

FILED  
Court of Appeals  
Division II  
State of Washington  
4/3/2018 2:53 PM  
50150-3-II

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

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TERRY L. SCHMID,

Appellant,

v.

CHRISTOPHER D. FOSS, and “JANE DOE” FOSS,

Respondents

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Intervenor.

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TERRY L. SCHMID,

Appellant,

v.

ROBERT REYNOLDS and “JANE DOE” REYNOLDS,

Respondents.

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BRIEF OF RESPONDENT INTERVENOR SAFECO INSURANCE  
COMPANY OF ILLINOIS

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**I. INTRODUCTION AND SUMMARY OF SAFECO'S  
RESPONSE TO SCHMID'S APPEAL**

Appellant Schmid couches the issues before this Court as whether Safeco Insurance Company of Illinois ("Safeco") should have been allowed to intervene because it would be bound by the tort litigation result, while it is allowed to avoid being bound by the sweetheart limited-exposure arbitration. Safeco cannot have it "both ways," Schmid argues.

Safeco is not "having it both ways." There is no legal support for Schmid's argument that by having notice of the litigation, or by having intervened in the litigation, Safeco is at the mercy of the UIM insured and the tortfeasors, will be bound by an agreement to limit the tortfeasors' exposure at arbitration to the prejudice of Safeco, and will be bound to a forum that it has a contractual right to reject.

To backstop the legal argument, Schmid also asks this Court to reverse the trial court's evidentiary ruling and legal decision, and find that Safeco should have been compelled to participate in the limited-exposure arbitration based on an insurance policy provision that was amended in 2006. As the arbitration has already occurred, Appellants ask that Safeco be bound by the arbitration result as a remedy. The trial court's decisions related to this issue were correct, but whether the Safeco policy contained an arbitration provision that allowed unilateral election, or not, no party should be compelled to participate in an arbitration that has been set up to prejudice that party.

It is Schmid who seeks to have it “both ways.” Having failed in barring Safeco from the courtroom when Safeco moved to intervene, Schmid sought to bind Safeco to the limited-exposure arbitration by either compelling Safeco’s participation contractually, or through a ruling that Safeco would be bound even if it did not participate. Washington law does not support this unfair result, and the trial court did not err. The Court of Appeals should affirm the trial court’s rulings.

## **II. COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Did the trial court appropriately exercise its discretion in allowing Safeco to intervene in the tort litigation and in refusing to restrict Safeco’s rights as a litigant upon intervention? Answer: Yes.
2. Did the trial court properly exercise its discretion in admitting evidence and correctly find that Washington law regarding insurance policy changes was satisfied when Safeco mailed the policy amendment to Schmid? Answer: Yes.
3. Did the trial court properly decline to compel Safeco to participate in the arbitration proceeding where the insurance policy in effect required both parties to agree to arbitration? Answer: Yes.
4. Did the trial court properly rule that Safeco would not be bound by the result of the arbitration proceeding? Answer: Yes.

## **III. SAFECO’S STATEMENT OF THE CASE**

Appellant was involved in two automobile accidents in 2012. In addition to suing the other drivers (Foss and Reynolds) involved in those

accidents, Appellant made a claim under his Safeco insurance policy for underinsured motorist (“UIM”) coverage for each accident.<sup>1</sup>

**A. The Demand for Arbitration and Stipulation**

On September 29, 2015, Appellant demanded that Respondent arbitrate the UIM claims.<sup>2</sup> Safeco had already moved to intervene in the Schmid v. Foss litigation.<sup>3</sup> The *Schmid v. Foss* and *Schmid v. Reynolds* lawsuits were subsequently consolidated.<sup>4</sup>

Appellant opposed Safeco’s motion to intervene and the trial court initially reserved ruling. After Safeco filed a second motion to intervene, the trial court granted intervention on March 18, 2016.<sup>5</sup> Appellant argues that the order allowing Safeco’s “participation” in the lawsuit rather than allowing intervention as a “party” limited Safeco’s role in the lawsuit. There is no legal or factual basis for this argument, which the trial court properly rejected.

Meanwhile, Appellant, Foss and Reynolds agreed to proceed to arbitration, and Appellant moved to compel Safeco to arbitration. The trial court denied the motion.<sup>6</sup> Nevertheless, Appellant, Foss and

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<sup>1</sup> CP 223-224.

<sup>2</sup> CP 256-258

<sup>3</sup> CP 65-70.

<sup>4</sup> CP 174-175.

<sup>5</sup> CP 170-173.

<sup>6</sup> CP 554-555.

Reynolds stipulated that they would arbitrate their disputes, **but the defendants' exposure to damages would be capped by their respective liability policies, and the arbitrator would not be informed of the caps.**<sup>7</sup>

This was the sweetheart “arbitration” to which Safeco was invited – a proceeding in which:

- Defendants' risk was capped;
- Appellant's award was not capped;
- Safeco's risk was not capped; and
- Safeco's right to recover from the tortfeasors in subrogation was eviscerated.

Safeco had no choice but to reject this poison pill.

Schmid contends that he “settled” with defendant Foss by waiving recovery of any amount awarded over Foss's insurance policy limit, while Foss gave up his right to a jury trial. Schmid concludes that Safeco was required to either “buy out” this “settlement” or be bound by it. What Schmid demanded for “buy out,” however, was the defendant's policy limit of \$250,000.<sup>8</sup> Schmid never notified Safeco that Foss had made an offer to settle.<sup>9</sup> Defendant Foss never offered \$250,000 to settle the case. The trial court confirmed the fact that Foss had not made an offer twice during oral argument on Schmid's motion for summary judgment

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<sup>7</sup> CP 556-562.

<sup>8</sup> CP 242-243 (stipulation provision allowing Safeco to “buy out” the tort claim “for the applicable third-party policy limits”).

