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NO. 50850-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

PAYTON O. HOFF,

Respondent,

v.

SAFECO INSURANCE CO. OF ILLINOIS,

Petitioner.

BRIEF OF RESPONDENT HOFF

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I. INTRODUCTION

The narrow issue on appeal is whether the trial court has authority to order Safeco to produce for *in-camera* inspection every reason it had for removing Ms. Hoff to federal court in Tacoma. The larger issue is whether communications between Safeco and its attorneys, or the attorneys among themselves, or communications within Safeco itself enjoys an absolute immunity once litigation has commenced.

Safeco maintains that *all* such communications are sacred and cannot, under any circumstances, be seen by the trial judge *in camera*. Plaintiff contends, consistent with all current Washington law, that the trial court controls the litigation before it and the criteria it uses should be if a “reasonable person” having a “reasonable belief” that bad faith may have taken place, an *in camera* inspection is proper. In the absence of judicial oversight and control, there can be no check on the institutionalized dishonesty that would result.

The plaintiff, Ms. Hoff, has every reason to believe, and has alleged numerous times, that she is on the receiving end of a scheme by Safeco and its attorneys to force her to accept less than her UIM claim is worth. The scheme is manifested by offering substantially less (about 10%) than Safeco’s own internal valuations and offering the same amount after receipt

of Plaintiff's favorable PIP IME. Upon an unsuccessful removal to federal court, Safeco increased the offer to less than 50% of its own valuation. In the document dump in lieu of answering Plaintiff's first set of interrogatories regarding valuation, no mention is made of the removal and remand, nor is any mention made of the Safeco incentive program for its adjustors. Despite this, the attorney for Safeco claimed in open court that the document dump contained "each and every reason" for Safeco's offers. Safeco pretended incomprehension regarding "incentive programs" alleging the term was simply too vague and ambiguous to understand. Two sets of interrogatories later it turned out Safeco has, indeed, a "Variable Incentive Program" that the relevant adjustor earned bonuses under. Aside from the "vague and ambiguous" argument, Safeco claimed incentive/bonus programs were simply not discoverable despite a 2014 Division I case directly on point and involving the Safeco bonus program. All this is relevant to the trial court's determination that a reasonable person could have a reasonable belief that bad faith may have occurred and an *in camera* inspection was warranted.

The trial court had before it the above allegations and it ordered production of the internal documents regarding removal to federal court. Plaintiff contends Safeco has engaged in vexatious litigation in bad faith and the Safeco communications would contain relevant admissible evidence

supporting Plaintiff's allegations. What the court would do with that information in the form of sanctions is not before this Court.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err by ordering Safeco to produce documents for an *in camera* review regarding Safeco's removal to federal court in Tacoma.

2. The trial court did not err by denying Safeco's Motion for Reconsideration regarding production of documents for an *in camera* review.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether attorney-client privilege and work product privilege are so inviolate a trial court cannot order an *in camera* review.

2. Does the fact that a matter is being litigated deprive the trial court of control over the parties, particularly regarding discovery?

3. Whether "litigation strategy" is so sacred that a trial judge may not even gaze upon it.

IV. STANDARD OF REVIEW

A trial court's discovery orders are reviewed for abuse of discretion.

V. STATEMENT OF THE CASE

Removal to federal court was improper and vexatious litigation.

CHRONOLOGY:

Plaintiff filed suit against Safeco Insurance Company of Illinois (Safeco) on November 10, 2016 in Cowlitz County Superior Court. CP 1. She alleged Safeco mishandled her Underinsured Motorist (UIM) claim and acted in bad faith. Because Washington state courts prohibit ad damnum clauses, she did not place a monetary value on her suit.

Safeco then propounded two Requests for Admissions on December 20, 2016:

“REQUEST FOR ADMISSION NO. 1.

Admit that the total amount of damages (including any multiplier) that the Plaintiff seeks in this action exceeds \$75,000.00.”

“ANSWER:

Plaintiff denies that the total amount of her damages payable by defendant Safeco exceeds \$75,000.”

“REQUEST FOR ADMISSION NO. 2.

Admit that the total amount of damages (including multiplier) and attorney fees that the Plaintiff seeks in this action exceeds \$75,000.00.”

