

FILED
Court of Appeals
Division II
State of Washington
3/5/2018 4:32 PM
No. 50150-3-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

TERRY L. SCHMID, an individual,

Appellant,

v.

CHRISTOPHER D. FOSS and "JANE DOE" FOSS,
individually and as a presumed marital community,

Respondents

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Intervenor.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant, Terry Schmid (“Schmid”) asks this Court to reverse the Superior Court’s rulings, which – on the one hand – *allowed Safeco to intervene* on the basis that it *would bound by any judgment* against one or more of the tortfeasors, but – then on the other hand – determined that *Safeco would not be bound* by an arbitration award against the tortfeasor(s) *because Safeco had intervened*.¹ Safeco cannot have it both ways. Such an outcome violates the intention of underinsured motorist’s coverage (“UIM”) coverage and related public policy, as well as the *Finney-Fisher* Rule. In the unlikely event that this Court does not determine that Safeco is bound by the arbitration award in this matter, Schmid is asking that this Court reverse the Superior Court’s refusal to compel Safeco to arbitration pursuant to the applicable insurance policy.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it allowed Safeco to intervene in Schmid’s underlying lawsuit against the tortfeasor, Defendant Christopher Foss (“Foss”), over both Schmid’s and Foss’s objections.

2. The Superior Court abused its discretion when it allowed Safeco unlimited intervention in Schmid’s underlying lawsuit against Foss.

¹ Respondent Safeco Insurance Company of Illinois is referred to as “Safeco.”

3. The Superior Court erred when it ruled in contravention of the *Finney-Fisher* Rule that Safeco was not bound by the arbitration award in the underlying lawsuit – particularly after Safeco intervened in the lawsuit and then chose not to participate in the arbitration.

4. The Superior Court erred when it ruled that Safeco’s amendatory endorsement regarding UIM arbitration was “delivered” to Schmid and Schmid “agreed” to the provision, thus making it effective.

5. The Superior Court erred when it held that the amendatory provision did not require arbitration of Schmid’s UIM claim.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Can a UIM insurer intervene as a matter of right in its insured’s underlying lawsuit against a third-party tortfeasor when the insurer fails to meet all the requirements under CR 24(a)? (*Assignment of Error No. 1*).

B. If a UIM insurer can intervene in its insured’s underlying lawsuit against a third-party tortfeasor, must the court balance the insurer’s interests with those of the insured and thereby limit the scope of the UIM insurer’s intervention where appropriate? (*Assignment of Error No. 2*).

C. Can a UIM insurer avoid application of the *Finney-Fisher* Rule by intervening in a lawsuit brought its own insured against a third-party

tortfeasor by deliberately choosing to not participate in a binding arbitration? (*Assignment of Error No. 3*).

D. Can a UIM insurer avoid application of the *Finney-Fisher* Rule in circumstances where the insured agrees to not enforce any judgment against the third-party tortfeasor in excess of the tortfeasor's policy limits in exchange for the tortfeasor giving up its right to a jury trial because the insured has applicable UIM coverage? (*Assignment of Error No. 3*).

E. Is an insurance carrier required to prove notice and agreement before any amendment to its policy is effective against its insured? (*Assignments of Error No. 4 and 5*).

F. Is a UIM insurance policy amendment that implies that the insurer has agreed to arbitration and the decision of whether to arbitrate the UIM claim is at the option of the insured ambiguous and provide an illusory benefit, therefore requiring arbitration? (*Assignment of Error No. 5*).

IV. STATEMENT OF THE CASE

Most of the facts relevant to this appeal are thoroughly laid out in Commissioner Barse's September 5, 2017 Ruling. (CP 1165 -1185). They are also set forth below for this Court's benefit.

A. The Collisions and Underlying Lawsuit Against the Tortfeasors.

This action originally arose out of two rear-end collisions involving Schmid that occurred six days apart, both of which occurred in Tacoma, Washington on Highway 16. The first collision occurred on April 4, 2012 (caused by Defendant Robert Reynolds, “Reynolds”). The second collision occurred on April 10, 2012 (caused by Defendant Christopher Foss, “Foss”). (Clerk’s Papers, “CP” 2-5, 47-50).

On March 24, 2015, Schmid filed separate lawsuits for each of the collisions in Pierce County Superior Court. (CP 2-5, 47-50).²

B. History Relating to Safeco’s Intervention in the Underlying Lawsuit Against Foss.

Schmid has been insured with Safeco since 1967, over 50 years. (CP 413) At the time of the collisions referenced above, Schmid had Safeco automobile policies that included \$500,000 of UIM coverage applicable to each collision. (CP 417).

On September 24, 2015, after receiving notice of the underlying litigation against the tortfeasors, Safeco filed a 3 and ½ page motion to intervene in the Schmid/Foss lawsuit. (CP 65-70). Both Schmid and Foss opposed the motion. (CP 76-93). Safeco argued under CR 24(a) that it

² On March 28, 2015, the two cases were consolidated. (CP 174-182)

should be allowed to intervene as a **matter of right** and participate in all aspects of the case. (CP 65). Safeco’s claim for its “right” to intervene was focused on the Supreme Court’s ruling in *Lenzi*.³ Safeco argued:

Any judgment recovery by plaintiff will be binding upon Safeco. An insurer having notice of a lawsuit brought by its insured against the uninsured tortfeasor, will be bound by the findings, conclusions and judgment entered in the action brought by the insured. . . . Because Safeco will be bound by any judgment had by the plaintiff, Safeco should be allowed to intervene in order to protect its interests in this matter. (CP 67).

Schmid opposed the motion and argued that Safeco could not meet the criteria of CR 24(a)(2). (CP 76-90). More specifically, Schmid argued that Safeco failed to demonstrate that its interests were *not* already adequately represented as Foss’s interests were the *same* as Safeco’s: to keep any judgment by Schmid against Foss to a minimum. (CP 77).

Schmid further contended that under CR 24, the Court must balance the concerns of the original parties and Safeco’s fiduciary responsibilities to Schmid and that such a balancing prevented intervention in these circumstances. (CP 77). In that vein, Schmid argued that allowing Safeco to intervene would harm its own insured by “stacking the deck” and allowing multiple defense attorneys with multiple experts to litigate against him. (*Id.*) This included Schmid’s own insurer not only aligning itself with

³ See *Lenzi v. Redlands Insurance Co.*, 140 Wn.2d 267, 275, 996 P.2d 603 (2000)

the tortfeasor against Schmid, but also giving both the defense and Safeco two bites at the same apple. (CP 83). (Verbatim Report of Proceedings, “RP” 10/16/15).

Schmid also noted that his Safeco policy required arbitration and any UIM dispute should be resolved accordingly. (CP 85). Finally, he offered that if the Court were to allow Safeco to intervene, it should limit such intervention to that of an excess or umbrella carrier and Safeco be allowed to watch, given access to all discovery, appear at depositions, etc., but *not* be able to impair its own insured’s rights to a fair trial by *piling* onto the defense or *dictating the course of the litigation*. (CP 85).

Foss also argued against Safeco’s intervention. Foss argued that Safeco had no standing to participate in the action and intervention would work to prejudice him because Safeco’s presence would imply to a jury that Foss did not maintain sufficient insurance. (CP 91-93; RP 10/19/15).

On September 29, 2015, Schmid made a separate written demand to Safeco to arbitrate the April 2012 claims in accordance with his UIM policies – separate from the lawsuit against Foss. (CP 152-154). Safeco failed to oppose the request to arbitrate and/or agree to engage in separate litigation with Schmid as he requested. (CP 260-261).

On October 6, 2015, counsel for Safeco responded that he did not have authority to accept Schmid's Note to Arbitrate. (CP 260). Instead, Safeco continued with its Motion to Intervene.

On October 8, 2015, Reynolds' insurer offered to pay Reynold's policy limits of \$25,000 to Schmid. (CP 250). Schmid advised Safeco of the offer and provided Safeco the opportunity to "buy-out" the claim, which Safeco partially opted to do. Since the filing of Schmid's notice of discretionary review, Safeco has agreed to release Reynolds and the case against Reynolds has been dismissed. (CP 584-586). However, Safeco adjuster Rebecca Thayer's ("Thayer") letter to Schmid regarding its *partial* purchase of the Reynolds' claim is still relevant, particularly as it highlights how misguided Safeco's understanding of the law is in the UIM context. The letter stated:

We would like to remind Schmid that there is also a cooperation clause in the policy . . . 'We have no duty to provide coverage under this policy unless there has been full compliance with the following duties... B. A person seeking any coverage must 1. Cooperate with us in the investigation, settlement or defense of any claim or suit. As you know, we are currently filing a motion to intervene in the Schmid versus Foss action. We will also be intervening in the Schmid versus Reynolds action. Once we have formally intervened in both actions we would like to consolidate both actions so that the issue of apportioning injuries sustained in each accident may be heard at the same time. We feel this would be most time and cost efficient for all parties involved.

(CP 252-253) (Emphasis added).

On October 16, 2015, the Superior Court reserved ruling on the intervention motion, but allowed Safeco to participate in all discovery for a 90-day time-frame. (CP 97-99). The Honorable Bryan Chushcoff noted that he was not “convinced whether or not [Safeco was] going to be adequately protected” at that time, so he allowed Safeco the opportunity to determine Foss’s liability limits and Schmid’s damages and renew its motion if it chose to do the same. (RP 10/16/15, pp. 19-20). The parties exchanged all discovery with Safeco and included Safeco in all communications regarding the case. (CP 160-169).

On February 3, 2016, Safeco renewed its motion to intervene and again argued that its basis for intervention was “because Safeco will be bound by any judgment had by the Plaintiff ...”. (CP 104-111). Schmid opposed the motion on the same basis he had previously. (CP 140-150).

On March 18, 2016, the Superior Court granted Safeco’s *second* motion to intervene and ordered:

Safeco Insurance Company is permitted to intervene in the above-captioned case for the purpose of defending its position with respect to the claim asserted by Plaintiff arising out of a motor vehicle accident involving the underlying tortfeasor, Christopher Foss, on April 10, 2010, in Pierce County, Washington. Plaintiff has a UIM policy with Safeco Insurance Company of Illinois.

That Safeco Insurance Company of Illinois shall be and hereby is allowed to intervene as a participant in this action without

limitation. The Court will address issues as to how the trial will be administered. (CP 170-173; RP 3/18/16). (Emphasis added).

