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No. 95604-9

Court of Appeals, Division I No. 75674-5-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Respondent,

v.

IMMUNEX CORPORATION,

Appellant.

RESPONDENT/PLAINTIFF'S ANSWER
TO PETITION FOR REVIEW

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I. INTRODUCTION

In filing the instant Petition, Immunex Corporation (“Immunex”) asserts only two grounds for discretionary review: (a) that the decision of the court below is in conflict with a decision of the Washington Supreme Court, RAP 13.4(b)(1), and (b) that this matter involves an issue of substantial public interest that should now be determined by the Washington Supreme Court, RAP 13.4(b)(4).

Immunex is mistaken. First, the decision of the court below was a straight-forward application of settled Washington law, including the law of this case. Second, even if the Court were to conclude that this case involves an issue of substantial public interest, that issue has already been addressed by this Court in its prior opinion. There is no basis under RAP 13.4(b)(1) or (4) to review this matter yet again.

Although none of its policies covered the AWP Litigation, NSC was nevertheless required to pay \$670,000 because it issued a reservation of rights. That \$670,000 is the total amount of defense fees incurred by Immunex in the AWP Litigation, less the amount by which Immunex’s conduct resulted in prejudice to NSC, as determined by the jury. Obviously, the jury’s verdict reflects the substantial prejudice caused by Immunex as a result of its late tender.

In exchange for having to pay under policies that provide no

coverage, subject to a jury determination on the issue of prejudice, NSC received a significant benefit: insulation from claims for breach of contract and bad faith. That is settled Washington law, including the law of this case, and the courts below correctly applied that law.

For these reasons and others, the Court should decline to review this matter, and finally bring to an end what now has been more than a decade of expensive and time-consuming litigation.

II. STATEMENT OF THE CASE

A. Immunex is Repeatedly Sued for Illegally Inflating the Price of Medication at the Expense of Government Programs

The jury was presented with evidence that, beginning in 1999, more than twenty (20) lawsuits were filed against Immunex, all alleging that it fraudulently overstated the average wholesale price (or “AWP”) of its prescription drugs. TX 66 at NSC 2958-72.¹ Without consulting NSC, Immunex hired the law firm of Perkins Coie to serve as “lead national counsel,” along with a small army of local law firms around the country, incurring legal fees in excess of \$15.4 million over the course of more than five years. TX 302.

¹ The following citation abbreviations are used: “RP” for Record of Proceedings, with the applicable trial or hearing date noted parenthetically, “CP” for Clerk’s Papers, “App. Br.” for Immunex’s opening appellate brief, and “TX” for trial exhibits.

B. Immunex Does Not Disclose Relevant Information to NSC

1. Immunex Provides Limited Information

National Surety Corporation (“NSC”) issued liability insurance to Immunex over the course of several years. TX 6, 10. The policies issued by NSC required, as a condition to coverage, that Immunex provide notice of any claims or potential claims “as soon as practicable.” TX 6 at NSC 2682; RP 7:21-24 (May 11, 2016 a.m.),² RP 267:3-17 (May 10, 2016).

Although Immunex knew it was a defendant in the AWP Litigation by 1999, it did not provide any information to NSC regarding the AWP Litigation until 2001, at which time it notified NSC that it was the subject of four whistleblower (*qui tam*) actions. TX 9. Discovery has revealed that Immunex and its advisors intended to provide limited information to NSC regarding these matters and others.

For example, the jury was presented with evidence that Immunex created a detailed status report regarding the AWP Litigation in March 2001, and provided that document to Chubb, a different insurer (the “March 2001 Notice”). TX 8. The March 2001 Notice provided Chubb with significant information, such as the amount of legal fees incurred and

² Two transcripts were generated for May 11, 2016—one for the morning session and another for the afternoon session—and those transcripts are not consecutively paginated. For purposes of this brief, NSC cites only to the first of the May 11, 2016 transcripts, and refers to it herein as “May 11, 2016 a.m.”

the fact that one of Immunex's co-defendants made an eight-figure payment to resolve the claims against it. *Id.* at MARSH 980, 982.

Several months later, Immunex and its brokers drafted a very different "notice" to NSC. Unlike the helpful information provided to Chubb, Immunex's claims specialist characterized her working draft of the NSC notice as "my attempt at a notice letter without disclosure of anything." TX 8. That notice, which included none of the helpful information provided to Chubb months earlier, was sent to NSC in August 2001. TX 9.