<sup>9</sup> CP 413 ¶ 7.

regarding breach and prejudice.<sup>10</sup> “[I]s there an offer on the table by Mr. Foss’s insurance company to settle it for \$250? If there was, then Safeco can buy that and then go after Mr. Ross [sic].”<sup>11</sup> In response, counsel for Schmid stated the agreement to arbitrate was a “release” despite the fact that Foss retained the right to contest damages at the arbitration.<sup>12</sup>

The trial court properly decided that without an actual settlement offer, the “buy out” option under the Washington precedent simply did not apply.<sup>13</sup>

**B. Safeco’s Policy Requires Binary Agreement to Arbitration.**

The plain language of the Safeco policy’s arbitration clause requires mutual assent:

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. **Both parties must agree to arbitration.**<sup>14</sup>

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<sup>10</sup> RP June 23, 2017 p. 7 and 17. Schmid has appealed denial of this motion, but that appeal has been stayed.

<sup>11</sup> RP June 23, 2017 p. 17:6-13.

<sup>12</sup> RP June 23, 2017 p. 17:14-15.

<sup>13</sup> RP June 23, 2017 p. 22-21-25 and p. 23:1-15.

<sup>14</sup> CP 412-432 at 432 (emphasis added).

Washington law prohibits compelling a party to arbitration absent an agreement, and the trial court correctly rejected Schmid's claim that the Safeco policy required arbitration.

#### IV. LEGAL AUTHORITY AND ARGUMENT

##### A. Standard of Review.

Schmid has appealed several of the trial court's orders. The standard of review regarding those decisions differs.

Whether a party qualified for intervention as a matter of right under CR 24(a)(2) is reviewed de novo.<sup>15</sup> For purposes of determining whether the intervenor satisfies the conditions for intervention, the court is to "look to the pleadings, accepting the well pleaded allegations therein as true."<sup>16</sup>

Schmid argues that this Court should also review the scope of the intervention, contending the trial court's decision to allow intervention without limitation is reviewed for abuse of discretion.<sup>17</sup> The scope of intervention at issue in the case cited by Schmid, *Marino Property Co. v. Port Com'rs of Port of Seattle*<sup>18</sup> was whether the scope of the proceeding

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<sup>15</sup> *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 36, 499 P.2d 869 (1972) (en banc).

<sup>16</sup> *Id.*

<sup>17</sup> *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989) (the decision as to whether a motion to intervene was timely was within the trial court's discretion, and Court of Appeals should affirm unless "no reasonable person would take the position adopted by the trial court"). The *Kreidler* court did not address any question regarding the scope of intervention.

<sup>18</sup> 97 Wn.2d 307, 315-16, 644 P.2d 1182 (1982) (en banc).

(as dictated by the authorizing statute) restricted the intervenor's right to engage in potentially irrelevant discovery. The potential statutory restriction applied to all of the participants. In light of what the Supreme Court called a "not fully adversarial proceeding", the trial court's grant of limited intervention rights was affirmed.<sup>19</sup> There is no precedent supporting review of whether intervention may be restricted. If the Court considers whether the trial court erred as a matter of law in rejecting the suggestion it could restrict the scope of Safeco's intervention, it must do so as a case of first impression.

The trial court's evidentiary ruling is reviewed for abuse of discretion, not *de novo* as argued by Schmid. The appellate court "reviews admission of evidence under hearsay exceptions for abuse of discretion."<sup>20</sup> "A trial court abuses its discretion only when it takes a view that no reasonable person would take."<sup>21</sup>

As argued by Schmid, the trial court's ruling on the motion to compel arbitration is reviewed *de novo*. The trial court's interpretation of the Safeco policy is reviewed *de novo*.

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<sup>19</sup> *Id.* at 316. Schmid also cites to *Sherry v. Fin. Indemn. Co.*, 160 Wn.2d 611, 617, 160 P.3d 31 (2007) for the proposition that a trial court abuses its discretion if it bases its ruling on an erroneous legal conclusion. The *Sherry* decision involved questions of law and was reviewed *de novo*.

<sup>20</sup> *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879, 890 (2008) (citations omitted).

<sup>21</sup> *Id.* (citations omitted).

As argued by Schmid, review of the trial court's ruling on whether Safeco and Schmid would be bound by the result of the arbitration proceeding in any litigation between them is reviewed *de novo*.

**B. The Court Should Affirm the Trial Court's Decision Allowing Safeco to Intervene.**

Schmid argues that Safeco failed to satisfy the requirements of Civil Rule 24(a)(2) when moving to intervene, and concludes that the trial court erred in allowing intervention. In the case below and here, Schmid's core argument is that Safeco's interests were adequately represented by the tort defendants. Other than simply asserting that the tort defendants were adverse to Schmid, Schmid provided no support for his argument that Safeco's interests could have been adequately represented by the tort defendants.<sup>22</sup>

It is obvious that Safeco's interests were not represented by the tort defendants. Defendant Foss *opposed* Safeco's intervention, claiming Safeco had no standing.<sup>23</sup> Defendant Foss asserted that Safeco's presence would prejudice Foss.<sup>24</sup> The other parties eventually agreed to the limited-exposure arbitration that prejudiced Safeco's rights.<sup>25</sup> The supposition that parties who have adverse interests could adequately represent

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<sup>22</sup> CP 76-86.

<sup>23</sup> CP 91-92.

<sup>24</sup> CP 92.

<sup>25</sup> CP 556.

another's interest is unsupported. The trial court did not err in allowing intervention.

Schmid's argument that Foss was motivated to oppose Schmid is off the mark.<sup>26</sup> Foss's adversity to Schmid does not establish that Safeco's rights were represented by Foss. Schmid contends Safeco was obligated to come forward upon making its motion to list the different arguments it would make at trial. The decision cited, however, does not fully support Schmid's argument. In *Spokane County v. State*,<sup>27</sup> the lawsuit involved only a question of jurisdiction – specifically whether the Public Employment Relations Commission had jurisdiction over the office of the Prosecuting Attorney. The Union sought to intervene, and the trial court decided that for purposes of that jurisdictional question (the sole issue before the trial court), the Commission adequately represented the interests of the Union.<sup>28</sup> The procedural facts presented in the *Spokane County* case were far different from those here.