C. Safeco's Involvement Post-Intervention and Transfer of the Underlying Lawsuit Against the Tortfeasors to Binding Arbitration.

After the Court granted Safeco intervention, Safeco simply piled onto Foss's litigation of the case. (CP 463-464). For example, over the better part of a year (and when Safeco was involved with the case) Foss and Schmid worked through a request by Foss for a CR 35 examination of Schmid. Safeco did not engage in the request until a week before the agreed examination was scheduled to take place when Safeco – at the last minute – added two of its own duplicative defense examiners to the *same* examination. (*Id.*) Foss also paid to depose Schmid's treating neurosurgeon and expert, Dr. Richard Wohns; Safeco paid for no time at the deposition and Safeco's counsel asked *not a single question. (Id.)*

Even with Schmid's deposition, Foss's counsel noted the deposition and asked the majority of questions; Safeco's counsel asked Schmid only 13 questions. Schmid's counsel noted and took Foss's deposition and Safeco's counsel asked Mr. Foss only 7 questions. (*Id.*) Safeco sought none of its own depositions. Additionally, both Foss and Reynolds propounded multiple sets of discovery to Schmid; Safeco propounded none of its own discovery requests. (*Id.*)

Safeco's inaction exemplified Schmid's previous argument that Safeco had not established a right to intervention because Foss was more than "adequately" representing Safeco's interests in aggressively defending the case. (See RP 02/24/17, pp. 33¶¶14-25 – p. 36, ¶¶1-15).

In August 2016, the original parties to the litigation, Schmid, Foss and Reynolds, discussed transferring the case into binding arbitration as a possible means of settling the third-party cases for the respective tortfeasors' policy limits, as well as a list of potential arbitrators; the parties exchanged emails in this regard and included Safeco's counsel in all correspondence. (CP 377-380). Safeco's counsel refused to participate in any such discussions, and instead, attempted to *instruct* the parties – including Safeco's own insured – not to proceed to binding arbitration. (CP 378). Notwithstanding Safeco's refusal to participate, counsel continued their discussions for the next six-plus months, with Safeco's counsel copied on the communications. (CP 382-383). Safeco's counsel again attempted to dictate to the parties that they could not proceed to binding arbitration:

Counsel,

We have not agreed to a binding arbitration. Following mediation, if it fails, we can re-visit this issue, but please don't attempt to schedule arbitration at this time. Thank you.⁴

⁴ On January 11, 2017, Schmid, Safeco and Foss participated in a mediation, but it failed. (CP 385)

In January 2017, Schmid and the third-party tortfeasors ultimately agreed to enter into a settlement agreement by way of a Stipulation, which would transfer the case against the tortfeasors to binding arbitration *after notice* to Safeco and *upon motion* before the Court. (CP 238-244). In exchange for the tortfeasors giving up their right to a jury trial, Schmid agreed to not seek enforcement of any award or judgment *against the tortfeasors* in excess of their respective policy limits (should the arbitrator award up to/and or above the same). (CP 239-240).

The Stipulation specifically offered Safeco *notice* of the proposed settlement, the intended release of the tortfeasors, and an *opportunity* for Safeco to “buy-out” the claim *before* the Stipulation was entered with the Court and became effective. Alternatively, Safeco could choose to participate in the arbitration and defend against Schmid’s UIM claim(s).

The Stipulation specifically stated:

[a]s a condition to entering into this Stipulation, Plaintiff is entitled to make an offer to Safeco to determine whether it wants to buy-out the third-party claim in the *Schmid v. Foss* portion of this case for the applicable third-party policy limits.
(CP 242-243). (Emphasis added).

Schmid provided a copy of the proposed Stipulation to Safeco a *month* before it was entered by the Court and thus, Safeco had a month’s notice to decide whether or not to buy-out the Foss claim. (CP 238-247).

On January 23, 2017, Thayer sent a letter to Schmid's counsel further communicating Safeco's attempted instruction against any arbitration as means of resolving the third-party claim against Foss. (CP 385-386). The letter stated in pertinent part:

[A]s you know, your client must obtain the UIM carrier's agreement before reaching any settlement and releasing the tortfeasor. We also further reiterate our position that Safeco, as the UIM carrier, is not bound to the arbitrator's decision as we have formally intervened in the case entitled Terry L. Schmid v. Christopher D. Foss, case number 15-2-07027 filed in Pierce County Superior Court.

Thayer confirmed that Safeco refused to consent to the proposed settlement via binding arbitration, notwithstanding the fact that Safeco had no authority – either in its policy or law – to demand its consent to the same.⁵ Thayer then threatened Schmid that if he:

proceed[ed] to binding arbitration with Grange capping Foss' exposure to his insurance proceeds that may prejudice our subrogation interest and [Schmid] may be in breach of the contract. (Id.) (Emphasis added).

On January 26, 2017, Schmid filed a motion in the Superior Court to determine – *in advance of even transferring the case into arbitration* –

⁵ Neither the law, nor the applicable insurance policies, allow a first party insurance carrier to dictate the method and manner by which its first-party insured resolves its claim against a third-party tortfeasor. Contrary to the threats set forth in Safeco's letter, any "consent to settle" requirements in a policy are invalid and directly contrary to public policy because such clauses, which exclude UIM coverage if the insured settles without the insurer's written consent, deny insureds the second layer of floating protection provided by UIM coverage. *Elovich v. Nationwide Ins Co.*, 104 Wn.2d 543, 550-553, 707 P.2d 1319 (1985).

that Safeco would be bound by the arbitrator's award if it did not "buy-out" the claim or participate in the arbitration. (CP 221-244). Schmid filed the motion as a precautionary measure instead of simply presenting the binding arbitration stipulation to the Court for entry and trying to bind Safeco after the arbitration, given Safeco's continuous refusal to engage in arbitration and its threats in Thayer's letter. Alternatively, Schmid asked the Court to compel Safeco to arbitration (versus a jury trial) based upon the pertinent language of the applicable policy that allowed Schmid to choose arbitration as the method for resolution of his UIM claim(s). (*Id.*)

On February 8, 2017, Schmid's counsel followed-up via letter to Safeco and reiterated the offer to have Safeco "buy-out" the third-party claim against Foss if Safeco immediately tendered an amount to Schmid equivalent to Foss's liability policy limits of \$250,000 before the Stipulation was entered. The letter advised Safeco in pertinent part:

Enclosed with this letter is a copy of the Stipulation to Transfer this case to binding arbitration . . . As you can see from a review of this Stipulation, Schmid is not only offering Safeco notice and an opportunity to participate in the binding arbitration, but significantly, an opportunity to buy-out the third-party claim in the Foss case and immediately tender the \$250,000 third-party policy limits to Schmid.

As the agreed-to stipulation for binding arbitration makes clear, the recovery from Mr. Foss will be limited to his policy limits of \$250,000 and Mr. Foss is required to pay those limits within 10 days of any award; there is no appeal. Therefore, we deem the enclosed

Stipulation to be a tentative offer of settlement in accordance with Hamilton v. Farmers Insurance Co., 107 Wn.2d 721, 733 P.2d 213 1987), and we are hereby providing you notice of this stipulation, which is tantamount to a tentative settlement of Mr. Foss' policy limits. Safeco therefore has the available option under Hamilton to "succeed to the rights of its insured against the tortfeasor by (1) paying the underinsurance benefits prior to release of the tortfeasor; and (2) substituting a payment to the insured in an amount equal to the tentative settlement." Id. at 734.

*. . . **Please inform me immediately whether Safeco will or will not buy-out the third-party claim based upon the tentative settlement offer pursuant to the attached Stipulation.** If Safeco does not want to buy-out the third-party claim against Mr. Foss, then please confirm whether Safeco is going to participate in the binding arbitration, or if not, please confirm that Safeco will honor its obligations to pay any amount awarded by the arbitrator, John Cooper, to Schmid over the \$250,000 and up to his applicable UIM and PIP policy limits. Alternatively, as indicated, please confirm that Safeco will accept coverage and fully pay Schmid's UIM claim. (CP 385-386; 730-731). (Emphasis added).*

Safeco ignored Schmid's offer to buy-out his claim against Foss and instead, it filed an opposition to the motion to transfer the case to and compel binding arbitration. In its opposition, Safeco argued that it had the right to force *Schmid to engage in a jury trial against not only Safeco, but also to force Schmid to proceed to trial against Foss and Reynolds.* (CP 389-404).

As part of its opposition, Safeco included a declaration from Thayer with an attached notice and endorsement that she concluded "changed the

arbitration clause [in Schmid's UIM policy] to include the language 'both parties must agree to arbitration.'" (CP 413-414; 414-429).

Thayer asserted "Safeco's records show that on or about July 24, 2006, Safeco mailed to Plaintiff a Notice SA 2669/WAEP 9/05 with the endorsement SA 2668/WAEP 9/05." (CP 413). However, Thayer did not provide any facts as to how the endorsement was mailed or whether Schmid had ever received it. (CP 413-414). She also did not offer any confirmation of what records she reviewed, or on which records she was relying, for her testimony that Safeco mailed the notice and endorsement to Schmid specifically. (*Id.*) Safeco has never provided a new complete policy with these changes to Schmid, nor has it ever argued that it has.

In his reply, Schmid moved to strike the declaration of Thayer as constituting inadmissible hearsay. (CP 447). Schmid also argued that Thayer's declaration did not provide sufficient foundation that Safeco delivered the amendatory endorsement to Schmid. In support of such argument, Schmid submitted the Declaration of Gary Williams (an attorney and former Safeco adjuster). Mr. Williams testified that Safeco does not keep any type of records that would demonstrate that the notice or endorsement at issue were either specifically mailed to, or more

importantly, *received* by Schmid; Safeco did not rebut Mr. Williams' testimony in this regard. (CP 503).⁶

Schmid confirmed via declaration that he did not recall ever receiving the amendatory language, or any new automobile insurance policy after the notice and endorsement were allegedly sent to him. (CP 500-501).

