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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

PAYTON O. HOFF,

Respondent,

v.

SAFECO INSURANCE CO. OF ILLINOIS,

Petitioner.

PETITIONER SAFECO'S OPENING BRIEF

Attorneys for Petitioner
Safeco Insurance Company of Illinois

John M. Silk, WSBA #15035
Morgan E. Smith, WSBA #37954
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206) 623-4100
Facsimile: (206) 623-9273
silk@wscd.com; smithm@wscd.com

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I. INTRODUCTION

The trial court took the unprecedented step of ordering the production of Safeco's litigation strategy and attorney-client communications regarding its decision to remove this case to federal court. Plaintiff argued that Safeco acted in bad faith by removing this case to federal court only to have it remanded to state court because the federal court concluded that the amount in controversy did not exceed \$75,000. Plaintiff argued that this theory entitled her to discover Safeco's internal evaluations, Safeco's communications with its attorneys, and Safeco's attorney's internal memos and emails regarding the legal strategy to remove the case to federal court. In essence, the trial court's ruling opened the door to a claim by Plaintiff that any litigation strategy or action taken by Safeco in the course of litigation that she did not like could be actionable in this lawsuit, and subsequently subject to discovery.

Safeco vigorously objected to this ruling by the trial court, and filed a motion for discretionary review. Prior to the hearing on Safeco's motion for discretionary review, the Court of Appeals, Division II handed down its ruling in *Richardson v. Geico*, 200 Wn. App. 705, 403 P.3d 115 (2017). This ruling confirmed what Safeco had argued to the trial court all along: insurer post-litigation work product and attorney-client communications are not discoverable because post-litigation conduct

cannot serve as a basis for a claim against an insurer for bad faith. The commissioner granted Safeco's motion for discretionary review and concluded that *Richardson* controls and the trial court committed probable error.

Safeco requests that this Court reverse the trial court's rulings on Plaintiff's motion to compel and Safeco's motion for reconsideration. The trial court improperly ruled that Safeco's litigation strategy and post-litigation attorney-client communications are discoverable.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by including the following paragraph in the Order On Plaintiff's Second Motion to Compel Discovery and for Terms on August 31, 2017:

1. Interrogatory No. 5: Defendant's objection is overruled. Defendant will fully and completely answer this interrogatory or provide to the Court for *in camera* review by September 6, 2017, every reason Safeco had for removing Ms. Hoff's suit against Safeco to federal court in Tacoma. Safeco's production is not limited to just those documents identified in Safeco's privilege log if the complete answer encompasses items not listed in the privilege log.

CP 56, 824-827.

B. The trial court Safeco erred by entering the September 11, 2017, Order on Motion for Reconsideration, which states:

The written decision of the federal court dismissing

the federal filing, and the reasons given for that dismissal, give rise to a factual showing sufficient [sic] a reasonable belief of wrongful conduct sufficient to amount to fraud. In response Safeco has offered no legitimate reason whatsoever for the removal of this case to federal court.

CP 63, 850-850.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court err in ordering Safeco to produce information relating to Safeco's decision to remove this matter to federal court when that information relates exclusively to litigation strategy, and is protected by the attorney-client privilege and work product doctrine?

B. Even if an insurer's litigation strategy could properly be the basis for an extra-contractual claim, did the trial court err in concluding that the federal court's reasons for remanding the action to state court gave rise to a factual showing sufficient to support a reasonable believe that Safeco committed civil fraud by removing the action to federal court?

IV. STATEMENT OF THE CASE

A. Pre-Suit Facts

This matter relates to an Underinsured Motorist ("UIM") claim submitted by Plaintiff Payton Hoff to Safeco following an accident that occurred on May 14, 2011. On June 22, 2011, the Safeco adjuster spoke to Kim Hoff, Payton's mother, who stated that Payton had seen her primary care physician once after the accident, but had not sought any

other medical treatment.¹ CP 24, 338-438. On September 19, 2011, Kim told the adjuster that Payton's injury had resolved. CP 24, 338-438. At that time, Kim and Safeco believed the tortfeasor had no insurance, so Kim intended to pursue an uninsured motorist ("UM") claim under the UM/UIM coverage of the Safeco policy. The Safeco UM/UIM policy limit is \$50,000. CP 22, 94-118.

