No. 94756-2
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 34640-4-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ANASTASIA FORTSON-KEMMERER,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

RESPONDENT ALLSTATE INSURANCE COMPANY'S AMENDED PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Allstate Insurance Company ("Allstate"), respondent below, asks this Court to reverse the Court of Appeals decisions identified in Part II.

II. COURT OF APPEALS' DECISION

The Court of Appeals filed its opinion in this case on March 28, 2017. (Attached as Appendix A) The court denied Allstate's motion for reconsideration in an order entered on June 15, 2017. (Appendix B)

III. ISSUES PRESENTED FOR REVIEW

1. Does the doctrine of res judicata bar an insured from filing a second lawsuit against her insurer for bad faith, IFCA and CPA violations based on the insurer's alleged failure to pay underinsured motorist benefits, when the insured previously sued and obtained a judgment against the insurer for breach of contract for failing to pay those same underinsured motorist benefits?

2. Does a UIM insurer act in the same quality or capacity for purposes of res judicata when it acts to advance and protect its own interests in defending both UIM damage claims and UIM bad faith claims?

3. Does the Court of Appeals' holding that UIM insurers owe a quasi-fiduciary duty to their insureds when defending a UIM bad faith claim directly conflict with this Court's explicit holding in *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 779-80, 15 P.3d 640 (2001), *overruled on other grounds, Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003), that a UIM insurer does not owe a quasi-fiduciary duty to its insured?

4. Should the Court add a completely new factor—the possibility of "prejudice" in the context of motions to bifurcate under CR 42—when analyzing whether res judicata applies to bar a second lawsuit?

IV. STATEMENT OF THE CASE

A. The Accident And Fortson's Two Lawsuits Against Allstate.

On December 21, 2006, appellant, Anastasia Fortson-Kemmerer ("Fortson") was injured in an auto accident with an unknown driver who fled the scene. (CP 4; 24). Fortson was insured at the time by Allstate Insurance Company Policy No. 064031937, which included underinsured motorist ("UIM") coverage. (*Id*). Almost three years after the accident, Ms. Fortson demanded that Allstate pay $75,000 in UIM benefits to her for claimed accident related injuries. (CP 5; 31-34). In the same letter, Ms. Fortson's counsel specifically told Allstate that its failure to pay the demand would expose it to liability for violations of the Insurance Fair Conduct Act ("IFCA"), RCW 48.30 et seq., that Fortson would file suit if Allstate did not pay, and that she would seek UIM damages and damages under IFCA. (CP 33-34). Upon receipt of the demand, Allstate investigated the loss and based upon the information provided to it, offered Ms. Fortson $9,978.00 to settle her UIM claim. (CP 5). Fortson rejected the offer.

Fortson sued Allstate in Spokane County Superior Court, "*Fortson I*", on May 18, 2011, to recover UIM benefits, alleging that Allstate had breached its insurance contract by failing to pay the amount of UIM benefits she believed she was owed. (CP 36-40). Although Fortson had warned of her intent to pursue an IFCA claim if Allstate did not pay the amount she

demanded, she did not assert any extra contractual claims (i.e., bad faith, IFCA or CPA claims) in the suit. The lawsuit was resolved via mandatory arbitration on January 12, 2012, and a judgment was entered in Fortson's favor on February 29, 2012. (CP 6; 41-43). Allstate paid the judgment and a satisfaction of judgment was entered on April 17, 2012. (CP 44-45).

On February 6, 2015, almost four years after filing her first lawsuit, and nearly three years after the satisfaction of judgment was filed, Ms. Fortson sued Allstate a second time, again in Spokane County Superior Court, "*Fortson II*". (CP 3-9). The complaint in *Fortson II* alleged substantially the same facts as were alleged in *Fortson I*, including that Allstate refused to tender proper UIM payment. This time Fortson did assert claims for bad faith, IFCA and Consumer Protection Act ("CPA"), RCW 19.86 et seq., violations for Allstate's alleged refusal to pay the amount of UIM benefits Fortson had initially demanded, and for alleged failure to conduct a reasonable investigation of Fortson's UIM claim. (CP 7-9). In its Answer, Allstate asserted res judicata as an affirmative defense (CP 17) and subsequently filed a Motion for Summary Judgment seeking to dismiss Fortson's claims with prejudice, as barred by the doctrine of res judicata, because both lawsuits were based on the same event: Allstate's alleged failure to pay Fortson the UIM benefits she believed she was entitled to recover. (CP 20-60).

B. The Trial Court Dismisses *Fortson II*.

In its motion for summary judgment, Allstate relied on well-settled Washington case law governing the application of res judicata to establish that *Fortson I* and *Fortson II* shared an identify of (1) persons and parties; (2) causes of action or claims; (3) subject matter; and (4) the quality or capacity of the persons for or against whom the claim is made. (CP 49-56). And, while no Washington state appellate court had addressed the identical issue presented in this case—namely, whether res judicata bars an insured from filing a second lawsuit alleging bad faith and IFCA violations based on the insurer's failure to pay UIM benefits, when the insured had previously sued the insurer for breach of contract for failing to pay UIM benefits—Allstate relied on two federal district courts, applying Washington law, that addressed this precise issue: *Zweber v. State Farm Mut. Auto Ins. Co.*, 39 F. Supp. 3d 1161 (W.D. Wash. 2014) and *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 12-1505, 2013 WL 1499265 (W.D. Wash. Apr. 11, 2013). (*Id).* Both courts held that res judicata barred the plaintiffs' second lawsuits as a matter of law.

In *Zweber* and *Smith*, just as in this case, the insureds' first lawsuits against their insurers arose out of the insurers refusal to offer the amount of UIM compensation the insureds believed they were entitled to; ultimately, judgments were entered and satisfied. And like Fortson here, both insureds

later filed second actions asserting claims for bad faith, IFCA and CPA violations, claiming the insurers failed to properly evaluate and/or settle their UIM claims. The courts in *Zweber* and *Smith* undertook an extensive analysis of Washington law on res judicata, including the principles and purpose behind the doctrine, and evaluated whether there was identity between the two lawsuits with respect to (1) persons and parties; (2) causes of action; (3) subject matter; and (4) quality or capacity of persons for or against whom the claim is made. *Zweber*, 39 F. Supp. 3d at 1165-69; *Smith*, 2013 WL 1499265, at *4-5. Both courts found all four factors present and held that res judicata barred the second lawsuits, as a matter of law. *Zweber*, 39 F. Supp. 3d at 1169; *Smith*, 2013 WL 1499265, at *7. (CP 50-53)

The trial court, the Honorable Patrick Monasmith, agreed with Allstate finding it "inescapable" that res judicata applied to bar *Fortson II*. (RP 42:21-22). The court explained that both *Zweber* and *Smith* "were very clear on their face [with] very similar facts patterns" to the present case. (RP 41:20-22). While acknowledging that federal district court decisions are not binding, Judge Monasmith found the *Zweber* decision to be "very, very persuasive," particularly because the essential facts of *Zweber* were virtually identical to the facts in this case. (RP 42:11-14). The court thus entered an Order granting Allstate's Motion for Summary Judgment dismissing Fortson's lawsuit with prejudice. (CP 264-267). Fortson

subsequently filed a Notice of Appeal to this Court seeking Direct Review. (CP 268-73). That request was denied and the appeal was then considered by Division III of the Court of Appeals.

C. The Court of Appeals Reversed The Trial Court's Order.

The Court of Appeals reversed the trial court's summary judgment of dismissal, holding that res judicata did not preclude Fortson's second lawsuit for bad faith handling of her UIM claim because there was no identity of the "quality" or "capacity" of Allstate in the two lawsuits. In doing so, the court ruled that an insurer defends UIM bad faith claims in a quasi-fiduciary role but that when defending UIM damage claims, the insurer defends as an adversary. (Op. at 22-23, as modified by order entered June 15, 2017, Appendix A and B) However, this Court has long held that a UIM insurer does ***not*** owe a quasi-fiduciary duty to its insured. *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 779-80, 15 P.3d 640 (2001), *overruled on other grounds*, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003). Curiously, too, while holding that there was no identity of Allstate in its quality or character in the two lawsuits and therefore res judicata did not bar the second lawsuit, the Court of Appeals nonetheless stated that the UIM judgment was binding on Allstate for purposes of the bad faith lawsuit. (Op. at 15; Appendix A) This is logically and legally inconsistent.

