

64003-8

64003-8

NO. 64003-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

RYAN E. MILLER, individually,

Respondent,

v.

PATRICK J. KENNY, individually,

Defendant

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Intervenor/Defendant/Appellant.

ON APPEAL FROM SKAGIT COUNTY SUPERIOR COURT
(The Honorable Michael E. Rickert)

APPELLANT'S OPENING BRIEF

Timothy J. Parker, WSBA No. 8797
Michael B. King, WSBA No. 14405
Emilia L. Sweeney, WSBA No. 23371
Jason W. Anderson, WSBA No. 30512
Attorneys for Safeco Insurance Company of
Illinois, Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8125

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ASSIGNMENTS OF ERROR

The trial court erred when it denied Safeco's motion for a summary judgment dismissing Miller's claims based on Kenny's assignment. See Order re Motion for Summary Judgment on Harm/Damages (CP 316-18).

STATEMENT OF ISSUES

The following issue pertains to the assignment of error:

Did the trial court err in not dismissing Miller's claims based on Kenny's assignment, when (1) Miller does not own the claims for harm that Kenny reserved, and (2) that reserved harm is the sole basis for establishing the essential element of harm for the claims asserted by Miller pursuant to the assignment?

I. INTRODUCTION

Ryan Miller has asserted insurance bad faith and related claims against Safeco Insurance Company of Illinois, based upon a covenant judgment and assignment of rights from Patrick Kenny, Safeco's insured. The covenant judgment provided that, while Kenny stipulated to a judgment against him and in favor of Miller, Miller would only seek to execute that judgment against whatever insurance Kenny had to answer for that judgment. In turn, Kenny assigned his rights against Safeco to Miller. Kenny, however, gave Miller only a *partial* assignment, purporting to assign a cause of action for bad faith but reserving to himself all claims for intangible harm, including all "claims for damages for his personal emotional distress, ... personal damages to his credit or

reputation and other non-economic damages which arise from the assigned causes of action.”¹

Miller’s claims based on Kenny’s incomplete assignment should have been dismissed by the trial court on summary judgment. Under the Washington Supreme Court’s decision in *Safeco v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), where a covenant not to execute protects the insured from the unsatisfied portion of the judgment, the insured’s claims for intangible harm are the sole basis to establish the required element of harm in a bad faith action. Because Kenny reserved his claims for intangible harm to himself, Miller is precluded from establishing the element of harm.

Although *Butler* established a presumption of harm that applies once bad faith is established in the context of liability insurance coverage, it is a rebuttable presumption. The presumption is inapplicable here, or is conclusively rebutted, because Miller does not possess and cannot assert Kenny’s claims of harm. To accept Miller’s argument that the judgment *itself* establishes harm would convert the presumption of harm to an *irrebuttable* presumption, a result clearly foreclosed by *Butler*.

Although the trial court denied summary judgment to Safeco, it certified the issue for review under RAP 2.3(b)(4). A Commissioner of this Court (Hon. Mary S. Neel) concluded that the trial court’s

¹ Settlement Agreement, page 4, ¶ 4.c., Appendix A, A-4 (CP 139). Kenny also reserved his claim for his personal attorney’s fees. *Id.*

certification was “well taken” and granted review, and a panel of this Court denied Miller’s Motion to Modify. This Court should now reverse the denial of summary judgment and direct the trial court to enter summary judgment in Safeco’s favor.

II. STATEMENT OF THE CASE

A. **Three Injured Parties Assert Personal Injury Claims against Safeco’s Insured, Patrick Kenny, and Eventually Present Settlement Demands Exceeding the Policy Limits, including Ryan Miller’s Demand of *All Insurance Proceeds* for Himself.**

In August 2000, in the summer after their graduation from high school, Patrick Kenny, Ryan Miller, Ashley Bethards, and Cassandra Peterson took a road trip to Canada. App. A, A-2 (CP 137). They drove a car owned by Peterson’s parents, sharing the driving responsibilities. *Id.* While Kenny was driving, on August 23, 2000, he drove the car into the back of a truck. *Id.* Kenny did not recall the impact, but admitted he may have fallen asleep at the wheel. *Id.* Miller, Bethards, and Peterson sustained injuries. *Id.*

Because Kenny had permission to drive the Petersons’ vehicle, he was insured under the policies issued by Safeco to the Petersons. CP 97. Those included an automobile liability policy in the amount of \$500,000 and an umbrella policy in the amount of \$1,000,000. *Id.* Safeco defended and indemnified Kenny against the claims of Miller, Peterson, and Bethards without any reservation of rights.² CP 437. Safeco also provided

² Ryan Miller, represented by Ralph Brindley of the Luvera Law Firm, was the first to file suit against Kenny for the injuries Miller sustained in the accident. *See Miller v. Kenny*, Skagit County Superior Court Cause No. 01-2-01600-1. Cassandra Peterson filed (*Continued next page*)

UIM benefits to Peterson under the same policy. *Id.*

In June 2002, Peterson demanded \$350,000 to settle her claims against Kenny. CP 440. In July 2002, Miller demanded that *all* insurance monies available to Kenny be paid *only* to him, which would have left Kenny uninsured for the claims of Bethards and Peterson. *Id.* Safeco advised all claimants it could not settle the claims until it had received settlement demands from each of them, and proposed a global mediation should occur as soon as those demands were in hand. *Id.* Miller rejected mediation and advised that his willingness to accept full policy limits had expired. *Id.*

After the expiration of Miller's demand, Bethards demanded \$1,200,000 under the Safeco policies to settle her claims against Kenny. CP 440. The demands against Kenny totaled \$3,250,000. *Id.* Safeco tendered its policy limits to settle all claims in March 2003, leaving apportionment to the claimants. CP 441. Bethards and Peterson initially indicated their intention to accept the tender; Miller failed to respond. *Id.* The following month, however, Kenny received a letter signed by counsel for all three claimants rejecting the tender of policy limits as untimely and offering to release Kenny from liability in exchange for payment of the full policy limits and an assignment of his claims against Safeco. *Id.*³

suit against Kenny about eight months later. *See Cassandra M. Peterson v. Patrick Kenny*, Skagit County Superior Court Cause No. 02-2-01198-8. Ashley Bethards served Safeco with a complaint against Kenny several months after that, in April of 2003, a few months before Miller's case was set to go to trial.

³ Miller asserts Safeco's tender should have occurred sooner, claiming that "on 20 occasions over 2 1/2 years, Safeco evaluated Kenny's exposure as being substantially in (Continued next page)

B. The Parties Enter Into a Settlement Agreement under Which Kenny Assigns Certain Rights to Miller and Stipulates That a Judgment in Excess of the Policy Limits May Be Entered, Subject to a Covenant Not to Execute, but Reserves All Claims for Harm Allegedly Arising from Safeco's Actions and the Judgment.