In fact, a party need make only a minimal showing that its interests may not be adequately represented.<sup>29</sup> The party seeking to intervene is not required to show a direct conflict with other litigants, but only that their

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<sup>26</sup> Similarly, Schmid's complaint that Safeco did not conduct duplicative discovery is irrelevant. Washington courts do not require that a party show it will conduct extensive discovery no other party will conduct in order to intervene, but only that other parties will not adequately represent the party's interests.

<sup>27</sup> 136 Wn.2d 644, 966 P.2d 305 (1998).

<sup>28</sup> *Id.* at 649.

<sup>29</sup> *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn. App. 618, 629-630, 989 P.2d 1260 (1999).

interest may not be adequately articulated and addressed.<sup>30</sup> “When in doubt, intervention should be granted.”<sup>31</sup>

In the court below, Safeco noted that it had concerns about collusion between its insured and the tortfeasor.<sup>32</sup> That concern was borne out when Foss and Schmid agreed to the limited-exposure arbitration, a procedure that would prejudice Safeco if an award in excess of Foss’s insurance policy limit were made. For confirmation, this Court need look no further than the eventual limited-exposure arbitration fashioned by the other litigants to find evidence that Safeco’s interests would not have been adequately addressed by the tort defendants. The trial court did not err when it granted Safeco’s request to intervene.

**C. Trial Court did not Err When it Allowed Safeco to Intervene “as a Participant in This Action Without Limitation.”<sup>33</sup>**

Schmid argued that Safeco’s presence would amplify the tort litigation, unnecessarily increasing the costs.<sup>34</sup> Merely by requesting intervention, Schmid argued, breached Safeco’s quasi-fiduciary obligations.<sup>35</sup> While Schmid complains now that Safeco did not ask enough questions at depositions or hire its own expert, Schmid premises

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<sup>30</sup> *Id.* at 630.

<sup>31</sup> *Id.*, citing to *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 499 P.2d 869 (1972).

<sup>32</sup> CP 104-111 at 107.

<sup>33</sup> CP 170-171, at 171.

<sup>34</sup> CP 77.

<sup>35</sup> CP 78.

his argument for a limited scope of intervention on the potential for excess costs. It cannot reasonably be argued, and Schmid has provided no facts supporting his contention, that the cost to Schmid of including Safeco in the tort litigation was greater than if Schmid and Safeco were to litigate the tort action between them, separately.

The same is true for Schmid's argument that Safeco's intervention somehow prejudiced Schmid's case against Foss. First, as noted, Schmid and Safeco are adverse for purposes of UIM coverage, and Safeco has no obligation to "not prejudice" Schmid's ability to prove his case. Second, Schmid and Foss entered into the desired limited-exposure arbitration agreement, despite Safeco's objections. Schmid complains that Safeco has brought the federal district court case seeking a ruling that Schmid's action violated Safeco's policy terms, but any violation was caused by Schmid, not by Safeco's intervention.

To avoid these alleged potential prejudices, Schmid contended that Safeco's right to intervene should be limited to those "reasonable measures" that protect Safeco's interests without impeding the insured's ability to pursue his own interest.<sup>36</sup> Schmid concluded by suggesting the trial court restrict Safeco's participation to reviewing pleadings and documents, sitting in on depositions, and having notice of the trial.<sup>37</sup>

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<sup>36</sup> CP 82.

<sup>37</sup> CP 85.

These arguments, as admitted by Schmid below, are contrary to the fact that Safeco, as a UIM insurer, stood in the shoes of the tortfeasors.<sup>38</sup> Safeco was adverse to Schmid in all respects, and no Washington court has restricted an insurer's rights upon intervention, including in the manner Schmid suggests. Schmid admits that no Washington law supports his argument.<sup>39</sup>

The extra-jurisdictional decisions Schmid cites also do not support limiting the scope of intervention in the fashion he promotes.<sup>40</sup> For example, in *Zirger*, the court noted only that "case management issues, such as the designation of trial counsel will be addressed and resolved by trial courts."<sup>41</sup> The *Zirger* court did not discuss limiting the scope of UIM insurers' intervention; "case management" is a power held by all trial courts, applicable to all litigants.

Similarly, the court deciding *Wert v. Burke*<sup>42</sup> did not discuss limiting the scope of the UIM insurer's intervention. Instead, that court flatly rejected the arguments that the addition of the insurer, with its third set of attorneys, "would confuse the jury, hinder and delay an otherwise

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<sup>38</sup> CP 82.

<sup>39</sup> CP 82-83.

<sup>40</sup> *Zirger v. General Acc. Ins. Co.*, 144 N.J. 327, 341-42, 676 A.2d 1065 (1996) (discussing decisions finding that UIM insurer not in privity with tortfeasor, that the UIM insurer would not be estopped from litigating the tort claim, and that the UIM insurer's right to intervene is supported by the interest of avoiding repetitive litigation);

<sup>41</sup> *Zirger*, 144 N.J. at 342.

<sup>42</sup> 47 Ill. App. 2d 453, 197 N.E.2d 717 (1964).

simple personal injury action, and undoubtedly interfere with the presentation of the plaintiffs' case."<sup>43</sup> The conditions imposed by the *Wert* court were not restrictions on the intervention, but could be characterized as case management conditions: the parties should stipulate to the uninsured status of the tortfeasor to avoid presenting it to the jury, and if disputed, it should be presented to the court; the intervenor will be bound by the outcome of the litigation (with the right to appeal); and the intervenor must accept the issues as established to date (such as admissions by the tortfeasor) unless it could persuade the trial court it had evidence that would allow it to disprove an admitted issue.<sup>44</sup> The *Wert* court's decision does not support the sidelining of UIM insurers as promoted by Schmid.<sup>45</sup>

Schmid also argues that Safeco was allowed into the litigation only as a "participant" and therefore was powerless to object to arbitration. The trial court, however, expressly granted Safeco's motion to intervene by stating that Safeco would be allowed to intervene as a "participant in this action without limitation."<sup>46</sup> The trial court stated in the hearing on Schmid's motion to compel arbitration that "participant is no different

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<sup>43</sup> *Wert*, 47 Ill. App. 2d at 458-459.