The Court of Appeals further reasoned that the insurer's purported "different posture" when defending UIM claims and UIM bad faith claims, "makes it prejudicial [to insurers] for the claims to proceed in the same lawsuit," and therefore, the court concluded that res judicata would not apply to bar the second lawsuit. (Op. at 23 Appendix A) The court's consideration and finding of "prejudice" and the resulting rejection of res judicata to the facts of this case, was not an argument made or briefed by the parties, and was based on arguments made in an entirely different context, namely, discretionary motions to bifurcate under CR 42. An insurer may choose under CR 42 to move to bifurcate a UIM claim from the related bad faith claims and to stay resolution of the bad faith claims until the UIM claim has been resolved—when the insured has properly asserted all of those claims in one lawsuit. The Court of Appeals relied on case law from other states that, unlike Washington law, mandate that UIM and bad faith claims be bifurcated, to support its conclusion that insurers are prejudiced when UIM damage claims are tried with UIM bad faith claims and hence, res judicata did not apply to bar a second lawsuit. (Op. at 11-12, Appendix A)

Notably, too, the Court of Appeals overlooked and made absolutely no mention of the two well-reasoned decisions by respected U.S. District Court Judges who ruled on the precise issue in this case, decisions that the

trial court relied on in granting Allstate's motion for summary judgment, *Zweber*, 39 F. Supp. 3d 1161, and *Smith*, 2013 WL 1499265. The Court of Appeals also failed to address case law from other jurisdictions that established that "[t]he great majority of jurisdictions take the view that a breach-of-contract verdict in favor of the insured and against his or her insurer precludes a subsequent action for first-party bad faith..." *Villareal v. United Fire & Cas. Co.*, 873 N.W.2d 714, 722 (Iowa 2016) (examining cases from eleven jurisdictions that apply res judicata or claim preclusion to subsequent bad faith actions).

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review of the Court of Appeals' decision terminating review under RAP 13.4(b)(1) and (2) because the court's holding that UIM insurers act in different capacities when defending UIM claims and UIM bad faith claims, directly conflicts with *Flessher v. Carstens Packing Co.*, 96 Wash. 505, 165 P. 397 (1917), and the Court of Appeals decision in *Berschauer Phillips Construction Co. v. Mutual of Enumclaw Insurance Co.*, 175 Wn. App. 222, 308 P.3d 681 (2013). The Court in *Flessher* established that a party acts in a ***different*** quality or capacity when the party acts on behalf of ***another's interests*** in one lawsuit, but acts on behalf of ***its own interests*** in the second lawsuit. 96 Wash. At 509-10. On the other hand, a party acts in the ***same*** quality and capacity in

both lawsuits when a party acts "to advance and protect its *own interests* in both lawsuits." *Berschauer*, 175 Wn. App. at 231 (emphasis added). UIM insurers such as Allstate, act "to advance and protect [their] own interests in both [UIM damage and UIM bad faith] lawsuits" and hence act in the same quality or character – as plaintiff's UIM insurer – in both lawsuits.

Review should also be granted under RAP 13.4(b)(1) because the Court of Appeals' holding that UIM insurers defend UIM bad faith claims in a quasi-fiduciary role, but defend UIM contract claims as an adversary, directly conflicts with this Court's long-standing holding that a UIM insurer does <u>not</u> owe a quasi-fiduciary duty to its insured. *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 779-80, 15 P.3d 640 (2001), *overruled on other grounds*, *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003).

Review should also granted under RAP 13.4(b)(4) because the Court of Appeals added a new "prejudice" element into the res judicata analysis, premised upon the discretionary consideration of "prejudice" addressed in trial court motions to bifurcate and stay brought under CR 42. Determining whether "prejudice" is a factor that should be included in a res judicata analysis, involves an issue of substantial public interest that should be determined by the Supreme Court.

Finally, review should be granted under RAP 13.4(b)(4) because the question of whether res judicata bars an insured from filing a second lawsuit against its insurer alleging bad faith and violations of IFCA and the CPA based on the insurer's failure to pay underinsured motorist benefits, when the insured previously sued and received a judgment against the insurer for breach of contract for failing to pay those same underinsured motorist benefits is a matter of first impression, never before decided by the Washington State Supreme Court.

A. The Judicial Doctrine Of Res Judicata

"Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington." *Ensley v. Pitcher,* 152 Wn. App. 891, 898, 222 P.3d 99 (2009) (quoting *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999)), *rev. denied*, 168 Wn.2d 1028 (2010).

> The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.

Id. at 899, quoting *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982), quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). "The public policy favoring prevention of claim splitting applies to a party seeking to recover from an insurer based on various

theories of recovery." *Berschauer*, 175 Wn. App. at 228, citing *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986).

Under well settled Washington case law, res judicata applies to preclude a second lawsuit when the two lawsuits share an identity of (1) persons and parties; (2) causes of action or claims; (3) subject matter; and (4) the quality or capacity of the persons for or against whom the claim is made. *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Res judicata is an issue of law, subject to de novo review. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). In the present case, there is a concurrence of identity in all four respects between Fortson's two lawsuits. The Court of Appeals, however, ignored Washington law, created new law, and erroneously conclude that the fourth element – identity of the quality or character of parties for or against whom the claim is made – was not present in the two lawsuits Fortson filed against Allstate.

B. Review Should Be Granted Because The Court of Appeals' Decision Conflicts With Supreme Court Precedent On Whether a Party Acts In The Same Quality Or Capacity In Two Lawsuits.

Under Washington case law, establishing that two lawsuits share an identity of the quality or character of the persons for or against whom the claim is made, "simply requires a determination of which parties in the

second suit are bound by the judgment in the first suit." *Ensley*, 152 Wn. App. at 905 (citing 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.27, at 464 (1st ed. 2007)). When the parties to two lawsuits are the same, but there is an assertion that one party is acting in a different capacity in the two proceedings, as the Court of Appeals does here, the analysis remains simple. A party acts in a different capacity in two proceedings, for example, where that party brings suit in a representative capacity in one lawsuit and then sues personally in a second lawsuit; as a result, the party's "quality or character" is not the same in both actions. *Flessher*, 96 Wash. 505. In those situations, that party will neither be bound by nor entitled to the benefits of res judicata in a subsequent action in which he or she appears in another capacity. 47 Am. Jur. 2d Judgments § 578, Westlaw (database updated May 2017); Restatement (Second) of Judgments § 36(2) (1982). The rationale for this rule is that "in appearing as a representative of another, a person should be free to take positions inconsistent with those he might assert in litigation on his own behalf or on behalf of others he represents in some other fiduciary capacity." Restatement, supra, cmt. a.; *Andrews v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000).

In *Flessher*, a minor's father filed suit *in his capacity as guardian ad litem* for his daughter's injuries after she was poisoned by tainted food.

After that suit was resolved in his daughter's favor, the father filed a second lawsuit *in his own capacity*, seeking to recover his own personal damages that resulted from his daughter's injuries. 96 Wash. at 507. This Court determined that the father was acting in a different capacity in the two lawsuits because in the first lawsuit he was acting on behalf of his daughter, while in the second lawsuit, he was asserting his own personal claims. *Id.* at 509. Because the father was acting in different capacities in the two lawsuits, the first judgment did not act as a bar to the second lawsuit.[1] *Id.*

On the other hand, when a party seeks "to advance and protect its *own interests* in both lawsuits," that party *is* acting in the same capacity and quality in both lawsuits. *Berschauer*, 175 Wn. App. 2d at 231 (emphasis added)*; see also, Eugster v. Wash. State Bar Ass'n*, 198 Wn. App. 758, ¶59, --- P.3d --- (2017) (finding identity of the quality or character for both parties because in both lawsuits, plaintiff litigated in his individual capacity and the defendant litigated in its official capacity); *Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 636, 376 P.3d 430 (2016) (where parties are in actual control of their own interests in both lawsuits, the quality of the parties is identical in both suits).

[1] The father's request for damages for loss of services in his second lawsuit, however, were not allowable, because those damages had already been included in the recovery in the first lawsuit. *Flessher*, 96 Wash. at 510.

Here, as in *Berschauer*, Allstate, like all UIM insurers, defends both the UIM contract claims and the UIM bad faith claims in *its own capacity* – as the UIM insurer - and it seeks to advance and protect *its own interests.* The Court of Appeals' conclusion that because UIM insurers are entitled to assert the same defenses as the tortfeasor, UIM insurers do not act in the same capacity when defending UIM claims, is incorrect. The right to assert the tortfeasor's defenses in the UIM damage claim is not premised on the notion that the UIM insurer is *representing* the tortfeasor, or that the UIM insurer is acting on behalf of the tortfeasor. The purpose of allowing UIM insurers to assert defenses available to the tortfeasor is not to make UIM insurers representatives of the tortfeasor, but rather, to ensure that the UIM insured is not placed in a better position as a result of being struck by an uninsured motorist as opposed to an insured motorist. *Ellwein*, 142 Wn.2d at 780, (quoting *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 281, 876 P.2d 896 (1994)). Further, the UIM insurer's liability to the UIM insured arises from the insurance contract between the UIM insured and the UIM insurer. *See, Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 958 P.2d 990 (1998); *Bennett v. Computer Task Grp., Inc.*, 112 Wn. App. 102, 112, 47 P.3d 594 (2002). UIM insurers thus defend UIM damage claims as the UIM insurer and not as a representative of the tortfeasor; likewise, UIM insurers defend UIM bad faith claims as the UIM insurer. Consequently, Allstate

defended both Fortson's UIM contract claim and her UIM bad faith claims asserted in the second lawsuit, as Fortson's UIM insurer, and sought to advance and protect its own interests in both lawsuits. Allstate defended in the same capacity and quality in the two lawsuits.