The adjuster completed a bodily injury evaluation, which placed the value of Payton's claim at between \$1,500 and \$2,780. CP 24, 338-438. On October 3, 2011, he offered to settle Payton's claim for \$2,000. CP 24, 338-438. On October 12, 2011, Kim demanded \$3,000 to settle the UIM claim. CP 24, 338-438. Safeco countered with an offer of \$2,200. CP 24, 338-438. In November 2011, the tortfeasor's insurer confirmed he had liability coverage with a \$25,000 limit. CP 24, 338-438. Kim stopped pursuing the UM claim while proceeding with the liability claim against the at-fault driver.

On April 28, 2014, the tortfeasor's insurer informed Safeco that it paid the \$25,000 limit to settle Payton's claim against its insured. CP 24, 338-438. The next day, Kim told the Safeco adjuster she intended to pursue a UIM claim because Payton had ongoing complaints of pain in her

¹ Because Payton was a minor at the time of the accident, Safeco initially spoke with her mother. For the sake of clarity, Safeco will refer to Kim Hoff as Kim and Payton as Payton or Plaintiff. No disrespect is intended by the use of the Hoff's first names.

neck, back, shoulder and hip. CP 24, 338-438. She also asserted that Payton would need future care and was still emotionally troubled by the accident. CP 24, 338-438.

Safeco undertook its investigation of Payton's claim, but the Hoffes did not sign a medical records release to allow Safeco access to Payton's medical records, nor did they provide any additional information regarding her future treatment plan. CP 24, 338-438. On August 27, 2015, the adjuster spoke directly with Payton who confirmed she planned to continue chiropractic treatment and would update Safeco on her treatment. CP 24, 338-438. The adjuster followed up with her regularly through 2015. CP 24, 338-438.

On May 3, 2016, Kim advised Safeco that Payton was ready to settle her UIM claim. The adjuster completed a full Bodily Injury Evaluation and determined the full value of Payton's UIM claim, taking into consideration the underlying settlement of \$25,000 and PIP payments she had already received of \$15,375.74, was between -\$1,331.74 and +\$5,668.26. CP 24, 338-438. This reflected a total claim value of \$39,044 - \$46,044. Safeco offered to pay Payton \$2,500 to resolve her UIM claim. CP 24, 338-438. Kim rejected the offer, demanding \$100,000, or double the policy's limit. CP 24, 338-438. Safeco responded that \$100,000 was not a reasonable demand and invited the

Hoffs to revise the settlement demand. CP 24, 338-438. Payton never sent a revised settlement demand and filed a lawsuit against Safeco.

B. Facts Relating to Removal

Plaintiff filed this suit on November 10, 2016. CP 1, 1-6. Her Complaint alleged “Plaintiff’s damages far exceed Safeco’s available UIM limits and any funds expended by Safeco under the Personal Injury Protection on Plaintiff’s medical bills should not be repaid or otherwise credited to Safeco.” CP 1, 1-6. It also alleged that Safeco was “in violation of WAC 284-30-330(a)(7), RCW 48.40.010(7) and Washington’s Fair Conduct Act, RCW 48.30.” CP 1, 1-6.

The suit involved citizens of different states and if the amount in controversy exceeded \$75,000, the action would be subject to removal to federal court. 28 U.S.C. § 1441. Although the UIM limit was only \$50,000, the Complaint included extra-contractual allegations, including an allegation that Safeco had violated the Insurance Fair Conduct Act, allowing trebling of damages and an award of attorney’s fees. RCW 48.30.015(2). The Complaint, therefore, raised the likelihood that the amount in controversy exceeded \$75,000.

To assist in clarifying whether Plaintiff intended to seek more than \$75,000, Safeco served discovery requests and requests for admission on Plaintiff. In her responses, Plaintiff claimed her medical specials were at

least \$12,455.00, that she had additional medical bills of approximately \$4,733, and would also be continuing her treatment. CP 23, 119-337. Plaintiff responded that her general damages were unknown, but to “assist Safeco in setting appropriate reserves, the value is \$75,000 exclusive of third party recovery.” *Id.* Thus, Plaintiff answered that she was seeking at least \$92,188. She also stated that she would pursue damages under the Insurance Fair Conduct Act, including seeking “punitive damages in an amount a finder of fact deems appropriate.” CP 23, 119-337. Yet in her responses to Safeco’s Requests for Admission, she denied the damages “payable” by Safeco exceeded \$75,000. CP 23, 119-337.