2. NSC Assigns an Adjuster

NSC responded to the August 2001 "notice" by assigning adjuster Greg Brown to the matter. TX 12. Mr. Brown requested that Immunex direct any future correspondence to him, and that the company provide him with all relevant pleadings as soon as possible. *Id.* As explained below, and as the evidence presented to the jury demonstrated, Immunex actively frustrated both of those straight-forward requests.

3. Immunex Continues its Pattern of Non-Cooperation, Non-Disclosure, and Affirmative Misrepresentation

In fact, although Immunex would be served with twenty (20) additional AWP lawsuits over the course of the next five years, the jury was presented evidence demonstrating that Immunex purported to send only one of those complaints – *Citizens for Consumer Justice v. Abbot*

Laboratories, et. al. (“Citizens”) – to NSC prior to December of 2006.

But the evidence suggests that even that complaint was not actually sent to NSC, RP 477:8-478:23 (May 24, 2016), and if it was, it was transmitted in a manner that was almost certainly calculated to ensure Mr. Brown would not receive it. RP 275:6-14, 276:2-15 (May 10, 2016); RP 12:2-20, 43:24-44:15 (May 11, 2016 a.m.); RP 278:7-279:6 (May 10, 2016).

Worse, on February 14, 2003, Immunex’s Associate General Counsel, Antoinette Freeman, provided a misleading “status report” to Mr. Brown regarding the AWP Litigation. TX 27. Making no mention of the *Citizens* case, Ms. Freeman told Mr. Brown that “the status of these matters remains the same as previously reported to you. At such time as a complaint is unsealed and we are subsequently served, I shall promptly forward a copy to you.” *Id.*

What Ms. Freeman failed to mention was that Immunex had actually been served with at least nine AWP civil suits by that time, none of which had been filed under seal. *See* TX 66; RP 300:23-302:11 (May 10, 2016). Although nothing stopped Immunex from providing those nine lawsuits to NSC, the jury was presented with evidence that Ms. Freeman omitted any reference to them in her so-called “status report.” RP 302:12-303:10 (May 10, 2016).

Worse still, the jury was presented with evidence that Immunex

did provide notice of these nine civil suits to numerous other insurers, together with a detailed summary of those matters prepared by the law firm of Perkins Coie (the “Perkins Memo”). TX 14, 155, 159, 162, 165-67, CP 2336 ¶ 11. Immunex sent no such information to NSC.

C. The January 2002 Fax

As noted, Immunex purported to notify NSC of only one AWP civil suit prior to the end of 2006: the *Citizens* case. Immunex argued that its broker faxed a copy of the *Citizens* complaint to a generic “1-800” number affiliated with Fireman’s Fund, the parent company of NSC, in January of 2002 (the “January 2002 Fax”). RP 221:3-17 (May 10, 2016); RP 560:21-25 (May 24, 2016). The jury was presented with evidence that Immunex never sent the January 2002 Fax to Mr. Brown, even though numerous witnesses testified that they knew Mr. Brown was their point of contact. RP 278:7-279:6 (May 10, 2016).

Moreover, while Immunex admitted its obligation to give NSC prompt notice of each and every AWP lawsuit, RP 267:15-268-4, 297:18-20 (May 10, 2016); RP 13:11-14:4, 38:25-39:4 (May 11, 2016 a.m.), the jury was presented with evidence that *Citizens* is the only civil suit (out of twenty) for which Immunex even attempted to notify NSC prior to 2006. RP 267:15-268:4, 353:12-354:8 (May 10, 2016).

There is no evidence that Immunex sent the entire January 2002 Fax to NSC, and the jury was presented with unrefuted evidence that it did not do so. RP 477:8-478:23 (May 24, 2016). Assuming, contrary to the

evidence, that Immunex did send the entire January 2002 Fax to NSC, that document was at most a mere notice of the *Citizens* case. The January 2002 Fax clearly was not a tender for coverage, let alone a tender for coverage with respect to all twenty AWP lawsuits.

The plain language of the January 2002 Fax explicitly says so. TX 15. Moreover, that self-declared “notice” stands in stark contrast to a request for coverage (*i.e.*, a tender). RP 237:24-239:1, 285:19-286:20 (May 12, 2016); *see also* RP 489:12-493:12 (May 24, 2016). Indeed, when Immunex did tender the AWP Litigation to NSC five years later, it used dramatically different language and even explicitly distinguished its prior “notice” correspondence. TX 56. Lest there be any doubt, Immunex’s corporate representative testified that the January 2002 Fax was a mere notice and not a tender for coverage. CP 4550; CP 4551.