C. Review Should Be Granted Because Under *Ellwein*, UIM Insurers Do Not Owe A Quasi-Fiduciary To Their Insureds.

Generally speaking, insurers owe a quasi-fiduciary duty to their insureds. *Ellwein*, 142 Wn.2d at 779. This quasi-fiduciary duty "rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders" and requires that the insurer give "*equal consideration in all matters to the insured's interests*." *Id.* (quoting *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986)) (emphasis added). However, this Court has long recognized held that "the relationship between a UIM insurer and its insured," unlike other insurer-insured relationships, "'is by nature adversarial and at arm's length.'" *Id.* at 779 (quoting *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 249, 961 P.2d 350 (1998)). Indeed, when a dispute between the UIM insured and UIM insurer centers on the tortfeasor's liability or the amount of damages the insured is entitled to recover, the UIM insurer must be "free to be adversarial within the confines of the normal rules of procedure and ethics" because "[t]o require otherwise would contradict the very nature of UIM coverage." *Id.*

at 780. This holding recognizes that the UIM insurer and UIM insured approach the dispute resolution process (negotiation, mediation, arbitration, or litigation) as opposing civil litigants. Because of this, "the normal *rules of procedure and ethics*" apply, and the insurer does *not* have a duty to give equal consideration to the insured's interests. *Id.* (emphasis added). Thus, this Court in *Ellwein* explicitly held that a UIM insurer does *not* owe a quasi-fiduciary duty to its insured and is not required to give equal consideration to the insured's interests. *Id.* This is not to say that the UIM insurer owes no duties to its insured; instead, a UIM insurer owes its insured a duty of good faith to deal fairly with the UIM insured and not overreach. *Id*. at 781.

In this case, the Court of Appeals' holding that Allstate is required to defend the bad faith claims in a quasi-fiduciary role, while it defends the UIM claim as an adversary, to support its conclusion that there was no identity of the quality or capacity of Allstate in the two lawsuits Fortson filed against Allstate, is nonsensical and directly conflicts with this Court's holding in *Ellwein*. Under *Ellwein*, Allstate does not owe a quasi-fiduciary duty to plaintiffs, it is not obligated to give equal consideration and therefore, it does not defend against bad faith claims in a quasi-fiduciary role. Instead, Allstate owes the same duty of good faith to Fortson whether defending against the UIM claim or defending against a UIM related bad

faith claim: it owes a duty good faith to deal fairly with Fortson and not overreach. Consequently, Allstate's quality or capacity as Fortson's UIM insurer remains the same in the two lawsuits.

D. Review Should Be Granted Because Considerations Of Prejudice Relevant to Motions To Bifurcate Under CR 42 Have No Application To A Res Judicata Analysis.

The Court of Appeals improperly relied on discretionary CR 42 trial court motions to bifurcate, and cases from other jurisdictions that do not follow Washington law, to determine, *sua sponte*, that Allstate would be "prejudiced" if Fortson's UIM claim and bad faith claims had been tried together, and therefore, that res judicata did not bar Fortson's second lawsuit. Review should be granted under RAP 13.4(b)(4) because determining whether a discretionary "prejudice" factor should be included in a res judicata analysis involves an issue of substantial public interest that should be determined by the Supreme Court. Indeed, the Court of Appeals erred in relying on motions to bifurcate in its analysis for several reasons.

First, bifurcation was never an issue in this case. While Fortson argued that Allstate should be judicially estopped from asserting that claim preclusion applied to bar her bad faith claims because of arguments Allstate made in unrelated CR 42 motions to bifurcate in other cases, whether a trial court would have bifurcated the claims in this case was not an issue. Similarly, the question of whether Allstate would be prejudiced if the claims

were tried together so as to preclude the application of res judicata was not an issue below, so none of these issues were even briefed by the parties.

Second, the court's insertion of a "prejudice" factor in the res judicata analysis is not supported by any Washington case law. "Res judicata is a judicially created doctrine designed to prevent relitigation and to curtail multiplicity of actions by parties . . . who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." *Corbin v. Madison*, 12 Wn. App. 318, 323, 529 P.2d 1145 (1974), *rev. denied*, 85 Wn.2d 1005 (1975), citing *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967). Prejudice is neither a factor nor a consideration in the analysis for applying res judicata. Indeed, this makes sense because res judicata applies to determine whether all of the claims should have been asserted in the same lawsuit, while CR 42 applies *after* a party has properly asserted all claims in the same lawsuit. Nor has research revealed any Washington court decision rejecting the application of res judicata on the basis that the party seeking claim preclusion would be prejudiced if the two claims were tried together. By adding a "prejudice" factor to the res judicata analysis, the Court of Appeals effectively changes the law on res judicata, imposing a wholly new, different and irrelevant requirement for application of res judicata.

Third, the court's conclusion that UIM insurers are prejudiced when UIM contract and bad faith claims are tried together, misapprehends actual trial court practice in Washington with respect to motions to bifurcate and stay. Motions to bifurcate and stay are not always granted. (*See*, Amended App. C1-C6) Even when evidence used to support the bad faith claims could potentially be prejudicial to the insurer with respect to the UIM claim, motions to bifurcate and stay have been denied because the court determined that bifurcation is not necessary to avoid any potential prejudice to the insurer. (*See*, Am. App. C1-C2.) Some courts have imposed other measures to ameliorate any potential prejudice or jury confusion, for example, instructing the jury to disregard evidence for one purpose while considering it for another, or by dividing a single trial into two consecutive phases. (*See*, Am. App. C2; C4-C5) Finally, to some trial courts, the burdens of bifurcating discovery and conducting two trials "are obvious," and therefore, motions to bifurcate and stay have been denied because of the additional burdens on the court of "overseeing two rounds of discovery disputes, dispositive motions, jury selections/instruction, and trial would be far less efficient and economical than trying all of plaintiff's claims together." (*See*, Am. App. C2)

Finally, because the Court of Appeals did not go so far as to mandate that UIM and bad faith claims *must* be brought in separate lawsuits, (nor could it because that was not an issue presented to the trial court or the Court of Appeals), insureds are still free to file suit against their UIM insurers alleging UIM damage claims together with UIM bad faith claims, and trial courts still have authority under CR 42 to deny the insurers' motions to bifurcate. But with this Court's ruling, UIM insureds also have the option of filing multiple suits against their UIM insurers. Consequently, the Court's ruling encourages re-litigation and multiple actions by parties who have had the opportunity to litigate the same matter, it does not put an end to conflicts, and it does not produce certainty as to individual rights, all of which is directly contrary to the very purpose of the doctrine of res judicata.

VI. CONCLUSION

Based on the above arguments and authorities, Allstate respectfully requests this Court grant Allstate's Petition for Review of the Court of Appeals' opinions, pursuant to RAP 13.4(b)(1),(2) and (4), reverse the Court of Appeal's decision and reinstate the trial court's Order of Dismissal.

RESPECTFULLY SUBMITTED this 11 day of October, 2017.

KELLER ROHRBACK L.L.P.

By _____

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APPENDIX A

FILED
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WA State Court of Appeals, Division III

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

ANASTASIA FORSTON-KEMMERER, Appellant, v. ALLSTATE INSURANCE COMPANY, Respondent.	)	No. 34640-4-III PUBLISHED OPINION

SIDDOWAY, J. — Anastasia Fortson-Kemmerer filed this lawsuit against her insurer, Allstate Insurance Company, alleging Allstate violated the Insurance Fair Conduct Act (IFCA), RCW 48.30.015, and acted in bad faith in investigating her claim for underinsured motorist (UIM) coverage. That claim was resolved in an earlier action by an award of $44,151.11 following mandatory arbitration.

The trial court granted summary judgment dismissing this second action on the basis that Ms. Fortson-Kemmerer's action to enforce the UIM provision of her policy was res judicata as to her bad faith and IFCA claims. Whether final judgment resolving a UIM claim precludes a later claim for insurer bad faith is a question of first impression for a Washington court.