In an effort expressly designed to avoid removal to federal court, Plaintiff offered to sign a stipulation that the amount in controversy did not exceed \$75,000. Safeco asked that the stipulation include the following:

1. Now, therefore, Plaintiff and Safeco stipulate that the sum total of all monetary relief that Plaintiff will seek in this action, whether costs, attorney’s fees, expert expenses or otherwise, is \$75,000.00 or less.
2. Plaintiff and Safeco further stipulate to the entry of an order in limine that limits Plaintiff from seeking any monetary relief in this action, damages, attorney’s fees, costs, or otherwise, in excess of \$75,000.

CP 23, 119-337.

Plaintiff would not agree to paragraph 2, apparently in an effort to retain her ability to ask the jury for an award of more than \$75,000. CP 23, 119-337.

Because Plaintiff refused to agree that she would not ask the judge or jury to award her monetary relief in excess of \$75,000, Safeco concluded the amount in controversy exceeded \$75,000 and removed the case to federal court on February 15, 2017. CP 23, 119-337. Safeco's Notice of Removal included a detailed explanation as to why the company had concluded the amount in controversy exceeded \$75,000, as well as the legal support for removal. CP 23, 119-337.

Plaintiff filed a motion to remand the matter to state court and the federal district court entered its Order on Motion to Remand on April 21, 2017. Appendices to Response Opposing Petitioner's Motion for Discretionary Review ("Appendix") 12. The Order includes a detailed discussion of the facts and case law regarding the determination of the amount in controversy and the court specifically noted that "the parties raise a new spin on a fairly settled line." Appendix 12. The remand Order instructed Plaintiff that she must "limit her recovery to less than \$75,000—from asking the jury for—more." Appendix 12. The federal court's conclusion that Plaintiff could not ask the jury for more than \$75,000 directly contradicted and superseded Plaintiff's own previous

assertion that she could ask the jury for any amount, but would agree to take only \$75,000.

Pursuant to 28 U.S.C. § 1447(c), an order remanding a case to state court “may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” The United States Supreme Court has held that a federal district court may award fees on remand “where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Although Plaintiff requested an award of fees, the district court did not grant the request. Appendix 12.

C. Procedural History Related to Present Dispute

I. Motion to Compel and Related Orders

On June 9, 2017, Plaintiff served discovery requests on Safeco, including the following interrogatory to which Safeco objected:

INTERROGATORY NO. 5:

Please explain every reason Safeco had for removing Ms. Hoff's suit against Safeco to Federal Court in Tacoma.

CP 31, 483-500. Following a discovery conference, Safeco declined to withdraw its objections, stating in a letter on July 11, 2017, that answering the interrogatory would disclose litigation strategy, protected work product, and protected attorney-client communications. CP 42, 602-692.

On August 9, 2017, Plaintiff filed a motion to compel. CP 31, 483-500. Regarding Interrogatory No. 5, Plaintiff surmised that, because she had told Safeco she did not want to litigate in federal court, Safeco must have removed the case “to leverage a low ball offer.” CP 31, 483-500. She further speculated “that the removal to federal court was not a spontaneous reaction but rather a plan that was suggested, discussed, evaluated and then executed.” CP 31, 483-500. She, therefore, wished to engage in a fishing expedition to find information regarding the decision to remove, including “emails back and forth regarding reasons, costs, expected results, and all the other business of insurance.” *Id.*

Recognizing that she would be entitled to discovery of protected materials only if she made a prima facie showing of civil fraud, Plaintiff argued that Safeco’s settlement offers interspersed with the timing of the removal provided the required evidence. First, Plaintiff pointed to a reserve analysis produced by Safeco in discovery. CP 24, 338-438. That document included *estimates* of medical special damages and general damages, showing a net value range for purposes of setting reserves of between \$4,624.26 and \$24,624.26. CP 24, 338-438. Safeco completed this reserve evaluation in May 2015, but made a settlement offer of \$2,500 in May 2016 based on the full Bodily Injury Evaluation, *not* the reserve analysis. CP 24, 338-438. Plaintiff claimed these facts demonstrated

fraud. Second, Plaintiff pointed to the settlement offer Safeco made after the case was remanded as evidence of civil fraud because the offer showed that Safeco tried to “induce” her to accept a “low ball” settlement offer. CP 31, 483-500.