In May 2003, approximately one month before trial was to begin in Miller's case, Miller, Bethards, and Peterson entered into a Settlement Agreement with Kenny. App. A, A-1 to A-11 (CP 136-46). Kenny agreed to pay the full limits of the liability insurance tendered by Safeco and to assign to the claimants all rights, privileges, and causes of action that he had against his insurers:

b. Assignment: In further consideration, defendant Patrick Kenny agrees to cooperate with and assign to Plaintiffs all rights, privileges, claims and causes of action that he may have against his insurers or affiliated companies, and their agents. This assignment includes, but is not limited to, all of Mr. Kenny's privileges, and claims or causes of action arising out of the insurance contract, obligations or otherwise, as well as claims or actions for insurance protection, claims handling, investigation, evaluation, negotiation, settlement, defense, indemnification, along with any claims for breach of contract, negligence, fiduciary breach, Consumer Protection Act, bad faith, punitive damages and/or otherwise[.]

App. A, A-4 (CP 139).⁴

This assignment, however, was subject to a clause in which Kenny explicitly reserved to himself claims for all harm that could have resulted

excess of his liability limits." Motion to Modify at 5. Miller's claim mischaracterizes the record. Miller can only be referring to the statutorily-required loss reserves Safeco set equal to the policy limits. But reserves are not the same as evaluation and do not constitute an admission regarding settlement value. Safeco vigorously disputes that it ever evaluated Kenny's exposure as exceeding policy limits.

⁴ The assignment purported to assign Kenny's rights against his insurers to all the plaintiffs. However, a month before that Settlement Agreement was signed, the Bethards and Petersons agreed that any bad faith claims or rights relating to the claims of the Bethards and the Petersons would be assigned to the Millers to pursue. See CP 113-17.

from Safeco's alleged bad faith:

c. Reservation: Defendant Kenny hereby reserves to himself claims for damages for his personal emotional distress, personal attorneys' fees, personal damages to his credit or reputation and other non-economic damages which arise from the assigned causes of action.

App. A, A-4 (CP 139). This reservation was reiterated in paragraph d, where Kenny agreed not to settle any claims against Safeco "without the consent of the parties [to the settlement agreement] and to hold in trust any proceeds or judgment for later execution or assignment to the Plaintiffs *except as to damages reserved in paragraph C above.*" App. A, A-4 to A-5 (CP 139-140) (emphasis added).

In exchange for payment, assignment, and determination of "damages/judgment," the claimants agreed not to execute or enforce any judgment against Kenny, except against the insurance-related assets. CP 141. The parties also agreed that the amount of the judgment for each of the plaintiffs' claims would be determined by stipulation, contingent upon a reasonableness finding by the trial court. App. A, A-5 to A-6 (CP 140-41).

Safeco moved to intervene for purposes of participating in a reasonableness hearing, CP 4-9, but none was ever held. Instead, the parties (including Safeco) stipulated to reasonable settlement amounts for each claimant and agreed to treat the net stipulated amounts after subtraction of insurance proceeds as though judgment had been entered against Kenny in those amounts. CP 148-50.

The trial court signed the Stipulated Order Re: Reasonableness of Settlements on May 12, 2005. CP 149. The gross amount of damages agreed to for claimants Miller, Bethards, and Peterson totaled \$5.95 million. CP 148.

C. Miller Commences Bad Faith Litigation against Safeco; Kenny Threatens to Assert His Reserved Claims in Response to Discovery Requests from Safeco.

Following entry of the Stipulated Order Re: Reasonableness of Settlements, Safeco stipulated to allow Miller to amend his Complaint to allege claims directly against Safeco based on the assignments he received from Kenny and Peterson. CP 38. Early in the ensuing litigation of Miller's assigned claims from Kenny and Peterson, Safeco served discovery requests on Patrick Kenny. On October 26, 2005, Kenny's personal counsel responded to those requests by noting that Kenny had reserved his claims for harm and warned that he would be inclined to pursue suit against Safeco on his own behalf if Safeco did not withdraw the requests:

[I]n the settlement agreement Mr. Kenny did reserve to himself claims for his personal emotional distress, personal attorneys' 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. Safeco withdrew the discovery requests, and Kenny did not pursue his claims.

D. The Trial Court Denies Safeco's Motion for Summary Judgment Dismissal of Claims Brought by Miller Based on the Assignment from Kenny.

Safeco moved for summary judgment to dismiss Miller's claims predicated upon Kenny's assignment on the grounds that Kenny's reservation of claims for harm precluded Miller from establishing the essential element of harm of the assigned claims. CP 166-71. Although the trial court denied Safeco's motion, CP 316-17, the trial court believed the issue was "for the Court of Appeals to resolve":

This motion should be denied. I will say this is not as simple as Mr. Parker says, and it's not as clear as Mr. Beninger says. I think this is a very interesting case, very interesting argument with no clear answer. Perhaps it's best for the Court of Appeals to resolve that for us at some point because I find there is no clear answer.

....

I'm going to deny the motion for summary judgment by the skin of one's teeth. Perhaps this can go to the Court of Appeals, and they can sort this out. I'm going to deny the summary judgment by the slimmest of margins. I'm not doing it on the waiver issues. I'm doing it on the, what I will call the guts, feathers and all, the heartbeat of the motion which is a harm issue.

....

So let's let the Court of Appeals figure it out.

....

[A]nother reason why I'm ruling this way, too, is I think this is a close case. I think it's one for the Court of Appeals. I'd rather the lawsuit be an active one rather than slam the door at this point and end the lawsuit altogether.

....

Perhaps the Court of Appeals will find that's not the way it should be and will agree with Mr. Parker's analysis. It wouldn't shock me if they did.

RP 42-47.

Safeco moved for certification of the order denying summary judgment under RAP 2.3(b)(4). CP 319-23. In opposition to that motion,

Miller submitted a declaration by Kenny in which Kenny asserted that his intent was “to assign and transfer to Ryan all rights and control of any cause of action” he had against Safeco, including any cause of action that might give rise to any element of damage personal to him. *See* Declaration of Patrick Kenny, attached as Appendix B, B-1 to B-2 (CP 334-35). Kenny declared he had “no intent to bring a separate suit against Safeco for the damages I suffered as the causes of action have all been assigned to Ryan and he is pursuing those damages with the other damages.” App. B, B-1 (CP 335).

The trial court granted Safeco’s motion to certify, finding that Safeco’s summary judgment motion presented an issue of law on which there was substantial ground for a difference of opinion and that resolution of the issue would materially advance the termination of the litigation (specifically, because that issue could resolve the claims arising under Miller’s assignment of claims from Kenny). CP 346-47. Safeco timely filed its Notice for Discretionary Review. CP 341-45.

E. A Commissioner of This Court Grants Discretionary Review, and a Panel of This Court Denies Miller’s Motion to Modify.

Commissioner Neel found that the trial court’s certification was well taken and granted discretionary review, ruling that there is “substantial ground for a difference of opinion as to whether the reservation means Miller’s claims cannot satisfy the actual harm requirement of [*Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992)].” *See* Commissioner’s June 3, 2009 Ruling, at 4. Miller

brought a motion to modify the Commissioner's ruling, which was denied by a panel of this Court.