“ANSWER:

Plaintiff denies that defendant Safeco has any exposure to pay Plaintiff in excess of \$75,000.”

The answers were signed by Ms. Hoff “under penalty of perjury” on January 20, 2016 [sic]. CP 38, pp. 1288-1295.

On December 20, 2016 Safeco propounded Interrogatory No. 3, the same day as the Requests for Admission.

“INTERROGATORY NO. 3. To the extent you have not unqualifiedly admitted Defendant’s Requests for Admission, identify the following information:

a. All facts known to you or to your attorneys that you have based your response to the Request for Admission upon;

b. The identity of the person or persons known to you or your attorney who have knowledge of such facts; and

c. The identity of all documents that reflect any such facts.”

“ANSWER:

Objection to the extent the question invades work product privilege. Without waiving objection:

a) Safeco’s exposure to this suit will not exceed \$75,000. Longevity and severity of symptoms, medical treatment, Safeco’s claims practice regarding Plaintiff.

b) Safeco employees, Plaintiff’s health care providers, Plaintiff’s friends and relatives.

c) Documents regarding Plaintiff’s claim and Safeco’s policies are uniquely in the possession of Safeco.”

The Answer was signed by Ms. Hoff “under penalty of perjury” on January 20, 2017. CP 38, pp. 1292-1299.

By letter of January 23, 2017 to Safeco, Ms. Hoff’s attorney explained that Ms. Hoff was unilaterally limiting her damages recoverable from Safeco to \$75,000 and offered to draft a CR 2A stipulation. CP 38, pp. 1300-1302.

On February 6, 2017 Safeco proposed a 2-paragraph CR 2A stipulation, CP 38, Pp. 1303-1305. Ms. Hoff agreed by letter of February 7, 2017 to paragraph 1 wherein she limited her sum total of monetary relief to \$75,000 but was disinclined to agree to paragraph 2 which insisted on an Order in Limine that would, in effect, limit the evidence she presented to the jury. Instead, she suggested:

“2. However, admissible evidence that a trier of fact may consider is not subject to an order in limine. In the event a trier of fact values Plaintiff’s claim at more than \$75,000, Plaintiff and Safeco agree no money judgment may exceed \$75,000.” CP 38, pp. 1306-1307.

By letter of February 8, 2017 Safeco rebuffed Plaintiff’s proposed paragraph 2 and insisted that the Safeco CR 2A of February 6, 2017 be signed conflating a “claim” for damages with simply the presentation of evidence allowing a jury to decide the value. Absent Safeco’s signed CR 2A, removal to federal court was promised. CP 38, pp. 1308-1309.

The same day, Ms. Hoff's attorney responded reminding Safeco that Ms. Hoff's evidence could well engender a higher value but she would request \$75,000 and even if the jury placed a higher value, "...she will not seek more, nor accept more, than a judgment for \$75,000."

"It is difficult to reconcile your statement that Ms. Hoff seeks relief in an amount greater than \$75,000 when she has categorically and repeatedly, in writing, limited her recovery to \$75,000." CP, pp. 1310-1312.

Eight days later, on February 13, 2017, Safeco responded by claiming that refusing to accept more than \$75,000 yet presenting evidence that could be valued by a jury at more than \$75,000 were two concepts that simply could not be reconciled. "It is not enough that she will not 'recover' more than \$75,000 from Safeco." Thus placing Ms. Hoff in the unenviable position of having to guess which bit of evidence she should withhold from the jury in order to slide under the \$75,000 mark. CP 38, p. 1313-1317.

On February 15, 2017 Safeco removed this matter to federal court when Ms. Hoff refused to capitulate to the blatant bullying/overreaching demanded by Safeco regarding a wholly improper limitation on her own evidence. Plaintiff moved for remand to state court which was granted. CP 37, 1-4.

District Court Judge Leighton's Order on Motion to Remand:

“Furthermore, while Safeco’s proposed stipulation properly sought to limit both the amount Hoff could seek and recover, Hoff correctly claims that Safeco also sought to limit the evidence of general damages that she could offer. This is more than a plaintiff is required to concede in order to avoid removal. And it is not practical. As Hoff argues, there is a difference between limiting evidence of medical specials that total more than the limit (which would clearly be “seeking more “), and limiting testimony about general damages (pain, distress, and the like). How would an order limiting the latter be enforced? Is the plaintiff prohibited from crying on the stand? Can she use words like “devastating,” or is she limited to “it’s been pretty hard”?”