At the time of Plaintiff’s motion to compel, Safeco’s motion for partial summary judgment was also of record and the parties referred to the summary judgment submissions in their pleadings and argument regarding the motion to compel. Safeco’s summary judgment pleadings included a Declaration from the adjuster for Plaintiff’s claim. He testified that the reserve analysis was specifically performed to set reserves, not to value a claim for settlement. CP 24, 338-438. A bodily injury evaluation was a separate determination which was used for settlement purposes. *Id.* The record included the bodily injury evaluation Safeco conducted, which supported its settlement offers. CP 24, 338-438. The bodily injury evaluation shows that the adjuster did not take into account any litigation strategies, including the removal to federal court, in formulating his estimated value of Plaintiff’s injury claim. CP 24, 338-438.

The log notes prepared by the adjuster also showed that he received and reviewed additional information obtained from Plaintiff after Plaintiff filed her motion to remand but before the federal court issued its order remanding the case. CP 24, 338-438. This information formed the

basis of the increased settlement offer made, coincidentally, after the federal court issued its order of remand. CP 24, 338-438.

Safeco also pointed out that its removal pleadings directed to the federal court explained the basis for Safeco's conclusion that the amount in controversy exceeded \$75,000 and that the removal was done for this reason alone. CP 41, 581-601. Thus, Safeco refuted all of Plaintiff's arguments regarding the alleged "civil fraud."

Without specifically addressing the civil fraud issue, the superior court made the following oral ruling regarding Interrogatory No. 5:

But what he did clearly say is that it's clear from everything that went on, the Plaintiff was limiting her claim to avoid those jurisdictional limits. The fact that in light of that, without any other explanation, uh, the attempt to remove is made leaves open issues of how come. And those can run the gamut. And I'm not going to speculate on what they are. But I certainly think that it's an area that Counsel's entitled to inquire into.

Obviously, we're running into litigation strategy, attorney-client privilege, attorney work product. So it's something of a minefield. But my instruction is to answer the interrogatory, create a privilege log, submit anything that's in the privilege log for in camera review, and where it goes from there, we'll decide.

RP 8/16/17 at 33:15–34:3 (emphasis added).

On August 30, 2017, the trial court conducted a hearing to assist with determining the language of its final written order. When Safeco's attorney stated the court's ruling could require Safeco to produce "internal

attorney communications that I had in my office,” the court confirmed that was its intent:

We should include all the things that were considered. But as to the language on interrogatory number five, it strikes me that the language contained in Mr. Crandall’s response, other than the -- the ten day applying to everything I say, put that on the privilege log. But that’s what the Evidence Rules would contemplate in any event. If there’s information that Safeco has that’s relevant to the question of why it got removed to Federal Court. **I don’t care if it’s two lawyers who say, “We get better treatment in Federal Court,” or you know, “We like the lunchroom better there,”** or whatever it may be without an order from me all that’s required to be produced –

MS. SMITH: Your Honor, if I may –

THE COURT: -- under the -- under the -- no, ma’am -- under the discovery rules. So, uh, each and every reason it was removed to Federal Court. And that -- if it’s not part of a privilege log, it needs to be provided.

RP 8/30/17 at 7:2–7:18 (emphasis added). Plaintiff’s counsel also confirmed the court was ordering Safeco to produce *everything* regarding its removal decision:

MR. CRANDELL: So if Attorney A is talking to Attorney B, Safeco in-house vs. Safeco retained, and they say, oh, gosh, I like the bathrooms better in Federal Court, but that memo does not appear in the privilege log, I get it; is that correct?

THE COURT: Um, go back to my original statement. **Safeco has to provide everything** ... that’s responsive to the interrogatory. If they think it’s privilege (sic), put it in the log.

Id. at 10:13–10:22 (emphasis added). The sweeping nature of the trial court’s oral ruling was reflected in the written order, which included the following regarding Interrogatory No. 5:

... Defendant’s objection is overruled. Defendant will fully and completely answer this interrogatory or provide to the Court for *in camera* review by September 6, 2017, every reason Safeco had for removing Ms. Hoff’s suit against Safeco to federal court in Tacoma. Safeco’s production is not limited to just those documents identified in Safeco’s privilege log if the complete answer encompasses items not listed in the privilege log.

CP 56, 824-827.

Safeco moved for reconsideration on September 6, 2017. CP 58, 832-842. In its September 11, 2017, Order denying the request, the trial court stated:

The written decision of the federal court dismissing the federal filing, and the reasons given for that dismissal, give rise to a factual showing sufficient a reasonable belief of wrongful conduct sufficient to amount to fraud. In response Safeco has offered no legitimate reason whatsoever for the removal of this case to federal court.

CP 63, 850-850.

