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STATE OF WASHINGTON
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NO. 64003-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RYAN E. MILLER,

Plaintiff/Respondent,

v.

PATRICK J. KENNY, individually,

Defendant

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Intervenor/Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

Ryan Miller's action against Safeco, based on an assignment of claims from Patrick Kenny, is fatally flawed because the assignor, Kenny, reserved to himself all that could have constituted any actual harm following his settlement of Miller's personal injury claims. Indeed, Kenny reserved those very harms that are spelled out in *Safeco v. Butler* as the "real harm[s]" that can occur in the case of a confessed judgment subject to a covenant not to execute. *See Safeco v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992). The only "harm" not reserved was the covenant judgment itself, which by its terms could do no harm to Kenny because Miller could never enforce it. Miller's claims premised on Kenny's assignment therefore fail for lack of an essential element -- harm.

Miller insists he has received all rights in the assignment from Kenny, and that the "reservation" in the Settlement Agreement only allows Kenny the right to claim an interest in the proceeds of any award Miller receives. Yet Miller never quotes the reservation or cooperation clauses themselves, probably because this would only highlight that the word "proceeds" does not apply to Kenny's interest in what Miller may obtain but to Miller's interest in what Kenny may obtain. Nor does Miller address Kenny's actual post-assignment conduct, in which Kenny threatened to bring his own suit on his reserved claims, except to note that

this was not before the trial court on summary judgment and to urge this Court to disregard it. What Miller fails to mention is that *he* did not introduce extrinsic evidence of the assignment's intended effect until after the trial court had ruled on Safeco's summary judgment motion. It was only in opposing certification of the court's ruling for discretionary review that Miller introduced a newly generated declaration from Kenny, in which Kenny presumed to assert that he assigned all of his rights to Miller and reserved only an interest in the proceeds of any award Miller receives. It is this post-ruling submission of Miller that has prompted Safeco to point out the 2005 letter from Kenny's counsel, which was called to the attention of the trial court *before* Safeco moved for the dismissal of Miller's assigned claims. Either both the declaration and the letter are out under a strict application of RAP 9.12, or both should be considered. Either way, Miller's attempt to rewrite and thereby salvage the assignment fails as a matter of law.

Alternatively, Miller argues that even if the assignment was only partial, it nonetheless is valid. While it is true that a partial assignment may be enforceable, Miller offers no authority for the proposition that an assignment is enforceable which, as here, carves out and reserves to the assignor an essential element of the purportedly assigned claim. Relatedly, Miller spends a considerable portion of his brief explaining

why the only possible harm to Safeco from partial assignments -- the potential for multiple suits -- does not apply in this case, as *res judicata* would bar any second suit brought by Kenny. This argument reflects a fundamental misunderstanding of the issues in this case, for here there cannot be two judgments: Miller's claim, which is entirely dependent upon assignment from Kenny, is fatally flawed because Miller did not receive an essential element of the claim -- harm.

Miller argues, however, that Safeco conceded that its own conduct caused its insured to suffer a judgment and that *this* is somehow "dispositive" of the issue of harm. This factually incorrect assertion also begs the question of whether an assignee may pursue an action against an insurer when the insured has retained all harms that could have occurred as a result of the insurer's actions. Miller next argues that Safeco has failed to rebut the presumption that its insured, Patrick Kenny, suffered harm, but fails to show why such a showing is necessary in this action brought by Ryan Miller as assignee, when Kenny has reserved the harm and Kenny has neither brought an action against Safeco nor asserted a cross-claim against Safeco. Finally, Miller argues that a covenant judgment, standing alone, *is* sufficient to support a claim for bad faith. This claim, however, is tantamount to a call for this Court to ignore the clear language of the Supreme Court in *Butler* that a covenant judgment is

enforceable against the insurer only because of the presumption that such a judgment *can* cause harm to an insured -- a presumption that the Supreme Court also made clear the insurer will be allowed to rebut.