Hoff’s unilateral act is sufficient to deny this court jurisdiction. It does limit her recovery to less than \$75,000, and it does prohibit her from seeking---from asking the jury for---more. But Safeco’s claim that “capping” the amount in controversy requires the plaintiff to “pull her punches” or decline to submit evidence of her general damages is a bridge to [sic] far.”

CP 32, pp. 1248-1253.

Back in state court Ms. Hoff served discovery requests on Safeco seeking every reason Safeco had for removal. Since there was no basis in law for the removal (see Memorandum re: Removal, CP 37, pp. 1276-1284), Plaintiff sought any alternative to the only plausible explanation of bad faith. Safeco repeatedly refused to answer and upon Ms. Hoff’s motion to compel heard August 16, 2017, Judge Warning ordered production of the privileged documents for *in camera* review.

Judge Warning’s Verbatim Report of Proceedings dated 08-16-2017

at 33:15 to 34:3:

“As to number five, regarding the removal to Federal Court, what I’ve got is a finding that is res judicata as to both sides that the removal was done with the knowledge that the Plaintiff was waiving any claim that would meet the jurisdictional limits. And where it says the parties put a new spin on a fairly settled line, it’s not both parties. It’s Safeco. And the Court went on to say that the request that Safeco made for the additional language about basically not presenting evidence that the claim might be worth more was fairly, I guess, literary language, and I liked it, talking about does that mean they’re not allowed to say “devastated”; just say, “it’s pretty hard.” You know, the -- my impression is that Judge Leighton was not real impressed with the argument, but I don’t want to read anything into it.

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.

The Federal Court didn’t make any finding of reasonableness by not imposing any terms or sanctions because it was ignored. Uh, and I don’t think I can read anything to -- into the decision in that regard that wasn’t stated.”

See Appendix 11 to Plaintiff's Response to Safeco's Motion for Discretionary Review.

That the documents held by Safeco contain damning evidence of bad faith seems fairly certain. In Safeco's Motion for Discretionary Review, page 17, it claims that if the trial court saw them it would cause "irreversible damage to Safeco's defenses". And if Ms. Hoff got her hands on those documents, it "...would further damage Safeco's *rights* beyond the possibility of repair". (emphasis added) Apparently Safeco's attorneys believe that Safeco's "rights" to commit bad faith trump Ms. Hoff's expectations to be treated fairly. Which is an odd position to take when both statutory and common law require Ms. Hoff to be treated fairly and both statutory, common law, WAC, and court rule require Safeco and its attorneys to behave honestly.

VI. DISCUSSION

A. Power of the trial court to control litigation

The *Hoff v. Safeco* appeal is not about whether Ms. Hoff is allowed to see and use Safeco material as evidence in her case. It is not about admissibility but rather about the ability of the court, itself, to view Safeco documents. In *Richardson v. GEICO*, 200 Wash.App. 705 (2017), GEICO

produced material for *in camera* review and the court was so impressed that she ordered production to Plaintiff. Safeco wants even more protection by prohibiting the trial court from any inspection at all.

The recent Division I case of *Leahy v. State Farm*, 2108 WL 2296301, published May 21, 2018, speaks to the issues before this Court. Ms. Leahy sued her UIM carrier, State Farm, for bad faith and sought material from her claim files that State Farm considered privileged either by attorney-client or work product. State Farm was ordered to produce the documents, some 342 pages, for *in camera* review by the court. Upon review, the court ordered 149 of the pages produced to the plaintiff. The plaintiff then lost at summary judgment her bad faith claims and the appeal followed.

Division I held that the communications between State Farm and its attorneys were privileged unless the plaintiff could show fraud. “But there is absolutely nothing in the record before us that shows fraud or anything suggesting fraud. More importantly, the trial court conducted its own *in camera* review of documents from the claim file and did not suggest that any fraud had been committed. “...Accordingly, Leahy has failed to show that the trial court abused its discretion in determining, after *in camera* review, that she was not entitled to documents covered by the

attorney-client privilege.”