2. *Events Following Motion for Discretionary Review*

On September 13, 2017, Safeco filed a Notice for Discretionary Review with the trial court. CP 66, 861-871. On the same day, Safeco filed a motion asking the trial court to stay the action until this Court issued its ruling on Safeco’s Motion for Discretionary Review. CP 67,

872-879. The trial court denied that motion. In the Order Denying Safeco's Motion for Stay, the trial court further ordered:

Safeco will produce the complete answer to [Plaintiff's interrogatory] #5 but the Court will not review said answer until Div. II decides re: review.

CP 73, 892-893.

Safeco submitted the documents for *in camera* review and, because the trial court had stated it would not review them until this Court had ruled, Safeco's counsel placed them in a sealed envelope. Safeco also submitted a Notice with the envelope to make it clear to the trial court how Safeco interpreted the court's prior statement regarding whether it would review the documents. The Notice stated:

Attached as Exhibit A are Safeco's answer to Plaintiff's Interrogatory No. 5 from her second set of interrogatories and requests for production to Safeco and privileged documents submitted for *in camera* review to be **held and not reviewed by the Court until the Court of Appeals either denies Safeco's motion for discretionary review or grants the motion and later upholds this Court's ruling of August 31, 2017.** Such documents should then be held by the Court and not subject to further disclosure until such time as the Court completes its review of the documents and determines whether the documents are discoverable.

CP 76, 894-896 (emphasis in original).

After the trial court entered its order compelling Safeco to fully answer Interrogatory No. 5, Plaintiff's counsel served a third set of discovery requests, which included the following interrogatories:

INTERROGATORY NO. 8:

Did Safeco knowingly encourage, direct, participate in or ratify the removal of Ms. Hoff's Cowlitz County suit to Federal District Court in Tacoma?

INTERROGATORY NO. 9:

Please identify by name, address, and job title the person at Safeco who hired defense counsel in this suit.

INTERROGATORY NO 10:

Please describe and explain in specific detail why the firm of Wilson Smith Cochran Dickerson was chosen to represent Safeco in this suit. Do not leave anything out.

INTERROGATORY NO. 11:

Please identify by name and job description the person at Safeco that monitors the performance and expense of the Wilson Smith Cochran Dickerson defense of Ms. Hoff's suit.

INTERROGATORY NO. 12:

Does Safeco receive updates, reports, and billing statements from Wilson Smith Cochran Dickerson on a periodic basis for the defense of the Hoff case? If so, how often and to whom are those communicated?

CP 84, 955-1002.

Safeco served its objections and answers and Plaintiff's counsel filed a motion to compel. CP 84, 995-1002. In that motion, Plaintiff stated:

Plaintiff wants to discover whose idea it was to wrongfully remove Plaintiff to federal court. Plaintiff alleges the wrongful act was a tort. Plaintiff's theory is that Safeco knew there was no basis in law or fact to remove Plaintiff and that removal was done solely to leverage Safeco's low-ball offer. Restatement (Second) Torts, sec. 876 (b) states a claim for aiding and abetting the tortious conduct of another; a "primary tortfeasor" (Plaintiff is trying to discover which...Safeco or its attorneys) knows the primary tortfeasor's conduct constitutes a breach of duty, and that tortfeasor must substantially assist the primary tortfeasor in achieving the breach.

Plaintiff respectfully submits that aiding and abetting tortious conduct is sufficient to pierce the attorney-client privilege. This Court has already ordered Safeco to produce its secret file for in camera review. It is unknown how complete the secret file will be.

CP 79, 897-914. Thus, bolstered by the trial court's prior ruling, Plaintiff continued to test new ways to gain protected information even though the discoverability of this information was on appeal.

The trial court denied the motion, concluding Plaintiff's counsel had not satisfied the CR 26(i) certification requirement. CP 85, 832-842.

During the hearing, the trial court also explained that the documents Safeco had previously submitted pursuant to the court's order regarding *in camera* review had been accidentally shredded by the court's

judicial assistant. The trial court asked that Safeco resubmit the documents. RP 12/13/17 at 6:11–7:5.

On December 19, 2017, Plaintiff’s counsel served a fourth set of discovery requests. CP 101. Those requests ask additional questions regarding Safeco’s reasons for removing the case to federal court, including the following:

INTERROGATORY NO. 7:

Did Safeco knowingly encourage, direct, participate in or ratify the removal of Ms. Hoff’s Cowlitz County suit to Federal District Court in Tacoma?

You may satisfy this interrogatory by placing your answer, under seal, and submitting it to the court for in camera review.