D. Immunex Tenders to NSC Five Years Late

In fact, as this Court has acknowledged, Immunex did not tender any AWP-related suit to NSC until October 3, 2006, *Nat’l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 876 (2013), approximately five years after the first civil AWP complaint had been filed against it. TX 56.

Greg Brown responded by stating the obvious: “[N]one of the lawsuits mentioned in paragraph one of your letter were ever tendered to [NSC] If you have some documentation indicating any of these suit

papers were ever tendered to us, please send what you have.” TX 62. If Immunex believed the January 2002 Fax was a tender, as it now contends, certainly by that point it would have sent a prompt response to that effect. The jury was presented with evidence that it did not do so.

Instead, on December 12, 2006, Immunex provided copies of the nine complaints referenced in its October 3, 2006 correspondence, and without explanation tendered eleven additional AWP lawsuits to NSC. TX 66. Of those twenty lawsuits, two dated back to 2001, six dated back to 2002, two dated back to 2003, three dated back to 2004, six dated back to 2005, and only one had been filed in 2006. *Id.* at NSC 2959-72. The prejudice to NSC was obvious and substantial.

E. NSC Denies Coverage For the AWP Litigation

On December 14, 2006, NSC denied coverage for the AWP Litigation. TX 69. Mr. Brown nevertheless invited Immunex to inform him if the company “saw something in these suits that [it] believe[d] [brought] them within the wording” of NSC’s policies. *Id.*

F. Immunex Asks NSC to Reconsider its Denial of Coverage

NSC heard nothing from Immunex for three months. Then, in March of 2007, NSC received a letter from Immunex’s outside insurance counsel, Linda Kornfeld, then a partner in the Los Angeles office of Dickstein Shapiro. TX 70.

In asking NSC to reconsider its coverage position, Ms. Kornfeld articulated an entirely new legal theory—namely, that Immunex’s elaborate price-fixing scheme really constituted “discrimination” under the NSC policies. *Id.* at NSCLAIM 295-297.³ Notwithstanding the inapplicability of coverage, NSC still took Immunex’s newly-formulated theory of coverage seriously, promptly requesting that Immunex provide information essential to investigating it.

G. Immunex Refuses to Cooperate With NSC

The policies issued by NSC provided two types of coverage: “follow-form” excess insurance under Coverage A, TX 6 at NSC 2668, and umbrella insurance under Coverage B, *id.* at NSC 2673. If a claim is covered by a primary carrier, then the NSC policies provide excess insurance under Coverage A, and umbrella insurance under Coverage B cannot apply unless and until primary insurance has first been exhausted. CP 2978 at 139:13-21; CP 2988 at 47:20-22.

Because of this tiered coverage structure, Immunex and its own brokers admitted that the necessary first step to any coverage analysis would be to obtain the primary carriers’ coverage positions. CP 2976-77 at 126:19-127:4; CP 2978-79 at 139:25-140:8; CP 3005-06 at 79:21-80:20.

³ Under Coverage B, coverage existed for “personal injury” arising out of “discrimination.” TX 6 at NSC 2673, 2690, TX 10 at NSC 2727, 2744.

Mr. Brown attempted to analyze Immunex's "discrimination" theory by taking that necessary first step, repeatedly requesting that Immunex provide the coverage positions of the underlying primary carriers. Immunex not only refused to cooperate with NSC's repeated requests, but also made numerous affirmative misstatements along the way. CP 2454. The jury was presented with evidence that Immunex's improper conduct resulted in significant and unnecessary delays.

H. NSC Commences the Instant Action, Issues the ROR, and Requests Immunex's Legal Bills, but Immunex Does Not Provide Legal Bills For a Prolonged Period of Time

NSC filed a declaratory judgment action on March 31, 2008, seeking a ruling that, among other things, NSC "owes no obligation to pay Immunex's legal expenses incurred by Immunex in the AWP Litigation." CP 1532 at ¶ 6.1. Out of an abundance of caution, and relying on misinformation provided by Immunex, NSC also issued an ROR. TX 95.