Similarly, Division I analyzed the work product privilege and stated, “While Leahy is correct that there is an established protocol governing discovery in bad faith insurance claims, this trial court followed the protocol by conducting an *in camera* review. She has nothing to complain about in this respect.”

The sole issue of this appeal by Safeco is whether the trial court has authority to order production of privileged material for *in camera* review. The overwhelming authority supports Ms. Hoff. Moreover, the facts in *Leahy* involved disputes between the parties’ doctors’ diagnoses and causation. There was nothing obviously underhanded or nefarious as opposed to the case at bar.

If Safeco’s request is honored by this court, it will be creating entirely new law in Washington. Even if Plaintiff were not permitted to see, for example, egregious planning of bad faith schemes, our courts still retain the power to sanction which would necessarily include the power to inspect. Ms. Hoff claims the removal was solely for the purpose of delay and leverage.

Where sanctions are not expressly authorized, “the trial court is not powerless to fashion and impose appropriate sanctions under its inherent

authority to control litigation.” *State v. S.H.*, 102 Wn.App. 468, 473 (2000) 8P.3d 1058 (citing *In re Firestorm 1991*, 129 Wn.2d 130, 139 P.2d 411 (1996)). A trial court has the power to sanction litigation conduct upon a finding of bad faith. See RCW 2.28.010(2)-(3) (“Every court of justice has power. . . [t]o enforce order in the proceedings before it. . .[and] [t]o provide for the orderly conduct of proceedings before it[.]”); *State v. S.H.*, 102 Wn.App. at 473-75. See also *Wilson v. Henkle*, 45 Wn.App. 162, 173, 724 P.2d 1069 (1986) (upholding trial court’s conclusion that it had inherent power to impose sanctions against an attorney for inappropriate and improper conduct). A party may demonstrate bad faith by delaying or disrupting litigation. *State v. S.H.*, 102 Wn.App. at 474. Sanctions for bad faith conduct are appropriate if an act “affects” “the integrity of the court and, [if] left unchecked, would encourage future abuses.” *Id.* The case of *Hedger v. Groeschell*, 19 Wash.App. 8, 14 (2017) describes “procedural bad faith” as “vexatious conduct during the course of litigation”, citing *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wash.App. 918, 928 (1999). “The conduct can include delaying or disrupting litigation.” *Hedger*, at 14. PPG engaged in “aggressive litigation strategy” culminating in significant sanctions; courts should not promote “frivolous defense strategies”. *Fiore v. PPG Industries*, 169 Wash.App. 325, 333 (2012).

It is Ms. Hoff's contention that Safeco has engaged in a litany of bad faith litigation including failing to acknowledge a bonus/incentive system (eventually disclosed) to document dumping, to refusing to provide discovery and then moving for summary judgment on the very matters it withheld. CP 12, 13, 28, 29, 31, 32, 79, 80, 87, 88, 104, 105.

The above is relevant to this appeal because it provides a reasonable basis for a trial court to require an *in camera* inspection based upon the tort of bad faith.

B. Low ball offers constitute bad faith and bad faith can pierce privileges.

As an example of Safeco's "low ball" strategy, Safeco's opening brief admits on page 4 both Ms. Hoff's mother *and* Safeco believed the deceased at-fault driver had no insurance. So Safeco decided to settle Payton's claim for \$2,000 total on October 12, 2011. After haggling with Payton's mother, Safeco increased the offer to \$2,200. Yet when it was discovered that the tortfeasor actually had a liability policy, the decedent's insurer apparently had no trouble tendering the \$25,000 liability limits without argument to the pro se Ms. Hoff. *See* Safeco Opening Brief, p. 4. That one insurance company valued Ms. Hoff's claim at \$25,000 or more while her own insurer felt \$2,200 was reasonable is a significant point.

In October 2011 Safeco offered \$2,000 to unrepresented Ms. Hoff.

On 05-24-2016 Safeco offered \$2,500 to unrepresented Ms. Hoff.

On 07-22-2016 Safeco received Duane Crandall's letter of representation.