III. STANDARD OF REVIEW

This Court reviews the grant or denial of summary judgment *de novo*. *Kaplan v. N.W. Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003), citing *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Summary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

IV. ARGUMENT

A. Where the Insured Is Protected from Liability for a Judgment by a Covenant Not to Execute, the Sole Basis for Establishing the Essential Element of Harm of a Cause of Action for Bad Faith Is "Intangible Harm" Such as Damage to Reputation or Credit Rating.

In Washington, as in most jurisdictions, "if an insurer acts in bad faith by refusing to effect a settlement for a small sum, an insured can recover from the insurer the amount of a judgment rendered against the insured, even if the judgment exceeds the contractual policy limits." *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 735, 49 P.3d 887 (2002), citing *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952).

Harm is an essential element of a claim of bad faith or negligent handling of an insurance claim. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). There has long been a split of authority on

whether the insured is sufficiently harmed to seek recovery from his insurer where he has not paid any portion of an excess judgment allegedly resulting from the insurer's actions. *See Annotation, Insured's Payment of Excess Judgment, or a Portion Thereof, as Prerequisite of Recovery against Liability Insurer for Wrongful Failure to Settle Claim against Insured*, 63 A.L.R.3d 627 (1975). Some jurisdictions adhere to the "prepayment rule," under which "the insurer's wrong does not harm the insured until he is out-of-pocket, and then only to the extent of payment." *Id.* § 2(a). Most jurisdictions have adopted the opposite rule, known as the "judgment rule."

The judgment rule initially was applied in cases where the insured or his estate paid none of the judgment and was incapable of doing so due to insufficiency of assets. *See Annotation, supra*, § 2(a); *Wolfbert v. Prudence Mut. Cas. Co.*, 98 Ill. App. 2d 190, 240 N.E.2d 176, 180 (1968). The rationale in those circumstances was that the existence of the judgment as a liability was harmful, even if the insured could not pay it: "The very fact of the entry of judgment itself constitutes damage and harm sufficient to permit recovery....The rule of damages is that incurrence is equivalent to outlay." *Wolfbert*, 240 N.E.2d at 180. In addition to liability for the judgment itself, courts recognized "intangible harms" that can result from an unsatisfied judgment, such as damage to reputation or credit rating:

Courts enforcing the judgment rule, that the tort is complete when the judgment becomes final, adopt the view that intangible harms are remediable in suits of this kind, and cite such factors as damage to credit and general reputation, loss of business opportunities, and the like, as sufficient in and of themselves to afford a basis for recovery.

Id.

Washington first adopted the judgment rule in *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960), holding that an action for negligence or bad faith “will lie regardless of whether or not the insured has paid or can pay the portion of the judgment which is in excess of the limits of liability in the insurance policy.” *Id.* at 911.

Washington subsequently applied the judgment rule to cases where the insured is protected from liability for the judgment itself by a covenant not to execute. The Court of Appeals decided in 1985 that an insured may sue for negligence or bad faith despite a covenant not to execute: “[A] covenant not to execute coupled with an assignment and settlement agreement is not a release permitting the insurer to escape its obligation.” *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 198, 698 P.2d 90 (1985), citing in part *Steil v. Florida Physicians’ Ins. Reciprocal*, 448 So.2d 589, 591 (Fla. Dist. Ct. App. 1984). In so holding, the Court of Appeals also adopted the rule of a majority of jurisdictions that a claim of bad faith by an insured against his insurer may be assigned to the injured party. *Kagele*, 40 Wn. App. at 197; *see also Butler*, 118 Wn.2d at 399.

The Supreme Court approved the Court of Appeals’ application of the judgment rule to cases involving covenant judgments in *Greer v. N.W. Nat’l Ins. Co.*, 109 Wn.2d 191, 204, 743 P.2d 1244 (1987), citing *Kagele*, 40 Wn. App. at 198-99, and *Steil*, 448 So.2d at 591. The court observed: “A ‘slim majority’ of jurisdictions permit an insured plaintiff to recover damages from the insurer despite the existence of a covenant between the plaintiff and the insured to seek relief only from the insurer.” *Greer*, 109

Wn.2d at 204, citing *Steil*, 448 So.2d at 591. *Accord Butler*, 118 Wn.2d at 397-400; *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 741 P.2d 1054 (1987) (“The fact that [the insured] did not pay out of her own pocket and was not subjected to personal liability because of the covenant is immaterial.”).

Where the insured is protected by a covenant not to execute, however, the fact of the judgment itself is *not* sufficient to establish harm to the insured; the insured’s cause of action for bad faith in such a case is premised strictly upon the “intangible harms” (such as damage to credit and reputation and loss of business opportunities) that a judgment whose enforceability against the insured is prevented by a covenant not to execute may still cause to the insured. *See Butler*, 118 Wn.2d at 399. In *Butler*, the Supreme Court identified such intangible harm as the basis for recognizing that a covenant not to execute does not preclude a showing of harm:

[E]ven though the agreement insulates the insured from liability [for the unsatisfied judgment], 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[.]

118 Wn.2d at 399, quoting *Barr v. Gen. Accid. Group Ins. Co. of N. Am.*, 360 Pa. Super. 334, 520 A.2d 485, 489 (1987) (edits the court’s in part).⁵

⁵ The Pennsylvania Supreme Court had cited *Mossman* in adopting the judgment rule more than 20 years before *Barr*, in *Gray v. Nationwide Mutual Insurance Co.*, 422 Pa. 500, 223 A.2d 8, 10 (1966), where the court set forth “very sound reasons” for adopting the judgment rule, including that it “recognizes that the fact of entry of the judgment itself against the insured constitutes a real damage to him because of the potential harm to (Continued next page)

The Supreme Court in *Butler* not only held that such intangible harms are a sufficient basis to establish the element of harm in a bad faith action; the court also held that such harm will be presumed in bad faith cases involving third-party claims against the insured, once bad faith is established. *Butler*, 118 Wn.2d at 390. The court made clear, however, that the presumption is a *rebuttable* one, such that the insurer can avoid all liability for bad faith “by showing by a preponderance of the evidence its acts did not harm or prejudice the insured.” *Id.* at 394.

B. Kenny’s Incomplete Assignment and Reservation of His Claims for Harm from the Judgment Mandates the Dismissal of Miller’s Assigned Claims from Kenny.

Kenny reserved the claims for all harm that could have resulted from alleged bad faith by Safeco, including the precise damages our Supreme Court in *Butler* characterized as the “real harm” that a covenant judgment can cause to an insured. 118 Wn.2d at 399, quoting *Barr*, 520 A.2d at 489. Miller has asserted that Kenny assigned all his rights and claims and merely retained an interest in the recovery of certain damages. But the reservation states that Kenony reserved to himself the “*claims*” for his personal damages resulting from the alleged bad faith, and not merely

his credit rating.” *Id.* In *Barr*, Pennsylvania’s intermediate appellate court again cited *Mossman* in affirming the rationale of *Gray*:

The court, in *Gray*, recognized that entry of judgment constitutes a real harm because of the potential effect on the insured’s credit rating. In addition, courts have cited factors such as damage to reputation and loss of business opportunities as real harm suffered by entry of judgment. 63 A.L.R.3d 622

Barr, 520 A.2d at 489.

an unspecified interest in any amounts Miller might recover:

c. Reservation: Defendant Kenny hereby reserves to himself *claims* for damages for his personal emotional distress, personal attorneys' fees, personal damages to his credit or reputation and other non-economic damages which arise from the assigned causes of action.