A single lawsuit that combines UIM and bad faith claims places the insurer, both pretrial and at trial, in two different legal postures with prejudicial consequences. There is no dispute that Allstate prefers to resolve such claims separately and would have sought bifurcation and a stay of the bad faith claim had it been asserted earlier. Because of this difference in the insurer's quality as a party in the two types of actions, the UIM action was not res judicata as to this action. We reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

In December 2005, Anastasia Fortson-Kemmerer was in a collision with a motorist who fled the scene, was never identified, and is presumed uninsured. Ms. Fortson-Kemmerer was insured by Allstate Insurance Company. She eventually sent a demand letter to Allstate requesting $75,000 in UIM benefits for injuries and damages she incurred as a result of the collision. She stated in her letter that if Allstate did not pay the amount requested, she would bring a lawsuit to enforce payment of her benefits under the policy and for the remedies and penalties provided by IFCA.

Shortly thereafter, Allstate made a counteroffer of $9,978, which Ms. Fortson-Kemmerer rejected. Allstate then requested and obtained a medical examination of Ms. Fortson-Kemmerer, after which it renewed its offer of $9,978. Ms. Fortson-Kemmerer rejected it again.

In 2011, Ms. Fortson-Kemmerer sued Allstate, which had been reporting monthly that it was continuing to investigate her claim. She still sought $75,000.00 in UIM benefits. Following mandatory arbitration, she was awarded $44,151.11. Allstate made a post-award offer of $25,000.00 that she rejected, after which Allstate paid the award.

Ms. Fortson-Kemmerer then filed this action against Allstate, alleging it had acted in bad faith and violated IFCA by failing to conduct a reasonable investigation into her claim, constructively denying her claim, and compelling her to bring a lawsuit to recover what she was owed under her insurance policy.

Allstate raised the affirmative defense that her action to enforce the UIM provision of her policy operated as res judicata and barred her bad faith claim. It then moved for summary judgment on that basis.

Ms. Fortson-Kemmerer responded with evidence that in other cases in which insureds combine UIM claims with what we will refer to hereafter, generically, as bad

faith claims,[1] Allstate and other insurers often persuade courts to bifurcate not only trial, but also discovery. The insurers advance arguments such as the following:

- That "[a] claim for breach of contract against an insurance company is significantly different than a claim that in breaching the insurance contract the insurance company somehow acted in bad faith";[2]
- That "[i]t is judicially recognized that . . . the evidence necessary to support a bad faith claim is 'very different from that necessary to support a claim for UIM benefits,'" since "[t]he focus of discovery and trial of the UIM claims relates solely to the *plaintiff's* bodily injuries and medical treatment," while "[c]onversely, the focus of discovery and trial on the bad faith claims is on *Allstate's* conduct";[3]
- That until the fact finder has determined the dollar value of the UIM claim, "there is no way to know whether a bad faith claim based upon an alleged failure to properly evaluate, negotiate and settle a UIM claim is even colorable";[4]
- That "[n]one" of the "eyewitnesses, investigating officers, medical providers, and experts" who will testify to the accident related claims "has a remote scintilla of evidence relevant to the insurance claims," and "evidence about

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[1] We use the generic "bad faith claims" to include actions for common law bad faith and claims that an insurer has violated IFCA or the Consumer Protection Act, chapter 19.86 RCW.

[2] Clerk's Papers (CP) at 62 (citing a submission by Allstate in *Sayler v. Allstate*, No. 06-02-03067-7 (Spokane County Super. Ct., Wash.)).

[3] CP at 64 (quoting a submission by Allstate in *Krett v. Allstate Insurance Co.*, No. 2:13-cv-00131 RSL (W.D. Wash.)).

[4] CP at 63 (citing a different submission by Allstate in the *Krett* case).

> Allstate's evaluation and handling of the claim is not at all relevant to the accident-related claims";[5] and
>
> - That without bifurcation and a stay of discovery as to the bad faith claim, an insurer's defense "will be prejudiced," since it will be "required to produce its UIM file and internal privileged documents to plaintiff before the UIM claim is resolved."[6]

Ms. Forston-Kemmerer's evidence included seven bifurcation and stay orders that Allstate or other insurers obtained in Washington courts, state and federal, between 2009 and 2013, in cases in which plaintiff-insureds asserted UIM and bad faith claims in the same lawsuit. Six of the orders not only bifurcated trial of the UIM and bad faith claims, but also bifurcated discovery and stayed discovery addressing bad faith until after the UIM claim was resolved. The following language from one order is representative of orders contemplating what are not back-to-back trials, but, in essence, one lawsuit turned into two:

> Plaintiffs' UIM claim is hereby bifurcated from plaintiffs' "bad faith claims" for purpose of both discovery and trial, and all discovery in the trial of plaintiffs "bad faith claims" are hereby stayed until after plaintiffs' claim for Underinsured Motorist (UIM) benefits has been fully resolved.

Clerk's Papers (CP) at 76.

In addition to opposing Allstate's summary judgment motion, Ms. Forston-

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[5] CP at 65 (citing a submission by Allstate in *Young v. Allstate Ins. Co.*, No. 09-2-42284-2 SEA (King County Super. Ct., Wash.)).

[6] CP at 114, 113 (citing a submission by Allstate in *Krett*).

Kemmerer sought a continuance under CR 56(f), arguing that discovery could yield even more evidence that when Allstate's insureds join UIM and bad faith claims, Allstate regularly seeks what are in effect separate lawsuits, citing prejudice and significant differences between UIM and bad faith claims. She argued information of Allstate's prior practice was relevant to res judicata and to whether Allstate should be judicially estopped from asserting claim preclusion as an affirmative defense.

The trial court denied Ms. Fortson-Kemmerer's motion to continue and granted summary judgment dismissal of her claim. Ms. Fortson-Kemmerer appeals.

ANALYSIS

Res judicata or modernly, claim preclusion,[7] "acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding." *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). For almost a century, Washington cases have held that for a judgment to operate as res judicata in a subsequent action "there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made." *N. Pac. Ry. Co. v. Snohomish County*, 101 Wash. 686,

[7] For the most part, we use the term "claim preclusion," which is arguably narrower and more clearly refers only to preclusion of relitigating a claim, not an issue. *See* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985); *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008).

688, 172 P. 878 (1918); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865-66, 93 P.3d 108, *aff'd*, 151 Wn.2d 853, 93 P.3d 108 (2004); Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 812 & n.48 (1985) (observing in 1985 that "scores" of Washington cases had "stated for almost seven decades" that a judgment has preclusive effect only if the successive proceedings are identical in the four respects). "Res judicata is an issue of law, subject to de novo review on appeal." *Berschauer Phillips Const. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227, 308 P.3d 681 (2013). Allstate, as the party asserting claim preclusion, bears the burden of proof. *Hisle*, 151 Wn.2d at 865.

Allstate relies on language from a number of cases to the effect that claim preclusion prohibits the relitigation of cases that "could have" or "might have" been asserted in earlier litigation, as if that simpler criterion can substitute for the four required identities. Since Ms. Fortson-Kemmerer's first demand letter threatened to sue for IFCA remedies and penalties, Allstate argues that of course she "could have" advanced IFCA and bad faith claims in her first lawsuit. But none of the cases cited by Allstate has ever retreated from the four identities required to establish claim preclusion. And Allstate's argument was directly rejected in *Seattle-First National Bank v. Kawachi*, 91 Wn.2d 223, 225-28, 588 P.2d 725 (1978), in which a plaintiff's claims had not been adjudicated in a prior action, but the defendants maintained that "the claims should be barred because they

could have been decided in that suit." *Id.* at 226 (emphasis added). As the court explained:

> While it is often said that a judgment is res judicata of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. 50 C.J.S. *Judgments* § 668 (1947); 46 Am. Jur. 2d *Judgments* § 404 (1969). A judgment is res judicata as to every question which was *properly a part of the matter in controversy*, but it does not bar litigation of claims which were not in fact adjudicated.

Id. (emphasis added). Essentially, it is the four required identities that enable us to determine whether a question was "properly a part" of an earlier matter in controversy.

We therefore look to the four required identities. Ms. Forston-Kemmerer concedes that the parties are identical. She disputes that any of the remaining three factors is. While she advances argument and authority in support of her position that the UIM and bad faith claims lack three of the required identities, she suggested at oral argument that the narrowest ground on which we can reverse the trial court is the different "quality" of Allstate's defense in UIM and bad faith cases. It is that different quality that accounts for Allstate's and other insurers' efforts—and their success—in persuading courts to treat UIM and bad faith claims joined in a single lawsuit as if the claims had been brought separately.

