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DIVISION II

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STATE OF WASHINGTON
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No. 47494-8-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant / Cross-Respondent,

vs.

MYONG SUK DAY,

Respondent / Cross-Appellant.

BRIEF OF APPELLANT / CROSS-RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the final judgments against Myong Suk Day / dba Stop In Grocery (“Day or “SIG”).
2. The trial court erred in entering final judgment against Mutual of Enumclaw Insurance Company (“Enumclaw”).
3. The trial court erred in granting SIG’s Motions *in Limine* preventing the introduction of evidence supporting Enumclaw’s claim that SIG had not been harmed.
4. The trial court erred by failing to properly instruct the jury on the legal standards applicable to reformation and insurance binders.
5. The trial court erred in imposing a presumption of harm and coverage by estoppel against Enumclaw, and failing to make any findings regarding causation before entering judgment.
6. The trial court erred in refusing to allow Enumclaw to present evidence rebutting the erroneously applied presumption of harm.
7. The trial court erred by imposing a damages multiplier under the Insurance Fair Conduct Act, RCW 48.30.015.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court exceed its jurisdictional authority, under the doctrine of mootness, by entering judgments against SIG that would not require any party to do or pay anything? (Assignments of Error Nos. 1,2,5)

2. Was Enumclaw wrongly deprived of the opportunity to present evidence of its involvement in achieving complete resolution of Smith's and Lee's claim against SIG, on the issue of whether Enumclaw had harmed SIG? (Assignments of Error Nos. 2, 3, 6)
3. Was the jury entitled to be apprised of the proper legal standards applicable to claims for reformation and the effect of insurance binders under which Enumclaw handled Stop in Grocery's claim? (Assignments of Error Nos. 2, 4).
4. Is a presumption of harm or coverage by estoppel permitted where an insurer's coverage position in a reservation of rights defense is based on facts entirely discrete from the insured's potential liability to a third party, such that coverage issues do not have the potential to influence that defense? (Assignments of Error Nos. 2, 5)
5. Even where a presumption of harm arises, is an insurer entitled to present evidence rebutting that presumption to the jury, and have the jury resolve the issue as a factual matter? (Assignments of Error Nos. 2, 3, 6)
6. Is an insured entitled to "coverage by estoppel" in favor of the insured, instead of the injured party, in the amount of a judgment where that judgment has been completely satisfied by payments to the injured party, cannot be executed in any way, and where the insured has paid nothing? (Assignments of Error Nos. 2, 5)

7. Should emotional distress damages qualify for a multiplier under the Insurance Fair Conduct Act? (Assignments of Error No. 2, 7)

III. STATEMENT OF THE CASE

At the core of this case are two broken people, their injuries as terrible as the alcohol-fueled drag race that caused them was reprehensible. CP 131-139. In May 2008¹, a teenager named David Pavolka successfully bought beer at SIG, the insured in this case. *Id.* Pavolka shared it with friends, including Christopher Stewart and Todd McLaughlin, who then went for drunken drag racing through Point Defiance Park. *Id.* Stewart lost control of his car and seriously injured, two pedestrians: Dawn Smith and William Lee. *Id.* In August 2009, Smith and Lee sued the parties responsible for their injuries, including Stewart, McLaughlin, and SIG. *Id.*

When SIG received the Lee and Smith Complaint, Day sent it to her insurance agent, Michael Huh in September 2009. RP 11/18/14 p. 132. Huh was an independent agent that sold insurance from a variety of insurers, including Enumclaw; he was the agent from whom SIG had purchased business owners liability insurance from Enumclaw starting in December 2003. CP 3, 7. There is no dispute that this policy had an exclusion for liquor liability, and did not provide any coverage for the

¹ A timeline of important events is attached as Appendix A.

allegations against SIG. CP 7.

Huh testified that when he received the Complaint, he remembered that there was no coverage, because SIG had not purchased it. RP 12/2/14, p. 104. Day claimed he told her she “should” have coverage. CP 384. In either event, everyone agrees that Huh reported the notice to Enumclaw. CP 382.

The claim was assigned to Enumclaw claims examiner Linda Johnston, who noticed in the file that Day reported her agent said there “should” be coverage. RP 11/25/14, p. 90-91. Enumclaw asked its coverage counsel, Ron Dinning, to look at the claim. CP 1224. Mr. Dinning recognized that Day’s only potential liability was expressly excluded, and recommended denial. *Id.* Enumclaw, however, was concerned enough about Day’s claim about what her agent said that Ms. Johnston ordered the underwriting file to make sure that the policy had issued per the application. CP 1535. She found that it had. CP 385. She then called agent Huh who wrote the policy. *Id.*

Huh told her that he remembered selling this policy to SIG six years earlier, and that he remembered this particular transaction because it was unusual that a grocery insured would decline liquor coverage. CP 391-392, RP 12/2/14, p. 99-100. He went to see Day at SIG, and they conversed in Korean about insurance. *Id.* at 107. Huh explained liquor

liability coverage to Day, and told her that the additional premium would be \$200. CP 111. She declined, explaining that only she and her sister would be working the cash register, and selling liquor was a risk that they could mitigate by being careful. RP 12/2/14, p. 98.

Ms. Johnston noted Huh's apparent memory of the events, which suggested that there had been no error in issuing the policy. However, because of Day's contention, Enumclaw decided to provide the only policy benefit at issue at the time – a full legal defense. RP 11/25/14 p. 91. On October 14, 2009, Enumclaw wrote Day that it would appoint attorney Scott Clement to defend SIG, but that the liquor exclusion meant there would be no coverage for any judgment. CP 852. Enumclaw also explained it may bring a declaratory judgment action for a judicial declaration of coverage. *Id.* Enumclaw's Director of Litigation, Thomas Underbrink, authorized the preparation of that action at the same time the reservation of rights letter was sent. CP 387. Mr. Clement defended SIG vigorously from the moment he was appointed until the case was settled. RP 12/24/14 p. 61-62. Importantly, there is no claim that this defense was improper in *any way*, including no allegation that Enumclaw's position on coverage for liquor liability influenced the defense in the slightest.

Enumclaw filed this declaratory judgment action on February 2, 2010. CP 1. When SIG answered the declaratory judgment action on April

13, 2010, Day admitted that there was no coverage under the policy. CP 6. She did, however, for the first time crystalize SIG's claim that there "should be coverage" into a legal theory – namely reformation based on alleged mutual mistake. *Id.* A year after the declaratory action was filed, SIG amended its Answer, in February 2011, to include a third party Complaint against Huh for having failed recommend liquor liability coverage, and a counterclaim against Enumclaw for bad faith, alleging that Enumclaw had failed to adequately investigate her reformation claim. CP 194.

Both SIG and Enumclaw took a number of depositions in the coverage lawsuit. Amongst others, Enumclaw questioned Day, Huh, and Mr. Kim. RP 11/25/14 p. 66, 67; 12/1/14 p. 109. By Spring 2011, SIG was in settlement negotiations with Smith and Lee. Enumclaw participated in the ultimate settlement, dated June 7, 2011. CP 304. The terms of the settlement were these: Enumclaw paid \$125,000 on behalf of Day; Day agreed that Smith and Lee could enter judgment against her for a combined \$8 million, but they covenanted that they would not execute it against any asset other than Day's claim *against SIG's agent, Huh. Id.* Day then assigned SIG's claims against Huh to Smith and Lee. She *did not* assign any of her claims against Enumclaw – Smith and Lee did not want them. RP 11-6-14, p. 22. *Day paid nothing to extinguish her own multi-*

million-dollar liability. CP 304. Enumclaw agreed that the settlement amount was reasonable. CP 936.

Another crucial aspect of the settlement agreement was that it detailed how the stipulated judgments against Day would be satisfied after the assigned claims against Huh had been exhausted:

As soon as the assigned claims have concluded (whether by settlement, final judgment, or exhaustion of all appeals and the time for further action has expired), Day may enter a full satisfaction of judgment signed by Plaintiffs [Lee & Smith] in favor of Day, which full satisfaction shall be signed by Plaintiffs when this settlement is executed. ***The full satisfaction is to be entered regardless of the amount of any judgment award or settlement accepted and regardless of whether the result is less than the judgment agreed in this settlement.***

CP 305 (emphasis added, attached as Appendix B).

Armed with this assignment, Lee and Smith settled with Huh, without *ever* entering judgments against Day. CP 963. The amount of the settlement was \$600,000, well within the limits of *his* liability insurance, so the size of that settlement was not related to his ability to pay. CP 1788. Lee and Smith dismissed their assigned claims against Huh with prejudice. CP 226. Instead of entering judgment against Day (there was no need), the “matter [having] been fully settled and compromised,” Smith and Lee dismissed *all* of their claims *with prejudice* on October 12, 2011. CP 622. As of that date, the Smith and Lee lawsuit against Day had concluded forever, with her paying nothing, no judgment having been entered against

her, and no future obligations that could ever mature. In every sense, both legal and factual, the case against her was over and her liability had been compromised, paid, and discharged. *Id.*

Day proceeded on her bad faith counterclaims. She unsuccessfully moved for summary judgment that Enumclaw had violated its alleged obligation to investigate and keep her informed of developments related to her own reformation claim. CP 316, 594. Enumclaw objected that there was no bad faith, but regardless, she could not have been damaged by judgments that not only had never been entered, but that represented obligations that had been fully satisfied and forever discharged by the settlement with Huh. CP 535. Day's attorney had previously brought proposed judgments *against his client* to an oral argument to have the trial court enter them.² CP 245. Importantly: that suit against SIG had already been dismissed with prejudice, her liability discharged by settlement and payment, and *no one* other than Day and her lawyer wanted the judgments. Enumclaw objected strenuously to this tactic, and Judge Arend correctly declined to enter them.

But having judgment entered against herself was important to Day and her attorney, so they tried again when Judge Arend was reassigned.

² Day's attorney's justification has been that the judgments were *not* harmful: "Day's lawyers are simply trying to protect their client by having judgment entered [against her] ..." CP 581.