INTERROGATORY NO. 8:

As between Safeco and its attorneys defending the Hoff claim, who suggested removal of her claim to federal court? What was communicated? Please identify the person(s) involved by name and job title/description. Please do not leave anything out.

You may satisfy this interrogatory by placing your answer, under seal, and submitting it to the court for *in camera* review.

CP 101.

Also on December 19, 2017, Plaintiff’s counsel filed a Motion to Seek In Camera Review; Alternatively, Motion for Reconsideration. CP 87. The motion for in camera review related to Plaintiff’s Fourth Set of

Interrogatories, which were served the same day Plaintiff filed the motion. Plaintiff noted that the new discovery requests included “some interrogatories with the intent of discovering where the idea of removal to federal court originated ... with Safeco or with the defense firm representing Safeco.” CP 87.

On December 20, 2017, Safeco’s attorney resubmitted the protected documents as requested by the trial court. CP 76. In a letter to Safeco’s attorney dated December 26, 2017, and received on January 3, 2018, the trial court stated:

Per my August 31, 2017, court order, SAFECO Insurance Co. was to provide un-redacted copies of documents for in camera review to this Court. However, I have received heavily redacted copies of the documents in question. This is unacceptable. Send immediately the correct un-redacted transcript / documents to my attention.²

CP 98.

On January 4, 2018, Safeco filed an emergency motion for a stay asking that this Court stay the underlying matter in its entirety. The Court granted the motion as to the trial court’s Orders of August 31 and September 11, 2017, but declined to stay discovery.

² The trial court ordered Safeco to produce to “provide to the Court for in camera review by September 6, 2017, every reason Safeco had for removing Ms. Hoff’s suit against Safeco to federal court in Tacoma.” CP 56, 824-827. Safeco’s submission complied with that order. The redactions were of information unrelated to the removal issue and protected by the attorney-client privilege and work product doctrine.

On January 31, 2018, the trial court denied Plaintiff's Motion to Seek In Camera Review; Alternatively, Motion for Reconsideration. CP 113.

V. ARGUMENT

A. Standard of Review

The present matter presents substantially the same issue this Court recently addressed in *Richardson v. Government Employees Insurance Co.*, 200 Wn. App. 705, 403 P.3d 115 (2017). In that case, the Court summarized the applicable standard of review as follows:

We review a trial court's discovery order for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006). A trial court's discovery rulings are reversed only when "a 'clear showing' that the court's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *T.S.*, 157 Wn.2d at 423, 138 P.3d 1053 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). When a trial court's decision rests on a question of law, we review the decision de novo. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

When a trial court relies on unsupported facts or applies the wrong legal standard, its decision is exercised on untenable grounds. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). If the trial court applies the correct legal standard to the supported facts, but adopts a view no reasonable person would take, its decision is manifestly unreasonable. *Mayer*, 156 Wn.2d at 684, 132 P.3d 115. Thus, if the trial court rested its decision on an improper understanding of the law, it has abused its discretion and we may remand. *Dreiling v. Jain*, 151 Wash.2d 900, 907, 93 P.3d 861 (2004).

200 Wn. App. at 711–12.

In *Richardson*, this Court reached two conclusions that are applicable here: (1) a UIM insurer’s attorney-client privileged communications and work product are not discoverable, and (2) a UIM insurer’s post-litigation conduct is not actionable to support a claim for bad faith.

B. The trial court erred in concluding Plaintiff’s extra-contractual claims could be premised upon Safeco’s litigation decisions.

The trial court’s orders requiring Safeco to submit protected documents for in camera review was manifestly unreasonable and was exercised on untenable grounds. They should, therefore, be reversed.³ *T.S.*, 157 Wn.2d at 423.

This matter rests upon a discrete question – when a UIM insured has sued her insurer for coverage and extra-contractual claims, may the insurer’s litigation decision to remove the case to federal court be the basis of a bad faith claim? This question is a subset of a larger issue this Court addressed in *Richardson*. There, the insured sought discovery of protected portions of the insurer’s defense counsel’s file created after the insured

³ The trial court admitted it already looked at the documents Safeco submitted. The court’s actions do not make this matter moot, however, because the in camera review was simply a precursor to a potential order to require Safeco to produce the documents to Plaintiff.

had filed suit against the insurer. The trial court ordered GEICO to produce portions of the defense counsel's file that were subject to the attorney-client privilege and work product protections, so long as they related to one or more of the following issues:

- a. An evaluation and/or investigation of [Richardson's] claim to the extent new information is being considered.
- b. Consideration of a strategy to prolong litigation or increase costs of litigation to Plaintiff.
- c. The refusal to settle the case.

