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

PAYTON O. HOFF, Respondent,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, Petitioner.

SAFECO'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Ms. Hoff asks this Court to reach a decision that is contrary to the rule of law in Washington State. Specifically, she proposes that this Court adopt the rule that in any UIM bad faith lawsuit, an insured may (1) argue that the procedural litigation actions and decisions taken by an insurer and its attorneys can support a claim for bad faith, and (2) that all attorney-client communications and attorney-work product regarding litigation strategy, decisions, and actions are discoverable. These arguments were expressly rejected by the Washington Supreme Court in *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 698, 295 P.3d 239 (2013) and Division II of the Washington Court of Appeals in *Richardson v. Geico*, 200 Wn. App. 705, 403 P.3d 115 (2017)(*rev. den.* 190 Wn.2d 1008)(2018).

Safeco is not trying to conceal a “big secret” or some devious plot by arguing for the protection of its privileged materials. Safeco objects to the principle of the trial court’s ruling and the trial court’s misapplication of the standard that must be met before the court orders an *in camera* review. Here, the trial court erred when it ordered an *in camera* review, which is a precursor to production to Ms. Hoff, of Safeco’s attorney-client communications and work product concerning its litigation decision to remove the case to federal court. This ruling does not comport with established Washington law. The trial court abused its discretion and its rulings should be reversed.

II. ARGUMENT

A. There is No Precedent or Authority for the Discoverability of a UIM Insurer's Post-Litigation Attorney-Client Communications or Work Product

The trial court abused its discretion when it ordered an *in camera* review of Safeco's post-litigation attorney-client communications and work product. Safeco is not asking this Court to create "entirely new law in Washington" as Ms. Hoff suggests, but to require the trial court to apply existing Washington law, which it did not. *See*, Respondent's Brief at 12. Ms. Hoff is incorrect that the *Richardson* court "[failed] entirely to discuss the criteria or even a process for a trial court to view post-litigation material allegedly protected by the attorney-client privilege." *See*, Respondent's Brief at 18-19. The court in *Richardson* addressed this *exact* issue and concluded that in order for a court to conduct an *in camera* review of any materials, the information must be **discoverable**. The court in *Richardson* **clearly** stated that post-litigation information and materials in a UIM bad faith case are not discoverable.

In this case, per *Cedell*, Geico produced Richardson's claim file concerning both her PIP and UIM claims. *Cedell* does not suggest that privileged or work product information generated post-litigation is also subject to discovery.

...

We agree with the public policy concerns discussed above, particularly in light of the adversarial relationship between insurers and insureds in UIM bad faith actions. Further, the law on attorney-client privilege and work product doctrine provides that, in this context, **information generated post-litigation is not discoverable**.

Richardson, at 715-716, 720 (emphasis added)

Therefore, the trial court should never have granted a request for

an *in camera* review because post-litigation information is not discoverable. There is no reason to even conduct an *in camera* review if there is no chance that any of the materials subject to review will ever be admissible evidence at trial.

Likewise, the court in *Richardson* highlighted the strong public policy *against* allowing discovery of an insurer's post-litigation materials in the UIM context. *Richardson* at 720. Discovery of such information is "contrary to the purposes of attorney-client privilege" and "would have a chilling effect on an insurer's ability to defend itself against claim disputes." *Id.* There is no basis for Ms. Hoff's claim that public policy supports the discoverability of a UIM insurer's post-litigation privileged materials. *See*, Respondent's Brief at 26.

Ms. Hoff also argues that *Richardson* did not address whether post-litigation conduct can give rise to a claim for bad faith against a UIM insurer. *See*, Respondent's Brief at 20. This is inaccurate. The court in *Richardson* settled in the negative the question of whether post-litigation conduct can give rise to a claim of insurance bad faith against a UIM insurer. The conclusion that an insured cannot maintain a cause of action for bad faith based on litigation conduct is consistent with its conclusion that post-litigation conduct is not discoverable in a UIM bad faith lawsuit. The Court of Appeals in *Richardson* reversed the trial court's order that required Geico to produce a number of attorney-client privileged communications and work product generated after the insured filed her

lawsuit, including:

An evaluation and/or investigation of Richardson's claim to the extent new information is being considered.

Consideration of a strategy to prolong litigation or increase costs of litigation to Plaintiff

The refusal to settle the case.

Richardson at 710.

The court in *Richardson* agreed with the federal courts that concluded that "litigation conduct [cannot] be used as evidence of bad faith." *Richardson* at 719-720, quoting *Timberlake Const. Co v. United States Fid. & Guar. Co.*, 71 F.3d 335 (10th Cir. 1995). Thus, the trial court improperly allowed discovery into the above categories of information that were generated after the insured filed her lawsuit because litigation conduct cannot be used as evidence to support a claim for bad faith.