This time, she first orchestrated a Motion to set aside the Order of Dismissal with Prejudice that had ended the claims against her. CP 625. The court acquiesced to setting aside the Order of Dismissal, since Day and Lee and Smith all agreed to it. CP 704. Then Day successfully consolidated the Lee and Smith case with the coverage case. CP 603. Next, she urged the court to conduct a reasonableness hearing (to “establish” an amount to which Enumclaw had already stipulated³), and her attorney again demanded the court enter judgments against his client. CP 801. Over Enumclaw’s objection, the court did so. CP 1045, 1048.

Before the bad faith trial commenced, Day moved *in limine* to exclude evidence of how the case was actually resolved, including all facts related to the lead-up to the settlement, and the details of it. CP 1387. She asked the Court to focus exclusively on Enumclaw’s investigation of her reformation claim, and the insurer’s communication with her on that issue, arguing that how the claim was resolved was irrelevant. *Id.* Enumclaw objected that this would not allow the jury to understand the investigation in the context of the entire case, but the trial court granted that motion. RP 11/17/14, p. 8.

At trial, Enumclaw was prevented from offering any evidence of

³ The intention of conducting a reasonableness hearing had nothing *at all* to do with Enumclaw: SIG’s lawyer confirmed this: “Any reasonableness hearing the plaintiffs bring will be adverse to Michael Hub and his insurer, *not MOE.*” CP 258. (Emphasis added).

the proper legal standards that apply to a reformation claim, that were the standards that legally governed Enumclaw's evaluation of the claim as it was being handled: namely that reformation requires a *mutual* mistake, and it is the *reformer's* burden to prove it by clear and convincing evidence. *See Appendix C*. The trial court refused to instruct the jury on that issue, as well, even though it allowed Day's claims handling expert to assert an incorrect and much lower standard, based on "agent error." RP 12/3/14 p. 19, 54, 57-58, 62, 11/24/14, p. 146-147.

Enumclaw also attempted to present evidence that even if there had been any claims handling bad faith, it was unrelated to liability ultimately imposed on SIG (CP 1915), and that in any event, *no* such liability *had* been imposed (CP 1478-1481). The trial court ruled the evidence irrelevant, and excluded it. RP 11/17/14, p. 8.

Based on limited evidence, the jury determined that Enumclaw had failed to investigate SIG's reformation claim in good faith, and awarded \$300,000 in emotional distress damages. CP 1675. Day moved for a determination that the verdict created a presumption that the Lee and Smith judgments against her were caused by bad faith, and that Enumclaw was liable *to her* for the amount of those judgments plus interest: ***\$10,160,366.14***. CP 1766. That reflected the amount that would have been reasonable for her to compensate *her victims*. It *is not* an amount she paid

them, or will *ever* have to pay them, because she has a complete release. However, the trial court used Lee and Smith's damages as a proxy for SIG's damages, and awarded that amount. On Day's motion (CP 1956), the court also trebled the emotional distress award to total \$900,000 under the Insurance Fair Conduct Act. CP 2127.

Post-verdict the court finally addressed SIG's reformation argument, which was an equitable claim. The court applied the correct "clear and convincing evidence" standard, ruled that SIG had *failed* to prove reformation, and that the policy must stand as written; there was never any liquor liability coverage at all – no duty to defend, and no duty to indemnify. CP 2153. From these orders and judgment against it, Enumclaw timely appealed.

IV. Argument

1. Summary of the Argument

The most important facts in this case are: 1) The trial court found no coverage for any of SIG's liability, no duty to defend, no duty to indemnify. 2) SIG has acknowledged there was nothing wrong with the defense Enumclaw provided, which was "a benefit, without question, to her." RP 11/24/14 p. 138. 3) Enumclaw followed the proper path of defending under a reservation and bringing a declaratory judgment action to resolve its coverage obligation. 4) Day's potential liability to Smith and

Lee had come to an end – a strong form release and dismissal with prejudice. 5) Day herself is the one who undid that dismissal and entered the phantom, meaningless judgments against herself. Now she claims that she is “harmed” by those judgments and should receive, herself, their face value, although *the injured parties* have settled, been compensated, and have entirely released her. This is nothing but gamesmanship, which is not new in insurance law:

What we have here, at bottom, is an effort by Aguerre to concoct a bad faith claim out of whole cloth, or, by collusion between the claimants and the insured, with the “ingenious assistance of counsel.” In return for its alleged commitment to pay Kerstens \$25,000, Aguerre has attempted to position itself to pursue a high stakes, bad faith case, seeking punitive damages, from which it hopes to emerge not only with the Kersten claim disposed of at no cost to Aguerre, but a profit as well in the form of damages recovered from Zurich.

Bad faith litigation is not a game, where insureds are free to manufacture claims for recovery. Every judgment against an insurer potentially increases the amounts that other citizens must pay for their insurance premiums.

J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co., 59 Cal.App.4th 6 (1997)
(citation omitted)

Bad faith litigation is no more a game in Washington than it is in California, and the Court should not countenance Day’s efforts to manufacture harm to herself. It is not real, and it is not harmful, except to the other citizens who must pay for it in their insurance premiums.

In this brief, Enumclaw will show that the kind of bad faith claims

handling alleged by SIG does not result in a presumption of harm or coverage by estoppel. Enumclaw will then argue that the trial court erred in entering moot phantom judgments against Day, and that the evidentiary errors and jury instructions mandate a reversal as well. Finally, Enumclaw will show that emotional harm is not subject to the Insurance Fair Conduct Act's treble damages provision. Enumclaw respectfully requests that the Court reverse the \$11,165,306.14 judgment against it.

2. *Standards of Review*

The following issues are subject to *de novo* review:

Whether the court had jurisdiction to enter moot judgments against SIG. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn. 2d 272, 276, 333 P.3d 380 (2014).

Whether a presumption of harm and coverage by estoppel were applicable to this case. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 127, 196 P.3d 664 (2008) (resolving this issue as a matter of law).

Whether, as a matter of statutory interpretation, the RCW 48.30.015 can be applied to multiply damages for emotional distress. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

The following issues are subject to review for abuse of discretion:

The failure to give jury instructions. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

Evidentiary rulings. *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 259, 11 P.3d 883 (2000).

3. *The trial court erred by imposing coverage by estoppel.*

Even if the Court were to affirm the jury's finding of bad faith

claims handling (which it should not), the facts of this case do not support a presumption of harm or coverage by estoppel. Although coverage by estoppel is a recognized remedy in certain types of bad faith cases, it is equally well-established that it *is not* in others. The kind of bad faith Day accuses Enumclaw of in this case – an alleged procedural failure to promptly investigate her claim for reformation and promptly communicate with her about that investigation – does not trigger the policy concerns that have led courts to apply the remedies of presumed harm and estoppel. Where those concerns are not present, those remedies are not available. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122. Here, the facts do not support estoppel, and the Court should reverse the trial court’s determination to the contrary.

Coverage by estoppel sets the insured’s damages against an insurer equal to the damages the insured is legally obligated to pay a third party. The principle is that because liability insurance is supposed to protect the insured against liability, if the insurer wrongfully acts in a way that *could increase* the insured’s uncovered liability, the insurer is bound to the judgment against the insured by estoppel. *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). In Washington, this remedy was first developed and applied in the context of bad faith “failure to settle” cases. It was later expanded to a second type of bad faith: the

failure to provide an adequate defense to the insured, either by not defending at all, or by providing a tainted defense that surreptitiously undermines the insured's *coverage* position. Below, this brief will address the legal predicates to impose coverage by estoppel in each of these contexts, then show that the facts here cannot support such a judgment.

a. Coverage by estoppel for failure to settle within policy limits is not appropriate in this case.

In *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952), the insurer refused to settle a case within policy limits, hoping the verdict against the insured would be less than that, but knowing that its policy limits protected it from any downside. The insurer was held bound by the excess judgment. If an insurer unreasonably misses an opportunity to settle the case within limits, then the insurer is liable for the excess judgment. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002). "Failure to settle" bad faith is a narrow doctrine, tailored to a narrow issue. Although Day had alleged a "failure to settle" claim, she expressly and tactically abandoned it before the trial of this case began. CP 1387. Failure to settle is not an issue in the case at bar.

b. Coverage by estoppel for unreasonably failing to defend is not appropriate in this case.

A second type of bad faith that can result in estoppel is where the insurer unreasonably fails to defend. The defense obligation is triggered at

the time a complaint is filed against the insured by any allegation which, if proven, could conceivably come within the scope of the policy. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007). The duty to indemnify applies only to established liability *actually* covered by the policy. *Id.* Unless it is clear from the complaint that there is no coverage, the insurer must defend; if it does not, it commits bad faith and will be estopped from denying coverage (*Id.*); in the case at bar, Enumclaw provided a comprehensive, fully-funded defense to SIG, so this variety of bad faith estoppel is inapplicable here.

c. *Coverage by estoppel for providing a defective defense is not applicable to this case.*

An insurer can also be estopped when it provides a defense in bad faith. Where there is a duty to defend but indemnification coverage is debatable, the proper course is for the insurer to defend, informing the insured that it is reserving its rights not to pay a judgment outside of policy coverage.⁴ *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010). The archetypal case of this nature is where Insured “I” injured Victim “V”, and V sues, alleging both negligent and intentional behavior. A typical liability insurance policy might provide coverage for negligent acts, but exclude intentional ones. Since it is

⁴ Enumclaw’s provision of a defense, reserving its rights, and bringing a declaratory judgment action for a determination of coverage in this case is exactly the course of action proscribed by *Am. Best Food, Inc.* 168 Wn.2d 398.

conceivable under the complaint that there could be liability for a covered act, the insurer should provide a defense under a reservation. The insurer may bring a declaratory judgment action for a judicial determination of its obligations under the policy. *Woo*, 176 Wn.2d 872, 879. “By providing that defense, the insurer avoids breaching its duty to defend, but preserves its right to challenge coverage.” *Id.*

In this setting, courts have recognized the potential for a conflict of interest. When an insurer provides a defense, but reserves its right not to pay a judgment if facts established in the Victim v. Insured case show the judgment was outside of policy coverage, the insurer and the insured have a conflict of interest in *how that defense is structured*. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 384, 715 P.2d 1133 (1986) recited the insured’s argument, where the reservation was based on the textbook negligent / intentional injury schism: “. . . State Farm [could have] subordinated Tank’s interests to its own interests by structuring a defense which would absolve State Farm of liability under Tank’s insurance policy.” An insurer that structures the insured’s defense in order to direct liability into the “not-covered” bucket negates the policy benefits of the defense and indemnification. In order to protect the insured, the *Tank* court created a list of obligations an insurer has any time it provides a

defense that has potential to be corrupted by a reservation of rights.⁵

Bad faith based on a *Tank* violation is a tort, and the insured generally must prove duty, breach of duty, and damages proximately caused it. *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593, 595 (2005). Harm to the insured is an essential element of every bad faith claim. *Id.* However, when the insurer violates a *Tank* obligation, courts have recognized that the insured will face an “almost impossible” burden in showing the corrupt defense proximately caused harm. As a policy matter, once the insured has proven a violation of the *Tank* obligations in a conflicted reservation of rights setting, there is a rebuttable presumption of harm (causation), and coverage by estoppel. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992).