On February 24, 2017, the Superior Court heard the motion and ordered that Schmid, Foss, and Reynolds could engage in binding arbitration and entered the "Stipulation and Order Transferring Claims to Binding Arbitration to Settle Claims and Release Defendants." (CP 556-562). However, in a separate "Order on Plaintiff's Motion to Transfer Case to and Compel Binding Arbitration," also entered on February 24, 2017, the Court denied Schmid's motion to compel Safeco to arbitration. The Court also refused to determine that Safeco would be bound by the award if it refused to participate in the arbitration.⁷ (CP 554-555). Finally, the court

⁶ Mr. Williams confirmed that prior to the conversion to computerized printing and mailing, insurers - such as Safeco - used to obtain a signature from a postmaster indicating that a list of envelopes had been received by the USPS, a practice to which he testified Safeco has not followed in years. (CP 502-510)

⁷ Schmid also asked the Court to find that Safeco had the opportunity to buy-out the underlying third-party claim and thus, it could not claim prejudice by any release of the tortfeasors for any amounts above their liability policy limits. The court reserved "ruling on the effect of the stipulation as to Safeco per the Court's oral ruling" and ruled that "Plaintiff may bring a separate motion for the same." (CP 555)

denied Schmid's motion for *Olympic Steamship* fees.⁸ (*Id.*) The Court ruled in pertinent part as follows:

. . . Plaintiff's Request for Olympic Steamship Fees is denied; Plaintiff's Motion to Compel is denied. If Safeco does not participate in the arbitration, it will not be bound by the arbitration award and Plaintiff is likewise not bound by the arbitration award as to Safeco/UIM claim. The Court has changed the trial date to April 17, 2017 due to its recess calendar, but the parties may seek an adjustment of the trial date based upon the rulings of the Court and the parties availability.⁹ **Pursuant to the Stipulation/Order signed and entered on this date, Foss and Schmid and Reynolds may proceed to arbitration. . .**
(CP 554-555) (Emphasis added).

The Court disagreed with Schmid that Thayer's declaration contained any hearsay. (RP 2/10/17, p. 11, lines 3-12). Instead, the Court considered the declaration as evidence of proof of delivery of the amendatory endorsement and stated:

I think this is the policy language as established by the representative . . . Ms. Thayer. . . that policy language says both parties must agree to arbitration. Safeco is not agreeing to arbitration – binding arbitration, that is. (RP 2/24/17, p. 45-46).

On March 24, 2017, Schmid filed a notice of discretionary review of the Court's February 24, 2017 Order, refusing to compel Safeco to

⁸ See *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) ("*Olympic Steamship*")

⁹ Trial between Schmid and Safeco on *the UIM claim* was scheduled for April 17, 2017 but was thereafter continued to February 12, 2018 by the parties. (CP 563-572)

arbitration or bind it to the resulting award. (CP 573-575). He also included the Court's March 18, 2016 Order allowing Safeco intervention. (*Id.*)

D. Safeco Denies Schmid His UIM Coverage.

Safeco has made it clear that irrespective of how Schmid's damages resulting from the April 10, 2012 collision are determined (i.e. whether Safeco is ultimately bound by the award, or if Schmid is able to arbitrate his UIM claim, or if he must undergo a UIM trial), Safeco is denying Schmid his UIM coverage as it relates to the April 10, 2012 collision. (CP 1063-1075).

On March 27, 2017, Safeco filed an action for declaratory relief with the Federal Court to have it declare that Schmid is not entitled to his UIM coverage for the April 10, 2012 collision. (CP 1037-1044). Safeco's claim was that Schmid breached his UIM policy by "settling" his claim with Foss because Safeco would not consent to the resolution.¹⁰

On May 26, 2017, Schmid filed a motion for summary judgment with the *Superior Court* asking *it* to determine that he did not breach his

¹⁰ Safeco has also concocted a more recent theory that Schmid is not "legally entitled" to any UIM benefits that exceed Foss' policy limits of \$250,000 and it filed a motion for summary judgment in the Western District of Washington in support of this proposition. Schmid contemporaneously filed a motion to stay with that Court, particularly as Safeco recently amended its Complaint for Declaratory Relief to add Schmid's UIM and the *very issues* currently pending before *this* Court. Schmid filed a copy of the briefing relative to these issues with this Court in support of his motion to extend the time to file his opening brief.

policy as a matter of law by resolving the third-party claim with Foss via binding arbitration. (CP 589-615). Schmid further argued that even if Safeco could manifest some claim as to breach (which he argued it could not), as a matter of law, Safeco could not demonstrate any resulting prejudice.

On June 23, 2017, the Superior Court denied Schmid's Motion for Summary Judgment. (CP 1155-1157). Schmid immediately filed a notice of discretionary review that same day on June 23, 2017. (CP 1148-1154).

On June 29 and 30, 2017, a two-day binding arbitration between Schmid and Foss occurred with John Cooper of Washington Arbitration & Mediation Service ("WAMS") presiding as arbitrator. (CP 1058). Schmid provided Safeco with advanced notice of the arbitration date and multiple opportunities to participate in the hearing. (CP 1046-1061).

On June 30, 2017, Schmid filed a Motion to Convert his Motion for Discretionary Review to [an] Appeal as a Matter of Right.

On July 3, 2017, Schmid filed a Motion to Consolidate his two motions for discretionary review.

On July 6, 2017, Commissioner Bearsse denied the Motion to Consolidate without prejudice, given the pending motion to convert.

On September 5, 2017, Commissioner Bearse granted (in part) Schmid's motion to convert his motion for discretionary review to an appeal as a matter of right. (CP 1165 -1185). The Commissioner ruled:

ORDERED that Schmid's notice of discretionary review of the superior court's February 24, 2017 order on motions, COA No. 50150-3-II, is partially converted to a notice of appeal. RAP 5.1 (c) It is further

ORDERED that Schmid's request for discretionary review of a March 18, 2016 trial court order on intervention, included in the notice of discretionary review in COA No, 50150-3-II, is included within the appeal as of right. RAP 2.4(b). It is further

ORDERED that (1) consideration of the cost issue remaining in Schmid's March 26, 2017 notice of discretionary review COA No. 50150-3-II); (2) consideration of the second notice of discretionary review (COA 50520-7-II); and (3) superior court proceedings are stayed pending a decision in the appeal as of right. (CP 1184-1885).

V. ARGUMENT

A. Applicable Standard of Review.

The issues as to whether the Court erred in allowing Safeco to intervene as a matter of right and/or by failing to limit the scope of its intervention is reviewed two-fold. A ruling on intervention as a matter of right is reviewed *de novo*,¹¹ whereas a decision regarding a limitation of the *scope* of intervention is reviewed for an abuse of discretion.¹² A

¹¹ *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994).

¹² *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); *see Marino Prop. Co. v. Port Comm'rs of the Port of Seattle*, 97 Wn.2d 307, 316, 644 P.2d 1181 (1982).

Superior Court abuses its discretion where either no reasonable person would adopt the Court's position, or the Court based its ruling on an erroneous legal conclusion.¹³

The issue of whether the Superior Court erred when it ruled that Safeco was *not* bound by the arbitration award if it did *not* participate in the arbitration – presents a question of law, which is reviewed *de novo*.¹⁴ Additionally, this issue also involves the question of whether collateral estoppel precludes re-litigation of Schmid's damages, which is likewise reviewed *de novo*.¹⁵

The issue of whether the Superior Court erred in admitting portions of Thayer's declaration – which contained inadmissible hearsay – and then erroneously relied on the same is reviewed *de novo*.¹⁶ Likewise, the issue of whether the Court erred in refusing to compel Safeco to arbitration pursuant to its policy is also reviewed *de novo* because it involves the interpretation of an insurance policy and the question of arbitrability.¹⁷

¹³ *Kreidler*, 111 Wn.2d at 832.

¹⁴ See *Sherry v. Fin. Indem. Co.*, 160 Wn.2d 611, 617, 160 P.3d 31, 34 (2007).

¹⁵ *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957, 960 (2004); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 248, 961 P.2d 350 (1998)(citing *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 617, 586 P.2d 519 (1978) and noting that the rule in *Finney* “modifies the technical requirements for privity to establish collateral estoppel”).

¹⁶ *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 689, 370 P.3d 989, 992 (2016).

¹⁷ *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (interpretation of an insurance policy is an issue of law that appellate courts also review *de novo*); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007) (same); *Stein v.*

B. Overview of UIM Coverage and Related Public Policy.

Washington citizens enjoy access to first-party UIM coverage, authorized by statute. The UIM statute, RCW 48.22.030, was intended to provide a “floating layer” of insurance coverage.¹⁸ The purpose of UIM coverage is to protect innocent victims of uninsured (“UM”) or underinsured negligent motorists and place the insureds in the same position as if the tortfeasor carried sufficient liability insurance.¹⁹ In the UIM context, the insurance carrier “stands in the shoes” of the uninsured or underinsured tortfeasor(s) and must provide coverage for any amounts above the tortfeasor’s liability limits.²⁰ UIM insurers cannot diminish the statutorily mandated UIM coverage through language in the insurance policy.²¹

Washington courts consider contract principles, public policy, and legislative intent when deciding UIM cases.²² The Courts must abide by the

Geonerco, Inc., 105 Wn. App. 41, 45–46, 17 P.3d 1266 (2001) (questions of arbitrability are also reviewed *de novo*).

¹⁸ *Elovich*, 104 Wn.2d at 550-553 (invalidating a restrictive provision the insurer had inserted, which denied UIM coverage where the insured “settles, without [the insurer’s] written consent, with anyone who may be liable for the injury” because it violated “the statutorily enunciated public policy of protecting insureds from uncompensated injury.”

¹⁹ *Finney v. Farmers Ins. Co. of Washington*, 92 Wn.2d 748, 751, 600 P.2d 1272 (1979), *aff’d*, 92 Wn.2d 748, 600 P.2d 1272 (1979).

²⁰ *Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 281, 876 P.2d 896 (1994).

²¹ *Liberty Mutual Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001); *See also Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 662, 999 P.2d 29 (2000).

²² *McIlwain v. State Farm Mut. Auto Ins. Co.*, 113 Wn. App. 439, 446, 136 P.2d 135 (2006)(citations omitted).

clear public policy that automobile accident victims **should be compensated for the full cost of their injuries, up to the UIM policy limits.**²³ In *Hamilton v. Farmers Ins. Co.*, Farmers argued that, where a UIM insured has settled with and released a tortfeasor, the insurer should be able to offset the amount of the assets of the tortfeasor against UIM benefits. Farmers' theory was that the insured had impaired the insurer's right of subrogation. The Supreme Court noted that a UIM carrier should not have the right to interfere with the insured's settlement:

Why should the insurer, mandated by statute to afford UM coverage and receiving a premium for exposure over liability limits of the underinsured motorist, have the right to interfere with its insured's settlement with a liability carrier within policy limits, and that carrier's insured?²⁴ . . . Where the injured insured has released the tortfeasor, the underinsurer's subrogation upon payment will not enable it to recover the insured's claim against the tortfeasor, nor are any rights prejudiced which would permit a reduction in compensation to the insured.²⁵

The Court reiterated: "The statutory aim of fully compensating the insured cannot be defeated by offsetting underinsurance coverage by tortfeasor assets that have not been received by the insured."²⁶

²³ *Elovich*, 104 Wn.2d at 553; See also *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 727-729, 733 P.2d 213 (1987) (holding that an underinsurer's attempts to limit contractually the insured's right to recover when his damages exceed the limits of the tortfeasor's liability insurance are void as against public policy).