We examine the nature of UIM and bad faith claims, why joining them in one lawsuit is problematic, the few claim preclusion decisions from other jurisdictions in which the common practice of severing or bifurcating UIM and bad faith claims has been considered, and the several Washington decisions that address what it means for parties to have an identical "quality" with respect to two claims. We conclude that where a party's different posture as to two claims makes it prejudicial for the claims to proceed in the same lawsuit, this is a different "quality" that prevents the claims from being identical for claim preclusion purposes. A UIM claim therefore does not preclude a subsequent bad faith action.

I. The unique character of a UIM claim, and why it prompts courts to treat UIM and bad faith claims that are joined as if they were separate actions

The purpose of the Washington statute requiring insurers doing business in Washington to offer UIM coverage is to allow an injured party to recover those damages the injured party would have received had the responsible party been insured with liability limits as broad as the injured party's UIM limits. *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 726, 733 P.2d 213 (1987). Coverage eligibility requires the insured to demonstrate that he or she is "legally entitled to recover damages" from the underinsured motorist "because of bodily injury, death, or property damage." RCW 48.22.030(2). A tort judgment against the tortfeasor establishes conclusively the damages to which the

insured is "legally entitled." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 247-48, 961 P.2d 350 (1998).

"The insurance carrier which issued the policy stands, therefore, in the shoes of the uninsured motorist to the extent of the carrier's policy limits." *State Farm Mut. Auto. Ins. Co. v. Bafus*, 77 Wn.2d 720, 724, 466 P.2d 159 (1970). It "may defend as the tortfeasor would defend" and "strategiz[e] the same defenses that the tortfeasor could have asserted." *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 697, 295 P.3d 239 (2013). A UIM insurer's relationship with its insured in the action to enforce UIM coverage is therefore "'by nature adversarial and at arm's length.'" *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 779, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003) (quoting *Fisher*, 136 Wn.2d at 249). This is markedly unlike first party bad faith claims, in which insurers are recognized as having a quasi-fiduciary duty to act in good faith toward their insureds. *Cedell*, 176 Wn.2d at 696.

Ms. Forston-Kemmerer demonstrates that when an insured joins her UIM and bad faith claims, insurers are often able to obtain a stay and bifurcation order that effectively transforms the one lawsuit into two: a UIM lawsuit, followed by a bad faith lawsuit. While no reported Washington decision has required or endorsed such a procedure, insurers often obtain bifurcation and stay orders in Washington courts by relying on cases

from other jurisdictions, analogous Washington case law,[8] and by identifying for Washington courts the problems presented when discovery and trial of the claims proceed simultaneously.

Texas courts have held that it is always an abuse of discretion for a trial court to refuse to sever a UIM claim for initial trial and abate any bad faith claims asserted in the same action if the insurer has made a settlement offer, because the evidence of the offer, which the insurer will want to present in defense of the bad faith claim, will prejudice it in the UIM action. *In re State Farm Mut. Auto. Ins. Co.*, 395 S.W.3d 229, 234 (Tex. App. 2012). Texas courts will grant mandamus relief if a trial court denies severance of such claims. *Id.* at 237; *accord In re United Fire Lloyds*, 327 S.W.3d 250, 257 (Tex. App. 2010). In *Lloyds*, the court characterized UIM contracts as "unique" for severance and abatement purposes, citing the Texas Supreme Court's observation that unlike other first party insurance contracts in which the policy alone dictates coverage, "'UIM insurance utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined'"—

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[8] Allstate has pointed in the past to *Roberts v. Safeco Insurance Co.*, 87 Wn. App. 604, 941 P.2d 668 (1997) (bad faith claim was properly dismissed on summary judgment where insured might have been fully compensated for her loss, which required that her actual damages first be determined) and *Escalante v. Sentry Insurance Co.*, 49 Wn. App. 375, 381, 743 P.2d 832 (1987), *overruled on other grounds by Ellwein*, 142 Wn.2d 766, 779 (mentioning that the trial court had stayed insured's bad faith claim pending mandatory arbitration of the issue of the amount of damages payable under the policy). CP at 117-18.

that being the liability of the *underinsured motorist*, and the damages proved recoverable against him or her. *Id.* at 255 (quoting *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006)).

Similarly, in Rhode Island, "claims of insurer bad faith are severed and tried separately from the breach of insurance contract claim, a procedure that provides the insurer with significant procedural protections, including nondisclosure of its file until the completion of the breach-of-contract action." *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1010 (R.I. 2002). And in *Garg v. State Automobile Mutual Insurance Co.*, the Ohio appellate court held that it would be "grossly prejudicial to [the insurer] and, thus, an abuse of discretion" for the trial court not to bifurcate an insured's bad faith claim and stay discovery on that claim until the breach of contract claim was resolved. 155 Ohio App. 3d 258, 266, 800 N.E.2d 757 (2003). The court observed that requiring the insurer to divulge otherwise privileged information discoverable in connection with the bad faith claim "would unquestionably impact [the insurer's] ability to defend against" the contract claim. *Id.* at 267.

Finally, New Jersey has held that it is an abuse of discretion for a trial court to order that discovery on UIM and bad faith claims joined in a single suit proceed simultaneously, and that a severance motion must be granted in such cases. *Procopio v. Gov't Emps. Ins. Co.*, 433 N.J. Super. 377, 80 A.3d 749 (2013). Severance and stay "promotes judicial economy and efficiency by holding in abeyance expensive, time-

consuming, and potentially wasteful discovery on a bad faith claim that may be rendered moot by a favorable ruling for the insurer in the . . . UIM litigation." *Id.* at 381.

Only these jurisdictions mandate bifurcation and discovery stays where UIM claims and bad faith claims are joined. But the discretion for trial courts to stay discovery and require separate trials is widely recognized and often exercised. In a 1998 case involving Allstate, the West Virginia Supreme Court observed that "[a]s a general matter, whenever courts bifurcate and stay bad faith claims against insurers, the *trend* is to order a stay of discovery on the bad faith claim." *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 35, 506 S.E.2d 64 (1998). A dissenting justice in that case, who would have mandated bifurcation and a discovery stay, summarized "[t]he compelling advantages of mandatory bifurcation and stay of discovery on first-party statutory bad faith claims:"

> (1) [C]ost savings to both parties, with increased incentive to settle before trial, (2) avoidance of burdensome and complicated discovery problems with insurance claims files, (3) avoidance of unfair prejudice to a litigant which arises when contract and bad faith claims are combined, and (4) avoidance of the possibility of the disqualification of trial counsel because of inherent conflict of interest problems. Gregory S. Clayton, *Bifurcation of Breach of Contract and Bad Faith Claims in First-Party Insurance Litigation*, 21 Vt. B.J. & L. Dig. 35 (1995).

Id. at 36 (McCluskey, J., dissenting).

II. Few courts have analyzed whether the bifurcation practice matters for claim preclusion purposes

We have identified only a few reported decisions that consider whether this common practice of holding a bad faith case in abeyance until a UIM case is resolved is

relevant to whether final judgment in a UIM case should preclude a subsequent action for bad faith. All apply different standards than Washington's for determining the scope of a claim, but are nonetheless worth examining.

In the earliest, *Porn v. National Grange Mutual Insurance Co.*, 93 F.3d 31, 34 (1st Cir. 1996), the First Circuit Court of Appeals determined the scope of a claim for preclusion purposes by applying the "'transactional approach'" articulated in the *Restatement (Second) of Judgments* (AM. LAW INST. 1982). The *Restatement* focuses on "the transaction, or series of connected transactions, out of which the action arose." RESTATEMENT (SECOND) § 24(1). To determine what "factual grouping" constitutes a "'transaction'" and what groupings constitute a "'series,'" the *Restatement* requires a "pragmatic[ ]" determination, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation." Most important for present purposes, it also requires giving weight to "whether the[facts] form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* at § 24(2).

Porn argued that his bad faith claim was not precluded by the final judgment on his contract claim because, in part, the bad faith facts did not form a convenient trial unit with the contract facts. *Porn*, 93 F.3d at 33. In the portion of its decision devoted to trial convenience, the First Circuit questioned this, reasoning that details of the collision required to be presented in the first case would "likely [be] repeated in the second." *Id.* at

36. Allstate's characterization of the overlap as "little if any" is more reflective of the Washington experience. CP at 126.[9] The determination of damages in the UIM action is binding in the bad faith action. *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 803, 855 P.2d 1223 (1993); *Girtz v. N.H. Ins. Co.*, 65 Wn. App. 419, 422-23, 828 P.2d 90 (1992). It is true that a disparity between damages recovered and an insurer's offer will not alone establish that an insurer acted unfairly; the insured must present "something more." *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 684, 389 P.3d 476 (2017). But the evidence in the second action will address the "something more"; the insurer cannot retry the issue of damages.