<sup>44</sup> *Wert*, 47 Ill. App. 2d at 459.

<sup>45</sup> The American Law Reports article cited by Schmid also does not offer any decisions supporting imposition of the restrictions sought by Schmid here. 35 A.L.R.4th 757 (1985).

<sup>46</sup> CP 170-173 at 171.

than a party.”<sup>47</sup> Schmid cites to no authority supporting the notion that an intervenor is not a party or is somehow stripped of rights held by other parties. As the trial court noted, “Safeco is a party, and if they’re objecting to going forward with binding arbitration, they will not be bound.”<sup>48</sup>

The Court of Appeals should affirm the trial court’s grant of Safeco’s motion to intervene, and should decline to make new law restricting UIM insurers’ rights as litigants once they have intervened.

**D. Trial Court did not Err in Finding Policy’s Arbitration Clause Requires Binary Agreement.**

Schmid does not dispute that a court cannot impose arbitration where the parties have not agreed to arbitrate.<sup>49</sup> Schmid instead contends a policy provision requires Safeco to arbitrate at Schmid’s request.

The plain language of the policy’s arbitration clause, however, requires mutual assent – both parties must agree to arbitrate:

ARBITRATION

A. If we and an insured do not agree:

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<sup>47</sup> RP February 24, 2017, p. 46.

<sup>48</sup> RP February 24, 2017, p. 46.

<sup>49</sup> See *King County v. Boeing Co.*, 18 Wn. App. 595, 602-603, 570 P.2d 713 (1977); *Price v. Farmers Insurance Co. of Wash.*, 133 Wn.2d 490, 496 fn. 3, 946 P.2d 388 (1997) (“[P]arties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication,” quoting *Flood v. Country Mut. Ins. Co.*, 41 Ill.2d 91, 242 N.E.2d 149, 151 (1968)). See also RCW 7.04A.070(1) (“If the court finds that there is no enforceable agreement [to arbitrate], it may not order the parties to arbitrate.”)

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.***<sup>50</sup>

Schmid contends that the clause is ambiguous, but his contention that the clause could be read as a blanket agreement to arbitrate at the insured's discretion reads the last phrase out of the clause. A construction of a policy clause that reads part of that clause out of the policy is not reasonable.<sup>51</sup> If the policy language is plain, the court must enforce it as written; it may not "modify it or create ambiguity where none exists."<sup>52</sup> It is not reasonable to interpret the clause as allowing Schmid to unilaterally demand arbitration, because the clause says "both parties must agree." There is only one reasonable interpretation, and the trial court so found.

In further support of his position that the clause is ambiguous, Appellant notes that the clause contains no alternative to arbitration. This argument is nonsensical, as Washington residents also have the right to

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<sup>50</sup> CP 412-432 at 432 (emphasis added).

<sup>51</sup> *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201, 206 (1994) (policy must be construed as a whole).

<sup>52</sup> *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 712, 375 P.3d 596, 600–01 (2016), as amended on denial of reconsideration (Aug. 15, 2016); *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

seek legal redress in the courts – that right does not come from the policy. Conversely, arbitration must be agreed to. There is no ambiguity in this policy provision.

On appeal, Schmid notes the Amendatory Endorsement states it provides no coverage, and claims the title of the endorsement does not align with any section in the policy. Safeco cannot discern the import of these arguments. Similarly, Schmid argues that the amendment to the Personal Injury Protection coverage somehow rendered the arbitration clause ambiguous, but he fails to explain how. A mere difference in language does not render policy provisions ambiguous.

The trial court correctly followed decisions finding similar language unambiguous.<sup>53</sup> The “we both must agree” provision is enforced in courts throughout this state on summary judgment. It is clear, it is unambiguous, and the trial court correctly held that the Safeco policy requires that both parties must agree to arbitration.<sup>54</sup>

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<sup>53</sup> In *Mutual of Enumclaw Insurance Co., v. Huddleston*, 119 Wn. App. 122, 77 P.3d 360 (2003), the court denied a motion to compel arbitration under a similar clause. The arbitration clause in *Huddleston* stated, as here, that a disagreement “may be settled by arbitration” but that both parties “must mutually agree to arbitrate the disagreement.” *Id.* at 124. The court concluded that the clause was unambiguous in requiring that both the insurer and insured to agree to arbitrate, and denied the motion to compel. *Id.* at 125.

<sup>54</sup> RP February 24, 2017, p. 45-46.

**E. The Court Should Decline to Make New Law Binding UIM Insurers to Sweetheart Arbitration Proceedings.**

Schmid contends that the doctrine of collateral estoppel provides that once Safeco intervened in the litigation, it would be bound by any procedure, including the limited exposure arbitration to which the other parties agreed. Some of the case authority Schmid cites involved insurers that had notice, but which did not intervene.<sup>55</sup> Similarly, case authority involving insurers who do not “buy out” settlements despite notice is inapposite.<sup>56</sup> Schmid notes that in *MOE v. T&G*, the fact that the insurer eventually participated in the reasonableness hearing did not change the binding effect of the settlement. There was no settlement in this case, and the *T&G* decision simply does not apply.