²⁴ *Hamilton*, 107 Wn. 2d at 730-31 (quoting *Niemann v. Travelers Ins. Co.*, 368 So.2d 1003 (La.1979)).

²⁵ *Hamilton*, 107 Wn. 2d at 730-31.

²⁶ *Hamilton*, 107 Wn. 2d at 735; See also *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 531, 707 P.2d 125 (1985) (Supreme Court considered a provision in a UIM policy

C. The Superior Court Erred When It Allowed Safeco to Intervene and Abused its Discretion When It Allowed Safeco Unlimited Intervention.

It is respectfully suggested that this Court has the opportunity in this appeal to better define the scope of intervention allowed by a UIM insurer in its insured's lawsuit against a tortfeasor. This is imperative given the predictable situation that has resulted here and will likely continue to occur in future cases where a UIM carrier intervenes, but the underlying parties ultimately engage in alternative dispute resolution such as arbitration. Such consideration is also critical given Safeco's failure to understand its duties to provide UIM coverage as set forth in its correspondence to Schmid and its pleadings. Issues relating to intervention should be resolved on a case by case basis.

Here, where Foss had \$250,000 of coverage and issues such as collusion discussed in *Lenzi, infra*, were not a concern (Foss did not have a minimal limits policy), Foss had every reason to vigorously litigate against Schmid. That was borne out by the fact that Safeco did virtually nothing in the litigation and used Foss to manage the defense. Certainly, the

which offset disability benefits received by the insured against UIM benefits and held that the reduction in benefits was void as against public policy).

intervention that was granted should not have entitled Safeco to object to Schmid's ability to submit the underlying claim to binding arbitration.

CR 24, the Court Rule regarding intervention, provides the two ways in which nonparties may join an action, either as a matter of right, or permissively:

- (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the person is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

- (b) **Permissive Intervention.** Upon timely application, anyone may be permitted to intervene in an action:
 - (1) When a statute confers a conditional right to intervene; or
 - (2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.... (Emphasis added)

CR 1 guides the Court's application of CR 24. It states as follows:

These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. **They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.**

(Emphasis added)

Accordingly, CR 1 mandates that in construing CR 24, the Court cannot allow intervention, or at least must limit it if intervention will prohibit the just, speedy and inexpensive determination of the case.

Safeco brought two motions to intervene in Schmid's case against Foss. On both occasions, Safeco moved only under CR 24(a) – claiming that it was entitled as a matter of right (not permissively) – to intervene in the underlying case against Foss. (CP 318-324). Safeco provided no policy provision as a basis for intervention. Rather, it's main argument rested on its allegation that Schmid's claim "appeared" to exceed Foss's available coverage of \$250,000 and that there was "no indication or reason to believe that Grange Insurance will adequately protect Safeco's interests in this lawsuit." (CP 323).

In order to intervene as a matter of right under CR 24(a)(2) (as section 1 is not applicable), Safeco had to: (1) timely apply for intervention; (2) claim an interest which was the subject of the action; (3) be so situated that the disposition would impair or impede Safeco's ability to protect that interest; and (4) demonstrate that interest is not adequately protected by the existing parties.²⁷

²⁷ See *Spokane Cty. v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998).

The timeliness of a motion to intervene as a matter of right under CR 24(a) is a determination within the trial court's discretion.²⁸ Case law suggests that a motion for intervention under CR 24(a)(2) is timely when made prior to trial.²⁹ Schmid did not object to the timeliness of Safeco's motion.

Whether one has an "interest" of sufficient character so as to permit him or her to intervene in an action as a matter of right under CR 24(a)(2) cannot be determined by absolute or fixed standards. It is for the court in each instance to analyze and balance the relative concerns, not only of the person desiring to intervene, **but also of the parties to the main action in controlling their own lawsuit, and of the public in the efficient resolution of controversies.**³⁰ Here, both Schmid and Foss objected and specifically asserted that their interests outweighed those of Safeco's.

Relevant questions in conducting an analysis as to whether nonparties are adequately represented by a current party include:

- (1) Will the existing parties undoubtedly make all the intervenor's arguments?
- (2) Are the existing parties able and willing to make all those arguments?

²⁸ *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989).

²⁹ *American Discount Corp. v. Saratoga West, Inc.* 81 Wn.2d 34, 499 P.2d 869 (1972).

³⁰ *American Discount Corp.*, 81 Wn.2d 34.

- (3) Will the intervenor more effectively articulate any aspect of its interest?³¹

To justify intervention, **it was incumbent upon Safeco to demonstrate what different arguments it would make apart from Foss.**³² Safeco failed to make any showing in this regard. In fact, as set forth above – apart from seeking duplicative CR 35 examinations that Safeco scheduled when the exam sought by Foss was *already* set – Safeco did nothing independent of Foss. With \$250,000 in policy limits, Foss had significant incentive to fully defend the lawsuit against him and he did so; Safeco did *nothing* but ride Foss’s coattails and then pile on to Foss’s experts, only to make the case more expensive for Schmid.

Admittedly, most courts recognize at least a *qualified right* to intervene on the part of an insurer.³³ The consequence of this qualified right is that, when the insurer has notice of a tort proceeding but declines to intervene, it will be bound by the resulting judgment, under collateral

³¹ See, *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 989 P.2d 1260 (1999).

³² See *Spokane County v. State*, 136 Wn. 2d 644, 650, 966 P.2d 305 (1998) (denying intervention as a matter of right to a union and holding “[t]hat PERC adequately represents the Union’s position is evidenced by the fact that the Union presents no argument on the issue of PERC’s jurisdiction different from the arguments advanced by PERC”).

³³ See generally Francis M. Dougherty, Annotation, *Right of Insurer Issuing “Uninsured Motorist” Coverage to Intervene in Action By Insured Against Uninsured Motorist*, 35 A.L.R.4th 757, 762-766 (originally published in 1985) (cited by *Fisher v. Allstate Ins. Co.*, 85 Wn. App. 594, 599-600, 933 P.2d 1094 (1997))

estoppel principles.³⁴ Those courts that allow intervention often address this concern by imposing limitations on the scope of an insurer's participation in the tort litigation, or recognizing the trial court's discretion to do so.³⁵

Other courts, emphasizing the inherent conflicts that arise when an insurer intervenes against its insured, deny any right of intervention no matter how efficient a single proceeding might be.³⁶ These courts are concerned primarily with the fiduciary duties owed by a UM or UIM insurer toward its insured, which are necessarily jeopardized when the insurer intervenes.³⁷

In Washington, while *Fisher* and *Lenzi* (discussed at greater length, *infra*) hold that a UIM insurer is bound by an arbitration award or judgment if it does not intervene in the underlying action against the tortfeasor, neither case defines the limitation(s) and scope of a UIM carrier's intervention. *Fisher, infra*, recognizes that a conflict exists with the intervention of an insurer, but does not explore what limitations must be placed on the insurer,

³⁴ *Dougherty, supra*, at 762-766.

³⁵ See e.g., *Zirger v. General Acc. Ins. Co.*, 676 A.2d 1065, 1073 (N.J. 1996) (cited by *Fisher* 136 Wn.2d at 249) (holding UM/UIM insurer may generally intervene, and that "case management issues" can be addressed and resolved by trial court); *West v. Burke*, 197 N.E.2d 717 (Ill. App. 1964) (allowing intervention subject to conditions); see generally, *Dougherty, supra*, at 767-68.

³⁶ See, *Dougherty, supra*, at 768-71 (collecting cases).

³⁷ *Dougherty, supra*, at 768-71.

even if intervention is contemplated.³⁸ It is essential that in any case where the UIM carrier intervenes, the intervention does not undermine its insured's right(s) to pursue recovery in the civil justice system; it is up to the trial court to ensure that does not happen. This is further mandated by the language of CR 24(b)(2) and CR(1).

The *extent* of intervention rights – even where granted – is subject to a case by case determination.³⁹

[I]t is for the court in each instance to analyze and balance the relative concerns, not only of the absentee in having his interest protected, but also of the parties to the main action in controlling their own lawsuit, and of the public in the efficient resolution of controversies.⁴⁰

While at first glance, it might appear acceptable to give a UIM insurer full intervention rights, this case is a prime example of why a UIM insurer's intervention – where allowed – needs to be restricted. Plaintiff cases are expensive to bring. As discussed in *Fisher, infra*, the import of and policy behind allowing a UIM insurer to intervene in its insured's lawsuit against the tortfeasor is to limit – not increase – the expenses an

³⁸ *Fisher*, 136 Wn.2d at 249.

³⁹ *Marino Prop. Co. v. Port Comm'rs of Port of Seattle*, 97 Wn.2d 307, 316, 644 P.2d 1181, 1186–87 (1982)

⁴⁰ *Marino Prop. Co.*, 97 Wn.2d at 316 (citing *American Discount Corp. Inc.*, 81 Wn.2d at 34).

insured might have to otherwise bear if it has to engage in duplicate litigation.

However, what the Courts have not previously addressed is the expense and prejudice an insured faces when a tortfeasor vigorously defends itself in litigation and the UIM insurer intervenes and piles on to that defense. The advantage to the UIM insurer is clear: it can save significant money and double-up on defending against its insured. The prejudice to its insured, by comparison, is substantial. The Courts have to engage in a balancing test; intervention is meant to be a shield for the UIM insurer – *not* a sword against the insured.

Here, Safeco used its intervention as a means to dictate the method and manner by which its own first-party insured resolved his claim against the tortfeasor and objected to Schmid's ability to even transfer the case into binding arbitration. Safeco then used the settlement between Foss and Schmid via the transferred arbitration to deny Schmid his UIM coverage and is still doing the same in Federal Court. This cannot be the outcome that the Court anticipated in *Fisher* and *Lenzi* when it *suggested* that UIM carriers can protect their interests by intervening in their insureds' lawsuits.