- i. *Some kinds of bad faith do not implicate a presumption of harm or coverage by estoppel; this is one of them.*

The facts of this case neither mandate nor permit a presumption of

⁵ These are: “First, the company must thoroughly investigate the cause of the insured’s accident and the nature and severity of the plaintiff’s injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation of rights defense itself, but of *all* developments relevant to his policy coverage and the progress of his lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk.”

Tank v. State Farm Fire & Cas. Co., 105 Wn. 2d at 388.

harm or estoppel, firstly because there was no bad faith, but equally because these would be the wrong remedies. Below, SIG successfully but erroneously argued that *Butler* mandated that *any* kind of bad faith automatically entitles an insured to both a presumption of harm and coverage by estoppel. While this proposition possesses the allure of being simple to apply, it is incorrect. Cases subsequent to *Butler* have made it clear that while bad faith *can* result in a presumption and estoppel, the nature of the potential harm facing the insured in particular circumstances governs the application of these remedies. Enumclaw begins this section by showing that, despite overly broad dicta, there is no automatic estoppel for every kind of bad faith. Next, Enumclaw will examine two cases, *Coventry* and *Onvia*, both of which rejected a presumption and estoppel. Finally, Enumclaw will show the principles of bad faith insurance law do not support a presumption of harm or estoppel in the case at bar.

ii. *Despite overly broad language in Butler, a presumption of harm and estoppel are not automatic remedies in every case of bad faith.*

Superficially, the proposition that a presumption of harm and estoppel invariably follow bad faith enjoys support in an incautiously written portion of *Butler*; Day wields it like a cudgel, so it deserves a very careful look:

[W]e presume prejudice in *any* case in which the insurer acted in

bad faith. . . [i]f the insured prevails on the bad faith claim, the insurer is estopped from denying coverage.”

Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d at 391-394 (emphasis added).

For ease of reference this will be referred to as the Butler Absolute Estoppel rule, because that case cast it in absolute terms. Indeed, the subsequent case of *Besel v. Viking* applied it in exactly that sense:

The principles in *Butler* do not depend on how an insurer acted in bad faith. Rather, the principles apply whenever an insurer acts in bad faith. . . .

Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d at 737.

This paragraph from *Besel* contains the most expansive reported recitation of the Butler Absolute Estoppel rule, which was necessarily rejected by subsequent cases *finding* bad faith but *refusing* to impose a presumption of harm or estoppel. Among these are *Coventry*, in which the insurer committed bad faith by failing to investigate the insured’s claim, but was *not* subject to a presumption or estoppel, and *Onvia*, in which the insurer committed procedural bad faith by failing to investigate or respond to an insured’s tender of defense, but was *not* subject to *Butler* remedies. To understand how *Coventry* and *Onvia* bad faith is distinguishable from *Butler* bad faith (and why this case is more like the first two), it is important to begin with a firm understanding of *Butler*.

iii. *The Butler decision.*

Hap Butler, insured by Safeco, chased down and shot at kids that had blown up his mailbox. *Butler*, 118 Wn.2d 383. He hit one of the kids, Zenker, in the head. *Id.* Zenker sued Butler, who tendered the claim to Safeco. Safeco provided a lawyer to defend, and reserved its right not to indemnify for intentional conduct – the ubiquitous negligent/intentional dichotomy. *Id.* Eventually, Zenker and Butler settled the case by a covenant judgment. Butler agreed to allow a stipulated judgment to be entered against him for \$3 million and to give Zenker an assignment of Butler’s rights against Safeco. *Id.* In exchange, Zenker covenanted not to execute that judgment against any asset other than Butler’s insurance policy. *Id.* Zenker asserted Butler’s bad faith claim against Safeco, alleging a violation of the *Tank* rules. *Id.* Zenker did this in hopes of recovering the reasonable amount of the stipulated judgment to compensate him for his own bodily injuries.

The Court ruled the appropriate remedy would be a presumption and estoppel, measured by the \$3 million covenant judgment. *Id.* In that context, the Court scribed the Butler Absolute Estoppel language, stating that a presumption of harm and estoppel apply *any* time an insurer acts in bad faith. *Id.*

- iv. *The presumption of harm and estoppel do not apply any time an insurer acts in bad faith, contrary to Butler.*

The first post-*Butler* case that abandoned the Butler Absolute Estoppel rule was *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269. There, the insured made a claim for mudslide damage to its own building. The insurer admitted to having investigated the claim in bad faith; it had not performed the necessary investigation to determine if the cause of the damage was excluded before denying. Ultimately, after the insured had performed its own investigation, it became clear there was no coverage. *Id.* The insured asserted that the bad faith created a presumption and estopped American States from denial, citing the Butler Absolute Estoppel rule. *Id.* *Coventry* brushed aside *both* prongs of *Butler*, holding that the presumption does *not* apply to first party cases because there is no duty to defend or potential conflict of interest, and that estoppel is the *wrong* remedy, because bad faith in a first-party claim does not contribute to the insured's loss. Thus, contrary to *Besel's* dicta, the principles in *Butler* certainly *do* depend on the kind of bad faith. That distinction was subsequently honored in the third-party case of *Onvia*, discussed below.

v. *Under Onvia, the insured must prove causation in the usual way, and is not entitled to estoppel.*

In the case of *Onvia*, the Court was presented with a certified question, which the Supreme Court distilled and answered as follows:

[T]he insurer did not act in bad faith in refusing to defend, settle,

or indemnify its insured on a third-party liability claim. The issue then is whether an insured may pursue common law bad faith and CPA claims based solely on procedural missteps by the insurer in handling the claim, once a court has determined that the insurer breached no duty to defend, settle, or indemnify the insured. *We hold that, while such claims are viable, the insured in this circumstance is not entitled to a presumption of harm or coverage by estoppel, but must prove all elements of the claim, including actual damages.*

St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,
165 Wn.2d at 126, (emphasis added).

Onvia, insured by St. Paul, was sued in a class action for illegal “fax blasting.” *Id.* Onvia tendered this third-party liability claim to St. Paul. St. Paul did not respond to the tender for *nine months*, during which time Onvia was funding its own defense. *Id.* When St. Paul did respond, it denied the claim. Shortly thereafter, Onvia stipulated to class certification, and settled with the class for a \$17.5 million stipulated judgment, along with a covenant not to execute against any asset other than the St. Paul policy, and an assignment of Onvia’s rights against St. Paul. *Id.* It was a classic covenant judgment action where the injured plaintiff seeks recovery from the insurer via the assignment of rights vehicle. *Id.*

The trial court determined that there was no coverage for the class’s claims, and that St. Paul’s denial was not made in bad faith other than St. Paul’s bad faith failure to reasonably investigate and communicate with Onvia. *Id.* The certified question inquired whether these bad faith

claims-handling practices should lead to a presumption of harm and coverage by estoppel for the \$17.5 million judgment. *Id.* The Supreme Court ruled that it should not; the insured must prove actual harm and damages. *Id.* at 133. Thus the class was not entitled to the \$17.5 million judgment against St. Paul. *Id.*

Because *Coventry* had distinguished *Butler* with respect to the presumption of harm and estoppel primarily on the basis that bad faith in handling a *first-party* claim could not cause the kind of harm that estoppel was designed to remedy, it was not clear, prior to *Onvia*, if the *Coventry* reasoning would apply in the *third-party liability insurance* context; indeed, the injured class in *Onvia* made a \$17.5 million losing bet that *Butler Absolute Estoppel* applied to every third-party case. But *Onvia* shattered the logic on which the class had wagered by seeing past the first-party/third-party distinction and considering whether the particular kind of bad faith *could* inflict the kind of harm to the insured that *Butler* estoppel sought to ameliorate.

In *Onvia*, the Court noted the insurer's abject failure to investigate coverage for the liability claim and communicate with the insured for nine months. In rejecting the presumption and estoppel remedies, the Court relied on the *Coventry* logic that a presumption is not appropriate where the "potential conflicts of interest between the insured and the insurer"

have no relationship to the insured's defense. Where that potential does not exist, there is no presumption of harm. *Coventry Associates v. Am. States Ins. Co.*, 136 Wn.2d 269. Just as in *Coventry*, estoppel was not appropriate because the insurer did not contribute to the insured's loss by failing to fulfill its obligations. *Onvia, Inc.*, 165 Wn.2d 122.

vi. *Under Onvia, no presumption of harm arose in this case.*

In this case, SIG was erroneously granted a presumption of harm based on bad faith found by the (incorrectly informed) jury. Although Enumclaw provided a "reservation of rights" defense, it was not based on the archetypal scenario where indemnity coverage depended upon how the underlying case against the insured turned out. Here, at the time of tender, the coverage die had been cast *six years* earlier, when Day procured the Enumclaw policy through Huh. Whatever Day and Huh agreed to when she bought that policy was entirely unrelated to her liability for the profound injuries she was alleged to have caused by selling alcohol to a minor. Everyone agrees that if the policy were not reformed, it would provide no coverage; conversely, if it were reformed, it would have provided coverage without exclusion up to policy limits. The coverage facts were factually and legally discrete from the underlying claims.