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[9] Allstate explained to a federal judge in the Western District of Washington in 2013 that "there is little if any overlap of issues or discovery between plaintiffs UIM claim and plaintiff's bad faith claims." CP at 126 (quoting a submission by Allstate in the *Krett* case).

> The focus of discovery and trial of the UIM claims relates solely to the *plaintiff's* bodily injuries and medical treatment incurred as a result of the accident; discovery and trial on the UIM claims requires the plaintiff's testimony and testimony from his medical providers and fact witnesses. Conversely, the focus of discovery and trial on the bad faith claims is on *Allstate's* conduct, what Allstate did or did not do, and whether its actions were reasonable based upon the information it had at the time it evaluated and attempted to settle plaintiff's UIM claim. Discovery and trial on the bad faith claims requires the testimony of Allstate personnel as to what they knew and the basis for their actions as well as consideration of Allstate's claim handling materials and procedures. Neither plaintiff nor his medical providers or fact witnesses can provide testimony as to what Allstate knew or the reasons for Allstate's actions.

Id. at 125-26.

The First Circuit recognized that *Porn* relied less on differences in the evidence relevant to the two claims and more on prejudice: the fact that evidence about the amount of insurance, settlement offers, and negotiations essential to the bad faith claim would be prejudicial to the insurer on the UIM claim. *Porn*, 93 F.3d at 36. While not questioning the prejudice presented by a joint trial of the claims, the First Circuit concluded it could be addressed by bifurcation. Significantly, it did not contemplate any stay of discovery or a second trial. It contemplated back-to-back trials before a single jury, stating, "the evidence common to both claims . . . could have been presented *at once*," thereby avoiding a delay of months or years. *Id.* (emphasis added).

In a recent decision, the seven-member Iowa Supreme Court split, 4-3, on whether final judgment on a UIM claim precludes a later bad faith claim. The majority's holding that claim preclusion applies was premised on judicial economy and its stated expectation that there should be no difficulty combining the UIM and bad faith discovery processes so that trials can be conducted back-to-back, before a single jury. *Villareal v. United Fire & Cas. Co.*, 873 N.W.2d 714, 728 (Iowa 2016). Like the First Circuit in *Porn*, the bifurcation that the majority contemplated would "allow[ ] the evidence, common to both claims, to be presented at once." *Id.* at 728 (internal quotation marks omitted) (quoting *Salazar v. State Farm Mut. Auto. Ins. Co.*, 148 P.3d 278, 282 (2006).

One of the dissenting justices wrote separately (joined by a colleague) only to "stress that under the majority decision, district courts should not limit discovery when a

party joins a bad-faith claim with his or her underlying tort or contract claim." *Id.* at 731 (Wiggins, J., dissenting). Moreover,

> [A]lthough a court may require the jury to decide the underlying tort or contract claim prior to having it hear further evidence and decide the bad-faith claim, the trial should not be bifurcated when both claims are brought in the same action. Rather, the district court should allow discovery to proceed on both claims and try both claims in the same trial.

Id. Otherwise, Justice Wiggins observed, little was accomplished by precluding a later bad faith claim. *Id.*

A third justice, joined by one of his colleagues, would have reversed dismissal of the insured's claim and allowed the bad faith claim to proceed to trial. *Id.* at 731 (Appel, J., dissenting). In his view, application of Iowa's same-claim, same-evidence principles supported the position of the insured and would not allow application of claim preclusion in the case—and "the mere fact that the bad-faith claim could have been brought earlier clearly is not determinative." *Id.* at 737. To the extent the *Restatement (Second) of Judgment*'s transactional approach taken into consideration by the majority was inconsistent with Iowa's prior caselaw, he "would not follow it." *Id.* at 738.

In *Bankruptcy Estate of Lake Geneva Sugar Shack, Inc. v. General Star Indemnity Co.*, 200 F.3d 479 (7th Cir. 2000), the Seventh Circuit Court of Appeals reversed a district court's dismissal of a bankruptcy estate's bad faith lawsuit on claim preclusion grounds. The decision turned in part on the likelihood that the parties, the court, or all of them intended that the bad faith claim could proceed after the contract claim. (The

insurer, aka GenStar, denied that it had any such intent.) The court was persuaded by the procedural history and by the problems with trying the claims together:

> There was no issue of judicial economy and no way to avoid two trials. Even had the bad faith claim been filed in Walworth County, the state court judge stated that he would have tried that claim separately from the rest of the case. That suited GenStar, which quite naturally wanted bad faith issues kept out of the first trial.

Id. at 483.

The Seventh Circuit also observed that the district court had erred by conducting a "*Restatement*-based[ ] analysis" rather than heeding Wisconsin law. *Id.* at 482. In reversing and remanding the bad faith claim for trial, the court observed that its conclusion "is consistent with the long-standing view of the Wisconsin courts that a breach of contract claim and a bad faith claim are separate claims" because a "bad faith claim is not based on the policy . . . as is the breach of contract claim . . . but grows out of a breach of a duty to properly investigate a claim." *Id.* at 484.

Finally, in *Sazegari v. Geico General Insurance Co.*, No. Civ.A.304CV679H, 2005 WL 1631013 (W.D. Ky. July 8, 2005) (court order), a case similar to *Sugar Shack*, the district court found that parties who dismissed a bad faith claim from a lawsuit in which both contract and bad faith claims had originally been asserted probably meant to do so without prejudice, intending that the bad faith claim would proceed later. (Here, too, Geico, arguing for claim preclusion, denied any such intent.) Among other

reasoning, the court stated that applying the "consent" exception to the rule against claim splitting "does not offend the underlying purposes of claim preclusion," in part because

> separate proceedings will not unduly waste judicial resources. The claims would likely have proceeded separately anyway. Actions against an insurer for breach of contract and bad faith are often bifurcated. Indeed, Geico had requested bifurcation in the underlying action here. Under these particular circumstances, the Court concludes that Kentucky courts would not apply claim preclusion.

Id. at *4 (citation omitted).

III. Washington case law addressing "the quality of the persons for or against whom a claim is made" treats it as an independent, fourth required identity

In most Washington cases addressing claim preclusion in which the parties are the same, there has been no contention that there is a difference in the parties' quality. Only a few cases address the required identity "in the quality of" a party.

Flessher v. Carstens Packing Co., 96 Wash. 505, 165 P. 397 (1917) has been characterized as an early case in which the quality of a party was relevant. *Berschauer*, 175 Wn. App. 231 & n.21. Mr. Flessher's 10-year-old daughter suffered permanent injuries after ingesting diseased meat obtained from Carstens. It was the law at the time that "when a minor is injured, two causes of action arise, one in favor of the minor for pain and suffering and permanent injury, the other in favor of the parent for loss of services during minority and expenses of treatment." *Flessher*, 96 Wash. at 509. Yet there had been cases where a parent, as guardian ad litem in the child's action, had sought and recovered expenses to which he was entitled as a parent. When that happened, case

law held that the parent was deemed to "'have emancipated his [child] in so far as the right to recover damages which were included in the [child's] suit is concerned.'" *Id.* at 510 (quoting *Donald v. Ballard*, 34 Wash. 576, 578, 76 P. 80 (1904)). The parent, qua parent, was not permitted to obtain a second recovery of the expenses in his own suit.

Mr. Flessher brought a first action as guardian ad litem for his daughter. Thereafter, he brought his own action. At issue was whether he had already recovered the damages in his daughter's action that the law allowed him to recover as a parent. The court found that in his daughter's action, he had recovered damages for loss of his daughter's services, but had not recovered the expenses of her treatment. His daughter's suit was therefore held to preclude his claim as a parent for the former damages, but not the latter.

In 1983, Justice James M. Dolliver discussed the required identity "in the quality of" a party in two decisions, filed a week apart. The first was *Mellor v. Chamberlin*, 100 Wn.2d 643, 673 P.2d 610 (1983). Mr. Mellor purchased two office buildings from the Chamberlins. He first sued them after learning that a parking lot to the north of the buildings, used by his tenants, belonged to the adjoining landowner, from whom he was required to lease the lot. He claimed that the Chamberlins had falsely represented the parking lot as being included in the sale of the buildings. *Id.* at 644. That lawsuit was settled and dismissed.

Later, after paying off the real estate contract and receiving a warranty deed, Mr. Mellor settled an encroachment issue with the same adjoining neighbor and brought a second suit against the Chamberlins for breach of the covenant of warranty and peaceful possession. *Id.* at 645. The Chamberlins moved to dismiss the action on claim preclusion grounds, demonstrating that the neighbor informed Mr. Mellor of the encroachment before his first suit against them.

After determining that the subject matter and causes of action were different in the two cases, Justice Dolliver turned to whether the parties were different in identity or quality:

> Clearly, the identity of the parties was the same; their "quality" differed, however, as the causes of action changed from misrepresentation to breach of covenant of title. Hence, we hold the second action is not barred by res judicata as the concurrence of identity in three out of the four elements is missing.