NSC was clear that it would not pay defense fees to the extent Immunex's conduct resulted in prejudice, but nevertheless requested that Immunex provide it with the legal invoices it wanted NSC to pay. *Id.* at AMG 10353-3969-70; CP 1205-06. Immunex did not begin sending invoices to NSC until almost a year later, CP 1173-74, and did not complete that process until August 2009, CP 1582 – nearly a year and a half after NSC requested the bills. TX 95.

I. Pre-Trial Procedural History

1. Initial Summary Judgment Rulings

In the meantime, on April 14, 2009 – before Immunex had provided NSC with any of the legal bills it had requested – the trial court ruled that NSC had no duty to defend Immunex in connection with the AWP Litigation. CP 1124-26. The court subsequently ruled that “National Surety must pay all reasonable defense fees and costs incurred by Immunex in the AWP Litigation through April 14, 2009, the date that the Court granted National Surety’s duty to defend motion, unless Plaintiff prevails on its late notice claim at trial.” CP 1408-10.

The Court of Appeals affirmed. It also recognized that, by subjecting itself to potential exposure for defense costs under the ROR, NSC insulated itself from claims for breach of contract and bad faith.

The Court acknowledged “that National Surety had not, at the time of the trial court ruling, actually paid Immunex’s defense costs,” *id.* at 777, but made clear that this fact in no way diminished the protections afforded to it under the ROR: “Although here [sic] that National Surety has not yet taken on the actual defense of Immunex, National Surety had the benefit of insulating itself from a bad faith claim and possible coverage by estoppel.” *Id.* at 778.

The Court of Appeals also made clear that, depending on the

outcome of trial and in light of the facts of this case, NSC might not have any obligation to reimburse Immunex's defense fees at all: "This holding does not preclude National Surety from arguing to the fact finder that prejudice resulted as a matter of fact and that it should be excused from some or all of its obligation to pay defense costs." *Nat'l Sur. Corp.*, 162 Wn. App. at 782 n.14.

This Court affirmed, and again reiterated that NSC may have no reimbursement obligation: "We recognize, however, that an insurer may avoid or minimize its responsibility for defense costs when an insured belatedly tenders a claim and the insurer demonstrates actual and substantial prejudice." *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 875 (2013). This Court also reiterated that, regardless of how the jury resolved the issue of prejudice, NSC's assumption of potential liability under the ROR absolved it from liability for breach of contract or bad faith. *Id.* at 879-80.

2. Immunex Files Counterclaims

Simply ignoring these rulings, Immunex amended its answer to include counterclaims for breach of contract and bad faith. CP 1583-90.

3. The Trial Court Grants NSC's Motion for Summary Judgment on Immunex's Counterclaims

NSC moved for summary judgment on Immunex's counterclaims, arguing that Washington law bars any claims for breach of contract or bad

faith under the facts of this case. CP 2058-77, 3130-35. Immunex responded by arguing, as it does again here, that NSC cannot receive any protection under the ROR because it did not reimburse defense costs prior to trial. CP 3113-15.

During oral argument, the trial court asked Immunex’s counsel what his client believed NSC “should [] have been doing” prior to trial, and counsel judicially admitted that he had no idea what amount, if any, was owed, and that payment of \$1.00 or less would have sufficed in Immunex’s view. RP at 14:19 – 15:4 (Oral Argument Transcript of April 28, 2016). That admission epitomizes the flaw underlying Immunex’s legal position: No one could have said, prior to trial, whether any amount was due. Indeed, that is precisely why this Court remanded the case for trial. The trial court granted NSC’s motion for summary judgment, and dismissed Immunex’s counterclaims. CP 3521-22.

J. The Trial

At trial, the jury heard overwhelming evidence regarding the actual and substantial prejudice that Immunex caused to NSC, and discounted Immunex’s claimed damages by nearly 95 percent – from \$15.4 million down to \$670,000. CP 4506-7. NSC timely paid the verdict with interest.

K. The Second Appeal

Following trial, Immunex initiated the instant appeal, arguing that

the trial court erred (1) in granting NSC's motion to dismiss its bad faith and extracontractual claims, and (2) in allegedly excluding evidence regarding one of its theories at trial. The Court of Appeals affirmed. Immunex now assigns error to that ruling.

III. ARGUMENT

A. **The Decisions Below Were a Straight-Forward and Correct Application of Washington Law**

Immunex argues, as it must, that the decision of the court below is in conflict with a decision of the Washington Supreme Court, and must therefore be reviewed under RAP 13.4(b)(1). Immunex is wrong.