This conceptual isolation in the case at bar distinguishes it from *Butler* and mandates the application of the *Onvia* rule: the insured must

prove that the insurer caused the damages it seeks. The presumption in *Butler* addressed a conflict of interest situation where the insurer corrupted the insured's defense in potentially unquantifiable ways in order to improve its coverage position. Here there was *no* conflict of interest in the defense (nor has Day suggested there was one⁶), despite the fact that it was being provided under a reservation.⁷ The reason *Butler* created special remedies applicable to reservation of rights defenses is that "the potential conflicts of interest between insurer and insured inherent in *this type of defense* mandate an even higher standard." *Tank*, 105 Wn.2d at 387. But where the defense does not suffer from a conflict of interest, the *Butler* presumption does not apply. *Onvia, Inc.*, 165 Wn.2d 122. Just as true in *Onvia*, Enumclaw was not alleged to have acted in bad faith by refusing to defend, settle, or indemnify. Day was provided with a conflict-free defense, the coverage conflict remaining entirely isolated, just as it was in *Onvia*. No case has ever imposed a presumption of harm in a reservation of rights case where the coverage issue that could create a "conflict of interests" was unrelated to any aspect of how the defense would be structured. Doing so would separate the remedy from the reason for its creation.

⁶ In fact, her claims handling expert testified, "There is *nothing adversarial* about a claims investigation." RP 11-24-14, p. 122.

⁷ MR. KILPATRICK: "Your Honor, we have made no allegation about them defending, so we're just getting awfully far afield. It's just not germane." RP 12-20-14, p. 63.

vii. Under *Onvia*, estoppel was an inappropriate remedy.

The second aspect of the *Butler* remedy, binding the insurer to the judgment against the insured by estoppel, establishes the measure of harm. The *Butler* rationale for applying estoppel as a remedy for a corrupted defense does not apply, however, where the alleged bad faith *does not* implicate the defense. *Onvia, Inc.*, 165 Wn.2d 122. It is important to keep in mind exactly what claims of bad faith Day tried to the jury: that Enumclaw failed to adequately investigate her *unmeritorious* claim that her policy should be reformed, and failed to adequately communicate with her regarding that investigation. The bad faith that Enumclaw was accused of in the case at bar was at the same claims processing stage as the bad faith St. Paul was accused of in *Onvia*; failure to adequately investigate whether the insured was entitled to coverage and failure to communicate with the insured regarding its coverage investigation.

Another significant similarity is that the insured was *not* entitled to coverage in either *Onvia* or in this case. The difference is that here, Enumclaw *did not* wait nine months to respond to SIG. Enumclaw immediately provided a defense entirely aligned with her interests, immediately informed SIG (correctly) that its policy excluded liability for any judgment, and began a declaratory judgment action for a judicial determination of whether the policy issued to her excluded liquor liability.

None of those things had the potential to impact Day's liability to Smith or Lee because they had nothing to do with Day's defense. *None* of these things put Day in a worse position than if Enumclaw had denied the defense entirely, as happened in *Onvia*.

On the other hand, *Butler* coverage by estoppel was crafted to address bad faith that *does* have the potential to impact the liability case against the insured. This aspect of *Butler* estoppel was explained in more detail in *Coventry*:

We hold coverage by estoppel in the first-party context is not the appropriate remedy. . . . In third-party reservation of rights cases, though, coverage by estoppel is an appropriate remedy ***because the insurer contributes to the insured's loss by failing to fulfill its obligation in some way***. This contribution to loss is particularly true ***when acts of the insurer have led the insured to believe it is covered under the terms of the policy***. See 1 WINDT, supra, §§ 2.03, 2.05 (insurer's breach of its duty to investigate ***should not*** result in the insurer being estopped from denying coverage). This difference between third-party cases and first-party cases warrants different remedies.

Coventry Associates, 136 Wn.2d at 284 (emphasis added)

Butler espoused the estoppel remedy because where the insurer contributes to causing the insured's liability by providing a corrupted defense, as a matter of policy, the insurer must own the results of that corrupted defense. *Coventry* used the first-party/third-party distinction as a convenient shorthand, highlighting the difference between bad faith that inheres in the claims process versus bad faith that *augments* the loss faced

by the insured; *Onvia* makes it clear that this is not, properly framed, a first-party/third-party distinction, because procedural claims handling bad faith in the third-party context *also* does not contribute to the insured's loss (liability to a third party). Here, just as in *Coventry* and *Onvia* (but unlike in *Butler*), nothing of what Day alleged had the potential to corrupt her defense by steering her liability away from a covered judgment. Just as in *Coventry* and *Onvia*, estoppel was the wrong remedy, and this Court should reverse the estoppel-based judgment against Enumclaw.

4. *Covenant judgments are the recognized measure of harm only because they represent the amount the insured is obligated to pay the injured party; without that obligation, they measure nothing.*

The trial court held that Enumclaw was liable *to Day* for the \$10 million stipulated judgments against her in favor of Lee and Smith, despite the fact that she owes them nothing. Those judgments are unrecognizable as any kind of legal obligation, they were satisfied before they were filed, and the *only* reason that they exist at all is because Day moved the court to set aside the dismissal with prejudice of those claims and enter judgment against herself.

Where appropriate, the application of coverage by estoppel is not mechanically difficult to measure when a litigated judgment is entered against the insured. The value of the claim against the insurer *is* the value of the judgment against the insured; the insured owes that amount, and the

only way to discharge that debt is for the insurer to pay it to the injured party. There are, however, many circumstances under which the case against the insured should be settled rather than tried, and where the only asset of the insured worth pursuing is the insured's cause of action against its insurer. In those circumstances, the tort victim and the insured have explored various methods of replicating a litigated judgment that results in a "sum which the insured is legally obligated to pay. . ." (the usual obligation of an insurer under a liability insurance policy, including Day's (CP 142)), while guaranteeing that the tort victim will look exclusively to the insurer to pay the amount.

This generally takes the shape of a *Butler*-style covenant judgment. Insurers, including Safeco in *Butler*, have advanced the argument that once the tort victim covenants not to execute, the insured will never have to pay, is no longer effectively liable, and the "harm" element in the cause of action that was assigned to the tort victim vanished along with the covenant. Courts have considered this "somewhat metaphysical contention" (*Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1132-33 (D.C. Cir. 1989), and the majority of them, including those in Washington, have rejected it. *Butler*, 118 Wn.2d 383.

No court has ever considered, however, a case where the covenant judgment against the insured was directed toward a defendant *other* than

the insurer, the “judgment” was satisfied before it was entered, and was entered only because the insured petitioned the court to enter it against herself. No court has considered a case where the insured argues that *the insured* should be entitled to receive the value of the “judgment” even though she has been completely exonerated, having paid nothing, and has no obligation to pay that amount to the people she injured. There is no case anywhere in which the stipulated judgment did not accompany an assignment of rights against the insurer. Existing jurisprudence takes Day nowhere close to the result she seeks.

Day’s argument is that hers is a covenant judgment, just like those in *Butler* and *Besel*, and the fact that she did not assign her rights to her victims is immaterial; her rhetoric has been that if the insured does not own the right to collect the judgment amount from the insurer, it would have had nothing to assign to the tort victims in cases like *Butler*. What Day’s argument misses is that *nothing* turns on the assignability of the cause of action. It *does* matter that she is demanding that Enumclaw pay *her* instead of her victims, though, because it reflects the fact that her debts to Smith and Lee were forever legally extinguished as soon as Smith and Lee received payment by settling their assigned claims with Huh.

In order to more fully understand why this covenant judgment does not harm Day, even though the covenant judgments in *Butler* and *Besel*

were found to harm the insured, it is important to follow the reasoning in those cases. In *Butler*, followed by *Besel*, the Court rejected the insurers' argument that the covenant judgment did not harm the insured: First, it is a real judgment of record, which has the potential to hurt the insured's credit, reputation, and business. Second:

[T]his type of agreement is not a release from liability. Instead, it is an agreement to seek recovery only from a specific asset -- the proceeds of the insurance policy and the rights owed by the insurer to the insured.

Butler, 118 Wn.2d at 399.

The facts of this case are entirely different, and neither of these two factors is present to dignify the judgments. First, there were no judgments against Day at all, much less one that could hurt her credit, until she actively petitioned the trial court to enter them, two and a half *years* after the case against her had been dismissed with prejudice. Second, pursuant to the settlement agreement and Lee and Smith's payment from Enumclaw and Huh, Day *did* have a *complete release*. Each of these consideration is separately addressed below.

a. *There was no cognizable harm to credit or reputation.*

Day's attorney, after two attempts, "successfully" achieved the appearance of harming his client by having these multi-million dollar judgments entered against her, replacing the Final Order of Dismissal with

Prejudice.⁸ An insured's attorney ought not be allowed to manufacture a judgment against his client that did not previously exist, for the express and solitary purpose of proving that the insurer caused harm, and then hold the insurer liable for harm to her credit and reputation as a result. But aside from that, the *reason* that measuring the insured's harm by reference to a covenant judgment can be rational in the first place is that forcing the insurer to pay that amount to the judgment creditor (in this case Smith and Lee) will *satisfy* the judgment of record, by compensating the injured parties for the loss. The insurer is forced to make the judgment go away.

But in the case at bar, what Day sought, and what was erroneously awarded by the trial court, could not achieve that result. The judgments were satisfied by Huh's payment before entry, and the only step remaining for Day to officially satisfy them on the judgment roles is to enter the satisfaction she has in her possession.⁹ The threat that these judgments could damage her credit is not only a problem of her own making, it is one solved, at any time of her choosing, by her election to enter the satisfaction to which she is entitled.