The *Mencel* court’s decision provides a concise quote that amply illustrates why UIM insurers may not be either required to litigate in “capped” exposure forums, nor be bound by the results if they refuse to do so. “An insurer is bound by the judgment in the insured’s action where

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<sup>55</sup> See *Lenzi v. Redlands Ins. Co.*, 140 Wn.2d 267, 275, 996 P.2d 603 (2000); *Fisher v. Allstate*, 136 Wn.2d 240, 246, 961 P.2d 350 (1998); *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 617, 586 P.2d 519 (1978), *aff’d* 92 Wn.2d 748, 600 P.2d 1272 (1979). See also *Mencel v. Farmers Ins. Co. of Washington*, 86 Wn. App. 480, 937 P.2d 627 (1997). The decision in *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329, *rev. denied*, 111 Wn.2d 1012 (1988) is unhelpful, as it involves whether or not the insured will be collaterally estopped by an arbitration award where the arbitrator exceeds his authority. Those facts do not line up with any before this Court.

<sup>56</sup> See *Mutual of Enumclaw Ins. Co. v. T&G Const. Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008).

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.”<sup>57</sup> Had Safeco voluntarily arbitrated, it would have been bound by the “cap” agreement. Safeco would have been precluded or hindered from a) arguing that more damages were caused by the tortfeasor with high rather than low policy limits<sup>58</sup>; and b) would now be barred (because it would be bound by the cap) from seeking recovery from Foss in the event Safeco is adjudged to owe UIM benefits to Schmid in a later litigation. In other words, Safeco was not afforded the opportunity to fully defend. Similarly, the *Finney/Fisher* courts did not envision the complicated stratagem agreed to by Schmid and the tortfeasors, much less intend such a trap for UIM insurers.

Safeco did exactly as the cases call for – it considered the matter and decided to intervene, knowing it would be bound if it did not intervene, and (of course) would be bound by the litigation once it had intervened. What Safeco did not agree to, and what the court decisions do not require, is that following intervention Safeco could be dragged into the secret (from the arbitrator), capped arbitration.

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<sup>57</sup> *Mencel* 86 Wn. App. at 486 (citing *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 617, 586 P.2d 519 (1978)).

<sup>58</sup> When complaining about Safeco’s intervention in the case, Schmid repeatedly ignores the fact that two tort claims were at issue; one against Foss, who had \$250,000 in policy limits, and one against Reynolds, who had \$25,000. Schmid’s argument that Foss would adequately protect Safeco’s interests based on his available policy limits is, therefore, flawed.

No court decision supports the notion that Safeco could be compelled to arbitrate where the arbitration included the limited exposure for the defendants. Had Safeco agreed to arbitrate, it would have to make the difficult argument that although it was present at the arbitration it should not be bound. The trial court recognized this, and denied Schmid's motion to compel arbitration and denied Schmid's motion to bind Safeco to the arbitration even if it did not participate.<sup>59</sup>

The Court should decline to "make new law" that restricts the right of Washington Underinsured Motorist carriers to intervene in tort actions or binds insurers to poison pill arbitrations that cap the tortfeasors' liability. To rule as Schmid requests would mean that a UIM insurer could be 1) precluded from protecting itself in the tort litigation; or 2) become bound by tort arbitrations even where, as in this case, the UIM insured voluntarily agreed to limit the jurisdiction of that forum, thus exposing the UIM insurer to greater liability than might have been the case in the absence of such a cap; or 3) both.

**F. This Court Should Affirm the Trial Court's Finding that the Policy Change Was in Effect.**

As a corollary to his argument that the arbitration clause is ambiguous or means something other than what it says, Schmid claimed the arbitration clause was not in effect because he does not recall receiving the language from Safeco.<sup>60</sup> Also, while Schmid does not dispute that the

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<sup>59</sup> CP 554-555.

<sup>60</sup> CP 500-501 ¶ 4.

Washington legislature has enacted the “mailbox rule” that holds proof of mailing satisfies Safeco’s requirement to notify insureds of cancellations or refusals to renew,<sup>61</sup> Schmid argues that proof of receipt and agreement to new policy language is required, despite no such proof being required for cancellation.<sup>62</sup>

### 1. Proof of Mailing Sufficient.

Schmid argues that the *McGreevy v. Oregon Mut. Ins. Co.*, decision mandated proof of delivery and rejected the “mailbox rule.” This argument is not supported by Washington law.

Fifteen years after the decision in *McGreevy*, the Washington legislature enacted RCW 48.18.293.<sup>63</sup> RCW 48.18.293(2) provides that proof of mailing is sufficient proof of notice of policy cancellation. Very recently, the issue was again addressed by Division I of the Court of Appeals, in *Jackson v. Esurance Insurance Company*.<sup>64</sup>

In *Jackson*, Esurance sent the insured an offer for policy renewal, providing that if Jackson renewed his policy he would be deemed to have

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<sup>61</sup> See RCW 48.18.293(2) (proof of mailing is proof of notice); *Johnson v. Safeco Ins. Co. of Am.*, 178 Wn. App. 828, 844, 316 P.3d 1054, 1061 (2013).

<sup>62</sup> See *McGreevy v. Oregon Mut. Ins. Co.*, 74 Wn. App. 858, 867-68, 876 P.2d 463 (1994), *aff’d on other grounds*, 128 Wn.2d 26, 904 P.2d 731 (1995).

<sup>63</sup> Enacted in 2009.

<sup>64</sup> \_\_\_ Wn. App. \_\_\_, 412 P.3d 299 (2017) (publication ordered Feb. 28, 2017).

agreed to the Terms and Conditions on the company's website.<sup>65</sup> The policy renewal communication included the policy declarations page, renewal offer, a notice of policy changes, and a complete copy of the new personal auto policy form.<sup>66</sup> The renewal offer explained that the company had expanded the racing exclusion.<sup>67</sup> Jackson accepted this new policy, including the expanded exclusion, by paying the first installment due for the policy.<sup>68</sup>

The *Jackson* court noted that, while the *McGreevy* decision requires that the insurer give the policyholder notice and obtain agreement to insurance contract modifications,<sup>69</sup> Washington law "does not dictate the manner in which notice of changes or amendments are to be delivered to the insured."<sup>70</sup> The *Jackson* court held that as Jackson had consented to e-service of policy documents and notices, and as it had been established that Esurance emailed him the policy change information, and as Jackson accepted the renewal offer by paying the premium (or a portion thereof), the policy change had been delivered to Jackson and was enforceable.<sup>71</sup>

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<sup>65</sup> *Jackson*, 412 P.3d at 300. The insured had previously elected to receive notices by email as opposed to U.S. Mail.