Miller also offers a series of procedural arguments for why this Court should affirm the trial court. To begin, Miller argues Safeco lacks standing to contest Miller's assignment. Miller misapprehends the nature of Safeco's defense. Safeco maintains that the assignment Miller has received lacks an essential element, not -- as Miller reframes the issue -- that Kenny and Miller could not contract a settlement. Miller also fails to acknowledge that Safeco has an interest in the outcome of the case, and indeed is identified and acknowledged in the Settlement Agreement that contains the assignment. Because Safeco does not challenge the validity of the Settlement Agreement itself, and because Safeco is not a "stranger" to the assignment, Safeco has standing to challenge the effectiveness of the assignment under which Miller is suing Safeco.

Next, Miller argues that even if the assignment was not complete, and if the incomplete assignment was not valid, this Court should nevertheless allow Miller's claim to go forward because the real party in interest rules preclude dismissal where ratification or joinder has occurred. Miller claims that Kenny has ratified Miller's suit, and "joined" in the suit. But this case does not present a true real party in interest issue, as neither

Kenny nor Miller own the entirety of what Miller seeks: Miller owns the covenant judgment, while Kenny owns the only harms that could possibly result from that covenant judgment. The “solutions” of joinder, substitution, or ratification cannot reattach the harm to the covenant judgments. Only a reformation or rescission of the Settlement Agreement might do that, and Miller has not even attempted to do either. Moreover, ratification cannot occur where there has been no showing of agency, and there has been no contention, much less any evidence, that Kenny has the right to control the manner and means of bringing this suit. Joinder and substitution are similarly incapable of resolving the problem at hand, because this is not a case where one owns the claim brought by another, but a case where one (Kenny) owns all the damages that might flow from a covenant judgment and the other (Miller) owns the covenant judgment itself. In sum, the tools for resolution of a real party in interest issue cannot salvage Miller’s assigned claims against Safeco.

In his penultimate procedural point, Miller argues that Safeco has waived its right to challenge the effectiveness of the assignment, citing cases where the lack of capacity defense was waived. However, Safeco is not raising a lack of capacity defense but a failure of an essential element in Miller’s case, which is not an affirmative defense at all. And even if one were to treat the point as being in the nature of an affirmative defense,

it is an affirmative defense of the nonwaivable sort, such as failure to state a claim upon which relief can be granted

In his ultimate procedural argument, Miller urges this Court not to reach the merits because the grant of discretionary review was supposedly improvident. Of all the arguments made by Miller, this one is outright *frivolous*. Miller moved to modify the Commissioner's grant of review, and a three judge panel of this Court denied modification. Miller could then have, but did not, seek discretionary review by the Supreme Court of that denial. There is no colorable basis *whatsoever* under the Rules of Appellate Procedure for a respondent, after modification of a grant of discretionary review by a Commissioner of the Court of Appeals has been denied by a three judge panel of that court, and after the time for seeking review of that denial by the Supreme Court has passed, to ask the three judge panel of the Court of Appeals assigned to decide the merits to instead refuse to do so, on the grounds that review should not have been granted in the first place.

II. RESTATEMENT OF FACTS

Safeco provided a defense to defendant Patrick Kenny without a reservation of rights. CP 106, 137, 138. Prior to the time that Kenny settled with Miller, Safeco made its policy limits available to Kenny to settle the claims of the injured passengers. CP 138. When Miller settled

with Kenny, they entered into a Settlement Agreement crafted by Miller's attorney that included a covenant not to execute in exchange for an assignment of rights as against Safeco. CP 139, 141. However, the Settlement Agreement also included a reservation of rights that specifically exempted all of the harms that could have occurred in this context as a result of Safeco's actions. CP 139. Moreover, in recognition that the claims assigned "may or may not be assignable," the Settlement Agreement further provided that Kenny would not settle any claims he brought without Miller's consent, and that he would hold those proceeds in trust for Miller. CP 139. Kenny has not brought a separate suit against Safeco, and although he remains a defendant in this lawsuit he has not brought a cross-claim against Safeco.

