding."[47] MOE's counsel asserted that reformation is "the basis of the bad faith claim."[48] The court concluded, "I see the case as being a tort claim related to bad faith, not a contract claim related to reformation," and noted the reformation of the contract was a theory reserved to the trial court.[49]

We agree that the issue whether to reform the contract was reserved to the trial court. It was within the discretion of the trial court to conclude the jury may be misled or confused by instructions focusing on the legal standards governing binders, limits on modifying insurance policies, and no duty to investigate any claim that the policy means something other than its written terms. To the extent MOE suggests a theory that there was no bad faith failure to investigate or advise because, as a matter of law, there could be no reformation of the contract, that was not an issue for the jury.

MOE's arguments are not persuasive. The trial court adequately instructed the jury on the requirements for a showing of bad faith and the elements Day was required to prove to establish bad faith. The trial court focused on the instructions necessary to argue the theories presented.[50] MOE does not establish that the court's instructions were inadequate or that the trial court abused its discretion.

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[47] RP (Dec. 3, 2014) at 14.

[48] Id. at 16.

[49] Id. at 16-18.

[50] For example, regarding the proposed instruction based on a Kansas case, the court stated, "I'm not willing to add to our growing body of law by importing Kansas law when I believe that the instructions already provide you with an opportunity to argue

We affirm the jury award of emotional distress damages resulting from MOE's bad faith.

III. IFCA Treble Damage Award

For the first time on appeal, MOE argues that emotional distress damages are not "actual damages" subject to trebling under IFCA.[51] "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. . . . The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials."[52] Because this issue was not preserved for appeal, we decline to address it.[53]

III. Contract Reformation

On cross appeal, Day challenges the denial of her claim to reform the insurance contract. She argues the trial court erred as a matter of law and should have inquired "whether clear and convincing evidence of *inequitable conduct* by the insurer deprived the insured of the full benefits of the policy to which she believed she was entitled."[54]

Mutual mistake supporting reformation of a contract must be proved by clear, cogent and convincing evidence, "and if doubts exist as the parties' intent, reformation

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that: 'We did our investigation. We found that the policy as written was excluding liquor liability coverage. Mr. Huh said it was specifically excluded.' You can make your case without this instruction." RP (Dec. 3, 2014) at 62.

[51] MOE acknowledges it did not raise this argument to the trial court, but asks this court to reach this issue because Schreib v. Am. Family Mut. Ins. Co., 129 F. Supp. 3d 1129 (W.D. Wash. 2015) had not been decided when judgment was entered. However, the Washington authority the court relied on in Schreib was in existence when MOE brought its motion opposing the treble damage award.

[52] Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

[53] RAP 2.5(a).

[54] Respondent's Br. at 48 (emphasis added).

is not appropriate."[55] "Reformation is an equitable remedy employed to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement."[56] In matters of equity, the trial court has broad discretionary power to fashion an equitable remedy.[57]

Here, the trial court reserved the equitable remedy of contract reformation for the court, not the jury. The parties presented conflicting testimony about Day's intent or desire to purchase liquor liability coverage. The trial court's decision that Day failed to meet the burden of clear, cogent, and convincing evidence was largely a credibility determination.

Our review of the record does not reveal that Day offered a separate theory of reformation based on "inequitable conduct." We decline to consider this theory raised for the first time on appeal.

We conclude the trial court did not commit an error of law, rely on insufficient evidence, or abuse its discretion when it concluded that Day had not met her burden of clear, cogent, and convincing evidence.

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[55] Denny's Rests., Inc. v. Security Union Title Ins. Co., 71 Wn. App. 194, 212, 859 P.2d 619 (1993).

[56] Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 669, 63 P.3d 125 (2003).

[57] Arzola v. Name Intelligence, Inc., 188 Wn. App. 588, 596, 355 P.3d 286 (2015).

IV. Attorney Fees

IFCA authorizes an award of "reasonable attorneys' fees and actual and statutory litigation costs" to the prevailing insured.[58] We award Day her reasonable attorney fees on appeal on the issues she prevailed upon.

CONCLUSION

We affirm the judgment in favor of Day for $300,000 for emotional distress damages and the $600,000 of multiplied damages under IFCA awarded by the trial court.[59]

We affirm the trial court's denial of Day's claim for contract reformation.

We reverse the judgment in favor of Day against MOE based on coverage by estoppel.

Finally, we award Day her reasonable attorney fees on appeal on the issues she prevailed upon.

WE CONCUR:

[58] RCW 48.30.015(2), (3); Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 201, 312 P.3d 976 (2013); Olympic Steamship Co., Inc. v. Centennial Ins. Co. 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).

[59] On reconsideration in this court, the parties debate whether a supplemental judgment may yet be entered for Day's attorney fees in the trial court. Because this question was not meaningfully addressed in the parties' briefs, we express no opinion.

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 March 13, 2017, I arranged for service of the foregoing Letter of Errata, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice PO Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Richard B. Kilpatrick Kilpatrick Law Group, P.C. 1408 140th Pl. NE, Suite 150 Bellevue, WA 98007 dick@pnw-law.com Kathy@pnw-law.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Timothy A. Bearb Olive|Bearb Law Group, PLLC 1218 Third Avenue, Suite 1000 Seattle, WA 98101 timothy@olivebearb.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Brent Beecher James Beecher Law Offices of Hackett, Beecher, & Hart 1601 Fifth Avenue, Ste. 2200 Seattle, WA 98101-1651 bbeecher@hackettbeecher.com jbeecher@hackettbeecher.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 13th day of March, 2017.

Patricia Miller