<sup>66</sup> *Jackson*, 412 P.3d at 301.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 302.

<sup>69</sup> *Jackson*, 412 P.3d at 303.

<sup>70</sup> *Jackson*, 412 P.3d at 303.

<sup>71</sup> *Id.*

As here, Jackson argued that *McGreevy* required the insurer to prove physical delivery of the policy change, such as proof of delivery by certified mail. The *Jackson* court noted that in *McGreevy* the jury found the insurer had not, in fact, mailed the endorsement.<sup>72</sup> The *McGreevy* court's comment that proof of mailing could have been made by using certified mail was not a holding that certified or registered mail is the only proof that a notice of policy change was delivered, according to the *Jackson* court.

In Washington, “[o]nce there is proof of mailing, it is presumed that the mails proceed in due course and that the letter is received by the person to whom it is addressed.”<sup>73</sup> To render this presumption effective, the mailing party need only show the properly addressed and stamped document was deposited in the U.S. Mail.

## **2. Safeco Proved Policy Change.**

Safeco presented evidence to the trial court that the “mutual assent” arbitration clause was first issued in 2007, and that the new clause language was mailed to Schmid in 2006.<sup>74</sup>

### **a) Thayer Testimony Admissible**

Schmid moved to exclude the Safeco representative's testimony regarding mailing the policy change as hearsay, under Evidence Rule 801.

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<sup>72</sup> *Jackson*, 412 P.3d at 304.

<sup>73</sup> *See Automat Co. v. Yakima County*, 8 Wn. App. 991, 995, 497 P.2d 617 (1972) (citation to Supreme Court opinions omitted).

<sup>74</sup> CP 412-432, p. 413-414 ¶5, p. 414 ¶ 6.

Before the trial court, the only support for the motion was that the representative did not personally mail out the changes and did not attach the documentation showing the policy changes were mailed out.<sup>75</sup>

On appeal, Schmid argues that Safeco was required to provide the basis for an exception under ER 803 and to establish foundation for business records under RCW 5.45.020. First, Safeco's representative testified that she reviewed records kept in the ordinary course of business by Safeco, and that the records are regularly maintained to reflect activity related to the issuance, amendment, payment, renewal, and cancellation of all insurance policies issued by Safeco.<sup>76</sup> This established that the witness was testifying regarding records coming within the business records exception. Second, this testimony satisfies the requirements set out by RCW 5.45.020:

**Business records as evidence.**

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.

Schmid additionally argues that testimony that the Safeco representative personally mailed out the policy changes was required or that the Safeco representative was required to attach the proof that a

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<sup>75</sup> CP 447:6-11.

<sup>76</sup> CP 413 ¶ 3.

mailing was sent specifically to Schmid. The representative testified that “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.”<sup>77</sup> The mailed documents from Safeco’s business records were provided to the trial court.<sup>78</sup>

Even if factually accurate, these objections do not go to the admissibility of the testimony, but, at most, to the weight.<sup>79</sup> Further, the rule is that evidence that would be admissible at trial if in the proper form may be considered by a court hearing a motion.<sup>80</sup>

Not only were these particular objections not well-founded, they were not raised below. Before the trial court, Schmid claimed only that the testimony was “hearsay,” and that Ms. Thayer did not indicate how she knows the policy change was mailed to Schmid.<sup>81</sup> As noted, the Safeco representative testified exactly how she knew the mailing had gone out - she reviewed Safeco’s business records. The trial court heard the evidence and decided it established that the policy change had, in fact, been

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<sup>77</sup> CP 413 ¶ 5.

<sup>78</sup> CP 431 and 432.

<sup>79</sup> *State v. Fleming*, 155 Wn. App. 489, 500-501, 228 P.3d 804 (2010) (questions regarding accuracy of records, or knowledge of custodian, go to weight not admissibility).

<sup>80</sup> *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548 (1986) (party not required to produce evidence in a form that would be admissible at trial).

<sup>81</sup> CP 447:6-11; RP February 24, 2017 p. 19:17-23.

mailed.<sup>82</sup> Proof of receipt by Schmid was certainly not required to overcome Schmid's hearsay objections, but in any event the trial court rejected the legal argument that the policy change was ineffectual unless Safeco proved Schmid received it.<sup>83</sup> The trial court also did not believe that Schmid did not receive the mailings based on his equivocal testimony.<sup>84</sup>

**b) Schmid Failed to Rebut Delivery of Policy Change.**

As the trial court concluded, Safeco does, in fact, have records that show the notice was mailed.<sup>85</sup> That witness testified that she reviewed the business records related to Schmid's insurance with Safeco, and that those records include activity related to issuance, amendment, payment, renewal and cancellation of Schmid's policies, as it does for all insureds.<sup>86</sup> The Safeco representative further testified that the records showed that Safeco mailed the policy amendment notice to Schmid on July 24, 2006.<sup>87</sup> She further testified that the records confirm that Schmid has remained insured through at least the 2012 policy period, and that the amended arbitration clause was included in each of those policies.<sup>88</sup> The mailbox rule raises

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<sup>82</sup> RP February 24, 2017 p. 45:20-22.

<sup>83</sup> RP February 24, 2017 p. 45:17-20.

<sup>84</sup> RP February 24, 2017 p. 45:17-18.

<sup>85</sup> CP 412-432.

<sup>86</sup> CP 413 ¶ 3.

<sup>87</sup> CP 413-414 ¶ 5.

<sup>88</sup> CP 413 ¶ 2, 414 ¶ 6.

the presumption that the mail correctly addressed was delivered to Schmid. In fact, Schmid paid his premiums and remained insured with Safeco after 2006, confirming delivery of the Notice.<sup>89</sup> Delivery can be rebutted by the insured, but only with proper testimony.