Unable to deny the truth of these facts, Miller presumes to restate the case with numerous citations to items in the record that he did not call to the attention of the trial court in his opposition to Safeco's motion for summary judgment. In doing so, Miller mischaracterizes the actual facts of the matters to which these citations relate:

- The bonus program to which Miller refers was not at issue before the trial court at the time of the summary judgment hearing. Indeed, it could not have been, as one of the depositions upon which Miller relies to substantiate his claims concerning the program was taken

four months after the motion was heard. CP 881. In fact, bonuses were based upon company profitability which includes its investment portfolio, and not paid to adjusters for reducing or delaying payment. CP 874.

- Miller claims that Safeco refused to disclose policy limits amounts to counsel for both Bethards and Miller. However, even the record cited by Miller shows that it was only Miller that demanded the policy limits. Miller also claims that Safeco refused to mediate the underlying case. But it was *Miller* that repeatedly refused Safeco's request to mediate the case. *See, e.g.,* CP 38, 98, 298, 299.

- Miller claims that Safeco's answer was stricken. But it was not the answer that was stricken but the third party complaint for declaratory relief. CP 475. And it was the answer that prayed the court find that Safeco is not bound by the assigned stipulated judgments. CP 110-111.

Safeco respectfully requests that this Court disregard Miller's barrage of irrelevant and misleading factual claims.

III. ARGUMENT ON REPLY

A. **The Words of the Settlement Agreement And The Assignment Clearly Establish That Kenny Reserved All Harms to Himself and Did Not Assign Them to Miller. The Subsequent Conduct of The Parties Confirms That Kenny Reserved His Right to Bring a Claim For These Harms.**

An assignment is a contract, and therefore is interpreted and construed according to the rules of contract interpretation and

construction. *Boley v. Greenough*, 22 P.3d 854, 858 (Wyo. 2001). Washington courts follow the context rule in ascertaining the intent of the contracting parties and interpreting written contracts. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). Under the context rule, extrinsic (or “parol”) evidence:

...is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.

Berg at 669 (citation omitted). Where language in the contract remains ambiguous even after considering extrinsic evidence, it is proper for the court to construe the contract against the drafter. *Berg* at 677.

The language of the Settlement Agreement assigned to Miller Kenny’s rights as against his insurers. CP 139. However, that same language reserved to Kenny all harm that could possibly have occurred to him by confessing to a judgment subject to a covenant not to execute. *Id.* In addition, by the language of the Settlement Agreement the parties acknowledged that the assignment to Miller might not be effective, and therefore agreed that Kenny would hold in trust for the benefit of Miller any proceeds Kenny received from any suit or claim he might bring against Safeco based on what he had reserved for himself. CP 139-140.

Miller argues that Kenny assigned all rights to him and reserved to himself “only the right to claim an interest in the *proceeds* of any damage award for non-economic losses caused by Safeco.” (Emphasis original.) Respondent’s Brief at 20. This claim conflicts with the plain language of the Settlement Agreement. While the word “proceeds” is not used in the reservation clause, it is used in the cooperation clause; but there the “proceeds” inure to Miller’s benefit, and not to Kenny’s. Nothing in the assignment clause, or in the reservation clause, or in the cooperation clause, or anywhere else in the Settlement Agreement, gives Kenny the right to claim an interest in the proceeds of any damage award obtained by Miller.

In support of his argument that Kenny has reserved to himself only the right to participate in some unspecified “proceeds,” Miller proffers a declaration signed by Kenny nearly six years after Kenny had signed the Settlement Agreement, which purports to explain Kenny’s original intent. But the declaration is inconsistent with the terms of the Settlement Agreement, *and* inconsistent with Kenny’s own conduct shortly after this bad faith suit was instituted.