Although none of its policies covered the AWP Litigation, NSC was nevertheless required to pay \$670,000 because it issued an ROR. That \$670,000 is the total amount of defense fees incurred by Immunex in the AWP Litigation, less the amount by which Immunex's conduct resulted in prejudice to NSC, as determined by the jury. CP 4506-7. Obviously, the jury's verdict reflects the substantial prejudice caused by Immunex.

In exchange for having to pay under policies that provide no coverage, subject to a jury determination on the issue of prejudice, NSC received a significant benefit – namely, insulation from claims for breach of contract and bad faith. That is settled Washington law, including the law of this case. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d at 879-85.

Unhappy with the jury's verdict, Immunex attempts to breathe life into its extracontractual claims, arguing that “an insurer receives the

protections that flow from defending under a reservation of rights only if the insurer *actually defends*; the mere reservation of rights and unfulfilled promise to defend is not enough.” Pet. at 12 (emphasis original).

But this is not a case in which an insurer did nothing more than issue a “mere reservation of rights.” Indeed, the jury was presented with evidence that Immunex did not tender to NSC until the AWP Litigation was all but over. In the meantime, Immunex unilaterally hired a law firm that was significantly more expensive than one that could have done a comparable job. RP 413:13-24 (May 23, 2016); RP 414:25-416:6 (May 18, 2016). NSC nevertheless issued an ROR and then paid \$670,000 following the jury’s determination on the issue of prejudice.

NSC could not have paid that amount sooner than it did. Before the jury resolved the issue of prejudice, no one was capable of saying whether, and if so, to what extent, NSC would be obligated to pay any defense fees at all. That is why this Court remanded the case for trial. That is what Immunex’s own counsel judicially admitted in open court. RP at 14:19 – 15:4 (Oral Argument Transcript of April 28, 2016). And that is what Immunex’s own insurance expert conceded. CP 3160 at 12:3-8.

Additionally, both the lower court and this Court recognized that, depending upon the outcome of trial, NSC might have no payment obligation to Immunex at all. *Nat’l Sur. Corp.*, 162 Wn. App. at 782 n.14 (“This holding does not preclude National Surety from arguing to the fact finder that . . . it should be excused from some or all of its obligation to

pay defense costs.”); *Nat’l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 875 (2013) (NSC “may avoid or minimize its responsibility for defense costs,” depending on jury determination regarding extent of prejudice).

Indeed, the last time this case went up on appeal, the lower court acknowledged “that National Surety had not, at the time of the trial court ruling, actually paid Immunex’s defense costs.” *Nat’l Sur. Corp.*, 162 Wn. App. at 777. The court made clear that this fact in no way diminished the protections afforded to NSC under the ROR: “Although here [sic] that National Surety has not yet taken on the actual defense of Immunex, National Surety had the benefit of insulating itself from a bad faith claim and possible coverage by estoppel.” *Id.* at 778. This Court affirmed that ruling.

In reliance upon those rulings and other Washington law, the trial court dismissed Immunex’s bad faith and breach of contract claims. That decision was not, as Immunex contends, “in conflict with a decision of the Court of Appeals or the Supreme Court,” Pet. at 20 (*citing* RAP 13.4(b)(1)), but was instead a straight-forward and faithful application of settled Washington law, including the law of this case.

Contrary to Immunex’s suggestion, the lower court’s ruling is perfectly consistent with *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43 (2007). Indeed, as the lower court properly noted, nothing in *Woo* or any other Washington case suggests that, in order for an insurer to receive the benefits that come along with the substantial burdens imposed by an ROR, it must pay defense fees prior to a jury determination on the issue of

prejudice, and while significant questions remain as to whether any amount is owed by the insurer. Pet. at Appendix A, p. 7. To be sure, this Court held precisely the opposite in the context of this very case. *Nat'l Sur. Corp.*, 176 Wn.2d at 875.

Immunex characterizes the lower court's ruling as confirmation that, when an insurer issues an ROR, it receives "matter of law or *per se* immunity" with respect to breach of contract and bad faith claims. Pet. at 17. There is nothing unfair about an insurer receiving such immunity, and this case perfectly illustrates why: Where an insurer assumes an obligation to pay defense fees, even in the event a court determines there is no coverage, it obviously receives something in return – namely, immunity from claims for breach of contract and bad faith. That is the fundamental trade-off underlying a reservation of rights, as recognized by this Court in this very case.⁴ If that trade-off is not respected by our courts, no insurer would ever issue an ROR.