Schmid failed to rebut the presumption raised. Schmid testified in the trial court that he has not maintained historical records of the documents mailed to him by Safeco.<sup>90</sup> Schmid testified only that “to the best of his recollection” Safeco does not send policies upon renewal.<sup>91</sup> Schmid does “not recall” the “last time Safeco sent” a policy copy.<sup>92</sup> Schmid did not testify that he always retained mailings from Safeco – in fact he testified to the contrary.<sup>93</sup> Schmid did not testify that he always reviews policies and policy changes sent to him.<sup>94</sup> Schmid did not testify that had he received the notice of policy change amending the arbitration clause to require mutual assent, he would have rejected the change.<sup>95</sup>

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<sup>89</sup> The Notice was a renewal. CP 431-432. It is undisputed that Schmid remained insured with Safeco following 2006. At the hearing, Safeco argued that the payment of premiums provided evidence of actual delivery. RP February 24, 2017 p. 27.

<sup>90</sup> CP 499-501, p. 500-501 ¶ 4 (stating he could not find any policies or policy language changes in his records).

<sup>91</sup> CP 500 ¶ 3.

<sup>92</sup> CP 500-501 ¶ 4.

<sup>93</sup> CP 500-501 ¶ 4 (does not retain declarations, did not find *any* policy forms).

<sup>94</sup> CP 500-501.

<sup>95</sup> CP 500-501.

A decision that predated *McGreevy* found these failures fatal to the insured's contest of an amended policy provision.<sup>96</sup> That court held:

Neither Mr. nor Mrs. Webster had read any of their prior State Farm policies until after the issue of coverage was raised in this case. There is no evidence they intended to purchase insurance permitting stacking. Nor is there any evidence the Websters would have rejected the policy had they known it contained an anti-stacking provision. The Websters had the benefit of coverage under two of the policies for 2 years. Under these circumstances, they must accept the policies' limitations as well as the benefits on the dollar amount of coverage purchased by them. To do otherwise ignores the intent of the parties and impermissibly creates a contract the parties did not make for themselves. *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 288, 654 P.2d 712 (1982), *review denied*, 99 Wn.2d 1006 (1983).<sup>97</sup>

It is true that the *McGreevy* court of appeals declined to apply the *Webster* ruling to the dispute before it. In *McGreevy*, however, the insured testified that she retained mailed endorsements, and could confirm that the asserted endorsement had not been received.<sup>98</sup> Here, Schmid only says he does not recall receiving the notice with the new language.<sup>99</sup>

To further place the *McGreevy* decision fully in context, *a jury* found that the insurance company had **not mailed** the amended policy language to the insured McGreevy.<sup>100</sup> The court of appeals noted that the

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<sup>96</sup> *Webster v. State Farm Mut. Auto. Ins. Co.*, 54 Wn. App. 492, 497-98, 74 P. 2d 50, 53 (1989).

<sup>97</sup> *Id.*

<sup>98</sup> *McGreevy*, 74 Wn. App. at 862.

<sup>99</sup> CP 500 ¶ 3.

<sup>100</sup> *McGreevy*, 74 Wn. App. at 868.

jury's finding was based on conflicting trial testimony, and had ample evidence to support it.<sup>101</sup>

Here, the evidence before the trial court was that Safeco did, in fact, mail out the new policy language. This information is unrebutted by any competent testimony or evidence.<sup>102</sup> Schmid's practice over many years of not retaining communications from Safeco cannot rebut this fact. In fact, the evidence shows Mr. Schmid *did* receive the materials including the policy change, because the policy change was sent with a renewal – in other words, there was also a bill in the mailing.<sup>103</sup> Had he truly not received the policy change, he would not have received the bill; if he had not received the bill, he would not have paid his premium back in 2007 and would have had no insurance in 2012 when the accidents happened.

The trial court considered the evidence and decided that Safeco had established that the new policy provision was effective at the time of the accidents, as supported by the testimony of the Safeco representative that the policy changes were mailed.<sup>104</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> The testimony of Schmid's expert witness, who was not involved in the issuance of these policy changes, is not probative.

<sup>103</sup> CP 431 ("Enclosed with this renewal is an Amendatory Endorsement").

<sup>104</sup> RP February 24, 2017, p. 45.

**G. No *Olympic Steamship* Fees May Be Awarded As Coverage Is Not Disputed.**

**1. *Schmid's Olympic Steamship* Fee Request Has Been Stayed.**

It is Safeco's understanding that appeal of the trial court's ruling regarding *Olympic Steamship* fees has been stayed. The Commissioner ordered that "consideration of the cost issue remaining in Schmid's March 26, 2017 notice of discretionary review COA No. 50150-3-II" and other appealed matters "are stayed pending a decision in the appeal as of right."<sup>105</sup> The "cost issues" are described by the Commissioner as those "1) decided on February 24, 2017."<sup>106</sup> The "cost issue" decided by the trial court on February 24, 2017 was Schmid's claim for *Olympic Steamship* fees.<sup>107</sup>

The trial court's denial makes sense, because the trial court denied Schmid's motion, and no *Olympic Steamship* fees would ever be recoverable where the insured did not prevail. The stay makes sense because only if this Court reverses one or more of the trial court's rulings should the trial court then consider whether or not *Olympic Steamship* fees are awardable. Despite this, Schmid asks for *Olympic Steamship* fees in connection with this appeal.

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<sup>105</sup> CP 1184-85.

<sup>106</sup> CP 1184.

<sup>107</sup> CP 554 ("Plaintiff's Request for *Olympic Steamship* fees is denied").

## 2. No Coverage Dispute Presented.

On appeal, the only issues are whether Safeco should have been allowed to intervene, whether its intervention should have been limited, whether Safeco should have been compelled to arbitrate, and whether Safeco should be bound by the arbitration's outcome despite the trial court's excusing Safeco from the arbitration. None of the issues involved Safeco's policy. Schmid, but not Safeco, contended a superseded policy provision required Safeco to arbitrate. Safeco relied upon Washington law to support its claim that it was not required to arbitrate.