Schmid specifically raised these types of concerns in his opposition to Safeco's motions to intervene and asked the Court – if it granted Safeco

intervention over Schmid's objections to the same – to at least limit Safeco's intervention, so Safeco could not manipulate or prejudice Schmid's case against Foss. Unfortunately, as the case played out, that is exactly what Safeco did. Schmid asks this Court to reverse the Superior Court's ruling allowing Safeco unlimited intervention.

D. Neither Safeco's Intervention in the Underlying Tort Litigation, Nor the Agreement to Limit Enforcement of the Award Against Foss to His Policy Limits Negates the Mandatory Application of the Fisher/Finney Rule.

Whether a UIM carrier that *has* intervened in a lawsuit against a tortfeasor will be bound by an arbitration award if the insurer thereafter intentionally chooses *not* to participate in the binding arbitration has already been addressed by Washington Courts.⁴¹ Based upon principles of collateral estoppel, as long as the UIM carrier “has notice and an opportunity to intervene in the underlying action against the tortfeasor, it will be bound by the findings, conclusions, and judgment of an arbitral proceeding.”⁴² An insurer's intervention does not change this longstanding Rule. The Superior Court's ruling that ignored that Rule must be reversed.

⁴¹ It should be noted that Schmid could have undergone the arbitration without Safeco given its refusal to participate and *then* requested the Court bind Safeco as to the award.

⁴² *Fisher v. Allstate*, 136 Wn.2d 240, 246, 961 P.2d 350 (1998). The Courts have applied the principle of collateral estoppel to cases like the present one because there is sufficient identify of interests between the UIM insurer and the tortfeasor, even though technical privity for the application of collateral estoppel may be absent. *Id.* at 248. **Here, there is technical privity because Safeco actually intervened.**

Fisher v. Allstate, supra, was decided 20 years ago, but its holding is still on point. The question posed in *Fisher* is the same as the one here:

Is an underinsurance motorist carrier bound by the results of an arbitration between its insured and the tortfeasor when the carrier did not participate but had notice and an opportunity to intervene in the action? Yes.⁴³

In *Fisher*, Kelly Fisher (“Fisher”) was seriously injured in a motorcycle accident. The tortfeasor’s liability coverage limit was \$125,000 and Fisher’s UIM coverage limit with Allstate was \$25,000.⁴⁴ Fisher sued the tortfeasor but filed a **separate** lawsuit against Allstate for UIM coverage. Allstate was aware of Fisher’s lawsuit against the tortfeasor but chose not to participate in it. Fisher entered into arbitration with the tortfeasor before Fisher’s UIM claim went to trial, but Allstate did not participate in the arbitration. The arbitrator determined that the tortfeasor was liable to Fisher for \$236,000 in damages, but the tortfeasor only had \$125,000 in total liability coverage. Fisher then demanded that Allstate pay its UIM coverage limit of \$25,000.

The trial court held that Allstate was bound by the arbitration award and the Court of Appeals affirmed. Citing *Finney v. Farmers Ins. Co., supra*, the Court of Appeals in *Fisher* explained:

⁴³ *Fisher*, 136 Wn.2d at 242.

⁴⁴ *Fisher*, 136 Wn.2d at 242–43.

Finney [only] requires that a party by fully informed of the proceedings and afforded an opportunity to participate in those proceedings in order to be bound by them.⁴⁵

The Supreme Court also affirmed and held that because Allstate had notice of Fisher's claim against the tortfeasor, the arbitration ruling was binding on Allstate.⁴⁶ In so holding, the Court upheld and applied its prior holding in *Finney v. Farmers Ins. Co.*⁴⁷

The facts in *Lenzi, supra*, are similar to those in *Fisher*. The difference, however, is that Lenzi obtained a default judgment against the tortfeasor before Lenzi's UIM claim went to trial.⁴⁸ The issue in *Lenzi* was whether the default judgment bound Lenzi's insurer. In rendering its decision, the Supreme Court reaffirmed its reasoning in *Fisher*, explored what has been dubbed the "*Finney-Fisher* Rule" in detail, and held:

Our UIM jurisprudence has clearly indicated an insurer having notice of a lawsuit brought by its insured against the uninsured tortfeasor may be bound by the judgment obtained by the insured.⁴⁹

⁴⁵ *Fisher v. Allstate Ins. Co.*, 85 Wn. App. 594, 600, 933 P.2d 1094 (1997) (citing *Finney*, 21 Wn. App. at 617) (Emphasis added).

⁴⁶ *Fisher*, 136 Wn.2d at 251-252.

⁴⁷ *Fisher*, 136 Wn.2d at 251-252 (citing *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978), aff'd by *Finney v. Farmers Ins. Co. of Washington*, 92 Wn.2d 748, 600 P.2d 1272 (1979)).

⁴⁸ *Lenzi*, 140 Wn.2d at 271-72.

⁴⁹ *Lenzi*, 140 Wn.2d at 273. (Emphasis added).

The Court explained that policy considerations were the animating force behind the “*Finney/Fisher* Rule” and enumerated those to include: “[c]onsiderations of fairness and the avoidance of redundant litigation[,]” the prevention of “anomalous results,” and “preventing insurers from picking and choosing their judgments.”⁵⁰ It also noted that the “*Fisher–Finney* rule” is based on an insurer’s contractual promise to pay its insured.⁵¹

Mencel v. Farmers Ins. Co. of Washington,⁵² is another case that is helpful here; it was decided after *Finney*, but before *Fisher*. In *Mencel*, the tortfeasor (“Graves”), crashed into Mencel.⁵³ Graves had a liability policy with limits of \$500,000. Mencel obtained a jury verdict against Graves in the amount of \$804,450. Thereafter, Graves’ liability insurer settled with Mencel for \$725,000, \$225,000 more than Graves’ applicable insurance, but almost \$80,000 less than the verdict amount. Mencel then made a UIM claim with his own insurer, Farmers, for his \$50,000 UIM coverage. Farmers rejected the claim on the grounds that Mencel had already been fully compensated for his injuries by the settlement with Graves’ liability carrier and that was the only amount he was “legally entitled” to obtain for

⁵⁰ *Lenzi*, 140 Wn.2d at 279

⁵¹ *Lenzi*, 140 Wn.2d at 280.

⁵² *Mencel v. Farmers Ins. Co. of Washington* 86 Wn. App. 480, 937 P.2d 627 (1997).

⁵³ *Mencel*, 86 Wn. App. at 628.

purposes of his UIM coverage. Mencil filed suit against Farmers, including bad faith and CPA claims. **The trial court ruled that Farmers was required to arbitrate the UIM claim, but Farmers was not bound by the verdict or settlement.** On appeal – and significant here – the *Mencil* court noted and held (in part) that:

Farmers argues that it is not bound by the jury verdict rendered in Mencil’s tort action against Graves. This contention is without merit. **An insurer is bound by the judgment in the insured’s action against the tortfeasor where the insurer had adequate notice and an opportunity to intervene and defend at the time the insured litigated the issues of liability and damages with the insured tortfeasor.** See *Finney v. Farmers Ins. Co.*, 21 Wash.App. 601, 617, 586 P.2d 519 (1978).

The payment by American States to Mencil of \$725,000 represents **only partial compensation. Mencil is entitled to look to his underinsurer for payment until the limits of his UIM policy are reached or until he is fully compensated, whichever occurs first.** The limits of Mencil’s UIM policy will be reached before he is fully compensated, so he is entitled to payment of those limits, or \$50,000, from Farmers. **The trial court thus erred by denying Mencil’s claim for UIM benefits and by finding that Farmers is entitled to arbitrate its liability under the policy and the amount of UIM benefits it is obligated to pay.**⁵⁴

Mencil, supra, confirms that Schmid is not required to relitigate the amount of damages because those issues are conclusively established by the arbitration award and Safeco is bound by the same. *State Farm Mut. Auto.*

⁵⁴ *Mencil*, 86 Wn. App. at 629-630. (Some internal citations omitted) (Emphasis added).

Insurance Co. v. Amirpanahi,⁵⁵ a case cited by *Mencel, supra* provides further support for this conclusion.⁵⁶

The underlying facts in *Amirpanahi* are similar to those here, including the submission of the third-party claim to arbitration. The difference in *Amirpanahi* is that Amirpanahi and the tortfeasor entered into a “voluntary arbitration agreement with floor/ceiling limits of \$17,000 and \$50,000 [Grange’s policy limits] respectively” and thereby included **limitations on what the arbitrator could award**. The arbitrator awarded damages of \$64,763.42, \$14,763.42 beyond his authority, and Grange paid the policy limits of \$50,000. The UIM insured, Amirpanahi, thereafter demanded arbitration under his policy with State Farm. State Farm filed a declaratory relief action and argued that, based on collateral estoppel, it was only obligated to pay the \$6,266.09 difference between the award and the Grange policy, less paid PIP.

The Superior Court found that the UIM insured was collaterally estopped by the arbitration award. The Court of Appeals reversed, holding that because the arbitrator’s award had been restricted by agreement and the arbitrator went outside his agreement, the insureds were not collaterally

⁵⁵ *State Farm Mut. Auto. Insurance Co. v. Amirpanahi* 50 Wn. App. 869, 751 P.2d 329, review denied, 111 Wn.2d 1012 (1988).

⁵⁶ *Mencel*, 86 Wn. App. at FN 3.

estopped by the prior arbitration award/agreement fixing the amount of the damages. The UIM insureds were entitled to *relitigate* the issue of their total damages **because of the limitation on the authority of the arbitrator**. The Court further held that its decision was in accord with principles of automobile insurance law and that “all insurance contracts are available to the insured until he or she has recovered the full amount of his or her damages.”⁵⁷

Here, there was no limitation on the arbitrator’s authority and Schmid has agreed to be bound by the arbitration award, just as Safeco must be bound. Safeco was clearly provided notice of the underlying lawsuit against Foss in which it intervened, as well as the binding arbitration in which it was invited to participate. Safeco ignored the offer to “buy-out” the claim against Foss and refused to participate in the binding arbitration.