Because NSC issued an ROR to Immunex, it obligated itself to pay whatever amount the jury determined was appropriate, after the jury had an opportunity to weigh the substantial prejudice that resulted from Immunex's conduct. As it turns out, that amount was \$670,000. If NSC

⁴ As the Court of Appeals observed: "By defending under a reservation of rights, National Surety assumed as a matter of law the obligation to pay reasonable defense costs. The only question was how much was reasonable; the only duty was to pay. Immunex asserted a counter claim for more than \$15 million dollars. National Surety asserted it owed nothing. It had a right to ask the court to determine the reasonableness of the fees and costs sought." Pet. at Appendix A, pgs. 6-7.

had failed to pay that amount following trial, then Immunex would have been entitled to immediately collect upon its judgment without the need for further litigation. That is precisely the framework established by Washington law.

As the Court of Appeals put it: “Until the reasonableness of the defense costs was resolved by the jury and reduced to judgment, tender of payment in this case was not required.” Pet. at Appendix A, p. 7.

Even if the Court was inclined to conclude that paying some amount of defense fees prior to trial would be appropriate for some other insurer in the context of some other case, imposing such a requirement would defy logic in this particular case. Indeed, at the time Immunex tendered to NSC, the AWP Litigation was all but over. Immunex had already paid the vast majority of the legal fees in question and there was nothing left to defend. Immunex was not “left to fend for itself” in litigation, but instead strategically chose to defend itself over a prolonged period of time, to then pursue NSC for coverage long after-the-fact, and to conceal (and in some instances, affirmatively misrepresent) material information along the way.

Moreover, notwithstanding the clear prejudice it suffered as a result of that improper conduct, NSC requested that Immunex provide copies of all legal bills it wanted NSC to pay. TX 95. It took Immunex more than a year and a half to do so, CP 1173-74, by which time the trial court had already ruled (1) that there was no coverage under any NSC policy, (2) that NSC might not be obligated to pay defense fees to

Immunex at all, and (3) that a jury trial would be necessary to resolve these issues. CP 1408-10. By following that guidance, NSC obviously has not lost the significant rights afforded to it under the ROR.

B. The Trial Court’s Ruling Does Nothing to Alter the Nature of the Duty to Defend

Contrary to Immunex’s suggestion, nothing about the lower court’s ruling “alters the nature of the duty to defend.” In the event an insured causes actual and substantial prejudice to its insurer, Washington law has always allocated the consequences of that conduct to the insured. Where, as here, the prejudice caused by the insured is so pervasive that no one can say prior to trial whether any amount is owed by the insurer – as the trial court, Court of Appeals, and this Court all concluded in this case, and as Immunex’s own counsel and insurance expert both admitted as well – it is entirely appropriate for any payment to await the jury’s determination of prejudice at trial.

There may be some other case, involving different parties and circumstances, in which some amount of defense fees are not subject to reasonable dispute, and for which payment need not await a jury determination at trial. This clearly is not such a case.

C. The Trial Court’s Evidentiary Rulings Were Correct

Immunex next argues that the trial court improperly excluded evidence and argument regarding NSC’s duties to investigate the AWP Litigation. As the Court of Appeals noted, that argument is factually incorrect. Pet., Appendix A, p. 9.

The Court of Appeals noted, among other things, that “Immunex presented testimony from two experts on how National Surety should have acted,” *id.*, and that “[t]he jury was able to factor this evidence about claim handling into its decision about the amount of prejudice suffered.” *Id.* at p. 10. In its Petition, Immunex does not dispute, nor could it dispute, these observations. The trial court’s evidentiary rulings clearly do not constitute reversible error.

IV. CONCLUSION

For all of the foregoing reasons, Respondent/Plaintiff respectfully requests that the Court deny Appellant/Defendant’s petition for review.

DATED THIS 30th day of April, 2018.

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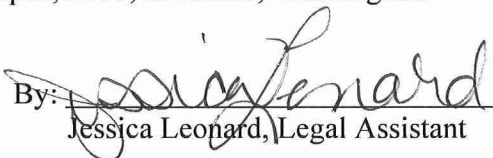
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on April 30, 2018, I caused a copy of the foregoing Respondent/Plaintiff's Answer to Petition for Review to be served by electronic mail on:

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DATED this 30th day of April, 2018, at Seattle, Washington.

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April 30, 2018 - 3:24 PM

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