CP 139 (emphasis added). Miller's assertion is further contradicted by the letter from Kenny's attorney (previously cited and quoted), threatening that Kenny might assert his reserved claims if Safeco "involve[d] him in [the] ongoing litigation." CP 92-93.

Miller contends that the unsatisfied portion of the judgment itself constitutes the damage or harm suffered by the insured. But that argument was rejected in *Butler*, where the Supreme Court recognized that a covenant not to execute insulates the insured from enforcement of the judgment. 118 Wn.2d at 396-97. If an unsatisfied judgment alone constituted real harm, *Butler's* presumption of harm would be rendered *irrebuttable*, contrary to the Supreme Court's clear holding. The court in *Butler* held that a covenant not to execute does not necessarily preclude a showing of harm, but only because the judgment—notwithstanding the covenant—can result in actual harm to the insured, such as damage to credit and reputation. *Id.* at 399, quoting *Barr*, 520 A.2d at 489.

This principle is well illustrated by this Court's decision in *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005). In that case, Dean Werlinger was killed in a motor vehicle accident caused by Michael Warner. 129 Wn. App. at 806. Before the

accident, Warner and his wife had filed a Chapter 13 bankruptcy proceeding, which they converted to Chapter 7 after the accident to gain protection from personal liability. *Id.* Werlinger's family and estate obtained relief from the automatic stay. *Id.* Warner's insurer, Clarendon, filed a declaratory judgment action on coverage while defending him under a reservation of rights. *Id.* at 807.

Clarendon did not respond to a demand by the Werlingers for the policy limits of \$25,000, but tendered that amount several months later after Warner prevailed in the declaratory judgment action. *Werlinger*, 129 Wn. App. at 807. The Werlingers rejected the tender and instead settled for an assignment of rights and stipulated judgment in the amount of \$5,000,000, subject to a covenant not to execute. *Id.*

This Court affirmed the dismissal of the subsequent bad faith action on summary judgment, recognizing that, notwithstanding the rebuttable presumption of harm, summary judgment in favor of the insurer is appropriate "if ... a reasonable person could only conclude that the insured suffered no harm." *Werlinger*, 129 Wn. App. at 808, 809-10. This Court reasoned that the assignee's claim for bad faith failed because the assignee received no "harm" from the assignor; the assignor had no harm to assign by virtue of the bankruptcy, which fully protected them from personal liability even before the accident. *Id.* at 809. This Court acknowledged the presumption of harm under *Butler*, but held it was rebutted because the insurer established there was no harm. *Id.* at 809-10.

If, as Miller contends, the existence of an unsatisfied covenant

judgment alone were sufficient to establish the harm required to recover under the claims assigned by an insured to a personal injury plaintiff, this Court would have held the presumption had not been rebutted and ruled instead that the element of harm had been established as a matter of law. *Cf. Ledcor Industries, Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255 (2009) (affirming summary judgment of dismissal on the basis that the presumption of harm was rebutted—despite a finding of bad faith—where the insured “ultimately received what the policy entitled it to.”); *Nat’l Union Fire Ins. Co. v. Greenwich Ins. Co.*, Case No. C07-2065-JCC, 2009 WL 1794041 at *5-6 (W.D. Wash., June 22, 2009) (granting summary judgment because presumption was rebutted where insured’s assignee had already been compensated for any damages resulting from any bad faith). But this Court *did* hold that the presumption of harm *had* been rebutted, because the mere fact of a covenant judgment is *not* sufficient to the essential element of harm. And this holding mandates the dismissal of Miller’s assigned claims from Kenny. In *Werlinger*, dismissal was mandated because the insured had no harm to assign; here, dismissal is mandated because the insured retained those rights for himself.

C. The Failure to Assign Harm Cannot Be Cured By A Late Declaration From Kenny Coming Nearly Six Years After the Settlement Agreement Was Reached.

Miller argues that even if the assignment is defective for a failure to assign harm, it has been cured or will be cured, and that this appeal is

therefore an exercise in futility. Following the hearing on the motion for summary judgment, Miller offered a new declaration signed by Patrick Kenny that declares, in effect, that he never intended to reserve what he did in fact reserve. However, parol evidence offered to establish the intent of the parties to a written contract may not contradict or contravene the express terms of the writing, and Kenny's declaration violates this basic rule of contract interpretation. Although never expressly offered for such a purpose, Kenny's declaration appears to be an effort to reform or rescind the settlement agreement contract in order to effect an assignment of harm and thereby salvage Miller's ability to pursue Kenny's assigned claims against Safeco. If so, Miller will find no relief in either doctrine, as neither rescission nor reformation of the settlement agreement is tenable.

1. Kenny's Declaration Impermissibly Seeks to Alter the Terms of the Written Settlement Agreement.

Kenny's declaration of February 2009 presumes to explain what he intended when he signed the Settlement Agreement and Assignment of Rights, Judgment and Covenant in May 2003. Such parol evidence, however, is not admissible to contradict the terms of a fully integrated written contract or to add terms that are inconsistent with the written terms of a partially integrated contract. Because Kenny's declaration contradicts terms of the Settlement Agreement, and seeks to add terms that are inconsistent with the written terms of the Settlement Agreement, his attempt to rewrite the agreement should be disregarded as legally incompetent.

A release, or settlement agreement, is a contract and its construction is governed by contract principles subject to judicial interpretation in light of the language used. *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). Parol evidence is admissible for the purpose of ascertaining the intention of the parties and properly construing the writing. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). However, the “parol evidence rule” precludes the use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract. *Id.* at 670. Where a partially integrated contract is involved, parol evidence may be used to prove the terms not included in the writing, provided that the additional terms are not inconsistent with the written terms. *DePhillips v. Zolt Construction Co., Inc.*, 136 Wn.2d 26, 32-33, 959 P.2d 1104 (1998). Whether the contract is fully integrated or only partially so, then, extrinsic evidence such as Kenny’s declaration may not alter the terms of a contract nor add additional terms that are inconsistent with the written terms.

Here, Kenny’s declaration flatly contradicts and adds additional terms inconsistent with the written terms of the Settlement Agreement. In the Settlement Agreement, Kenny reserved to himself “claims for damages for his personal emotional distress, personal attorney’s fees, personal damages to his credit or reputation and other noneconomic damages” However, Kenny declares, nearly six years later and following a motion for summary judgment, that it was his intent to assign and transfer to Ryan all of his rights, including any element of damage “personal to me for

emotional distress or personal attorney fees or otherwise” Kenny Declaration, ¶ 1, App. B, B-1 (CP 324). Because the Kenny declaration contradicts the terms of the Settlement Agreement, and attempts to add terms that are inconsistent with the written terms of the Settlement Agreement, the declaration cannot salvage Miller’s claims against Safeco.