Kenny’s declaration states that it was his intent to assign all claims to Miller, including “any cause of action that might give rise to any element of damage personal to me for emotional distress or personal

attorney fees or otherwise that I suffered from the mishandling of the action against me by Safeco.” CP 334. This directly contradicts the actual language of the reservation clause of the Settlement Agreement, which (as shown) states that Kenny is reserving such claims to himself. CP 139.

Miller did not submit Kenny’s declaration in opposition to Safeco’s summary judgment motion. Miller proffered the declaration *after* that ruling, during the dispute over whether the trial court should certify its summary judgment ruling for discretionary review. Anticipating that Miller would invoke the putative authority of the declaration in responding to its appeal, Safeco cited to a letter written by Kenny’s personal counsel in 2005 threatening suit against Safeco based on the reservation contained within the Settlement Agreement. In that letter, which had been called to the attention of the trial court before Safeco moved for the dismissal of Miller’s assigned claims, Kenny’s counsel wrote:

[I]n the Settlement Agreement Mr. Kenny did reserve to himself claims for his personal emotional distress, personal attorney’s fees, personal damages to his credit or reputation, and other non-economic damages which arise from the assigned causes of action. If you are going to actively involve him in this ongoing litigation, as you do by directing interrogatories and requests for production to him personally, then he will be inclined to pursue claims for damages personal to him that are exacerbated by this discovery request.

CP 92.

Miller dismisses Safeco's citation to this letter as a violation of RAP 9.12, without acknowledging that his citation to the declaration he proffered from Kenny would by that logic be equally in violation of RAP 9.12.¹ Miller then presumes to assert that the letter was intended to threaten suit and bring claims for Safeco's post-assignment conduct, rather than the claims Miller now argues were completely assigned to him. Yet neither Miller nor his attorney wrote the letter, and their interpretations of a letter they did not write plainly are entitled to no weight whatsoever.

The import of the language of the letter is crystal clear: The letter reminds Safeco that Kenny reserved certain claims to himself under the assignment, and threatens that Kenny will bring suit *on those claims* if Safeco does not desist in seeking discovery from him in Safeco's dispute with Miller. This conduct is entirely consistent with the plain language of the reservation and cooperation clauses contained within the Settlement

¹ RAP 9.12 was adopted to codify the principles embodied in decisions of the Washington Supreme Court such as *American Universal Ins. Co. v. Ransom*, 59 Wn.2d 811, 370 P.2d 867 (1962). See 2A K. Tegland Washington Practice: Rules Practice at 637-38 (6th ed. 2004 (citing and quoting Drafters' Comment to RAP 9.12)). The rule, however, was never intended and has not operated as some sort of mindless straitjacket barring appellate courts from ever considering, on review of the grant or denial of summary judgments, evidence that was not specifically invoked either in support of or in opposition to the motion for summary judgment. Thus, it can be appropriate to bring to the appellate court's attention evidence submitted on reconsideration of a summary judgment ruling, in urging reversal of the ruling itself. See, e.g., *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000). Here, the letter from Kenny's counsel had been brought to the attention of the trial court before Safeco brought its motion for summary judgment, and is now being cited in response to a declaration that was not submitted to the trial court until after the court had ruled on the motion for summary judgment.

Agreement. It also is fatal to Miller's claim that Kenny actually assigned all of his rights to Miller, and merely reserved an interest in the proceeds that Miller might ultimately receive through his pursuit of those claims against Safeco.²

B. Safeco's Interpretation Is Consistent with the Purpose of the Settlement Agreement. Miller's Interpretation Is Not and Would Sanction Settlements Violating Public Policy.