Id. at 646. While the decision does not elaborate on the "quality" difference, the first suit was against the Chamberlins as active tortfeasors whereas the second was based on their status as grantors of a warranty deed that had not been delivered at the time of the first lawsuit.

The second of Justice Dolliver's opinions was *Rains v. State*, 100 Wn.2d 660, 674 P.2d 165 (1983). George Rains had first sued members of the Washington Public Disclosure Commission (PDC) in federal court, claiming they had violated his civil rights. His suit was dismissed. He then brought a second action in state court against the

State of Washington and the PDC. In affirming the trial court's dismissal of the second action on claim preclusion grounds, the court found a concurrence of the four identities, stating that the parties, although differently named on the complaints, "were 'qualitatively' the same." *Id.* at 664. It stated, "Identity of parties is not a mere matter of form, but of substance." *Id.* (internal quotation marks omitted) (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 1263 (1940)).

IV. Allstate fails to demonstrate an identity in its quality in the UIM and bad faith claims

The Washington cases can all be said to apply "quality" in its following sense:

> [A] character, position, or role usu. assumed temporarily : CAPACITY — usu. used in the phrases *in quality of, in the quality of* <I make this inquiry in ~ of an antiquary —Thomas Gray> <in the ~ of reader and companion —Joseph Conrad>

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1858 (2002). And in that sense, Allstate had a different quality in Ms. Forston-Kemmerer's UIM arbitration than it has in this case. In the UIM arbitration, it defended against her claim for damages from the collision "in the shoes of the underinsured motorist" and as a pure adversary. *Bafus*, 77 Wn.2d at 724. In this case, it will defend in a quasi-fiduciary role, as her insurer.

The doctrine of res judicata exists "to 'prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts.'" *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (quoting *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967)). The facts of this case

provide a new paradigm for when the difference in the quality of persons against whom a claim is made prevents claim preclusion: it prevents claim preclusion when a party's different posture as to two claims makes it prejudicial for the claims to proceed in the same lawsuit, and that prejudice is well borne out by practice and case law, as it is here.

This paradigm is consistent with the meaning of "in the quality of" as understood when the four required identities were first announced by our Supreme Court. It serves the purpose of res judicata. Allowing the bad faith action to be pursued after resolution of the UIM action does not result in relitigation of an already determined cause. It does not give rise to a multiplicity of pretrial and trial processes that would not also occur if a single lawsuit were brought and bifurcation and a stay were requested and ordered. It does not countenance harassment in the courts but only a manner of proceeding that is reasonable under the circumstances. We also observe that although Washington has not adopted the approach of the *Restatement (Second) of Judgments* (nor do we suggest that it should),[10] this new paradigm reflects a pragmatic approach, reflecting how bad faith claims often proceed.

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[10] As pointed out by Professor Tegland, portions of the *Restatement (Second) of Judgments* remain controversial and may not be supported by Washington law. 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35:20, at 508 n.1 (2d ed. 2009).

Because Allstate fails to demonstrate an identity in its quality in the arbitration of damages and the present bad faith claims, this action is not precluded. We reverse and remand for further proceedings.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, J.

APPENDIX B

FILED
JUNE 15, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ANASTASIA FORSTON-KEMMERER, Appellant, v. ALLSTATE INSURANCE COMPANY, Respondent.	)	No. 34640-4-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered Appellant's motion for reconsideration, and the answer thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of March 28, 2017, is hereby denied.

IT IS FURTHER ORDERED the opinion filed March 28, 2017, is amended as follows:

The second to the last sentence of the first full paragraph on page 22 that reads:

> In the UIM arbitration, it defended against her claim for damages from the collision "in the shoes of the underinsured motorist" and as a pure adversary.

shall be amended to read:

> In the UIM arbitration, it defended against her claim for damages from the collision "in the shoes of the underinsured motorist" and as an adversary.

PANEL: Judges Siddoway, Korsmo, Pennell

FOR THE COURT:

GEORGE B. FEARING, Chief Judge

AMENDED APPENDIX C

C.1 *Krett v. Allstate Ins. Co*.,
No. 13-131, 2013 WL 5406222 (W.D. Wash. Sept. 26, 2013)

C.2 *Campbell v. Metropolitan Property and Casualty Ins. Co*.,
No. 09-1611, 2011 (W.D. Wash. June 17, 2011)

2013 WL 5406222
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Seattle.

Richard P. KRETT, Plaintiff,
v.
ALLSTATE INSURANCE COMPANY, Defendant.

No. C13–0131RSL.
|
Sept. 26, 2013.

Attorneys and Law Firms

Leonard Semenea, Semenea Law Firm, PS, Patrick H. Lepley, Lepley Law Firm, Bellevue, WA, for Plaintiff.

Irene Margret Hecht, Michael G. Howard, Keller Rohrback, Seattle, WA for Defendant.

ORDER DENYING MOTION TO BIFURCATE PROCEEDINGS

ROBERT S. LASNIK, District Judge.

***1** This matter comes before the Court on "Defendant Allstate Insurance Company's Motion to Bifurcate." Dkt. # 14. Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

Plaintiff was involved in a car accident in April 2008. The other driver, Michael Ray, paid plaintiff the $50,000 limit of his automobile insurance policy. Plaintiff contends that this amount did not fully compensate him for injuries sustained in the accident and submitted a claim for underinsured motorist ("UIM") benefits to his own insurer, defendant Allstate. When the parties could not reach agreement regarding the payment of UIM benefits, plaintiff filed this action alleging that Allstate breached the insurance policy and handled the UIM claim in bad faith.

Allstate has moved to bifurcate, requesting that the Court stay discovery and trial of the bad faith claims until the UIM claim has been resolved. Allstate argues that the cause and value of plaintiff's claimed injuries can and should be resolved without reference to Allstate's claim file and any privileged materials contained therein and that the sequential consideration of the two types of claims will promote judicial economy.

Rule 42(b) of the Federal Rules of Civil Procedure governs bifurcation:

> **Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims....

A court's decision on bifurcation is committed to its discretion. *Danjaq LLC v. Sony Corp.,* 263 F.3d 942, 962 (9th Cir.2001). Nonetheless, separate trials are the exception, not the rule, and this Court will not bifurcate without a good reason. Bifurcation is occasionally in everyone's interest. For example, when a first trial on relatively straightforward issues might (depending on the outcome) eliminate the need for a trial on more complex issues, bifurcation may be ordered. *Karpenski v. Am. Gen. Life Cos.,* 916 F.Supp.2d 1188, 1190 (W.D.Wash.2012) (where recission claim would dispose of the entire case, determining whether a contract exists in the first place should be determined first). Similarly, where a case presents one set of issues that can be conveniently tried to a jury and another set that can be conveniently tried to the court, bifurcation may be appropriate. *Tavakoli v. Allstate Property & Cas. Ins. Co.,* 2012 WL 1903666, at *7 (W.D.Wash. May 25, 2012). A court can also bifurcate where the evidence necessary to prove one claim poses a significant threat of confusing or prejudicing the jury as it considers other claims. *Hirst v. Gertzen,* 676 F.2d 1252, 1261 (9th Cir.1982).

Allstate offers three justifications for bifurcation. First, it contends that the issues and evidence required to resolve the UIM benefitis claim are completely separate and distinct from that involved in litigating the bad faith claims. Second, it contends that the introduction of documents from Allstate's claim file showing its determinations regarding causation and valuation would be unfair to Allstate and/or would prejudice the jury's consideration of those issues. Finally, Allstate argues that bifurcation will promote judicial economy because if the first jury were to find that plaintiff's injuries were not causally related to the April 2008 accident or that he had already been fully compensated for the injuries suffered,

there would be no need for a second-phase trial on the bad faith issues.

***2** The first justification is unpersuasive. The Court does not, as a matter of course, bifurcate into separate trials every case in which distinct claims are asserted or which raise successive potentially dispositive issues. In the run-of-the-mill case, the time and expense associated with multiple discovery periods and trials outweighs any benefits from bifurcation, even if the claims asserted rely on different theories and/or require different evidence. In this case, the line between the two types of claims is not as wide or bright as Allstate would have it. Although Allstate argues that its claim file is completely irrelevant to plaintiff's UIM claim, there is no reason to assume that is true. If, for example, Allstate obtained a statement from the police officer who investigated the accident or plaintiff's physician regarding plaintiff's injuries, the statement could be relevant to both causation and the sufficiency of Allstate's claims handling processes.