⁸ The motion to set aside the dismissal with prejudice well after the one-year period for vacating a final order under CR 60 had lapsed. CP 622 ,625. Enumclaw could find no cases in which a defendant moved to set aside a dismissal with prejudice in order to enter a judgment against itself, but the impropriety of such "relief" under CR 60 is palpable, and highlights the strict sense in which Day manufactured the harm she claims to have suffered.

⁹ A judgment that cannot be satisfied should not be entered in the first place, because the case is moot, about which more shortly.

b. *Day is not "protected by a covenant;" her liability has been discharged by an absolute release.*

The second reason that *Butler* identifies as to why a covenant judgment harms the insured is that it does *not* release the insured from liability; "it is an agreement to seek recovery only from a specific asset -- the proceeds of the insurance policy and the rights owed by the insurer to the insured." *Butler, supra at 399*. Thus, covenant judgments are not releases, and the insured remains fully liable to the tort victim, albeit liable with asset protection.

In this case, there is *no* sense in which Day remains liable to Smith or Lee, who got *everything* to which they were entitled under the settlement agreement – Enumclaw paid \$125,000.00, they got an assignment of Day's rights against Huh, and they executed on those rights to achieve the \$600,000 settlement.¹⁰ Pursuant to that agreement, once they had settled the claim against Huh, they were obligated to give Day a full satisfaction of the covenant judgments (that Smith and Lee never actually entered). Similarly, Day got everything she was entitled to from the settlement agreement – namely, the dismissal of all claims against her with prejudice, forever, period. There are no further obligations under the settlement agreement, and the settlement agreement ensures that there

¹⁰ In total, the victims collected \$4,137,500 from the at-fault drivers and SIG (through Enumclaw's \$125,000 and \$600,000 from the assignment against Huh.). CP 755. This puts the \$12 million judgment, in favor of the instrument of that harm, in some relief.

could be no further obligations under any judgment, because Day has the right to officially satisfy it at will. This is nothing like a *Butler* covenant judgment where the insured remains fully liable, with execution restricted to a particular asset. Money cannot make Day's fictitious liability here go away because the Smith and Lee judgments do not require the payment of money. *Butler* honored the intention of the settlement agreement not to release the insured from liability; the Court should honor the settlement agreement in the same way in the case at bar, reaching the opposite result.

It bears noting that this is not a case of the insurer attempting a "gotcha" by arguing that the release and the assignment were executed in the wrong order, or the covenant was missing a comma, so the injured victim gets nothing, in contravention of the intention of the settlement. Enumclaw is not making a metaphysical contention that a technical nicety should cut off liability against the insured and thus exonerate Enumclaw. Rather, Enumclaw asserts that where the insured's obligation to pay the tort victim has been intentionally, entirely settled and extinguished by payments of hundreds of thousands of dollars, the insured is not entitled to claim that she has been harmed by an amount that she will never have to pay, and put that money into her own pocket, *free and clear* of any claim by the people she injured. That is not "equitable estoppel;" that is a multimillion dollar windfall.

5. *A judgment that is legally and absolutely unenforceable does not constitute "harm."*

Division One of this Court recognized a similar distinction from *Butler* in *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804. There, Warner, caused a car accident that killed Werlinger. Werlinger's estate sued Warner, but Warner filed for bankruptcy protection. Werlinger sought, and obtained, relief from the bankruptcy stay for the purpose of pursuing Warner for damages covered by Warner's insurer, Clarendon. *Id.* Clarendon accepted Warner's tender, and provided a defense. Although Clarendon's policy limits were \$25,000, Werlinger settled with Warner for a covenant judgment of \$5 million, and an assignment against Clarendon. *Id.* Clarendon paid its \$25,000 limits, but Werlinger pursued the insurer for bad faith. The trial court dismissed Werlinger's claims citing lack of any harm to Warner from the alleged bad faith, because Warner was personally insulated by bankruptcy protection. Werlinger appealed. *Id.*

Division One affirmed. "The Warners 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. *Werlinger* controls the case at bar. This is not a *Butler* or *Besel* situation where a covenant protects some of the insured's assets from an otherwise live judgment. Here, even giving no weight to the fact that Day's liability had been dismissed with prejudice

before she voluntarily moved to re-open the case, the settlement agreement provides Day absolute absolution by providing for satisfaction of the judgments. Just as was true for Werlinger's estate, it is legally impossible that Day's victims will ever be able to execute or pursue *any other right* under the judgments. Under Washington law, covenants that protect an insured's non-insurance assets do not negate the claim that an insured has been harmed by that judgment; absolute legal barriers to enforcement, however, do. *Werlinger* negates the possibility that Day was harmed by the judgments she had entered against herself. The Court should reverse the Judgment of the trial court.

6. *The trial court erred by re-opening the dismissed case and entering the Smith and Lee Judgments.*

Pursuant to Washington law, courts lose jurisdiction of a case if the dispute between the litigants becomes moot. *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592, 191 P.3d 1282 (2008). A case becomes moot once it has been:

deprived of its practical significance or becomes purely academic. The term "moot" has variously been applied to include cases concerning an abstract question not resting on existing facts, cases in which the rights have expired due to lapse of time, cases in which no judgment rendered could be put into effect, and cases seeking an advisory decision.

In re Marriage of Irwin, 64 Wn. App. 38, 59, 822 P.2d 797 (1992).

In the case at bar, the dispute between Day and Lee and Smith was

over. It had been dismissed with prejudice, and because of the protective covenant, the only avenue along which the inchoate, contemplated “judgment” could have been executed was Day’s rights against her agent, Huh. Smith and Lee settled *those* assigned rights, and dismissed Day’s claims against Huh with prejudice.

The trial court incorrectly entered the judgments against Day, even though there was nothing against which Lee or Smith could execute. This is a classic situation where the case has been deprived of its practical significance: “no judgment rendered could be put into effect.” *Id.* The case against SIG was over; all remedies among them had been fully and finally exhausted *two and a half years earlier*. That case was moot, and the court no longer had jurisdiction to enter a “Judgment.” *Id.*

A similar scenario was presented in the case of *Harbor Lands LP v. City of Blaine*, 146 Wn. App. at 593-94. There, the City of Blaine issued stop work orders to a developer during its construction of condominiums. The developer went through an administrative appeal, and ultimately challenged the City Counsel’s resolution of the issue in Superior Court. The developer also sued the city of Blaine in a separate lawsuit, which the City removed to Federal Court. While those cases were pending, the stop work orders were lifted, and the construction completed. *Id.* Nevertheless, and in spite of the fact that the State Court could offer them no further

remedy, both parties continued angling to use the State Court's resolution of the administrative appeal to further their positions in the Federal lawsuit, seeking a State Court Judgment for issue preclusion. *Id.* The State Court entered Judgment, in spite of *sua sponte* concerns about mootness. The City later regretted the Judgment, and appealed. *Id.*

The Court of Appeals dispatched the case definitively:

The hypothetical preclusive effect of a trial court judgment upon issues raised in a separate lawsuit does not constitute a cognizable legal right, preventing a case from becoming moot. This case was moot at the time the superior court entered judgment. Accordingly, we vacate that judgment and remand the cause to the superior court with directions to enter an order of dismissal with prejudice.

Id. at 591

The court noted that the sole basis on which the developer argued that the case was not moot was its status as a litigant in the federal court suit. *Id.* The same is true in the present matter. The only possible argument that the Day versus Smith and Lee case is not moot is that entering Judgment would have a preclusive effect against Enumclaw in the coverage case. *Harbor Lands* rejects that approach. The court explained that it was "not surprising" that there was no authority to support continuing jurisdiction on the basis that the outcome would have an effect on a parallel lawsuit, because the opposite position, "amounts to nothing more than a request that we issue a purely advisory opinion, instructing another court how to rule." *Id.*

The *Harbor Lands* court was neither ambiguous nor dispassionate about its ruling:

Rather, the parties, being fully cognizant that the superior court's judgment requires neither of them to do anything, pay anything, or refrain from doing or paying anything, have nonetheless continued to litigate in a quest to secure a favorable judgment that may then be used to preclude adjudication of the controversy in the federal court. Such tactics are a misuse of the state court system and an abuse of the citizens whose tax payments fund our courts.

Id. at 593-594 (emphasis added).

The same abusive tactics are at play here. The "judgments" Day demanded to have entered against herself could never require her to do anything, pay anything, or refrain from doing or paying anything. Seeking such "relief" was, by itself, a misuse and abuse of the court system that this Court need not, and should not tolerate. *Id.* The Court should vacate the Smith and Lee judgments and remand with instructions to re-dismiss the Smith and Lee lawsuit with prejudice.

7. *Even if the Court were to rule that Day was entitled to enter judgment against herself, and that she was entitled to a presumption of harm, Enumclaw was wrongly deprived of the opportunity to present evidence rebutting that presumption.*

In the case at bar, Enumclaw was erroneously prohibited from introducing any evidence to rebut the presumption of harm that the trial court had imposed. The caselaw that establishes a presumption uniformly holds that the presumption is factually rebuttable. *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255 (2009).

It is important to remember how the presumption fits into traditional bad faith jurisprudence. Bad faith, being a tort like any other, requires a showing of each of the following elements: duty, breach, causation and damages. If a presumption arises, the insurer can rebut it by showing “by a preponderance of the evidence its acts did not harm or prejudice the insured.” *Butler*, 118 Wn.2d at 394. The kind of rebuttal evidence contemplated by *Butler* are facts that establish the insured is demonstrably *not* “worse off because of the insurer’s actions. . . Whether the insurer’s acts prejudiced the insured is also a question of fact.” *Id.* at 395

It is no coincidence that this is the identical factor that *Onvia* used to distinguish the facts of that case from *Butler* regarding the presumption. There, the court ruled that the kind of procedural or technical bad faith in *Onvia* could not, as a matter of law, cause an adverse judgment against the insured. Therefore, there was no presumption of harm, and no estoppel. Even if this Court determines that the reservation of rights defense takes this case out of the strictures of *Onvia*, *Butler* allows Enumclaw to prove as a *matter of fact* that the bad faith alleged in this case *did not* cause an adverse judgment against Day.