Ms. Hoff's interpretation of *Leahy* is simply incorrect. The ruling by Division One in *Leahy v. State Farm*, 418 P.3d 175 (2018) is consistent with *Richardson*. In *Leahy*, the Court of Appeals stated that it was not asked to determine whether the trial court erred with respect to its rulings on the discoverability or an *in camera* review of post-litigation materials. *Leahy* at 184. Notably, the ruling in *Richardson* came after the conclusion of the briefing in *Leahy* and the parties did not apparently address the propriety of the *in camera* review. *Leahy* at 184. However, the court went on to state that:

As we read *Richardson*, had Leahy sought any materials that were prepared after she commenced this action on November 15, 2015,

they would have been protected.

Leahy at 184.

Finally, the Supreme Court's ruling in *Cedell v. Farmers*, 176 Wn.2d 686, 295 P.3d 239 (2013) does not support Ms. Hoff's position, but instead makes clear how the trial court erred in this case. The court in *Richardson* correctly pointed out that the ruling in *Cedell* did not address the discoverability of post-litigation materials generated by a UIM insurer. *Richardson* at 715. There is simply no basis for Ms. Hoff's argument that the Supreme Court's ruling in *Cedell* supports an *in camera* review of Safeco's post-litigation attorney-client communications and work product materials.

The Washington Supreme Court declined to accept review of the Court of Appeals' ruling in *Richardson*. *Richardson*, 190 Wn.2d 1008 (2018). Mandate has issued. The Court of Appeals' ruling in *Richardson* is the final authority on the discoverability of post-litigation materials in a UIM bad faith case and it is clear that such information is not discoverable. If material is not discoverable, then there is no basis for ordering an *in camera* review. The trial court abused its discretion and its orders should be reversed.

B. An *In Camera* Review is Not the Remedy for "Vexatious Litigation."

Ms. Hoff's remedy for any complaints with respect to any litigation actions taken by Safeco in this lawsuit is explained in CR 37 and CR 11. The court in *Richardson* confirmed that if an insured in a UIM

bad faith lawsuit believes that the insurer is conducting itself inappropriately, then the Civil Rules provide the appropriate relief:

Other remedies are available to a plaintiff asserting such a claim under the rules of civil procedure. Examples of redress for improper litigation conduct include motions to strike, compel discovery, secure protective orders, or impose sanctions.

Richardson, at 720 (internal citations omitted).

The remedy *is not* to allow an insured to pursue a claim for insurance bad faith based on litigation strategy, or to order an *in camera* review of attorney-client privileged communications and work product, which is what the trial court did in this case.

Ms. Hoff incorrectly suggests that Washington State recognizes a cause of action for “litigation in bad faith.” *See*, Respondent’s Brief at 24. The court in *Hiller Corp v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999) assessed ongoing bad faith litigation tactics in conjunction with the prevailing party’s request for an equitable award of attorney’s fees. The court in *Hiller* did not in any way address whether an insured can maintain a cause of action for bad faith against a UIM insurer, which the court in *Richardson* states she cannot. The court in *Hiller* also did not conclude that an *in camera* review of any attorney-client or work product privileged materials is an appropriate remedy for any “bad faith” litigation tactics.

Moreover, the “examples” of “bad faith litigation” by Safeco that Ms. Hoff presents to this Court in support of her argument are completely without factual support and irrelevant to the question presently before the

Court. *See*, Respondent's Brief at 2, 14, 25, 26, and 28. As discussed below, Safeco refuted all of Ms. Hoff's arguments in support of her request for an *in camera* review. Certainly, if the trial court felt that Safeco had participated in any discovery abuse or other "abusive" litigation tactics, it would have imposed sanctions against Safeco under CR 37 and/or CR 11, but it has not, nor should it.

Ms. Hoff has not produced any authority to support her argument that the trial court appropriately ordered an *in camera* review of Safeco's privileged post-litigation materials.

C. There is an Absence of Bad Faith Tantamount to Civil Fraud to Overcome the Applicable Privileges.

Even if the trial court had authority to order an *in camera* review, it abused its discretion because it lacked sufficient evidence to support such an order.

Safeco already explained to the federal court and trial court that its removal of the case to federal court was based on the way that Ms. Hoff presented her damages. There is a complete absence of any evidence to support Ms. Hoff's theory that this action was intended to "bully" or force her into a "lowball settlement." First, Ms. Hoff does not deny that before the federal court's ruling remanding the case, she intended to ask the jury to award her more than \$75,000. This caused Safeco to reasonably conclude that the amount in controversy exceeded the federal court jurisdictional minimum of \$75,000. CP 41, 581-601. Safeco explained this reasoning to the federal court (and to the trial court) and the result was

an express limitation from the federal court that in order to avoid its jurisdiction, Ms. Hoff cannot “[ask] the jury for more” than \$75,000. Appendix 12.