200 Wn. App. at 710. The trial court declined, however, to require GEICO to produce activities solely involving defense counsel, holding that "responsive discovery must involve one or more employees of GEICO." *Id.*

In concluding that the law did not support the trial court's order, this Court summarized the purpose of the applicable protections as follows:

As previously discussed, the attorney-client privilege protects communications and advice between a client, in this case, GEICO, and its attorney. ... The privilege allows clients to speak freely and fully inform their attorneys of all relevant facts. ... Similarly, the work product doctrine allows attorneys to have complete privacy to assess the strengths and weaknesses of a case, including defenses, counterclaims and cross claims, to plan litigation strategy and share impressions, and to meet with and interview witnesses without undue interference. ...

200 Wn. App. at 716 (internal citations omitted). The Court noted that:

Attorney work product that occurs after the filing of a lawsuit often contains the lawyer's assessment of the case, trial strategy, and impressions of witnesses. Here, the litigation file is irrelevant to Richardson's UIM claim. ...

Id. at 716–17.

The same is true in the present matter. When Safeco made the decision to remove the case to federal court, Plaintiff had already alleged the company was acting in bad faith. The removal decision was, therefore, irrelevant to Plaintiff's UIM claim, as well as her extra-contractual claims.

The trial court in the present matter went beyond what the trial court did in *Richardson* when it ordered the production of privileged information that otherwise related to the evaluation of the UIM claim. Here, the evidence Plaintiff sought related exclusively to a specific litigation decision. In addition, the trial court not only ordered Safeco to produce communications between its attorneys and Safeco employees regarding that decision, it also ordered Safeco to produce communications exclusively within defense counsel's firm which did not involve any Safeco employees. *Richardson* requires reversal of the trial court's decision.

C. **The trial court erred in concluding the evidence supported the reasonable belief that Safeco committed civil fraud when it removed the case to federal court.**

Even if this Court were to conclude, contrary to the holding in *Richardson*, that an insurer's litigation decisions could be the basis for extra-contractual claims and subject to discovery, Plaintiff in this matter did not satisfy the requirements for piercing the protections of the attorney-client privilege and the work product doctrine.

Under Washington law, a UIM insured's suit against her insurer is subject to different rules regarding attorney-client privilege and work product protection than suits involving other types of first party insurance coverage. As this Court explained in *Richardson*:

Cedell held that in first-party insurance claims where the insured claimed bad faith in the handling and processing of claims, a presumption existed that the attorney-client privilege did not apply. 176 Wn.2d at 700, 295 P.3d 239. The presumption could be overcome "upon a showing in camera that the attorney was providing counsel to the insurer and not engaged in a quasi-fiduciary function," i.e. investigating, evaluating, or processing the claim. *Cedell*, 176 Wn.2d at 700, 295 P.3d 239. Even if the attorney acted in a quasi-fiduciary role, an insured could pierce the privilege by showing, among other ways, that a fraud exception applies. *Cedell*, 176 Wn.2d at 700, 295 P.3d 239.

200 Wn. App. at 714. This presumption of no privilege does not apply in the UIM context:

Cedell recognized that the UIM insurer "may defend as the tortfeasor would defend" and "is entitled to counsel's

advice in strategizing the same defenses that the tortfeasor could have asserted.” 176 Wh.2d at 697, 295 P.3d 239. Because there is no presumption the insurer waives the attorney-client privilege in a UIM case, the insured must overcome a higher bar in order to discover privileged pre-litigation information. *Cedell*, 176 Wn.2d at 700, 295 P.3d 239.

Id. at 714–15.

Washington courts have consistently recognized the distinction between UIM and other insurance claims, and the application of the attorney-client and work product privilege. In *Barry v. USAA*, this Court reasoned that UIM claims are treated differently because a UIM carrier stands in the shoes of the tortfeasor. 98 Wn. App. 199, 204, 989 P.2d 1172 (1999). “Because the provision of UIM coverage is by nature adversarial, an inevitable conflict exists between the UIM carrier and the UIM insured.” 98 Wn. App. at 205. As a result, in suits involving UIM claims, an insured may not attempt to discover evidence protected by the attorney-client privilege unless she first makes “a showing that a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred.” *Cedell* 176 Wn.2d 676 at 700 (citing *Barry*, 98 Wn. App. at 208).