On 07-29-2016 Safeco provided their favorable-to-plaintiff IME report of 12-23-2013 and repeated the \$2,500 offer.

After removal by Safeco to federal court and remand to this court, on 04-25-2017 Safeco offered \$10,500.

An undated "BI Transfer Analysis", Bates No. 314 in the Higgins family file.

"Estimate Medical now at:

	\$20,000 - \$25,000
General damages	\$25000 - \$40,000
Total claim value	45000-65000
Less PIP paid	15375.74

Less Underlying \$25,000

Net value 24,624.26

Current UIM BI reserves at REDACT which are adequate for now pending a response from the clmt"

CP 32, p. 1266.

In an attempt to determine when the above valuation was made, the immediate preceding page, Bates No. 315, is a letter dated May 7, 2015 from adjustor Chavez. Bates No. 312 is a notation dated 05-28-2015.

This could be interpreted to mean that while Safeco valued Ms.

Hoff's net claim at nearly \$25,000 in mid-May 2015, and it had already paid over \$15,000 in medical bills; it offered only \$2,500 (10%) and repeated that offer two months later. Ms. Hoff filed suit on November 10, 2016. WAC 284-30-330 (7) defines as an unfair trade practice compelling insureds to institute litigation by offering substantially less than the amounts ultimately recovered. While no amount has "ultimately been recovered", Safeco's own valuation contrasted with the amounts they grudgingly offered is sufficient to invoke a "good faith belief" that Safeco "engaged in wrongful conduct sufficient to make the fraud exception to any alleged attorney-client privilege. *Barry v. USAA*, 98 Wash.App. 199 (1999), at 207. See also *Cedell v. Farmers Ins.*, 176 Wn.2d 686, 697, 698 (2013). And the disparity between Safeco's valuation and its offer is precisely the same reason the *Miller v. Kenny*, 180 Wash.App. 772 (2014), court allowed the jury to view Safeco's reserves.

Safeco, on pp. 10-11, makes a distinction between the reserve amounts it is required to formulate mandated by the Washington State Insurance Commissioner, and what it calls "Bodily Injury Evaluations", a figure it makes up out of whole cloth and presumably what it hopes to settle each case for. The sums are remarkably different. Safeco then implies it is impossible to propose a "low ball" figure if it is within the range of its own

“Bodily Injury Evaluation”. This was the same thinking *Ellwein v. Hartford*, 142 Wn.2d 766 (2001) engendered when it held that a UIM bad faith claimant must prove bad faith as a matter of law. If there was *any* factual dispute, the insured lost that particular cause of action. The result was insurers solemnly creating their own careful evaluations to counter the bad faith tort claim and prevailing at summary judgment. But then *Smith v. Safeco*, 150 Wn.2d 478 (2003) came along and overturned *Ellwein*, to the industry’s chagrin. “However, the existence of some theoretical reasonable basis for the insurer’s conduct does not end the inquiry. The insured may present evidence that the insurer’s alleged reasonable basis was not the actual basis for its action, or that other factors outweighed the alleged reasonable basis.” *Smith*, at 486. The above is to directly counter Safeco’s claim that since by its own evaluation Ms. Hoff was never low balled, then the vexatious litigation including removal to federal court was simply an innocent exercise in paying defense attorneys and never intended to discourage her meritorious claim.

In *Potter v. American Family Ins.*, W.D. Wash. 2017 WL 2464137 (June 7, 2017) a case where the insurer’s arguments at summary judgment were eerily close to Safeco’s, Judge Settle wrote:

“Second, American Family argues that ‘[a] reasonable

valuation [of a claim] is a complete defense to an IFCA claim.” Dkt. 41 at 10. American Family cites no authority for this proposition, and, even if this was the law, the Court must view the facts in the light most favorable to the Potters at this stage of the proceeding. Instead, American Family cites a litany of authorities addressing claims for bad faith, which is a tort separate from an IFCA claim. *See id.* The proper standard under IFCA is that ‘[d]isparity between an offer and an arbitration award alone does not establish a violation of [IFCA].’ *Perez Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 684 (2017) (citing *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wash.App. 686, 701, 17 P.3d 229 (2001). ‘There has to be something more.’ *Id.* Viewing the facts in the light most favorable to the Potters, they have shown both a disparity in American Family’s offer and the arbitration award and something more. American Family’s internal documents show that some of their agents and/or employees valued the claim at an amount almost twice what was offered.”