- a. *The trial court erred in preventing Enumclaw from presenting evidence to rebut a presumption of harm at trial.*

The insurer’s right to present evidence to the jury rebutting that

presumption is called out in the Washington Pattern Jury Instruction on bad faith:

. . . You are bound by that presumption *unless you find that [the insurer's] failure to act in good faith did not harm the plaintiff*. . .
[The insurer] bears the burden of proof that any failure to act in good faith did not harm the [plaintiff].

WPI 320.01.01 (emphasis added)

Whether the presumption applies in the first place is governed by the cases cited above (it should not), but where it does, this would be the appropriate instruction (offered by Enumclaw CP 1723) rejected by the court, RP 12/3/14 p. 67). In the case at bar, Day was successful in obtaining evidentiary rulings *in limine* that carefully constructed a sandbox around her claims. RP 11/17/14, p. 8. She was allowed to present evidence alleging that Enumclaw was not quick enough to investigate her reformation claim and did not timely inform her of the details of her reformation claim, under which she had the burden of proof by clear and convincing evidence. But the trial court ruled that Enumclaw was *not* allowed to present evidence of how the case was ultimately settled (including the fact that she paid absolutely nothing), nor the fact that by the time Enumclaw made its decision regarding settlement – the indemnification issue – Enumclaw had conducted thorough depositions of Day, Huh, and the other witnesses she put on to prove her reformation case. CP 1915. That is to say, by the time it was necessary for anyone to

take a firm position on whether and what to pay to settle the case against Day, Enumclaw had *all* of the information that Day claimed it should have collected earlier. Day's complaint was that Enumclaw had not collected it fast enough, and it had done it through the legal process rather than interviewing her without attorneys present, but the beginning and end of her complaint regarding investigation is that it took too long to conduct and too long to inform her of the issues of her reformation claim. After Enumclaw had conducted discovery, Ms. Johnston concluded that Day's reformation claim was unlikely to be successful (RP 11/25/15, p. 75), *and she was correct* (CP 2154). Nevertheless, Enumclaw compromised and paid \$125,000 to facilitate a settlement where the bulk of the money was contemplated to come from her assigned meritorious claim against her agent, namely that he had *failed to recommend* liquor liability coverage.

In short, there was compelling evidence that regardless of the merits of Day's contention that her reformation claim was not properly investigated within the WAC timeline (30 days, per WAC 284-30-360¹¹), the indemnification issue - the settlement with Smith and Lee - would have been handled *exactly as it actually was*.

Enumclaw was entitled, as a matter of law, to present evidence rebutting any presumption of harm to the jury. The trial court's evidentiary

¹¹ Enumclaw continues to argue that this timeline does not require an insurer to *resolve* an insured's reformation claim within that time.

rulings prevented Enumclaw from presenting this evidence were erroneous, prejudicial, and thus reversible error.¹² Because they were based on the legal error that Enumclaw was not entitled to rebut the presumption, the standard of review on that issue is *de novo*. The Court should reverse the Judgment based on the verdict.

b. The trial court erred by imposing an irrebuttable presumption after the verdict.

Instead of presenting the issue of causation to the jury, the trial court post-verdict took the fact that the jury had found bad faith claims handling, and imposed coverage by estoppel on that basis alone. The court ruled that Enumclaw was not entitled, at that proceeding either, to present any evidence rebutting the presumption that this conduct had caused the entry of judgment against Day. RP 2/9/15, p. 92.

Before the court ruled, Enumclaw presented an offer of proof from Ms. Johnston that Enumclaw would have made the same decision regarding indemnification if she had immediately conducted an interview of Day as it did once she had seen Day testify at deposition. (CP 1915) Enumclaw requested that it be allowed to present Ms. Johnston's live testimony on this issue before the trial court ruled on whether the bad faith

¹² If Day were entitled to a presumption of harm, and had Enumclaw been allowed to present evidence rebutting it, WPI 320.01.01 would have been appropriate. Enumclaw offered that instruction with the caveat that the court's evidentiary rulings had made it inappropriate. The court declined to give it.

found by the jury was the legal cause of the entry of judgment against Day. The trial court rejected this request, and entered judgment against Enumclaw including the entire amount of both judgments.

Enumclaw contends that the whole picture should have been put before the jury, properly instructed with WPI 320.01.01. But regardless of whether it was the jury or the court that ultimately decided the issue of causation, Enumclaw should have been allowed to present its evidence at *some* point. Causation is required element of the tort of bad faith; the jury did not address it because the jury was not allowed to hear that there even was a settlement, that Day contributed no money to it, and had an absolute release. After the verdict, the court expressly refused to hear any testimony on the issue, orally ruling that Enumclaw was estopped *regardless* of causation. RP 2/9/15, p. 92. That was an error of law.¹³ Even if this Court were to rule that the judgments here *could* constitute harm (and they cannot), the Court should reverse the Judgment and remand with

¹³ Findings of fact are conclusions of law were required to support the trial court's resolution of the factual issue of rebutting the presumption of harm. CR 50

While the degree of particularity required in findings of fact depends on the circumstances of the particular case, they should at least be sufficient to indicate the factual bases for the ultimate conclusions. *Groff v. Department of Labor & Indus.*, 65 Wash.2d 35, 40, 395 P.2d 633 (1964); *State v. Russell*, 68 Wash.2d 748, 415 P.2d 503 (1966). The purpose of the requirement of findings and conclusions is to insure the trial judge “ ‘has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.’ “

In re LaBelle, 107 Wn.2d 196, 218-19, 728 P.2d 138 (1986).

instructions that the entire case, causation and all, be re-tried before a jury.

8. *The court erred by preventing the jury from hearing the actual legal standards that applied to the claim that Enumclaw was handling, and erred by failing to instruct the jury as to those actual legal standards.*

Mr. Smith, SIG's expert witness on claims handling, testified at considerable length about circumstances under which an insured's policy could be something other than that written policy that was actually issued. He characterized the issue as one of whether the agent had "binding authority," and that it was an issue that ought to be resolved by a preponderance of the evidence. *See Appendix C.* He offered an opinion that Enumclaw should have come to the "conclusion that this should have been a covered claim." RP 11-24-14, p. 132. When Enumclaw inquired on cross about how long binders were effective, and the actual legal requirements of reformation, the court sustained Day's objection on the basis that the testimony would be a statement of law. Before trial, the court had promised that would inform the jury of the law governing claims handling when it gave its instructions. *Id.* Similarly, when Enumclaw attempted to solicit information regarding those same legal standards from its own claims handling expert, David Schoeggl, the court sustained Day's objections and again indicated that the court would apprise the jury of the law. *Id.*

However, when it came time to give instructions, the court refused

to give any of Enumclaw's proposed instructions that actually stated the legal rules under which Enumclaw was required to handle a claim for policy reformation. These included:

A "binder" is used to bind insurance temporarily pending the issuance of the policy. No binder shall be valid beyond the issuance of the policy as to which it was given, or beyond ninety days from its effective date, whichever period is the shorter.¹⁴

No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.¹⁵

An insurer has a duty to investigate whether the claims against its insured are covered by the policy as actually written by the insurer. However, an insurer has no duty to investigate an insured's claim that the policy should mean something other than the policy that was written by the insurer.¹⁶

Neither prior oral negotiations nor an expired binder can be the basis for changing the terms of a written insurance policy. If the true agreement was expressed in the oral contract or in the binder, and either varies from the written policy, the only remedy is reformation of the written contract to make it conform to the true intent of the parties. Reformation is only appropriate when there is clear, cogent and convincing evidence that the mutual intention of the parties is not properly reflected in the policy.¹⁷

By refusing to allow Enumclaw to present testimony that the legal standards for reformation were *not* what Mr. Smith represented them to be (just a question of "agent error"), and then failing to instruct the jury as to

¹⁴ Proposed Ins. No. 1, CP 1715, RCW 48.18.230

¹⁵ Proposed Ins. No. 2, CP 1716, RCW 48.18.190

¹⁶ Proposed Ins. No. 5, CP 1719, *Jones v. Reliable Sec. Incorporation, Inc.*, 29 Kan.App.2d 617 (2001)

¹⁷ Proposed Ins. No. 13, CP 1731. *Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am.*, 189 Wash. 329, 339, 65 P.2d 689, 693 (1937)

the *actual* legal issues presented to Enumclaw during the pendency of the claim (Mr. Schoeggl was right, as a matter of law), the trial court allowed the creation of a false standard of what is required of an insurer facing a reformation claim. Had the court given the proposed instructions, counsel for Enumclaw would have had the ability to identify all of the ways in which Mr. Smith's testimony deviated from the actual legal rules applicable to a reformation claim, and significantly undermined his credibility.

“Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error.” *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386, 389 (2004) (citations omitted). Here, there was significant evidence regarding the circumstances of Day's claim and the interaction between her and agent Huh when she bought the policy. In terms of claims handling, the strength of Day's reformation claim, and what facts were relevant to it, were governed by the laws as set forth in these instructions.¹⁸ The trial court's failure to give these instructions was prejudicial to Enumclaw because they significantly undermine Day's theory that Huh's binding authority had anything to do with her reformation claim (RP 11/24/14, p.

¹⁸ In fact, to evaluate the probability of successful reformation, Enumclaw had to engage in the same exercise as the trial court – with a heavy emphasis on *mutual* mistake, and applying the clear and convincing standard. CP 2154.

139); Huh's authority was an issue made up by Day to sew confusion, and failing to instruct the jury as to the actual law on this point allowed this misrepresentation of the law to persist. That was prejudicial, and thus reversible error. The Court should reverse and remand for a new trial for this independent reason.