2. Neither Reformation Nor Rescission Is Appropriate.

Kenny’s declaration cannot salvage Miller’s claims even if it is treated not as an attempt to establish the assignment’s intended scope, but instead as a showing that supposedly would justify reforming or rescinding the Settlement Agreement and thereby cure the fatal defect in Miller’s case caused by Kenny’s reservation of the essential element of harm.

Reformation is an equitable remedy employed to bring a writing that is materially at variance with the parties’ agreement into conformity with that agreement. *Denaxas v. Sandstone Court*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003), citing *Akers v. Sinclair*, 37 Wn.2d 693, 702, 226 P.2d 225 (1950).⁶ A party may seek reformation of a contract if (1) the parties made a mutual mistake or (2) one of them made a mistake and the other engaged in inequitable conduct. *Denaxas*, 148 Wn.2d at 669, citing *Wash.*

⁶ Miller may argue that Safeco does not have standing to assert defenses to a reconstruction of the settlement agreement to which it was not a direct party. The doctrine of standing ordinarily prohibits a party from asserting another person’s rights; however, 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. *Bunting v. State*, 87 Wn. App. 647, 651, 943 P.2d 347 (1997). Clearly, Safeco has a distinct and personal interest in the outcome of the interpretation and treatment of the settlement agreement in this case and will benefit from the relief it requests.

Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994). A three-year statute of limitations applies to a claim for reformation based upon mutual mistake. *Browning v. Howerton*, 92 Wn. App. 644, 650, 966 P.2d 367 (1998). The party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence. *Denaxas*, 148 Wn.2d at 669, citing *Akers*, 37 Wn.2d at 703. Here, there was no mutual mistake, as evidenced by Kenny's attorney's threat to pursue his reserved claims for intangible harm. Kenny's well after-the-fact declaration to the contrary falls well short as a matter of law of constituting the clear, cogent and convincing showing required to justify reformation. Moreover, any attempt to reform the contract would be barred by the statute of limitations; Kenny's declaration comes nearly six years after the parties entered into the Settlement Agreement, and the statute of limitations requires that reformation claims be brought within *three* years of the formation of the contract to be reformed.

In addition, a mistake of *law*, in the absence of fraud or some like cause, is not a ground for avoidance of a contract. *In re M.D.*, 110 Wn. App. 524, 542-543, 42 P.3d 424 (2002), citing *Schwieger v. Robbins*, 48 Wn.2d 22, 24, 290 P.2d 984 (1955). A mistake of law is an erroneous conclusion with respect to the legal effect of known facts. *Schwieger* at 24. Here, even assuming a "mistake" was made, it was only a mistake about the legal effect of Kenny's reservation. There was no mistake of fact, and reformation of the Settlement Agreement therefore is not appropriate.

Rescission of the settlement agreement is similarly not appropriate, as mutual mistake is also required to rescind the agreement. *See, Simonson v. Fendell*, 101 Wn.2d 88, 92, 675 P.2d 1218 (1984). Moreover, rescission contemplates restoration of the parties to as near their former position as possible; so, to effectuate a valid rescission, all parties to the settlement agreement (which include all accident victims and their parents) would have to return the funds they received for the settlement of their claims. *Id.* at 93. This was not done here.

In sum, neither the test for reformation nor rescission is met. All of the accident victims recovered from multiple policies, and Safeco paid its full policy limits. This settlement was reached more than six years ago, and the agreement reached between Miller and Kenny, among others, may not now be changed -- whether as a matter of reformation or rescission.

D. Defective Assignment Is Not A Real Party In Interest Problem, and a Defective Assignment Therefore May Not Be Cured In the Way a Real Party In Interest Problem May Be Cured.

In opposition to Safeco's motion for summary judgment, Miller argued that Safeco was actually asserting a "capacity" defense, and that it had waived that defense by not asserting it.⁷ In response, Safeco pointed out that the defective assignment meant Miller's claim failed for lack of an

⁷ The trial court expressly rejected Miller's waiver argument. CP 317 (judge's handwritten text on Order); RP 44 ("I'm going to deny the summary judgment by the slimmest of margins. I'm not doing it on the waiver issues."). A trial court's finding regarding waiver is reviewed for an abuse of discretion. *See Klotz v. Dehkhoda*, 134 Wn. App. 261, 270 n.2, 141 P.3d 67 (2006) (no abuse of discretion in finding that forum non conveniens was not waived by delay). The trial court properly exercised its discretion to find there was no waiver by Safeco where Safeco raised its objection more than six months before trial.

essential element, and that arguing that a party cannot establish an essential element of his or her case (here, harm) does not constitute raising an affirmative defense. Safeco went on to argue that even if the issue was treated as an affirmative defense, the matter was more akin to a real party in interest issue (in that Miller did not own the harm needed to bring his claim) and that the real party in interest defense could not be waived.

As the record of the briefing before the trial court and during course of the discretionary review phase of this proceeding reflects, the real party in interest issue has taken on a life of its own. Yet in reality the issue is entirely beside the point, as *neither* Miller nor Kenny “owns” the entire cause of action Miller seeks to bring: Kenny owns the harm, Miller owns the covenant judgments. Therefore, none of the tools employed to resolve a real party in interest issue is applicable or effective here.

CR 17(a) states:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

In this action, Miller seeks recovery of the dollar amounts in the covenant judgment. *See* ¶ 2.4 of the Second Amended Complaint and

Crossclaims Against Intervenor (CP131). The covenant judgment was assigned to Miller, but Kenny reserved claims for “his personal emotional distress, personal attorneys’ fees, personal damages to his credit or reputation and other non-economic damages which arise from the assigned causes of action.” Appendix A, A-4, ¶ 4.c (CP 139). No ratification, joinder, or substitution can reunite a claim that was divided by contract. And even if these tools could somehow combine a divided cause of action that resides in two different individuals, the attempt fails for other reasons rooted in the requirements of real party in interest law.

For example: Miller contends that Kenny has “expressly ratified Miller’s right to bring this claim in his own name.” Motion to Modify at 11-12. But any purported ratification would be ineffective. Ratification is an agency concept, which provides that the principal may ratify actions taken on his behalf by the agent. *See Riss v. Angel*, 131 Wn.2d 612, 636, 934 P.2d 669 (1997) (“[R]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him” (emphasis added)). Kenny cannot “ratify” Miller’s act in bringing suit against Safeco, because Miller asserted no claims on Kenny’s behalf. Miller asserts that he alleged claims “on behalf of” Kenny, referring to the introduction to his First Amended Complaint, which asserted that the suit was brought by Kenny: “COMES NOW, Patrick Kenny, by and through Ryan Miller as assignee and individually....”. *See Amended/Supplemental Complaint and Cross-*

claims Against Intervenor, filed July 10, 2005 (CP 10). But that misstatement was corrected in the Second Amended Complaint, which properly alleged: “COMES NOW, Ryan Miller, as assignee and individually...”. See Second Amended Complaint, filed April 14, 2006 (CP129). Setting aside Miller’s attempt to rewrite the Settlement Agreement, the fact is that Miller did not bring his claims against Safeco on Kenny’s behalf, and Kenny therefore cannot “ratify” Miller’s bringing of those claims.