Allstate's second concern carries more weight. In the course of considering plaintiff's claim, it is likley that Allstate's employees offered their own causation and valuation opinions regarding plaintiff's injuries. Those evaluations are now part of Allstate's claim file, along with documentation regarding Allstate's negotiating positions as it attempted to settle plaintiff's UIM claim. What value an adjuster placed on plaintiff's claim is of little or no relevance to what value the jury assigns, yet admission of such evidence could prejudice the jury's consideration of the issue. If the only issue to be tried were plaintiff's claim for UIM coverage, some documents in the claim file may be subject to a privilege, inadmissible under Fed. R. Ev. 408, and/or prejudicial. The same evidence would be admissible, however, if the triable issues included whether Allstate acted in bad faith by refusing to make a reasonable offer of compensation to its insured.

Bifurcation is not the only means by which the Court can ameliorate the risk of prejudice or jury confusion, however. The Court routinely instructs juries to disregard evidence for one purpose while considering it for another. If the admission of certain evidence would be so confusing or prejudicial that it could not be cured by instruction, the Court can simply exclude the evidence and/or divide a single trial into consecutive phases. These alternatives are not exhaustive, but simply show that bifurcation is not always necessary to avoid the ills posited by defendant.

Finally, Allstate argues that bifurcation would promote judicial efficiency. The Court disagrees. Even if the first jury were to find that Allstate did not breach the coverage provisions of the UIM policy, that would not necessarily dispose of plaintiff's bad faith claims. Insurers can act in bad faith even where they properly deny coverage or compensation to their insureds. *See Coventry Assocs. v. Am. States Ins. Co.,* 136 Wash.2d 269, 277–80, 961 P.2d 933 (1998) (reviewing examples of bad faith liability despite proper claim denial). Moreover, a violation of Washington's insurance regulations may, in some circumstances, constitute bad faith regardless of the coverage determination. *Tank v. State Farm Fire & Cas. Co.,* 105 Wash.2d 381, 386, 715 P.2d 1133 (1996). Allstate has not demonstrated that plaintiff's bad faith claim hinges on proof of an improper denial of benefits.

***3** Given that a second phase would likely be necessary in any event, it is difficult to discern any benefit that would arise from bifurcating discovery and conducting two trials. The burdens of such a procedure, however, are obvious. It is much more expensive and time consuming to resolve an action in two separate phases, particularly where Allstate insists not only on separate trials, but on partitioning (or attempting to partition) discovery. Although the increased expenses and time required for a two-phase proceeding would fall on both parties, they would likely weigh more heavily on plaintiff given Allstate's superior financial resources. From the Court's perspective, overseeing two rounds of discovery disputes, dispositive motions, jury selection/instruction, and trial would be far less efficient and economical than trying all of plaintiff's claims together.

For all of the foregoing reasons, the Court concludes that bifurcation is not necessary to avoid prejudice to Allstate and that the proposed procedure would likely increase costs and inefficiencies for the parties and the Court. Allstate's motion to bifurcate (Dkt.# 14) is therefore DENIED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 5406222

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REBECCA CAMPBELL,

Plaintiff,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant.

CASE NO. C09-1611RAJ

ORDER

The court issues this order to memorialize oral rulings it made at yesterday's pretrial conference. The court directs the clerk to TERMINATE each of the parties' pretrial motions (Dkt. ## 32, 34-36). The court has resolved the issues raised in those motions as described below.

Trial in this matter will begin on June 20, 2011. The presentation of evidence will take place over 8 days, from June 20-23, and June 27-30. Trial will begin at 9:00 a.m. each day, with a 15-minute break at 10:30, a 90-minute lunch break at noon, and a 15-minute break at 2:45 p.m. Jury selection will occur on the morning of June 20. Presuming that jury selection takes the entire morning, the remaining 2,475 minutes of trial time will be divided evenly between the parties. Any time that a party spends examining witnesses, giving opening statements or closing argument, objecting, participating in sidebar conferences or argument outside the jury's presence, or otherwise

will be subtracted from that party's time allotment. The courtroom deputy will advise the parties of their remaining time each day of trial.

The trial will be bifurcated into two phases: a first phase devoted solely to determining Ms. Campbell's personal injury damages arising from her November 2006 car accident (including her physical injuries, pain and suffering, emotional distress, and loss of consortium), and a second phase devoted to all other issues, including all issues arising from MetLife's handling of Ms. Campbell's insurance claim. Both phases will be tried before the same seven-person jury.

Although the court will advise the jury at the outset that the trial will be divided into two phases, it will reveal nothing about the issues to be resolved in the second phase until the first phase is completed. The parties are ordered to ensure that neither they nor their witnesses reveal to the jury what will be decided in the second phase. In particular, no voir dire questions revealing the nature of the second phase will be permitted.

The court recognizes that jury deliberations following the first phase of trial will take an unknown period of time. That time will not be subtracted from the allotment of either party. If necessary, the court will extend the presentation of evidence into the week of July 5-8. The court emphasizes, however, that it expects the parties to take all reasonable efforts to avoid undue delay in this trial, with the expectation that the jury can begin deliberations as to the second phase no later than the end of June 30. The court also notes that although June 24 and July 1 are not trial days, the court will permit the jury to deliberate on those days if deliberations as to either phase one or phase two are in progress.

The court now turns to the parties' pretrial motions, beginning with Plaintiff's motion in limine. The court DENIES each of the seven contested parts of this motion. The court GRANTS the six uncontested portions of the motion, and orders the parties to adhere to their agreements on these matters.

As to MetLife's motion in limine, the court GRANTS part one, which seeks a bifurcated trial, as stated above. The court GRANTS part two, which seeks to exclude evidence of MetLife's conduct in this litigation as evidence of bad faith. The court DENIES part three. The court DENIES part four. Dr. Quang may offer his opinion on Ms. Campbell's psychological condition, to the extent he establishes a foundation for doing so. Ms. Berndt may testify solely as to whether Ms. Campbell's psychological conditions limited her ability to work or the range of occupations available to her. The court GRANTS part five to the extent it seeks to bar mention of MetLife's financial status, and to the extent it seeks to bar mention of Ms. Campbell's financial status to elicit sympathy. To the extent Ms. Campbell's financial status is relevant, for example, in her response to MetLife's effort to establish that she did not mitigate her damages, such evidence is admissible. The court GRANTS parts six and seven. The court DENIES part eight, which seeks to bar Mr. Dietz from discussing Colossus software, provided that Mr. Dietz establishes a foundation for his knowledge of Colossus. The court GRANTS part nine, however, and rules that neither Mr. Dietz nor any other witness may introduce evidence of how Colossus is or was marketed to MetLife or any other insurance company. The court GRANTS in part and DENIES in part the tenth part of this motion. Both parties are admonished that their insurance claims handling experts may offer opinions only about insurance practices, and not about the law. No witness, expert or otherwise, will be permitted to testify as to what the law is. The court DENIES part eleven because it points to no specific testimony or question, but notes that any party may object to any question designed to elicit a legal conclusion. The court GRANTS part twelve to the extent it seeks to exclude testimony from Dr. Quang addressing MetLife's insurance practices. To the extent Dr. Quang has a medical opinion regarding any medical evaluation that MetLife made of Ms. Campbell, he may offer that opinion. Finally, the court DENIES part thirteen of the motion.

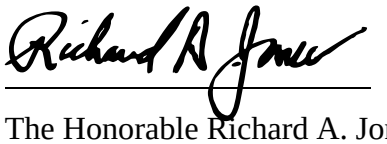
The court DENIES Ms. Campbell's separate motion regarding evidence of MetLife's conduct in discovery. As the court has already noted, evidence of either parties' conduct in this litigation will not come before the jury.

The court DENIES Ms. Campbell's separate motion for a "regular trial." As noted above, the court will bifurcate this trial.

The parties raised a few other issues in their pretrial filings, including their trial briefs. The court declines to impose limits on the number of Ms. Campbell's friends and relatives who will testify about her injuries. The court finds that the time limits it has imposed will serve as an adequate deterrent for cumulative testimony.

The court will decide at a later time whether the decision to treble damages under the Insurance Fair Conduct Act is a question for the court or for the jury. In any event, the court is likely to take a jury verdict on this issue. Should the court determine that it is responsible for deciding the issue, the jury's determination will be merely advisory.

DATED this 17th day of June, 2011.



The Honorable Richard A. Jones
United States District Judge

CERTIFICATE OF SERVICE

I, Tami Foster, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, and pursuant to the service agreement in this case, I caused a copy of the foregoing document to be served on the individuals identified below via Email and First Class U.S. mail, postage prepaid:

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SIGNED this 11th day of October, 2017, at Seattle, Washington.

Tami Foster, Legal Assistant

KELLER ROHRBACK L.L.P.

October 11, 2017 - 10:50 AM

Transmittal Information

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