The Superior Court erroneously agreed with Safeco’s argument that the “*Finney/Fisher* Rule” does not apply if the insurer intervenes in the lawsuit against the tortfeasor. The Court clarified that it believed if Safeco had *not* intervened, or if it ***had intervened but simply not engaged further***, Safeco *would* be bound by the arbitration result:

⁵⁷ *Amirpanahi*, 50 Wn. App. at 873 citing *Almeida v. State Farm Mutual Ins. Co.*, 53 Ala. App. 175, 298 So.2d 260 (1974) and *Elovich*, *supra*, 104 Wn.2d 543.

But if Safeco hadn't done what they have done, they absolutely -- they didn't -- they intervene, but they don't do anything further, like what's happening now, all of this litigation, and they don't really participate, aren't they bound by the arbitration result? I will answer my own question. Yes, I think they are. ("RP" 2/24/17, p. 38; CP 939). (Emphasis added).

There is no basis for such a distinction between this case where the insurer intervened and the cases of *Finney* (trial), *Mencel* (trial), *Fisher* (arbitration), and *Lenzi* (default judgment). The Superior Court's ruling – which is internally inconsistent – completely ignores all of the policy considerations that are the critical underpinnings of the “*Finney/Fisher* Rule.” As noted by the *Fisher* Court, “the possibility of settlement or arbitration is implicit in the context of litigation.”⁵⁸ Therefore, even when Safeco initially intervened in Schmid's lawsuit, it knew – or should have known – that Schmid could settle or arbitrate the underlying litigation.

Additionally, the Superior Court's oral ruling, on its face, penalizes Schmid for being transparent and providing Safeco notice of the litigation, including Safeco in everything, and then bringing the motion in advance of the arbitration with notice to Safeco. It is confounding how the Court could state that *if Safeco intervened but then sat back on its hands during the litigation* – which it in fact did – *the Court would have otherwise held*

⁵⁸ *Fisher*, 136 Wn. App. at 250-251 (citing to Alabama and Delaware cases).

Safeco bound Safeco to the award. The Court’s ***distinction*** is completely counter to the *Fisher-Finney* Rule.

Safeco wanted to have its “cake and eat it too.” It wanted to benefit from the tortfeasor’s defense of the lawsuit throughout the litigation, saving itself significant time and money and allowing Safeco to stack the deck against its insured in a jury trial, while the tortfeasors’ attorneys did all of the heavy lifting. Clearly, in these circumstances, Safeco reaps the benefits of the tortfeasors’ counsel’s labor and expense. Alternatively, Safeco wanted to be able to withdraw its participation and deny its insured coverage when the lawsuit no longer suited Safeco’s purpose – i.e., when it could no longer drag Schmid into a 2-3-week trial and pile on the tortfeasor’s defense to minimize the likelihood of a favorable outcome for its insured.⁵⁹ *Fisher, supra*, prohibits such tactics.

As noted by the Court in *Fisher*, if Safeco could do as it has attempted in this case:

⁵⁹ Safeco’s motives were made clear at p. 12 of its response to Schmid’s motion when it argued that its policy allows Safeco to subrogate any claims that Foss might hold against his insurer. (CP 400). Safeco’s real goal here was clear: it wanted to hedge its bets, and in the event that Schmid was successful - notwithstanding Safeco’s efforts to undermine Schmid’s third-party case through its intervention and tag-teaming with the defense - Safeco wanted to force Schmid to proceed to trial, requiring him to secure a judgment against the tortfeasor that Safeco could then use against the ***tortfeasor’s insurer***, instead of satisfying its obligations to provide UIM coverage. Such a position flies in the face of the entire purpose of UIM coverage, which is statutorily required and regulated.

A UIM carrier could deny a claim, wait until litigation between the insured and tortfeasor was complete, and then assert its insured is collaterally estopped if the damage award is low, but avoid the damage award by relitigating if considered too high.⁶⁰

Safeco calculatingly **chose** to not participate in the arbitration notwithstanding the fact that this issue was on appeal. It must now face the peril of its choice and pay the amount of the arbitration award that is in excess of Foss's insurance coverage, consistent with the Supreme Court's clear holdings.⁶¹ Safeco cited no rule, nor any case law to support its positions that it could: (i) prevent the stipulated binding arbitration from proceeding forward; or (ii) force Schmid to go to trial on any issues – including a separate trial on his UIM claim *after* Safeco chose to intervene in the case against Foss.

Here, Schmid provided Safeco with notice of his action against Foss. Safeco intervened in the Foss lawsuit, engaged in the litigation, and had the ability to participate in and contest a damages award at an arbitration proceeding if it so desired. This is all that is required by the “*Fisher/Finney* rule” and by *Lenzi* for a trial court to bind the insurer to the resulting

⁶⁰ *Fisher*, 136 Wn.2d at p. 249.

⁶¹ It is also worth pointing out that Washington law does not require an insured to pursue a third-party claim to obtain his or her UIM benefits; an insured can also settle for less than the tortfeasor's policy limits and still obtain the benefits of UIM coverage or an insured can pursue a UIM claim even *before* it pursues a third-party claim. *See, e.g., Elovich v. Nationwide Ins. Co.*, 104 Wn.2d at 550-553.

judgment against the tortfeasor. The insurer's actual intervention does not change the result or alter the effect of the well-established case law. The intervention simply offered Safeco the opportunity to defend its position in the litigation against the tortfeasor, including any arbitration regarding the same. *Mutual of Enumclaw Ins. Co. v. T&G Const. Inc.* is instructive on this point.⁶²

In *T&G Const. Inc.*, an insured settled third-party claims that had been brought against it. The insurer, Mutual of Enumclaw's (MOE), was aware of the settlement, but refused to consent to or participate in it. A reasonableness hearing proceeded in which MOE participated. Notwithstanding having the opportunity to participate in the hearing, MOE subsequently brought a declaratory judgment action, which included a claim that its insured breached its obligation to cooperate by settling and releasing parties without its consent.⁶³ The Court's holding makes it clear that an insurer's intervention and/or participation does not change the binding effect of a judgment:

MOE was on notice of the settlement and had an opportunity to intervene in the reasonableness proceedings. MOE did intervene, was heard, and as a result, the judge presiding over the reasonableness

⁶² *Id.*

⁶³ *Mutual of Enumclaw Ins. Co. v. T&G Const. Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008)

proceedings reduced the reasonable value of the settlement by \$300,000.⁶⁴

The *T&G Const. Inc.* Court confirmed that the purpose of intervention is to allow the insurer to have an opportunity to participate and be heard. Should the insurer choose to not participate in proceedings that determine the insured's amount of damages (i.e. in an arbitration here), the insurer assumes the risk that the result will be in excess of the tortfeasor's policy limits and the insurer will still be obligated to pay any excess, up to the insured's UIM policy limits. However, contrary to the Superior Court's ruling, here, the insurer's intervention and subsequent choice to not participate in the binding arbitration does not negate the requirement that the insurer be bound by the result.

D. **The Trial Court Erred When It Ruled in Contravention to *McGreevy* that Safeco Proved Notice and Agreement for the Alleged Change in its Policy and that the Policy Did Not Require Arbitration Upon Schmid's Demand for the Same.**

1. The Declaration Submitted by Safeco Contained Inadmissible Hearsay That Should Have Been Stricken.

Below are the notice and amendatory endorsement Safeco alleged were delivered to Schmid and to which Safeco alleged Schmid agreed:

⁶⁴ *T&G Const. Inc.*, 165 Wn.2d at 269. (Internal quotations and

NOTICE OF A CHANGE TO YOUR PERSONAL AUTO COVERAGE

Enclosed with this renewal is an Amendatory Endorsement. Please read the endorsement along with the policy and Declarations for a complete understanding of your coverages. You should keep the Amendatory Endorsement with your policy.

The Amendatory Endorsement revises the Arbitration provision under Personal Injury Protection Coverage, Part C — Underinsured Motorists Coverage and Underinsured Motorists Coverage — Property Damage. We have changed the Arbitration provision to state that both parties must agree to Arbitration.

No coverage is provided by this notice. If this notice conflicts with the policy, the provisions of the policy will prevail.

If you have any questions concerning this change, or any other insurance matter, please contact your agent. Your agent's telephone number and address are listed on the enclosed Declarations page.

SA-2669/WAEP 9/05

(CP 431)

**** REPRINTED FROM THE ARCHIVE. THE ORIGINAL TRANSACTION MAY INCLUDE ADDITIONAL FORMS ****

AMENDATORY ENDORSEMENT — WASHINGTON

It is agreed the policy is amended as follows:

PERSONAL INJURY PROTECTION COVERAGE

Arbitration

The **Arbitration** provision is amended as follows:

Paragraph **A.** is deleted and replaced by the following:

- A.** If we and an **insured** do not agree on the amounts payable under this coverage, the matter shall, upon mutual agreement, be decided by arbitration.

PART C — UNDERINSURED MOTORISTS COVERAGE and ADDITIONAL COVERAGES — UNDERINSURED MOTORISTS COVERAGE — PROPERTY DAMAGE

Arbitration

The **Arbitration** provision is amended as follows:

Paragraph **A.** is deleted and replaced by the following:

- A.** If we and an **Insured** do not agree:

1. Whether that **insured** is legally entitled to recover damages; or
2. As to the amount of damages which are recoverable by that **insured**;

from the owner or operator of an **underinsured motor vehicle**, then the matter may be arbitrated. However, disputes concerning coverage under this Part may not be arbitrated. Both parties must agree to arbitration.

SA-2668/WAEP 9/05

(CP 432)

As noted above, pursuant to ER 801, Schmid moved to strike the portion of Thayer's declaration that asserted Safeco sent Schmid a copy of

the above documents as inadmissible hearsay for which Safeco did not provide any basis for an exception under ER 803; or demonstrate the required foundation for a business record under RCW 5.45.020.⁶⁵ “Hearsay is not admissible except as provided by [court rule] or by statute.”⁶⁶

In addition to constituting inadmissible hearsay, the declaration also failed to lay the proper foundation. Thayer did not personally mail out the policy changes and she did not attach any proof or evidence to demonstrate that anyone ever actually mailed policy changes *specifically* to Schmid; rather her testimony referenced a mass mailing. Moreover, Safeco provided no evidence that Schmid received the policy amendment. Schmid testified that he specifically did not recall receiving such documentation, thus further rendering the changes ineffective.⁶⁷ The Superior Court erred in admitting

⁶⁵ ER 801 states in pertinent part that:

The following definitions apply under this article:

- (a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. A “declarant” is a person who makes a statement.
- (c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

RCW 5.45.020 provides an exception:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

⁶⁶ ER 802.