9. *The trial court erred in imposing IFCA treble damages*

Finally, the Court should reverse the trial court's imposition of treble damages under the Insurance Fair Conduct Act, RCW 48.30.015. The IFCA proscribes "unreasonable" denials of coverage or benefits, and allows for the court to award up to three times "actual damages" from an insurer's unreasonable denial of policy benefits. Here, however, the court applied an IFCA multiplier to Day's emotional distress damages. The issue of whether the IFCA multiplier ought to apply to emotional distress was thoroughly considered in the case of *Schreib v. Am. Family Mut. Ins. Co.*, No. C14-0165JLR, 2015 WL 5175708 (W.D. Wash. Sept. 3, 2015). There, the court found that the actual language of the IFCA was ambiguous as to whether it encompassed emotional distress. The court then looked to the legislative history, but failed to find clear direction. The court cited *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 766, 953 P.2d 796, 798 (1998), and held that the absence of a clear legislative mandate to allow for the trebling of emotional distress damages without

the requirement of intentional conduct meant that such damages were not subject to the multiplier. *Id.* The trial court erred by using the IFCA to multiply Day's emotional distress verdict, and this Court should reverse that determination as well.¹⁹

IV. CONCLUSION

For the foregoing reasons, Enumclaw respectfully requests that the Court reverse the judgment of the trial court and remand with instructions to vacate the portions of the judgment attributable to the Smith and Lee judgments and the IFCA award, vacate the Smith and Lee judgment themselves, and conduct a new trial of the bad faith claims handling claim with proper instruction on the standards relating to a reformation claim. In the alternative, Enumclaw respectfully requests that the Court remand for a new trial of the bad faith claims handling claim under proper instructions regarding reformation, and allowing a full presentation of Enumclaw's causation defense.

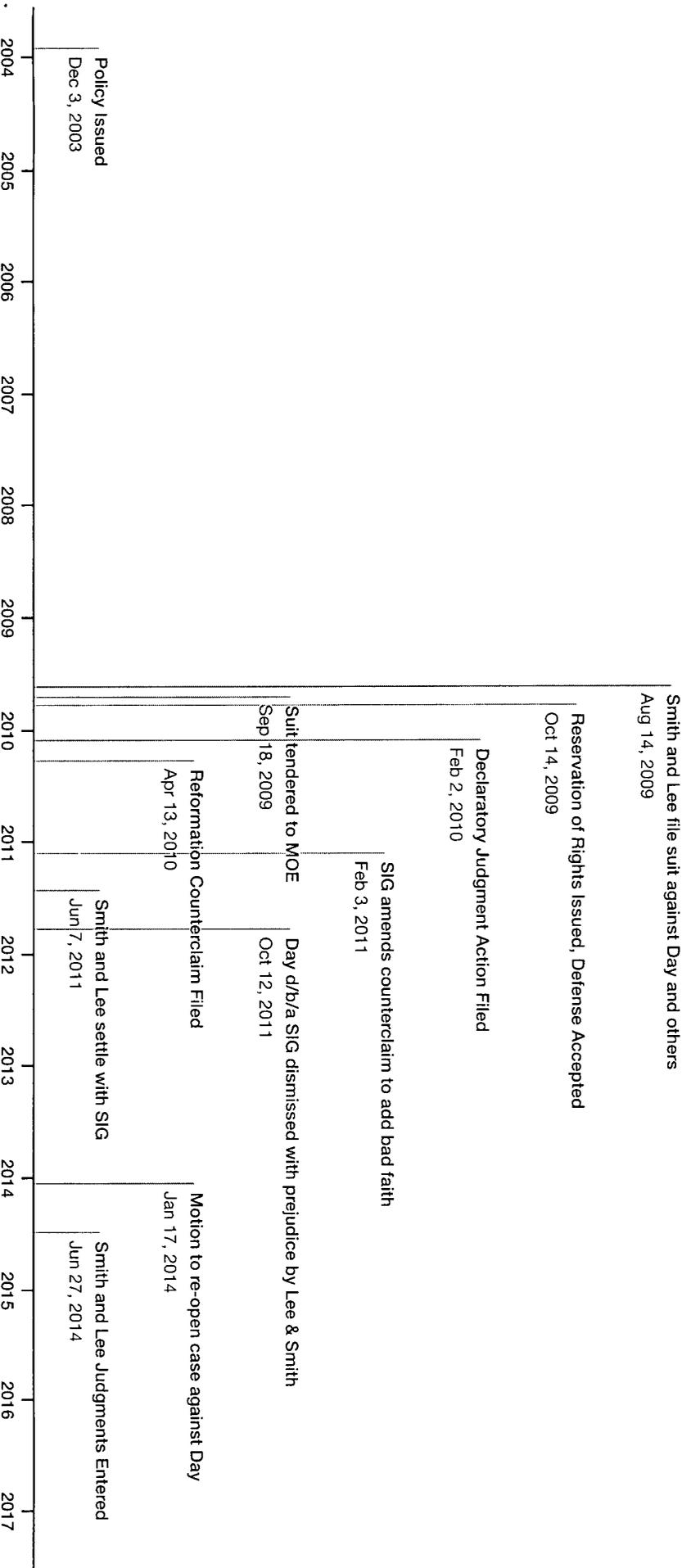
Respectfully submitted,



Brent W. Beecher, WSBA 31095
Hackett Beecher & Hart
Attorneys for Mutual of Enumclaw

¹⁹ Punitive damages for conduct that is less than reprehensible are unconstitutional under the due process clause. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 578, 116 S. Ct. 1589, 1600, 134 L. Ed. 2d 809 (1996). The trial court made no finding that could rise to the level of reprehensibility, and the award should be reversed on that basis alone. In any event, the trial court should be instructed to consider it on remand.

Appendix A



Appendix B

Settlement Agreement and Agreed Judgment

Underlying Incident and Parties: This agreement arises out of the failure of Michael Huh and any related entities, to properly advise and procure appropriate insurance coverage for Myong Suk Day, dba Stop in Grocery ("hereafter Day"). Because of those errors Mutual of Enumclaw ("MOE") asserts that Day has no liquor liability insurance to cover the claims by William R. Lee and Dawn Smith ("Plaintiffs"). Plaintiffs have sued Day and others in Pierce County, Cause No. 09-2-12395-6.

1. Purpose: The purposes of this Settlement Agreement are (a) to provide for settlement without further delay and expensive litigation between Plaintiffs and Day; (b) to protect Day's personal assets and her small business from probable multi-million dollar verdicts in favor of the Plaintiffs; (c) to have any meritorious claims against Michael Huh be held by the parties with the means to properly prosecute them; and (d) to minimize the costs, delay and uncertainties for Plaintiffs and for Day.

2. Reasonableness Hearing: Plaintiffs are responsible for scheduling and conducting a reasonableness hearing regarding this settlement. Day shall cooperate in providing materials and other reasonable assistance for the reasonableness hearing. In no manner does "cooperation" require or suggest anyone must make any statement that is not true or accurate.

3. Terms and Conditions:

- a. Cash payment: MOE shall pay Plaintiffs \$125,000.
- b. Judgment: Day does hereby agree that the Pierce County suit, Cause No. 09-2-12395-6 by Plaintiffs will be concluded with Day by entry of a judgment against her in the amount of \$ 4,292,754 for plaintiff Lee and 3,693,468 for plaintiff Smith (or for such other amounts as are found reasonable at the reasonableness hearing), provided that Plaintiffs will never execute nor attempt to execute upon such judgment except as provided below. This judgment shall also carry prejudgment interest at 12% until approval and entry by the Court, and thereafter shall carry post-judgment interest at 12% from date of entry until fully paid, along with all recoverable costs and statutory fees.
- c. Assignment: In consideration for Plaintiffs' agreement not to execute on the agreed judgment, Day assigns to Plaintiffs all rights, privileges, claims and causes of action that she may have against her insurance agent, Michael Huh and any related entities. This assignment includes but is not limited to all of Day's rights, privileges and claims or causes of action of any kind connected with the solicitation, advice and procurement of insurance coverage for Day, whether arising at common law or otherwise, as well as all claims or actions for failure to

procure requested insurance, negligence, breach of fiduciary duties or obligations, breach of the Consumer Protection Act, bad faith, breach of contract and/or for punitive damages. The claims Day has against MOE are not assigned and remain with Day. Consistent with this complete assignment of rights, Plaintiffs shall decide all matters of settlement of the assigned claims or conduct of any action bringing the assigned claims against any party. If any action to enforce the assigned rights is brought in Day's name, rather than in the name of Plaintiffs as assignee of Day, then Plaintiffs shall indemnify and hold Day harmless from all terms, sanctions, court-awarded costs or other losses connected with the filing or conduct of the action.

- d. Covenant Not to Execute or Enforce Judgment & Ultimate Satisfaction of Judgment: In consideration for the assignment and cooperation as described herein, Plaintiffs do hereby covenant not to execute or attempt to enforce any judgment obtained against any assets of Day other than Day's rights, privileges, claims and causes of action assigned. Plaintiffs' sole remedy is to pursue the assigned claims against others. As soon as the assigned claims have concluded (whether by settlement, final judgment, or exhaustion of all appeals and the time for further action has expired), Day may enter a full satisfaction of judgment signed by Plaintiffs in favor of Day, which full satisfaction shall be signed by Plaintiffs when this settlement is executed. The full satisfaction is to be entered regardless of the amount of any judgment awarded or settlement accepted and regardless whether the result is less than the judgment agreed in this settlement.
- e. Control of Settlement. Consistent with the complete assignment of the assigned claims, Plaintiffs shall decide all matters of prosecution and/or settlement of the assignment claims.
- f. Credit Assistance: While the judgment against Day is not fully satisfied, Plaintiffs shall when requested promptly provide a further certification of non-execution or other reasonably necessary documents in order to reasonably protect Day's business, credit, property and reputation.
- g. Day Cooperation: Day agrees to fully cooperate with Plaintiff in any reasonableness hearing and in Plaintiff's pursuit of the assigned claims, including but not limited to being interviewed by Plaintiffs' lawyers, testifying by deposition or at trial and to be present throughout the trial, if requested. In furtherance of her duty to cooperate and assist the plaintiffs as described herein, Day agrees she will, at all times until the assigned claims are resolved by way of final judgment or settlement, keep Lee and Smith's counsel advised of her current residence and telephone numbers (residence, business and cellular), and will respond to Lee and Smith's request

for assistance and cooperation within a reasonable time after the request(s) for assistance has (have) been made. In the event Day falls in these duties, the Covenant Not to Execute set forth in paragraph 3 shall become null and void at Lee's and Smith's sole election. She shall further direct any of her attorneys who have represented her in Pierce County, Cause No. 09-2-12395-6, to cooperate and testify if requested by Plaintiffs. Neither this part g., including all subparts, nor any other matter applies to Day's past, present or future attorney's representing Day against MOE in Pierce County Cause No. 10-2-06030-3, but to the extent sensible in Day's lawyers judgment such lawyers shall cooperate in the reasonableness hearing.