Safeco's interpretation of the Settlement Agreement is consistent with the actual language of the cooperation clause that follows the reservation clause, as well as with the stated purposes of the Settlement Agreement itself. Miller argues that this Court should harmonize clauses that seem to conflict, yet it is Miller's reading of the Agreement that would create disharmony, because Miller ignores the cooperation clause that reinforces Safeco's interpretation as well as ignoring the well-established rule that a contract may be construed against the party drafting it when that drafting has produced an ambiguity about what the parties to the contract actually intended.

² In response to Safeco's observation that the statutes of limitations have run on Kenny's claims, Miller claims that Kenny may still bring a claim against Safeco in this action, because Kenny purportedly may benefit from the relation back rules applicable under CR 15. (See Resp. Brief at 25.) Kenny, however, is a defendant along with Safeco, and, as such, any claims he might bring against Safeco in this action would have to be as cross-claims under CR 13, not amended claims sought to be added under CR 15 as if he were somehow a party-plaintiff aligned with Miller. Under this Court's decision in *Bennett v. Dalton*, 120 Wn. App. 74, 84 P.2d 265 (Div I. 2004), any attempt now by Kenny to bring such a cross-claim would have to be dismissed as barred by applicable statutes of limitations.

In support of his harmonization argument, Miller cites *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). (See Resp. Brief at 20.) Miller actually ignores the principle illustrated by the case law he cites, because his interpretation does not give effect to all of the contract's provisions, but instead requires that this Court read out, or ignore, both the reservation clause and the cooperation clause. The cooperation clause recognized and stated that Kenny's claims "may or may not be assignable," and so made provision for Kenny to hold in trust any proceeds he might receive on his claims for later assignment to the plaintiffs. CP 139. This is consistent with Safeco's reading of the Settlement Agreement, which is that Kenny reserved his claims for harm, and Miller and Kenny were both aware that the resulting division of essential elements might very well result in a failure of the assignment.

Here, the Settlement Agreement was drafted by Miller's attorney, and it acknowledged that the legal effect may be that the assignment may not be effective. To the extent there are ambiguities or conflicts in the Settlement Agreement remaining after considering evidence competent to be given weight under our state's context rule, they should be resolved against Miller, the drafting party. *See, e.g., Berg*, 115 Wn.2d at 677. This is especially appropriate considering that Safeco's interpretation does not conflict with the stated purposes of the Settlement Agreement, which were

to end the underlying litigation and provide prompt payment of the insurance proceeds; protect Patrick Kenny's personal assets, credit and reputation; afford protection to Kenny from execution on excess judgments, and minimize the costs, delays and uncertainties of continued litigation. CP 136-137.

Miller spends a considerable amount of space explaining to this Court why his interpretation -- which requires this court to ignore two of the agreement's clauses -- does not result in a multiplicity of suits as against Safeco. Miller's *res judicata* argument misapprehends the import of the Settlement Agreement his attorney wrote, however, as there cannot be two separate judgments arising out of the agreement given one suit must fail for lack of an essential element. Moreover, this Court should not allow a disembodied covenant judgment to stand in place of the harm an insured may suffer, lest others seek to so divide their Settlement Agreements, resulting in a court-sanctioned multiplicity of suits with the added twist that "claims" may be assigned and prosecuted without essential elements.

In support of his argument that the threat of multiple suits should not trouble this court, Miller argues that assignment of a partial claim may be made, citing *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Ins. Exchange*, 4 Wn. App. 49, 480 P.2d 226 (1971), and *Leavenworth State*

Bank v. Wenatchee Valley Fruit Exchange, 118 Wash. 366, 204 P.8 (1922). Neither case is remotely similar to the instant case, however. In *Hardware Dealers*, Farmers Insurance Exchange argued that a settlement between the parties to an automobile accident precluded the later medical subrogation claim brought by Hardware Dealers for the reason that the claim had been “illegally split.” The Court of Appeals held that Farmers Insurance Exchange had waived its right to claim the defense of *res judicata* or collateral estoppel. In *Leavenworth State Bank*, a business had borrowed 85% of the amount of each invoice to its customers, and had assigned the receivables from the invoices to the creditor bank. The trial court refused to allow the bank to recover more than 85% of the total amount of the invoices, as that was the amount loaned. The Supreme Court reversed, holding that the bank was entitled to “recover the whole amount of the assignments,” less offsets. *Leavenworth State Bank*, 118 Wash. at 373. These cases are simply not applicable, as there has not been a second suit on a separate claim, and Kenny did not assign the entirety of his claims but instead reserved the essential element of harm.