C. A discussion of *Richardson v. GEICO*, 200 Wash.App. 705 (2017)

Richardson was published during the *Hoff* litigation and is being used by Safeco as authority for the proposition that *nothing*, no matter how nefarious or even unlawful, is sufficient to allow an *in camera* review of a UIM insurer’s privileged documents once litigation has commenced. Despite what the *Richardson* case says at 715 regarding the threshold criteria for an *in camera* inspection, “the trial court engages in the two step process to determine if piercing the attorney/client privilege is appropriate” it limits that option to a pre-litigation context. The decision fails 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. In discussing *Gooch v. State Farm*, 712 N.E.2d 38 (Ind.App. 1999), at 718 of *Richardson*, the court seemed to agree “...that other existing remedies existed for misconduct of an insurer’s attorney”, a particularly knotty problem if the court is not even allowed a peek at the litigation file. *Richardson* seems to state that a UIM insurer must act in good faith until a lawsuit is started on pain of having its bad faith, if any, exposed during discovery. But once a suit is started, it can act in bad faith without any risk of discovery exposing the bad faith acts. The insurer “is entitled to counsel’s advice in strategizing the same defenses that the tortfeasor could have asserted.” *Richardson*, at 715. Surely this does not extend to bad faith conduct, unethical conduct, or violations of law. Such a position is worrisome because the *Richardson* court explains post-filing conduct should be excluded because it might “hinder the right to defend and impair access to the courts”. Plaintiff respectfully submits that is precisely why a trial court must review the privileged material *in camera*.

The *Richardson* decision purports to follow *Cedell v. Farmers*, 176 Wn.2d 686 (2013) but in reality vastly extends it in some respects. *Cedell* never distinguishes between pre- and post-litigation immunities. *Cedell* at 697 sets out the generally accepted responsibilities of first party insurers including UIM carriers basing its holding on the succession of cases *Barry*,

infra, *Escalante v. Sentry Ins.*, 49 Wash.App. 375 (1987), rev. denied, 109 Wn.2d 1025, *VanNoy v. State Farm*, 142 Wn.2d 784, 794 (2001) and *Ellwein*, at 780. While *Cedell* involved bad faith acts prior to litigation, it never limited its analysis to pre-litigation bad faith.

Nothing in *Richardson* or any other Washington case prohibits a trial court from performing *in camera* inspections of secret documents. That is because a trial court has the inherent power to control the litigation before it. Should an *in camera* inspection reveal unethical or unlawful conduct then the court can move immediately to sanctions.

The *Richardson* decision is sparse on facts but what we do know is that after a series of hearings and an *in camera* inspection of GEICO's litigation file, the trial court found something that rose to the level of civil fraud and she ordered its production to Richardson. The opinion does not tell us what those facts were.

The *Richardson* court decided that any acts of bad faith by GEICO after suit was filed were simply not relevant to Richardson's claim because she had alleged bad faith occurred pre-litigation. In contrast, Ms. Hoff alleges Safeco's bad faith occurred before and after litigation commenced so Safeco's conduct after the lawsuit was filed is entirely relevant to her claims of bad faith. But the *Richardson* decision leaves Ms. Hoff without recourse

because it fails to tell Ms. Hoff how high she must climb to pierce the privilege. But far worse, the trial court is given no direction either. Safeco contends there can be no proof high enough...essentially an absolute privilege. Of course, the easy answer is that no language in *Richardson* prohibits a trial court from making an *in camera* inspection.

In some ways the *Richardson* decision is similar to *Cedell v. Farmers*, 157 Wash.App. 267 (2010), while at the Division II level. In the Division II *Cedell*, Farmers was ordered by the trial court to produce its claim file, heavily redacted, and the trial court reviewed it *in camera*. The trial court eventually found Farmers engaged in wrongful conduct sufficient to invoke the fraud exception to the attorney-client privilege. *Cedell*, at 271. The court found Farmers' conduct so egregious it imposed sanctions of \$7,500.