- i. Materials: Day acknowledges that Plaintiffs counsel are not such third persons that their review of otherwise confidential materials of Day would waive any attorney-client privilege, remove any work-product protection or waive any other right of confidentiality available to Day against MOE. By signing this agreement Day hereby directs any attorneys who do or have represented her in Pierce County, Cause No. 09-2-12395-6 to allow Plaintiffs and their counsel complete inspection and use of all materials and files related to representing Day.
- ii. Waiver If Necessary: Day further agrees that to the extent Plaintiffs' counsel in their sole discretion determine that the use of any otherwise protected material and testimony, at deposition or trial, (including the testimony at trial of Day's lawyers who represented her in Pierce County, Cause No. 09-2-12395-6 is helpful to the assigned claims, Day agrees to waive any attorney-client privilege, work product protection or any other privilege or confidentiality right of any kind concerning MOE, those lawyers, and their work and will direct those counsel to give testimony as requested. To effectuate this agreement Day will sign written waivers prepared by Plaintiffs' counsel and return them executed with this agreement.

4. Warranty Regarding Assignment: Day warrants that except for the assignments provided for in this agreement, she has not assigned, transferred or similarly encumbered any of the rights she assigns in paragraph 3c above, and that she has full rights and authority to assign those rights.

5. This settlement agreement is not intended to benefit any other person or entity, and shall not be construed in any way to release Michael Huh, or MOE, for any liability either may have to Day or to Plaintiffs. No claim that Day or Plaintiffs have or may have against Michael Huh, MOE or any insurer that provided coverage

to Huh for errors and omissions shall be affected or limited in any way by this agreement.

6. All of the parties hereto agree that they will cooperate with respect to execution of any other documents and other acts necessary to carry out this agreement.

7. Entire Agreement: This agreement contains the entire agreement of the parties with respect to the subject matter hereof, and shall not be modified or amended in any way except in writing signed by the parties hereto.

8. Choice of Law: The interpretation, construction and enforcement of this agreement shall be governed by Washington law.

9. This agreement may be executed in counterparts, and fax signatures are as valid as an original.

5-30-2011

Date

Dawn M. Smith

Dawn Smith

5-30-2011

Date

William R. Lee

William R. Lee

6/7/11

Date

Myong Suk Day

Myong Suk Day

Appendix C

Citations to the record and excerpts thereof regarding the standards and burdens applicable to SIG's reformation claim during the claims handling process.

At a pre-trial evidentiary conference, the Court gave the following instruction:

The Court: But to say that "WAC 296.330 --" you know, whatever it is in the insurance code -- "required us to do such and such," that's a legal analysis.

To say generally that "the law required it" or "we understood that the legal standards required us to do whatever we did," that certainly is okay. And at the end the regulations from the WAC or statutory requirements or whatever the law is will be told to the jury.

And then you can say: "And remember when that witness said the legal requirements were whatever they were? Well, look what it really is." So that's the way I always believe that should be handled.

RP 11/13/14, p. 29 (emphasis added).

SIG's claims handling expert, Dennis Smith, talked extensively about the legal standards under which an insurer should handle a claim like SIG's – Enumclaw was entitled to instructions regarding the standards and burdens applicable to SIG's reformation claim at the end of case, so it could argue, "And remember when Mr. Smith said what the legal requirements were? Well, look what they really are." Below are excerpts of such testimony by Mr. Smith:

A. Well, I think Mutual of Enumclaw was correct that the policy, as written, did not provide coverage for this claim. There was a clear exclusion in my mind applied to this loss. And so the question then became whether or not that contract had been changed to eliminate that exclusion. And that, in turn,

relates to whether there was an agent mistake in going to Mutual of Enumclaw and advising them what kind of a policy they should write. And I would categorize the issue then as agent mistake.

RP 11-24-14, p. 100

A. So when you compare these two and you apply the standards that we've discussed, I think you can reach a conclusion that this should have been a covered claim.

RP 11-24-14, p. 132

A. . . . But if there is a reasonable doubt, the benefit ought to be given to the policyholder. And in this case, I believe if they applied consistent claims handling customs and practices and they applied rules of credibility, which are the same as we do in everyday life, they would conclude that she probably did ask for this and, therefore, coverage should have been extended.

Q. And even if they concluded, "It's really hard to tell. It's a real close call," would that have changed the outcome, do you believe, an objective insurer would have done?

A. Well, we think of it—although it's a little misleading to say the tie goes to the runner, and the runner is Ms. Day, the insured. But it's stronger than that. If you're looking to find coverage, you're looking to give her the benefit of the doubt. She doesn't get a free ride. If the facts are different than they appear to be here, then maybe she doesn't have coverage.

RP 11-24-14, p. 133

A. So what we have is a situation where there is the allegation of agent error. And I think that a prudent insurer, given everything that had been told, should have extended that coverage.

RP 11-24-14, p. 136

A. I think all they had to recognize was they had an agent with binding authority. And if he had an offer to -- if he had been asked to provide this coverage and he didn't, then the company is obligated to step in and provide the coverage.

A. Well, I don't know that they're changing the contract. It's just a simple agency principle. They're bound by an agent with binding authority. This agent had binding authority. He was prepared to write that risk. He wrote it on virtually every policy. Your client said, "If we would have written this, we would have provided that coverage."

RP 11-24-14, p. 139-140

Q. Mr. Smith, how long does an oral binder stay in place when a written policy follows it shortly thereafter?

A. Well, I've seen different lengths. But I think it's probably typically like 15 days, sometimes 30.

Q. Well, this accident happened six years after she bought the policy. So that binder was no longer in force, was it?

A. I would be happy to answer that question, but I'm trying to avoid usurping the Court's rule here --

THE COURT: We're not going to dive into the specifics of the law because I have to have something to do, and this would be it. If you're asking him a question that invokes that sort of an answer, then the question is improper.

Q. I'm asking his understanding of the-- THE COURT: You can answer what is your understanding, Mr. Smith, as long as it is clear that one of us is going to instruct on the law, and that's me.

Q. I think finally I want to ask you, isn't it true, sir, to reform a policy or change a policy, you don't say, "Well, let's see. The tie goes to the runner, or the benefit of the doubt should be given to the insured"? That's not the test for that, is it?

A. Again, I'm perfectly willing to answer that, as long as I don't get in trouble with the Court.

Q. Your understanding, and I'm using my understanding too.

A. My understanding is that this does not relate to reformation. It relates to an agent with binding authority. And the principal of that agent is Mutual of Enumclaw. So we're looking at conduct of the agent and what authority he had by the company that was given to him. We're not looking at legal doctrines of reformation.

Q. But if it turns out that that oral binder had expired years before this happened and we're stuck with the policy as written, to change the policy you have to have evidence with clear, cogent and convincing qualities, don't you?

A. You're trying to get me in trouble with the Judge here.

THE COURT: That's an improper question, Mr. Beecher.

MR. JAMES BEECHER: I'm sorry. I apologize.

Q. Isn't it your understanding that under those circumstances we don't apply the balancing and the benefit of the doubt goes to the policyholder, to the person who is orally challenging the written document?

A. No. That's not my understanding at all.

Enumclaw put on its own claims handling expert, David Schoeggl, whose testimony was presented to rebut Mr. Smith, and elucidate the real standards and burdens facing an insurer when an insured claims reformation.

Q. (Kilpatrick, SIG Cross-examination) That's what I'm saying, an agent mistake.

A. . . . You can't change the policy based on the agent's mistake beyond 90 days.

Q That's your testimony. Have you seen any testimony from any insurance person that said, "After 90 days, it would be too late for us to find out she probably asked for it and we wouldn't do anything about it"?

A Well, no. Agents are not allowed to issue temporary insurance beyond 90 days. So anything that happens after that has got to be issued by the insurance company. That's not anybody's opinion. That's a rule, an absolute rule.

RP 12-1-14, p. 157

Q. (Beecher, Enumclaw direct-examination) And how does that mechanism [reformation] work?

A Well, generally it can only be done by a court, unless the parties agree and they can jointly reform the policy. But if there is a dispute about whether the policy should be reformed, then that has to be resolved by a Court. And there are some real particular and strict rules about when and how that gets done. And there's also a very high standard of proof. And the reason for that is we don't actually want to make it easy for anybody to change a contract once it's been entered into.

MR. KILPATRICK: Your Honor, we seem to be entering into the legal –

THE COURT: Be careful, Mr. Schoegg, about rendering legal opinions, sir.

THE WITNESS: Sure.

RP 12-1-14, p. 45-56

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY, Appellant / Cross-Respondent, v. MYONG SUK DAY, dba STOP IN GROCERY, Respondent / Cross-Appellant.	NO. 47494-8-II DECLARATION OF SERVICE
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Brent Beecher, declares under penalty of perjury, that on the date noted below he caused a copy of the Brief of Appellant to be delivered to the parties listed below, by placing a copy of it in the U.S. Mail:

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STATE OF WASHINGTON
BY AR
DEPUTY

Signed in Seattle, WA this 4th day of November 2015.



Brent Beecher, Hackett Beecher & Hart