Under these unusual facts, the case authority cited by Schmid does not apply. The closest holding is that of *Godfrey v. Hartford Cas. Ins. Co.*,<sup>108</sup> but the facts take the case off point. In *Godfrey*, the insureds sought to enter judgment on an arbitration award they obtained against their insurer, Hartford.<sup>109</sup> Hartford demanded trial *de novo* on the issues decided at arbitration, based upon a provision in its policy allowing for the same.<sup>110</sup> The *Godfrey* court decided that the dispute was over whether the Godfreys could obtain their policy benefit in the amount of the arbitral award, and this triggered the right to *Olympic Steamship* fees.<sup>111</sup>

The *Godfrey* court characterized this as a "close question" and explained:

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<sup>108</sup> 142 Wn.2d 885, 899-900, 16 P.3d 617 (2001).

<sup>109</sup> *Godfrey*, 142 Wn.2d at 888-89.

<sup>110</sup> *Godfrey*, 142 Wn.2d at 890.

<sup>111</sup> *Godfrey*, 142 Wn.2d at 899.

We believe this case is more akin to a dispute over the vindication of policy provision 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).<sup>112</sup>

Hartford, the *Godfrey* court went on, did not dispute the award, but rather disputed that it was entitled to a trial de novo under the policy. The assertion of a policy provision made the case more akin to other decisions allowing fees where the insured was forced to the policy's coverage.<sup>113</sup>

The *Godfrey* facts are markedly different from those in this case. Here, Safeco intervened for the purposes of litigating damages, only. Schmid demanded Safeco arbitrate, and claimed the policy rather than any Washington law required Safeco to do so. Schmid asserted a defunct policy provision in an attempt to force Safeco to an arbitration that was not in its interests. Alternatively, Schmid attempted to bind Safeco to an arbitration the court determined it need not attend. Safeco did prove to the trial court that the applicable policy did not contain the provision Schmid contended required Safeco to participate in the limited-exposure arbitration, but relied upon Washington law that states no litigant may be forced to arbitrate absent an agreement to do so.<sup>114</sup> Schmid, not Safeco,

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<sup>112</sup> *Godfrey*, 142 Wn.2d at 899.

<sup>113</sup> *Godfrey*, 142 Wn.2d at 900 (citing *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995)).

<sup>114</sup> See *King County v. Boeing Co.*, 18 Wn. App. 595, 602-603 (1977); *Price v. Farmers Insurance Co. of Wash.*, 133 Wn.2d 490, 496 fn. 3, 946 P.2d 388 (1997) (“[P]arties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication,” quoting *Flood v. Country Mut. Ins. Co.*, 41 Ill.2d 91, 242 N.E.2d 149, 151 (1968)).

“tested the bounds of the law” by moving to compel Safeco in the absence of any agreement to arbitrate. Schmid, not Safeco, attempted to machinate a result by fashioning an arbitration that would expose Safeco to risk while absolving the tort defendant of exposure over his policy limit.

Safeco has declined to pay the arbitration award to Schmid, but it has done so for the reasons asserted in the federal declaratory judgment action, including its claim that Schmid has breached policy provisions or that application of other policy provisions have mooted Schmid’s UIM claim. Whether to award *Olympic Steamship* fees may be an issue should Schmid prevail, but Schmid may not obtain fees here for non-coverage disputes.

If the Court were to hold that even in this situation the insured is entitled to *Olympic Steamship* fees, insureds would be free to circumvent the “American Rule” in every UIM valuation dispute by asserting some policy provision or the other (such as an allegedly ambiguous arbitration clause requiring mutual assent) to transform a case where the parties bear their own costs into one where the insured may obtain fees. This result would be contrary to Washington law.

The Washington Supreme Court has ruled that this Court may not award fees to the insured where that insured has “failed to comply with express coverage terms, and the noncompliance may extinguish the

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*See also* RCW 7.04A.070(1) (“If the court finds that there is no enforceable agreement [to arbitrate], it may not order the parties to arbitrate.”)

insurer's liability under the policy.<sup>115</sup> In *Tripp*, in fact, the Supreme Court ruled that even if the insurer does not prove prejudice, no fees may be awarded, because the insured's action, not the insurer's conduct, precipitated the lawsuit.<sup>116</sup> This reasoning will likely preclude any award to Schmid in the federal declaratory judgment action where Schmid's breach of the UIM policy is at issue, but also applies in this case.

It was Schmid's attempt to corral Safeco into an unfair arbitration without any legal basis, not Safeco's actions, that precipitated all of the motions below and this appeal. Under *Tripp*, Schmid is not entitled to *Olympic Steamship* fees, even if he prevails on appeal on one or more of his several issues.<sup>117</sup> Well-settled Washington case authority, therefore, prohibits the award of fees requested by Schmid, and the Court should deny that request, regardless of its decision here.

## V. CONCLUSION

Judge Serko's decisions were correct in all respects. The trial court did not err. The Court should deny Schmid's appeal.

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<sup>115</sup> *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 31, 25 P.3d 997 (2001) (citing *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994)).

<sup>116</sup> *Id.*

<sup>117</sup> *Tripp*, 144 Wn.2d at 20 (even if the insurer fails to establish prejudice (*i.e.* even if the insured prevails on the dispute), the insured is not entitled to fees because his actions precipitated this action, not that of the insurance company).

DATED and respectfully submitted this 3<sup>rd</sup> day of April, 2018.

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**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division II of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing Brief of Respondent Intervenor Safeco Insurance Company of Illinois upon the following:

*By electronic and U.S. Mail*

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*s/ Traci Jay*

Traci Jay

**WILSON SMITH COCHRAN DICKERSON**

**April 03, 2018 - 2:53 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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**Note: The Filing Id is 20180403145301D2146918**