Miller also cites *Purdy v. Pacific Automobile Ins. Co.*, 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984), where an insured filed a joint suit with his bankruptcy trustee against the insurer for recovery of his emotional distress claim, while the trustee sought recovery of the excess

verdict. However, that case did not involve a covenant not to execute. The question before the court was whether a bankruptcy petition that did not expressly exclude the personal cause of action was void for apparent violation of the Bankruptcy Act. The court held that it was not. In reaching its decision, however, the court noted that an insured may not assign his cause of action for failure to settle and bring a separate action for his personal damages because “a cause of action [cannot] be split in that fashion,” citing *Purcell v. Colonial Ins. Co.*, 20 Cal. App. 3d 807, 97 Cal. Rptr. 874 (1971). *Purdy*, 157 Cal. App. 3d at 80. Miller asks that this Court sanction what the California courts would not. This Court should decline that invitation.

C. Because Kenny Reserved All Real Harm to Himself in a Settlement that Included a Covenant Not to Execute, Miller’s Claims on Assignment Fail for Lack of an Essential Element.

Miller agreed not to execute any judgment as against Kenny. Miller also agreed that Kenny could reserve to himself the precise damages our Supreme Court in *Butler* characterized as the “real harm” that a covenant judgment can cause an insured. Miller argues that Safeco has not rebutted the presumption that its conduct caused harm to Kenny, and that a covenant judgment constitutes sufficient harm to support a claim for bad faith. However, because Miller did not acquire Kenny’s rights to any of the harms that inure in the context of a covenant not to

execute, all of Miller's claims on assignment from Kenny must fail for lack of the essential element of harm.

Harm is an essential element in an action for an insurer's bad faith claim handling. *Safeco v. Butler*, 118 Wn.2d at 394. To be sure, the burden is initially on the insurer to show that the insured was not harmed by its conduct. This presumption of harm was imposed in recognition of the difficulty that insureds have in showing that a particular act caused harm, and as recognition that loss of control of the case is in itself prejudicial. *Id.* at 392. Nevertheless, the insurer may rebut the presumption of harm by showing by a preponderance of the evidence its acts did not harm the insured. *Id.* at 394.

Butler, like this case, involved a covenant not to execute. There, Safeco argued that the covenant not to execute precluded a finding that Safeco's acts harmed the Butlers. The court rejected that argument because a claim by an insured against his insurer may be assigned to the injured party (*id.* at 397-398) and because even though the agreement insulates the insured from liability, it still "constitutes a real harm because of the potential effect on the insured's credit rating...[and] damage to reputation and loss of business opportunities." *Id.* at 399. Miller argues that, because Safeco conceded that its insured, Patrick Kenny, was harmed by entry of the covenant judgment, any discussion of the scope of the

assignment is irrelevant. In fact, Safeco does not “concede” that it mishandled the claim in any way, or that it acted to delay settlement in bad faith, or that Kenny was harmed by its actions. Moreover, these factual disputes are not pertinent to this appeal, as the issue before this Court is whether this assignee may prosecute an assignment that specifically exempted and reserved all possible harm that could have arisen in conjunction with a covenant not to execute.