The higher bar the insured in *Richardson* and Plaintiff in the present matter attempted to clear was the civil fraud exception. This exception to the attorney-client and work product protections requires the

trial court to engage in a two-step analysis. First, the court must determine “whether there is a factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to evoke the fraud exception has occurred.” 200 Wn. App. at 715. Only if such a showing is made may the court proceed to the next step, which is conducting “an in camera inspection of the documents to determine whether there is a foundation in fact for the charge of civil fraud.” *Id.*

The trial court erred when it concluded this first step had been satisfied in this case. Regarding the first step, the *Cedell* court noted that “[i]f an insurer engages in bad faith in an attempt to defeat a meritorious claim, bad faith is tantamount to civil fraud.” 176 Wn.2d at 700. The trial court here concluded that, the federal court’s reasons for remanding the case to federal court gave rise to a factual showing that Safeco had committed bad faith tantamount to civil fraud when it removed the case to federal court. This conclusion is not supported by any evidence.

Safeco explained to the federal court in its removal pleadings and later to the trial court in its briefing that it removed the case to federal court based on Plaintiff’s ambiguous statement regarding her damages in this case; she planned to ask the jury for more than \$75,000 even though she would not collect more than \$75,000. The federal court warned

Plaintiff in its order that she cannot ask the jury for more than \$75,000 if she wishes to avoid federal court jurisdiction.

The federal court made no mention in its remand order or provided any analysis to suggest that Safeco acted improperly in any way in removing the case to federal court. The federal court expressly stated that “*the parties* raise a new spin on a fairly settled line” (emphasis added) and did not in any way accuse Safeco of committing fraud or acting improperly by the removal of the case to federal court, even though he disagreed that the federal court had jurisdiction. Moreover, the federal court certainly had the authority to order an award of attorney’s fees to Plaintiff if it had concluded that Safeco had no “objectively reasonable” basis for removing to federal court but notably did not. 28 U.S.C. § 1447(c).

Additionally, Safeco produced evidence to refute all of the theories posed by Plaintiff that Safeco acted improperly by removing the case to federal court in order to leverage a “low ball” settlement. First, Safeco produced fully unredacted copies of all of its evaluations of Plaintiff’s UIM claim. There is no mention of any consideration of the status of the litigation or the venue of the lawsuit. Therefore, there was, and is, absolutely no evidence to support Plaintiff’s “theory” that Safeco

attempted to “leverage a low ball settlement offer” by removing the case to federal court.

The settlement offers made by Safeco were also all within its accepted settlement range and therefore none were “low ball” offers. Safeco explained that Plaintiff’s interpretation of and reliance on Safeco’s reserve analysis to support a claim that Safeco made a “low ball” offer was misplaced and did not support her conclusion. She did not correctly calculate the values in the reserve analysis (the reserve analysis included a range for the potential value and Plaintiff only cited to the high end of the value) and did not use the document in the context for which it was created (Safeco creates the reserve analysis for the purposes of setting a statutory reserve as opposed to evaluating a claim for the purposes of settling a claim).

Thus, there is a complete absence of any evidence to support a prima facie showing of bad faith tantamount to civil fraud—and no evidence of wrongdoing—through the removal of this case to federal court. Plaintiff’s arguments in support of gaining access to Safeco’s privileged materials and the trial court’s orders granting this request were misplaced and in error. The trial court’s rulings are not supported by the evidence or law and must be reversed.

VI. CONCLUSION

Safeco respectfully requests that this Court grant discretionary review of the August 31, 2017, Order On Plaintiff's Second Motion to Compel Discovery and for Terms and the September 11, 2017, Order on Motion for Reconsideration.

DATED and respectfully submitted this 3rd day of May, 2018.

By: s/ John M. Silk
s/ Morgan E. Smith
John M. Silk, WSBA #15035
Morgan E. Smith, WSBA # 37954
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164-2050
Telephone: 206.623.4100
Email: silk@wscd.com; smithm@wscd.com
Counsel for Safeco Ins. Co. of Illinois

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 Safeco's Motion for Discretionary Review upon the following:

By E-Mail

Counsel for Respondent:

Duane C. Crandall
Crandall, O'Neill, Imboden & Styve, P.S.
1447 - 3rd Avenue, Suite A
P.O. Box 336
Longview, WA 98632

DATED at Seattle, Washington this 3rd day of May, 2018.

s/ Jennifer Hickman _____

Jennifer Hickman
Legal Secretary

WILSON SMITH COCHRAN DICKERSON

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