Second, Safeco did not make any “low ball” settlement offers. All of Safeco’s settlement offers were within Safeco’s accepted settlement range based on its evaluation of her injury claim. CP 24, 338-438. The parties disagree over the value of Ms. Hoff’s UIM claim. But this disagreement does not even rise to the level of a violation of the Insurance Fair Conduct Act. *See, Perez-Crisantos v. State Farm*, 187 Wn.2d 669, 389 P.3d 476 (2017). A disagreement over the value of a UIM claim does not constitute “civil fraud” or justify the production of an insurer’s privileged attorney-client communications and work product. *See, Cedell* 176 Wn.2d 676 at 700 (citing *Barry*, 98 Wn. App. at 208).

On pages 14 – 17 of Respondent’s Brief, Ms. Hoff misrepresents the facts of this case and what occurred with respect to Safeco’s investigation and evaluation of her claim. As of October 12, 2011, Ms. Hoff had seen a doctor once. Safeco evaluated her claim as follows:

Medical expenses	\$170
General damages	\$1,500 - \$2,700
Total claim	\$2,870

CP 754.

Safeco then made the settlement offer of \$2,000. CP 357. Ms. Hoff then continued seeking medical treatment over a period of almost three years. CP 365. She advised Safeco of her settlement with the tortfeasor in

April 2014. CP 365. John Chavez took over as the adjuster for Ms. Hoff's claim and prepared the "BI Transfer Analysis" for the purposes of setting reserves that included an estimate of the current value of Ms. Hoff's claim with a total value range of \$4,624.26 - \$24,624.26. Respondent's CP 32, p. 1266, *see also*, Respondent's Brief at 15. Ms. Hoff continued her medical treatment. CP 381, 386, 393, 395, and 399. Finally, in May 2016, Ms. Hoff confirmed that Safeco had all of her medical records and that she wanted to resolve her claim. CP 401. Safeco then reviewed all of the information it had, including all of Ms. Hoff's updated medical records, and completed a Bodily Injury Evaluation, which included the following evaluation:

Medical expenses	\$21,044
General damages	\$18,000 - \$25,000
Less underlying	-\$25,000
Less PIP	<u>-\$15,375.74</u>
Total Claim Value	-\$1,331.74 - \$5,668.26

CP 403 – 405.

Thereafter, Safeco offered Ms. Hoff \$2,500 to resolve her claim. CP 407. After Ms. Hoff filed her lawsuit, she continued her medical treatment. CP 435. During the course of litigation, Safeco reviewed these records and increased its evaluation of Ms. Hoff's claim:

Medical expenses	\$21,044
General damages	\$23,000 - \$30,000
Less underlying	-\$25,000
Less PIP	<u>-\$15,375.74</u>
Total Claim Value	\$3,668.26 - \$10,668.26

CP 435.

Safeco then increased its settlement offer to \$10,500. CP 437.

As explained above, Safeco did not value Ms. Hoff's claim at "nearly \$25,000 in mid-May 2015." *See*, Respondent's Brief at 16. Safeco also did not offer "10%" of what it evaluated the total value of Ms. Hoff's injury claim. *Id.*

There is no evidence that Safeco removed the case to federal court for any other reason than the way that Ms. Hoff presented her damages claim or to try to force her and her attorney to accept a "low ball" settlement offer. The trial court abused its discretion when it concluded that there is sufficient evidence to support a prima facie finding of bad faith tantamount to civil fraud so as to support an *in camera* review of Safeco's privileged communications.

III. CONCLUSION

The fact of the matter remains that the trial court should not have ordered an *in camera* review of Safeco's post-litigation attorney-client privileged communications and work product because (1) such information is not discoverable, and (2) Ms. Hoff cannot maintain a claim for bad faith against Safeco for litigation activities. The ruling by the Commissioner on Safeco's motion for discretionary review accurately summarizes and describes the error in the trial court's ruling and how it abused its discretion:

A recent decision of this court *Richardson v. Government Employees Ins. Co.*, 200 Wn. App. 705, 403 P.3d 115 (2017), supports Safeco's argument that the trial court abused its discretion. In that case, relying on *Cedell*, the trial court compelled GEICO to submit for *in camera* review post-litigation documents

pertaining to a strategy to prolong litigation or increase the costs of litigation or pertaining to its refusal to settle the case. *Richardson*, 200 Wn. App. At 721. Thus, it held:

To the extent that the [trial court's] order compels GEICO to produce post-litigation documents or information protected by the attorney-client privilege or work product doctrine as to Richardson's UIM bad faith claim, we conclude that the trial court abused its discretion.

200 Wn. App. At 721.

The same appears to be true of the trial court's order compelling Safeco to produce post-litigation documents or information protected by the attorney-client privilege or work product doctrine, as to Safeco's removal of Hoff's suit to federal court. Thus, it appears that the trial court committed probable error in so compelling Safeco. And the erroneous order substantially alters the status quo as to Safeco's attorney-client privilege and work product doctrine.

The trial court abused its discretion when it granted Ms. Hoff's motion to compel and denied Safeco's motion for reconsideration. Safeco respectfully requests that this Court reverse the trial court's rulings on these two orders.

DATED and respectfully submitted this 21st day of August, 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 Safeco's Reply Brief upon the following:

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Jennifer Hickman
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