Whether Kenny suffered harm is only relevant if Kenny assigned his harm to Miller, as it is Miller who brings this claim, not Kenny. Kenny is not a plaintiff in this action. He is still a named defendant³ in the motor vehicle tort action, in which Safeco intervened for purposes of participating in a reasonableness hearing and in which Miller elected to bring his claims against Safeco. But because Miller does not have a direct claim against Safeco, the claims he has brought depend upon the assignment he received from Kenny. And because Miller did not acquire the rights to claims that include the damages the *Butler* court described as the “real harms” in a covenant not to execute, Miller’s claim against Safeco fails for lack of an essential element regardless of whether Kenny was harmed.

³ There has been no motion to realign the parties, either in the trial court or in this Court, and Miller’s unilateral renaming of Kenny as a respondent in the caption of Miller’s brief is no substitute for such a motion.

Miller also argues that the covenant judgment alone constitutes sufficient harm to sustain a bad faith claim, arguing that Safeco has misconstrued the *Butler* court's explanatory dicta. (See Resp.'s Brief at 34.) Miller does not offer an alternative explanation for what seems relatively straightforward: The *Butler* court, in responding to the argument that no harm could be proved because the insured had assigned its rights in exchange for a covenant not to execute, noted that the entry of judgment even in the context of a covenant not to execute "constitutes a real harm because of the potential effect on the insured's credit rating...[and] damage to reputation and loss of business opportunities[.]" Given the Zenkers had acquired all of the Butlers' rights as they existed at the time of assignment, the (rebuttable) presumption of harm caused by the covenant judgment, and the existence of genuine issues of fact concerning whether Safeco had acted in bad faith, summary judgment in favor of Safeco was precluded. *Butler* at 399, 400. Here, however, Miller did *not* acquire all of Kenny's rights, and specifically did not acquire the damages the *Butler* court identified as the 'real harms.'" Miller's argument that a covenant judgment, shorn of the "real harm" that accompanies it, is sufficient to maintain a cause of action for bad faith, or any other claim, is simply not the law of Washington.

Miller also argues that the Supreme Court in *Mutual of Enumclaw v. Dan Paulson Construction, Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007), rejected an insurer's argument that it may rebut the presumption by showing that its insured failed to suffer any damage to its credit or reputation. (See Resp.'s Brief at 40.) In fact, in that case the trial court's actual initial conclusion -- later rejected -- was that any damage to DPCI's credit or reputation would have occurred whether or not DPCI entered into a stipulated agreement. The Supreme Court held that MOE's subpoena and ex parte communications with the arbitrator caused significant uncertainty and increased risk for DPCI, and refused to parse out of the damage to DPCI's credit rating and reputation what was caused by MOE's bad faith handling and what was caused by the initiation of the lawsuit itself. *Id.* at 923. Here, Kenny has reserved any damage to credit or reputation to himself. Miller can only bring before the trial court what Kenny has assigned to Miller, and Kenny did not assign those damages to Miller.

Miller attempts to distinguish *Werlinger v. Clarendon National Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005), by implying that there, the insurer had rebutted the harm only because the settlement was found to be unreasonable. (See Resp.'s Brief at 41-42.) But this Court actually held that "[t]he [insureds] suffered no harm as a result of Clarendon's

actions. They were shielded from personal liability by their Chapter 7 bankruptcy status.” *Id.* at 809. Miller also attempts to distinguish *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw*, 150 Wn. App. 1, 206 P.3d 1255 (2009), by arguing that there the insurer “aggressively defended” the insured’s interests without objection. (*See* Resp.’s Brief at 42.) However, there the court found that, while MOE had acted in bad faith, Ledcor ultimately received what the policy entitled it to, and therefore suffered no harm due to MOE’s failure to timely accept tender and defend. *Id.* at 11. Miller’s attempts to distinguish this case from these only underscore the point that an insurer may rebut the presumption of harm in a variety of ways and that the presumption is not, theoretically or functionally, an irrebuttable one.