Miller has also argued that, even if he is not the real party in interest, and Kenny’s ratification is ineffective, the remedy is not dismissal but a further opportunity to change the terms of the agreement and realign Kenny from a defendant to plaintiff, or to substitute him for Miller. Yet neither of those procedures would solve the defective assignment problem. Even if Kenny were joined or “realigned” as a plaintiff, Miller would remain unable to establish the element of harm for the claims being asserted by *him*. And Kenny, if joined or substituted, could assert only his personal claims (assuming they are not barred by the statute of limitations⁸) and not the claims he assigned to Miller, including those based on the covenant judgments. Joinder or substitution could work only if Miller or Kenny were to take possession of the *entire* cause of action, to do *that* would require a reformation or rescission, and -- as shown --

⁸ Kenny has owned these claims since May, 2003, when the Settlement Agreement was signed. He actually threatened Safeco with suit of his individual claims in October 2005, but never did bring them. However, the tort of insurance bad faith is governed by a three year statute of limitations. *O’Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 529-30, 125 P.3d 134 (2004). Kenny’s claims arising out of the handling of the motor vehicle accident claims are therefore barred by the Statute of Limitations.

neither remedy is available to cure the fatal defect in Miller's case against Safeco, created by the reservation by Kenny of the harm necessary to establish an essential element of the claims Miller is presuming to pursue against Safeco under the assignment from Kenny.

V. CONCLUSION

Because Kenny's claims for intangible harm form the sole possible basis for establishing the essential element of harm of the claims asserted by Miller based on Kenny's assignment, the trial court should have granted Safeco's motion for summary judgment and dismissed Miller's claims based on Kenny's incomplete assignment. Safeco requests that this Court reverse the denial of summary judgment and direct the entry of a summary judgment in Safeco's favor dismissing Miller's claims based on Kenny's assignment.

RESPECTFULLY SUBMITTED this 6th day of October, 2009

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Timothy J. Parker, WSBA No. 8797
Michael B. King, WSBA No. 14405
Emilia L. Sweeney, WSBA No. 23371
Jason W. Anderson, WSBA No. 30512

APPENDICES

APPENDIX A: Settlement Agreement, signed May 20,
2003 (CP136-146) A-1 – A-11

APPENDIX B: Declaration of Patrick Kenny, signed
February 7, 2009 (CP 334-335)B-1 – B-2

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

RYAN E. MILLER, individually,
Plaintiff,
vs.
PATRICK J. KENNY, individually,
Defendant.

CAUSE NO. 01-2-01600-1
SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT

1. **PARTIES:** The parties to this agreement are Ryan Miller and his parents ("Millers"), Ashley Bethards and her parents ("Bethards") and Cassandra Peterson and her parents ("Petersons"), all referred to as "Plaintiffs", and defendant Patrick Kenny (hereinafter "Kenny" or "Defendant"). The parties do hereby enter into the following Settlement Agreement with Assignments of Rights, Judgments and Covenants (herein referred to as "Settlement Agreement").

2. **PURPOSE OF SETTLEMENT AGREEMENT:** The purposes of this Settlement Agreement are to (a) provide for an end to the current litigation and settlement without further delay and with prompt payment of the applicable insurance proceeds to Plaintiffs for their medical, rehabilitation and other needs; (b) to protect Patrick Kenny's personal savings, property, assets, credit and reputation from any verdicts in favor of

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 1

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ATTORNEYS AT LAW
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1 plaintiffs that will likely be substantially in excess of the insurance limits available to him;
2 (c) to afford protection to Patrick Kenny from immediate execution on the likely excess
3 judgments arising from the Plaintiffs' injuries and damages; and (d) to minimize the costs,
4 delays, stress and uncertainties of continued litigation.
5

6 **3. RECITATIONS:** The Plaintiffs and Defendant all lived in Anacortes,
7 Washington, attended Anacortes High School and were friends. They had agreed to go on a
8 pleasure trip using the Peterson's car and to share the driving responsibilities. Their parents
9 knew about the trip and gave their permission to go and the Peterson's to use their car.
10

11 The trip took place on August 23, 2000. After stopping for some food, Patrick
12 Kenny took over the driving responsibilities. The last Patrick Kenny recalls, all passengers
13 in the car had buckled their seatbelts. Shortly thereafter, Patrick Kenny drove into the back
14 of a truck in his lane of travel without braking, swerving or taking any evasive action. The
15 car was totaled and the plaintiff passengers received serious injuries.
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18 Mr. Kenny does not remember the impact, but does not dispute that it is possible he
19 fell asleep and simply did not see the truck in his lane of travel before impact. The police
20 determined Mr. Kenny was at fault for the accident. Mr. Kenny accepted fault for the
21 accident and responsibility for the injuries and damages to all of the passengers and party
22 plaintiffs to this agreement.
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25 Mr. Kenny had applicable insurance to cover the injuries and damages which he
26 caused in this accident through Safeco Insurance Company of Illinois, State Farm Mutual
27 Automobile Insurance Company of Bloomington Illinois, and umbrella coverage with
28 Safeco Insurance Company of America,. Plaintiff Miller repeatedly requested the
29 representatives from Safeco to disclose all applicable insurance policy limits, rather than
30 having to sue Mr. Kenny to discover this information. Safeco refused. At no time that he
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SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 2

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1 can recall did Safeco contact Mr. Kenny for his permission to disclose all applicable
2 insurance limits before suit was filed. Nor did Safeco ever advise Mr. Kenny that it
3 considered his limits as private information or that his permission was needed to disclose
4 those limits. Further, defendant has no recollection or knowledge that Safeco ever advised
5 prior to suit that opportunities to settle within those limits would be lost and that he could
6 be exposed to an excess judgment by Safeco's persistent refusal to disclose those limits or
7 affirmatively seek out the best terms of settlement at an earlier date.
8

9
10 As a result, Mr. Kenny was sued by plaintiff Miller in order to learn the amount of
11 his insurance limits and to seek recovery for the injuries and damages.
12

13 Mr. Kenny has not, and does not, dispute that he is at fault for this accident and
14 injuries and damages. Until recently, all negotiations and decisions concerning settlement
15 were under the control of Safeco, State Farm and their agents. Mr. Kenny is now faced with
16 a trial in approximately one month. It is very likely that the damages are going to be
17 substantially in excess of all applicable insurance limits on all claims asserted by plaintiffs,
18 thereby exposing Mr. Kenny's personal property, assets, reputation, credit and future
19 livelihood to significant excess judgments over and above his insurance limits. Safeco and
20 State Farm have now offered to make their insurance policy limits available to settle the
21 claims of the Plaintiffs. The plaintiffs and Mr. Kenny have agreed to settle upon the
22 following terms and conditions.
23
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26 4. TERMS AND CONDITIONS: The terms and conditions of the settlement
27 agreement between the above parties are as follows:
28