⁶⁷ It is critical to point out that Safeco has never asserted, nor provided any evidence that it provided Schmid with a new policy that contains the above-referenced language. It only

the hearsay portion of Thayer's declaration and relying upon the same; the Court's ruling should be reversed accordingly.

2. There Was No Notice or Agreement for the Alleged Policy Change.

Schmid's actual policy states:

ARBITRATION

A. If we and an insured do not agree:

1. Whether that insured is legally entitled to recover damages; or
2. As to the amount of damages which are recoverable by that insured;

from the owner or operator of an underinsured motor vehicle, then the matter may be arbitrated. However, disputes concerning coverage under this Part may not be arbitrated. Arbitration shall begin upon a written demand from either party.

1. The parties may agree to a single arbitrator. A decision by the arbitrator will be binding.
2. If the parties cannot agree on a single arbitrator, each will select an independent representative, who will then select a single arbitrator. The parties may then proceed with the single arbitrator by agreement. A decision by the arbitrator will be binding.
3. If the representatives cannot agree on a single arbitrator within 30 days or the parties do not agree on the arbitrator selected, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a court having jurisdiction. A decision by two of the three arbitrators will be binding.

(CP 303; 419)⁶⁸

submitted Thayer's declaration stating that the above two pages were provided to Schmid and these pages are the documents upon which Safeco is relying to have notified Schmid that his policy changed. Notably, Thayer states in her declaration that this change occurred in 2006, but Safeco never sent Schmid a new policy with the changes, nor has it ever argued that it did.

⁶⁸ In 1980, after the underinsured motorist statute was adopted, virtually all insurance policies in Washington contained clauses that required disputes as to whether the claimant was legally entitled to recover damages and/or the amount of those damages to be decided by arbitration. The above-referenced policy is a prime example of such a clause.

Independent of the basis laid out in Section C, which dictates that the arbitration award is binding on Safeco, the applicable UIM policy set forth above calls for arbitration. Schmid requested arbitration in accordance with his policy; Safeco ignored that request. Safeco's claim was that it was not required to submit to arbitration under its UIM policy because the above alleged changes to its policy in its amendatory endorsement modified the applicable language. Safeco argued that the amendatory provision was applicable and the new provision stated that disputes regarding damages in a UIM case "may be arbitrated" if both parties "agree" to arbitration and Safeco would not "agree." However, Safeco failed to demonstrate that there was notice and agreement for any change in Schmid's UIM policy.

There is a disparity of bargaining power between an insurance company and its policyholder, particularly when an insurer amends the contract unilaterally. In fact, this disparity of bargaining power was recognized by the Supreme Court in *McGreevy v. Oregon Mut. Ins. Co.*⁶⁹ The Court of Appeals in *McGreevy* explained:

In our judgment, this disparity is at its greatest when an insurance company represents a current or prospective insured with a standardized or 'form' document, in essentially a non-negotiable, 'take-it-or-leave-it' environment. Second, we recognize that a motivation for an individual to obtain a contract of insurance is to

⁶⁹ *McGreevy v. Oregon Mutual Insurance Co.*, 74 Wn. App. 858, 867–68, 876 P.2d 463, 469 (1994), aff'd, 128 Wn.2d 26, 904 P.2d 731 (1995).

seek protection from expenses from litigation, not ‘vexatious, time consuming, expensive litigation with his insurer.’⁷⁰

McGreevy makes it clear that an amendment to an insurance policy requires “a change in the contract of insurance which, in turn, require[s] a meeting of the minds and agreement.”⁷¹ Notice and agreement must be obtained before amendments or modifications to insurance policies can be made by the insurer.⁷²

McGreevy further held that the argument that a policy amendment could be made without *proven delivery* – which is the scenario in this case – would eliminate the need to notify insureds of amendments and would allow an insurer to deny coverage or benefits without the knowledge or consent of the insured. As an example of the type of proof necessary (which is not the “mailbox rule”), the Court stated:

It could have had each insured sign a copy of the amendment and return it to an insurance agent verifying that they received and

⁷⁰ *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995)

⁷¹ *McGreevy*, 74 Wn. App. at 867–68.

⁷² Citing *Orsi v. Aetna Ins. Co.*, 41 Wn. App. 233, 240, 703 P.2d 1053 (1985) (before a policy can be modified, there must be an actual agreement or understanding that the policy will be or is modified) (relying on *Grand Lodge of Scandinavian Fraternity of Am., Dist. 7 v. United States Fid. & Guar. Co.*, 2 Wn.2d 561, 572, 98 P.2d 971 (1940) (in order to modify the bond, there must be an agreement to modify, supported by consideration). See also WAC 284-30-350, which requires automobile insurers to fully disclose to the pertinent benefits, coverage, or other provisions of an insurance policy or insurance contract under which a claim is presented to all first party claimants.

understood the changes; the notice could have been mailed certified or registered – any of which would have provided evidence of notice.⁷³

Therefore, even if the Court could accept Thayer’s baseless hearsay allegation that Safeco engaged in a mass mailing of the amendatory endorsements to its insureds as sufficient evidence of “notice,” Safeco never provided any proof that the amendatory endorsement was delivered to Schmid for purposes of “agreement,” which is fatal to its argument. Thus, Safeco cannot show that Schmid “agreed” to the amended language. Ironically, the amendatory endorsement states: “[i]t is agreed the policy is amended as follows.” In fact, there was never any such *agreement*.

The trial court therefore erred when it held – in contravention of *McGreevy, supra* – that Safeco proved that this amended “policy language” was applicable.

3. The Amendatory Endorsement is Ambiguous and Therefore Requires Arbitration.

Even if Safeco had established notice and agreement in accordance with *McGreevy, supra*, the language of the alleged applicable amendatory endorsement is ambiguous; when construed most favorably to Schmid, it requires arbitration if he requests it.

⁷³ *McGreevy*, 74 Wn. App. at 869. The proof of mailing and delivery, as required in *McGreevy* is different than the mailbox rule as set forth in RCW 48.18.290, which relates specifically to the practice of mailing notices of cancellation or non-renewal, *not* amendments to insurance policies.

Insurance policies are construed as contracts; interpretation of a policy is a question of law.⁷⁴ When construing the language of an insurance policy, the whole policy is examined.⁷⁵ If provisions in an insurance contract are inconsistent or ambiguous, rules of construction apply and the court must construe the clause most favorably to the insured.⁷⁶ A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable.⁷⁷

The policy should be given a fair, reasonable, and sensible construction such as would be given to the contract by the average person purchasing insurance.⁷⁸ Ambiguous clauses must be construed in favor of the insured, even if the insurer may have intended another meaning.⁷⁹ Washington courts rely on dictionary definitions to establish an ordinary and popular meaning of a word or term contained in an insurance policy that is undefined.⁸⁰

⁷⁴ *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 401, 670 P.2d 267 (1983).

⁷⁵ *Riley v. Viking Ins.* 46 Wn. App. 828, 829, 733 P.2d 566 (1987).

⁷⁶ *Mutual of Enumclaw Ins. Co. v. Grimstad-Hardy*, 71 Wn. App. 26, 857 P.2d 1064 (1993) (citations omitted).

⁷⁷ *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 840-841, 734 P.2d 17 (1987).

⁷⁸ *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 801 P.2d 207 (1990) (citation omitted).

⁷⁹ *Vadheim*, 107 Wn.2d at 840-41 (citations omitted).

⁸⁰ *Kish v. Insurance Co. of North America*, 125 Wn.2d 164, 170, 833 P.2d 308 (1994) (citation omitted).

There are numerous issues with the “new” UIM arbitration provision and accompanying notice. First, the notice specifically disavows that it is providing any coverage and states that the actual policy governs should any conflict arise:

The Amendatory Endorsement revises the Arbitration provision under Personal Injury Protection Coverage, Part C — Underinsured Motorists Coverage and Underinsured Motorists Coverage — Property Damage. We have changed the Arbitration provision to state that both parties must agree to Arbitration.

No coverage is provided by this notice. If this notice conflicts with the policy, the provisions of the policy will prevail.

Second, the title of the endorsement does not align with the title of any corresponding section of the underlying policy.

Third, upon a close look, a reasonable interpretation of the UIM arbitration provision is that it is binding **at the option of the insured, not the insurer**. The policy – even as amended – provides that “...the matter may be arbitrated.” This statement can reasonably be viewed as Safeco’s consent to arbitrate. Safeco’s use of “may” provides the insured an opportunity or permission to arbitrate.⁸¹ Since Safeco has provided Schmid the opportunity for arbitration, Safeco has already agreed to arbitration. If Schmid also agreed to arbitration, *which he did in this case*, then arbitration will occur, because “[B]oth parties must agree to arbitration.” If the insured does not agree to arbitration, there will be no arbitration.

⁸¹ One reasonable meaning of “may” is “(used to express opportunity or permission): You may enter.” <http://www.dictionary.com/browse/may>.

Contrasting the “amended” UIM arbitration clause above with the “amended” PIP arbitration clause – both of which are noted on the *same* page of the Amendatory Endorsement and thus add further confusion to the question because the language is *different* – confirms this result. When engaging in a direct comparison between the two provisions, the “amended” PIP provision is clear and tells the policy holder that “mutual agreement” is a prerequisite to arbitration and neither party is giving advance agreement. Therefore, the PIP clause requires contemporaneous consent. Conversely, the “amended” UIM clause makes arbitration mandatory at the demand of the insured. The difference in the two provisions also provides further evidence of *ambiguity*.

Once an automobile insurance contract assures its insureds that a UIM disagreement will be arbitrated the parties, the Court must abide by RCW 7.04A and work within the mandatory framework set forth in the statute. Washington has a strong public policy of encouraging and enforcing arbitration agreements.⁸² The arbitrability of the dispute is determined by examining the arbitration agreement between the parties.⁸³

⁸² See RCW 7.04A.060. See also *In re Marriage of Pascale*, 173 Wn. App. 836, 842-843, 295 P.3d 805 (2013) (citations omitted) (holding that “[a]ny doubts regarding the applicability of an arbitration agreement ‘should be resolved in favor of coverage.’”)