D. Miller’s Procedural Defenses Are Meritless.

1. Standing.

Miller argues that Safeco lacks standing to contest Miller’s assignment. This argument misses the point, however. Safeco maintains that the assignment Miller acquired did not include an essential element. Safeco does not maintain that Kenny and Miller could not contract and that the resulting settlement agreement therefore was somehow invalid. And even if Safeco were to make those arguments, it would still have standing under *Bunting v. State of Washington*, 87 Wn. App. 647, 943

P.2d 347 (1997). There, the injured parties -- who were the wife and son of the driver -- settled with the driver for a release of all claims. Three years later, the wife and son brought an action for the same incident as against the State. Two years after that, the husband and wife purported to rescind their settlement agreement, and moved to realign the husband as a defendant, in order to hold the State jointly and severally liable with the husband driver. The State argued that the purported rescission was invalid and the realignment improper. The husband and wife argued that the State did not have standing to raise these issues, but the Supreme Court rejected that claim. The Supreme Court observed that a party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested; the State met those requirements and therefore had standing to challenge the validity of the rescission and the realignment. *Id.* at 651. Safeco has at least as much of a distinct and personal interest in the outcome of Miller's case against Kenny as the State had in *Bunting*.

2. Real Party In Interest.

Miller argues that the real party in interest rules preclude dismissal where ratification or joinder has occurred, and that Kenny's declaration shows that he has ratified Miller's suit and that he has "joined" in it. There are several problems with these arguments, the first of which is this

case does not even present a real party in interest issue. Neither Kenny nor Miller own the entire of what Miller seeks: Miller owns and seeks to recover the amount of the covenant judgments, but Kenny owns all the harm. None of the solutions to a real party in interest problem can “reattach” the harm to the covenant judgment, which would require rescission or reformation of the contract. Miller dismisses this argument as “technical,” but never explains how the splitting of a claim through contractual means may somehow be resolved by means of a procedure designed to get *the* real party in interest before the court where because of the split there *is* no such single party. (*See* Resp.’s Brief at 26-27.) Moreover, as noted in Safeco’s Opening Brief, ratification is an agency concept, and Miller has made no showing that Kenny has the right to control the manner and means of bringing this suit. Nor can “joinder” save Miller’s claim, as Miller’s claim does not belong to Kenny. In sum, the solutions to a real party in interest problem cannot solve the problem with Miller’s assigned claims.

3. Waiver.

Miller argues Safeco has waived its defense, arguing the issue must be characterized as one involving a lack of capacity or a “theory of avoidancy,” and citing cases where the lack of capacity defense was held to have been waived. (*See* Resp.’s Brief at 27-31.) The problem here,

however, is that Miller has failed to state an essential element of each of his claims premised on Kenny's assignment; this is not a lack of capacity defense, but a failure of the plaintiff to meet his burden. Moreover, even if Safeco's defense is an affirmative defense, it concerns a failure of the plaintiff to meet his burden, i.e., a failure to state a claim upon which relief can be granted, and such a defense may be raised at any time. CR 12(h)(2).

IV. CONCLUSION

This Court should reverse, and with directions that the trial court should dismiss with prejudice Miller's assigned claims against Safeco.

RESPECTFULLY SUBMITTED this 11th day of March, 2010.

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NO. 64003-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RYAN E. MILLER,

Plaintiff/Respondent,

v.

PATRICK J. KENNY, individually,

Defendant

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Intervenor/Defendant/Appellant.

CERTIFICATE OF SERVICE

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On March 12, 2010, I caused to be served a true and correct copy of the following document on:

Mr. David M. Beninger Luvera Law Firm 701 Fifth Avenue, Suite 6700 Seattle, WA 98104	Howard M. Goodfriend Edwards, Sieh, Smith & Goodfriend, P.S. 1109 First Avenue South, Suite 500 Seattle, WA 98101-2988
<i>(VIA LEGAL MESSENGER)</i>	<i>(VIA LEGAL MESSENGER)</i>

Entitled exactly:

APPELLANT'S REPLY BRIEF

DATED: March 12, 2010.



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