- 29 a. Consideration: Defendant agrees to pay, through his insurers, the full
30 current limits of insurance coverage of \$1.8 million, in partial satisfaction of
31 the injuries and damages caused and any judgments that may have to be
32

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 3

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entered, or as a credit or offset of future damages if paid without the necessity of any judgment being entered, and

b. Assignment: In further consideration, defendant Patrick Kenny agrees to cooperate with and assign to Plaintiffs all rights, privileges, claims and causes of action that he may have against his insurers or affiliated companies, and their agents. This assignment includes, but is not limited to, all of Mr. Kenny's privileges, and claims or causes of action arising out of the insurance contract, obligations or otherwise, as well as claims or actions for insurance protection, claims handling, investigation, evaluation, negotiation, settlement, defense, indemnification, along with any claims for breach of contract, negligence, fiduciary breach, Consumer Protection Act, bad faith, punitive damages and/or otherwise, and

c. Reservation: Defendant Kenny hereby reserves to himself claims for damages for his personal emotional distress, personal attorneys' fees, personal damages to his credit or reputation and other non-economic damages which arise from the assigned causes of action.

d. Cooperation and Pursuit of Remaining Claims: In further consideration, defendant Kenny agrees to cooperate with pursuit of any claims for legal negligence if requested to as a result of any allegations of same by Safeco or State Farm as well as any claims for punitive damages or any of the other above claims which at any time may or may not be assignable. Defendant Kenny agrees not to settle said claims without the consent of the parties hereto and to hold in trust any proceeds or judgment for later execution or assignment to the Plaintiffs except as to damages reserved in paragraph C

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 4

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above. If this paragraph or any part thereof is determined to be unenforceable, the remaining provisions of this agreement shall remain in full force and effect.

e. Judgments: Defendant Kenny does hereby stipulate and agree to having partial judgment entered against him and in favor of all plaintiffs in the amount of the current insurance proceeds available of \$1.8 million, in exchange for partial satisfaction of that judgment. If the insurance proceeds are paid without the necessity of having judgment entered, then defendant will be given a credit or offset toward the claims of the Plaintiffs named herein. Plaintiffs agree to withhold entry of said judgment for ten (10) days in order to allow the insurance company(s) to tender and pay all insurance proceeds and interest earned thereon to the Luvera Trust Account, in trust for Millers, Bethards and Petersons.

Further, the parties agree to have the full amount of damages/judgments for each of the plaintiffs' claims to be determined in one of the ways set out below and submitted for approved by Judge Rickert of the Skagit County Superior Court ("court"). Said amount of full judgments shall be determined by stipulation, contingent upon a reasonableness finding by the court. If the parties are unable to reach a stipulated agreement within fourteen (14) days, unless extended by agreement, then the parties agree to submit the issue of a reasonable judgments to _____ for arbitration, again contingent upon a reasonableness finding by Judge Rickert if required. If Judge Rickert does not find the amounts stipulated to or determined by arbitration to be reasonable, or if a later Court does not find the amount

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 5

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1 reasonable and/or enforceable as the amount of damages owed in the
2 subsequent assigned actions, then Judge Rickert shall determine the amount
3 of reasonable damages.
4

5 f. **Interest:** The parties acknowledge that a delay in the determination or entry
6 of judgments may be of benefit to Mr. Kenny, but detrimental to the
7 Plaintiffs. Therefore, the parties agree that 12% statutory rate of interest
8 shall accrue and compound annually on the unpaid damages from the date of
9 this agreement.
10

11 g. **Covenants Not to Execute or Enforce Judgments:** In exchange for
12 payment, assignment, determination of damages/judgment interest and other
13 consideration as described above, Plaintiffs do hereby covenant not to
14 execute or enforce on any judgments except against the insurance related
15 assets, legal negligence related assets and/or punitive damages related assets
16 and not to execute on any other assets that are personal to Patrick Kenny.
17
18

19 h. **Satisfaction of Judgments:** Defendant Kenny would like to avoid the harm
20 arising from an entry of any judgment. Plaintiffs agree to consider
21 alternatives to formal entry of judgment. If alternatives cannot be agreed
22 upon, then Plaintiffs agree to partial satisfaction of any judgments by
23 amounts paid. Upon final resolution of all causes of action, Plaintiffs agree
24 to entry of full satisfaction of judgments. Further, Plaintiffs agree to provide
25 a release from the lien created by any real estate judgment entered pursuant
26 to this agreement on any interest in real property which Kenny may acquire.
27 Further, Plaintiffs agree to execute within 10 days of a written request, any
28 documents requested by Kenny to accomplish the purpose of the foregoing
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SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 6

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sentence, including without limitation any such documents required by a prospective seller, lender or other financial institution. Plaintiffs further agree to provide any prospective lender to Kenny with such written assurances as the lender may require that Kenny's personal assets and future earnings are exempt from execution or enforcement of any judgments entered in favor of Plaintiffs against Kenny under this agreement.

DATED this ____ day of _____, 2003.

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM

Ryan Miller, Plaintiff

Dr. Stephen Miller, Father

Mrs. Betty Miller, Mother

RALPH J. BRINDLEY, WSBA 8391
Attorney for Plaintiffs Miller

DATED this ____ day of _____, 2003.

WALSTEAD, MERTSCHING

ASHLEY BETHARDS, Plaintiff

Mr. Bethards, Father

Mrs. Bethards, Mother

JOHN A. BARLOW, WSBA 3304
Attorney for Plaintiffs Bethards

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 7

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sentences, including without limitation any such documents required by a prospective seller, lender or other financial institution. Plaintiff further agrees to provide any prospective lender to Kenny with such written assurances as the lender may require that Kenny's personal assets and future earnings are exempt from execution or enforcement of any judgments entered in favor of Plaintiff against Kenny under this agreement.

DATED this 20th day of May, 2003.

Ryan Miller
Ryan Miller, Plaintiff

LUYERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM

Dr. Stephen Miller
Dr. Stephen Miller, Father

Ralph J. Brindley
RALPH J. BRINDLEY, WSHA 8391
Attorney for Plaintiff Miller

Mrs. Betty Miller
Mrs. Betty Miller, Mother

DATED this ___ day of _____, 2003.

WALSTEAD, MERTSCHING

ASHLEY BETHARDS, Plaintiff

JOHN A. BARLOW, WSHA 3304
Attorney for Plaintiff Bethards

Mr. Bethards, Father

Mrs. Bethards, Mother

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 7
UNCATRYMILLERBENINGER-AGREEMENT-FINAL-4/03

LUYERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
5700 BANK OF AMERICA TOWER • 701 PULLEY AVENUE
SEATTLE, WASHINGTON 98107
(206) 467-6099

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exempt from execution or enforcement of any judgments entered in favor of
Plaintiffs against Kenny under this agreement.
DATED this ____ day of _____, 2003.