⁸³ *Heights at Issaquah Ridge, Owners Ass’n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403–04, 200 P.3d 254 (2009); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45–46,

“The party opposing arbitration bears the burden of showing that the agreement is not enforceable.”⁸⁴ If the Court can fairly say that the parties’ arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.⁸⁵

In its opposition to Schmid’s Motion to Compel Arbitration, Safeco cited *Mutual of Enumclaw Ins. Co. v. Huddleston*⁸⁶ to support its argument that the Court should not compel Safeco to arbitrate Schmid’s claim and that its policy calls for a trial on the UIM claim. However, there is an extremely important distinction between the policy language in the *Huddleston* case, versus here. The UIM provision in *Huddleston* provided for an alternative option in the event the parties did not “agree” to arbitrate the case; here, there is no alternative. The policy in *Huddleston* stated:

ARBITRATION OR TRIAL

- A. If **we** and a **covered person** do not agree on whether that person is legally entitled to recover damages from the owner or operator of any **underinsured motor vehicle** or do not agree as to the amount of damages, the disagreement may be settled by arbitration. **We** and the **covered person** however, must mutually agree to arbitrate the disagreement. If **we** or the **covered person** do not agree to arbitrate, ***then the disagreement will be resolved***

17 P.3d 1266 (2001); *Kruger Clinic v. Regence Blueshield*, 157 Wn.2d 290, 298, 138 P.3d 936 (2006).

⁸⁴ *Zuver v. Airtouch Communs., Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)

⁸⁵ *Heights*, 148 Wn. App. at 403–04; *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002).

⁸⁶ *Mutual of Enumclaw Ins. Co. v. Huddleston*, 119 Wn. App. 122, 77 P.3d 360 (2003).

*by a trial in a trial court of general jurisdiction. Either party may demand a jury.*⁸⁷

While this Court decided *Huddleston*, the case dealt with the limited issue of whether MOE's optional remedy provision in its UIM policy authorized either party to demand a jury, which is not the case here. This Court did not address the question as to whether the remedy provision was ambiguous or failed to properly disclose the insurer's intent in the event a disagreement arose regarding the insured's legal entitlement to damages. The issue of whether there was notice and agreement for an alleged policy change was also not an issue before this Court.

The insurer is always in the best position to draft clear and unambiguous policy language, but Safeco neglected to do so. Safeco's amendatory endorsement fails to explain in clear, unmistakable language to an insured that the insured will be required to file a lawsuit and that Safeco may force the insured to incur the expense and delay of presenting a claim in a jury setting. More importantly, it does not explain that Safeco will be allowed to force its insured to a jury trial after Safeco has intervened in the insured's underlying lawsuit against the tortfeasor. As Safeco would have it, the option to arbitrate or force a lawsuit will always be controlled by the

⁸⁷ *Huddleston*, 119 Wn. App. at 122 (Emphasis added)

insurer and not the insured. This is not a reasonable interpretation of the language in the amendatory endorsement.

The remedy for the insured in the *Huddleston* case, in the event of a disagreement regarding the amount of damages the insured is legally entitled to recover, is clear and unmistakable. Either there is arbitration, or the insured is forced to file a lawsuit against his or her own insurance carrier. In cases where the insured is forced to sue the insurer, there are obvious public policy problems (noted herein). But, at a minimum, the insured ought to know what to expect from the insurer if a disagreement arises regarding an entitlement to benefits under a UIM policy.

Safeco's amendatory endorsement – in conjunction with the policy – is ambiguous and that ambiguity must be resolved against Safeco in this case. Furthermore, there is no mention of a jury trial or a reservation of a right to force a jury trial in the amendatory language. Safeco failed to include clear and unambiguous language in its policy to that effect.

Therefore, based upon the ambiguous language in the amended policy, Washington's policy of favoring arbitration in first-party claims, as well as the applicable statutory provisions and supporting case law, the

Superior Court erred when it failed to compel Safeco to arbitrate Schmid's UIM claim and that ruling should be reversed.⁸⁸

**VI. REQUEST FOR ATTORNEY FEES AND COSTS
PURSUANT TO RAP 18.1 AND *OLYMPIC STEAMSHIP***

A. Schmid Should be Awarded His Attorney Fees and Costs on Appeal.

Pursuant to RAP 18.1, Schmid seeks an award of attorney fees and costs incurred in this appeal as allowed by *Olympic Steamship, supra*.⁸⁹

Olympic Steamship holds that an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of an insurance contract, regardless of whether the duty to defend is at issue.⁹⁰ Coverage does not have to be “in dispute.”⁹¹ The holding in *Godfrey v. Hartford Cas. Ins. Co.*,⁹² is instructive:

We believe this case is more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available). While it is true Hartford does not agree with the arbitral award of \$165,000, the dispute is not whether that

⁸⁸ While Safeco has argued in its briefing relating to Appellant's Motion to Convert his notice of discretionary review into an appeal as a matter of right that this point is moot because the arbitration has already occurred, that is not necessarily correct. In the unlikely event that this Court were to determine that Safeco is not bound by the arbitration award pursuant to the *Finney-Fisher* Rule and collateral estoppel, then Schmid would be entitled to arbitrate his UIM claim, versus have it litigated before a jury.

⁸⁹ *Olympic Steamship*, 117 Wn.2d 37.

⁹⁰ *Olympic Steamship*, 117 Wn.2d at 53.

⁹¹ See *McGreevy*, 128 Wn.2d at 28 (reaffirming *Olympic Steamship*).

⁹² *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 899-900, 16 P.3d 617 (2001).

amount should be less, but whether Hartford is entitled to a trial de novo to argue it should be less. **In other words, the dispute is over whether the Godfreys can receive the benefit of their insurance contract by entry of the arbitral award as a judgment in their favor.** This situation is like that present in *McGreevy v. Oregon Mutual Insurance Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995) where we allowed a fee award in a UIM case. The parties there contested the question of “stacking” of UIM coverages. The parties in *McGreevy* were certainly interested in the amount of damages to be allowed, but the fundamental issue was one of an insured being compelled to sue to vindicate a key policy provision, albeit one that affected damages. The Godfreys have had to litigate their right to entry of judgment on the arbitral award, and are therefore entitled to attorney fees.⁹³

Insurers often attempt to test the bounds of clear Supreme Court case law as evidenced by State Farm’s multiple attempts to distinguish the circumstances in which *Mahler v. Szucs* applies.⁹⁴ However, when they do so and fail, they are obligated to pay attorney fees to their insureds who paid for the coverage that the insurers are testing. The Court’s discussion in *Matsyuk, supra*, explains the reasoning for this:

Other courts have recognized that disparity of bargaining power between an insurance company and its policyholder makes the

⁹³ *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d at 899-900. (Emphasis added).

⁹⁴ *Mahler v. Szucs (State Farm)*, 135 Wn.2d 398, 427, 957 P.2d 632 (1998) (PIP carrier must pay its pro-rata share of fees and costs when the injured party recovers from a tortfeasor). See *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 881, 31 P.3d 1164 (2001) (holding that *Mahler* includes situations where the injured party recovers funds from both the underinsured at-fault party and the injured party’s own UIM carrier); *Hamm v. State Farm Mut. Ins. Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004) (holding that *Mahler* includes situations where the at-fault party was uninsured and the injured person received benefits only under his or her own PIP and UIM coverage). In *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 661-63, 272 P.3d 802 (2012), State Farm made a fourth attempt to distinguish the circumstances and argued that *Mahler* did not apply because State Farm was both the third-party insurer and the PIP insurer.

insurance contract substantially different from other commercial contracts. When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not “vexatious, time-consuming, expensive litigation with his insurer.” Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. **In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured. Further, allowing an award of attorney fees will encourage the prompt payment of claims.**

. . . In the absence of *Olympic Steamship* fees, Weismann would not be made whole because the coverage she is entitled to would be diminished by the attorney fees she incurred to obtain it. Moreover, an insurer would have little economic incentive to provide coverage without a fight because the most the insurer would be required to pay if it lost the legal battle is what it should have paid in the first place. . . The situation here is thus akin to the many cases where coverage was disputed and we found *Olympic Steamship* fees appropriate. . . Weismann is entitled to recover reasonable attorney fees, including on appeal under RAP 18.1.⁹⁵

This appeal specifically relates to Schmid’s enforcement of his UIM policy benefits and his rights in that regard. Like State Farm in *Matsyuk*, here, Safeco tested the bounds of the *Finney-Fisher* Rule and further refused Schmid his right to arbitrate his UIM claim. Therefore, Schmid is entitled to his fees and costs on appeal.⁹⁶

⁹⁵ *Matsyuk*, 173 Wn.2d at 658–62 (Emphasis added) (Some citations omitted) (citing *Safeco Insurance Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004)).

⁹⁶ Schmid also asked for his fees in his motion before the Superior Court and those were denied. He included that error in his notice of discretionary review, but Commissioner Bearnse stayed review of that ruling pending this appeal. Therefore, Schmid has not addressed that issue in this brief.

VII. CONCLUSION

Safeco failed to establish that it met the requirements for intervention as a matter of right and the Court erred when it allowed Safeco to intervene. Even if Safeco could have met the requirements to intervene in this case, the scope of Safeco's intervention should have been limited to only an exchange of discovery and participation in depositions, as well as an appearance at trial or arbitration, without participation and without rights as a party. Schmid requests that this Court reverse the Superior Court's rulings granting Safeco unlimited intervention.

For the reasons set forth above, it is also respectfully requested that this Court reverse the Superior Court and determine that Safeco is bound by John Cooper's arbitration award based upon the *Finney-Fisher* Rule and collateral estoppel. In the unlikely event this Court holds that Safeco is not bound by the award, then it is respectfully requested that this Court hold that Schmid's UIM claim shall be arbitrated pursuant to his UIM policy.

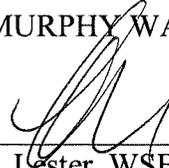
Finally, Schmid requests that this Court award him fees and costs on appeal pursuant to RAP 18.1 and *Olympic Steamship, supra*.

RESPECTFULLY SUBMITTED this 5th day of March, 2018.

Respectfully submitted,

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By



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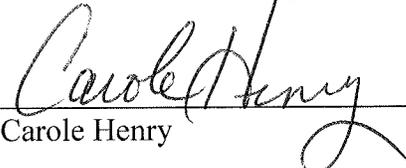
DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of in Court of Appeals, Division II, Cause No. 50150-3-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 5th day of March, 2018 at Seattle, Washington



Carole Henry

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March 05, 2018 - 4:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50150-3
Appellate Court Case Title: Terry L. Schmid, Appellant v. Christopher D. Foss, et ux, et al, Respondents
Superior Court Case Number: 15-2-07027-0

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