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM

Ryan Miller, Plaintiff

RALPH J. BRINDLEY, WSBA 8391
Attorney for Plaintiff Miller

Dr. Stephen Miller, Father

Mrs. Betty Miller, Mother

DATED this 20th day of May, 2003.

WALSTEAD, MERTSCHING

Ashley Bethards
ASHLEY BETHARDS, Plaintiff

John A. Barlow
JOHN A. BARLOW, WSBA 3304
Attorney for Plaintiff Bethards

Dr. Bethards, Father
Bill N. Bethards, DDS

BILL N. BETHARDS
Mrs. Bethards, Mother

Debra L. Stone Bethards

Mrs. J. & L. Stone

LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM ATTORNEYS

6700 BANK OF AMERICA TOWER, 791 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467-6090

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 8

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DATED this _____ day of _____, 2003.

LAW OFFICE OF MONTE WOLFF

Cass Peterson 5-21-03
CASSANDRA PETERSON, Plaintiff
Monte Wolff 5-21-03
MONTE WOLFF, WSBA 92149
Attorney for Plaintiffs Peterson
Michael A. Peterson
Mr. Michael Peterson, Father

Monica Peterson 5-21-03
Mrs. Monica Peterson, Mother

DATED this _____ day of _____, 2003.

ANDERSON HUNTER LAW FIRM

PATRICK KENNY, Defendant VICKIE NORRIS, WSBA 8725
Attorney for Defendant Kenny

PETERSON YOUNG PUTRA

JAN ERIC PETERSON, WSBA 0751
Attorney for Defendant Kenny

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - 8

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LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW

6700 BANK OF AMERICA TOWER - 701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467-6090

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DATED this _____ day of _____, 2003.

LAW OFFICE OF MONTE WOLFF

CASSANDRA PETERSON, Plaintiff

MONTE WOLFF, WSBA 12149
Attorney for Plaintiffs Peterson

Mr. Michael Peterson, Father

Mrs. Monica Peterson, Mother

DATED this 19th day of May, 2003.

ANDERSON HUNTER LAW FIRM

Patrick Kenny
PATRICK KENNY, Defendant

Vickie Norris
VICKIE NORRIS, WSBA 8725
Attorney for Defendant Kenny

PETERSON YOUNG PUTRA

Jan Eric Peterson
JAN ERIC PETERSON, WSBA 0751
Attorney for Defendant Kenny

SETTLEMENT AGREEMENT AND
ASSIGNMENT OF RIGHTS, JUDGMENT
AND COVENANT - B

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LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW

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SEATTLE, WASHINGTON 98104
(206) 467-6090

OK

APPENDIX B

OK

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2009 FEB -9 PM 3: 27

Honorable Michael Rickert

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

2

<p>RYAN E. MILLER, individually, Plaintiff, v. PATRICK J. KENNY, individually, and SAFECO INSURANCE COMPANY, Intervener.</p>	<p>CAUSE NO. 01-2-01600-1 DECLARATION OF PATRICK KENNY</p>
--	---

I, Patrick Kenny, declare under penalty of perjury that I am a party to this action and the following is true, correct and based upon my personal knowledge:

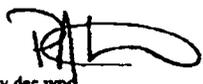
1. As part of the settlement of the action against me by Ryan Miller, I agreed to assign all causes of action I had against Safeco. It was and still is my intent to assign and transfer to Ryan all rights and control of any cause of action I had against Safeco. This includes any cause of action that might 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.

2. I expected Ryan would pursue the assigned causes of action at his risk and

ORIGINAL

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BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW

DEC. PATRICK KENNY - 1
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SEATTLE, WASHINGTON 98104
(206) 467-6090

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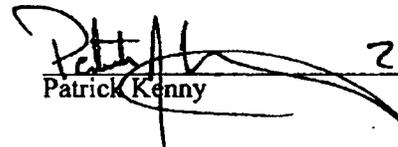
1 expense and without further risk or expense to me if he was unsuccessful. My expectation was
2 to share in part of any net recovery for the damage I suffered personally if there was a positive
3 result. If Ryan didn't recovery anything, I would not be responsible for any of the attorney fees
4 or costs incurred along the way.
5

6 4. I am aware that Ryan has pursued and sued Safeco for the various causes of
7 action I assigned to him. I am aware of and approve the fact that he included requests for the
8 elements of damages I experienced for the personal attorney fees I incurred, along with other
9 damages such as the distress, frustration and others feelings I experienced by the mishandling
10 of the claims against me. I understand that these damages are being claimed and pursued by
11 Ryan in addition to the judgment amounts for himself, Cassie Peterson and Ashley Bethards,
12 along with the effects of those judgments upon me. I approve and ratify his actions.
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15 5. I would prefer that Ryan continue to pursue as my assignee all the assigned
16 causes of action and damages at his cost and risk. I had no intent to bring a separate suit
17 against Safeco for the damages I suffered as the causes of action have all been assigned to Ryan
18 and he is pursuing those damages with the other damages. Ryan has complete and irrevocable
19 right and control of those actions and any decisions on settlement. I understand I will be bound
20 by any verdict or Court rulings. If there is a recovery for any of the damages that were personal
21 to me and which I reserved an interest in, I would look to Ryan only for reimbursement.
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25 6. However, if necessary, the causes of action or any of the damages my be brought
26 in my name, or continued in Ryan's name, as required by the Court or law. I am also willing
27 to continue to pursue any particular damages directly but only if Ryan is no longer allowed to
28 bring those damages on my behalf as part of the causes of action I assigned.
29

30 Dated this February 7, 2009

31  2/7/09
Patrick Kenny

32
LUVERA, BARNETT
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW

6700 BANK OF AMERICA TOWER • 701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467-6090

DEC. PATRICK KENNY - 2

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No. 64003-8

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

RYAN E. MILLER, individually,

Respondent,

v.

PATRICK J. KENNY,
individually,

Defendant.

and

SAFECO INSURANCE
COMPANY OF ILLINOIS,

Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of the *Opening Brief of Appellant* and this *Certificate of Service* to be served upon counsel of record on today as follows:

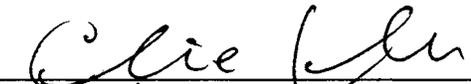
Mr. David M. Beninger
Luvera Law Firm
701 Fifth Avenue, Suite 6700
Seattle, WA 98104

U.S. Mail, postage paid
 Messenger
 Fax
 Email

Howard M. Goodfriend
Edwards, Sieh, Smith & Goodfriend, P.S.
1109 First Avenue South, Suite 500
Seattle, WA 98101-2988

U.S. Mail, postage paid
 Messenger
 Fax
 Email

Dated this 6th day of October, 2009.



Claire Uhler, Legal Assistant

FILED
COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2009 OCT - 6 PM 4: 14

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