Farmers appealed invoking the sanctity of the attorney-client privilege and claiming there was "...no basis to invoke the fraud exception to the attorney-client privilege". Division II agreed and held at 277 that fraud required a 9-element showing. The Washington Supreme Court abrogated that formula and re-imposed the "reasonable person/reasonable belief" standard. *Richardson* seems to be returning to the Division II position it took in *Cedell* in creating substantial impediments to requiring

UIM insurers to treat their insureds fairly. There is some validity to this perception when the dissenting opinion of Justice Alexander in *Cedell* is considered. He agreed enough with Judge Bridgewater's opinion in Division II *Cedell* to author the dissent in the Supreme Court opinion. Yet in that dissent he specifically discusses situations identical to ours.

“This court has said, ‘Because the [attorney-client] privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists.’ *Dietz v. John Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997) (citing *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968)). The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. Although this purpose is served by protecting communications regarding prior wrongful conduct, the privilege should not encourage the perpetration of such conduct. Engaging an attorney in order to further the bad faith denial of insurance coverage represents an abuse of the attorney-client privilege. *We should hold, therefore, that communications related to an attorney's aiding an ongoing or future commission of bad faith by an insurer are discoverable if an in camera inspection reveals a foundation in fact of such wrongful conduct, provided that the party seeking disclosure first makes a factual showing adequate to support a good faith belief by a reasonable person that such conduct has occurred.* “ (emphasis added)

The holding I advance is similar to that which is dictated in Ohio due to a law passed by that state's general assembly in response to *Boone*. Ohio Revised Code Annotated § 2317.02 now provides that an attorney shall not testify concerning a communication made to the

attorney by a client or the attorney's advice to a client 'except that if the client is an insurance company, the attorney may be compelled to testify, *subject to an in camera inspection by a court*, about communications...related to the attorney's aiding or furthering an ongoing or future commission of *bad faith* by the client, if the party seeking disclosure of the communications has made a *prima facie showing of bad faith*, fraud, or criminal misconduct by the client.' OHIO REV. CODE ANN. § 2317.02(A)(2) (West 2011) (emphasis added). In my judgment, this approach strikes the proper balance between the principle that justice is best achieved through the full disclosure of the facts and the important policy goals embodied by the attorney-client privilege."

Cedell v. Farmers, 176 Wn.2d 686, 710 (2013).

Ms. Hoff argues that the *Cedell* decision does not differentiate between pre- and post-litigation but, rather, describes the duty of insurers to their insureds regardless of the UIM insurers' litigation status. Indeed, the *Cedell* decision does not contain the words "pre-" or "post-litigation" anywhere in the opinion.

D. The UIM insurer does not stand exactly in the shoes of the tortfeasor.

Despite the decreasing footprint of good faith and fair dealing owed by UIM insurers to their own insureds, there remains some slight, residual obligation on the part of Safeco to treat insureds fairly. The language of *Ellwein v. Hartford Acc.*, 142 Wn.2d 766, 780 (2001), overruled on other grounds, *Smith v. Safeco*, 150 Wn.2d 478 (2003) and *VanNoy v. State Farm*,

142 Wn.2d 784, at 794, that explains that UIM insurers have “an elevated good faith obligation that rises to a level higher than that of mere honesty and lawfulness of purpose”, has not been reversed. “The insured still has the reasonable expectation that he will be dealt with fairly and in good faith by his insurer.” Which means, in plain English, that a UIM insurer must still behave a little more honestly than a third party insurer.

But if a UIM insurer stands in the shoes and can employ any and all defenses and tactics a wily third party defendant can employ, by what authority does that extend to unethical or otherwise prohibited conduct? If a first party UIM insurer wants to play like a third party defendant, surely the first party insurer has no *greater* ability to treat a claimant unfairly than that of a third party insurer who never took a dime in premiums from its own insured. It should follow that where a third party insurer is conducting litigation in bad faith, the opposing party and/or the court itself can ask for relief.

“Procedural bad faith is unrelated to the merits of the case and refers to ‘vexatious conduct during the course of litigation.’ *Mallor, supra* at 644. In *Lipsig v. National Student Mktg. Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980), bad faith attorney’s fees were upheld against a plaintiff for dilatory tactics during discovery, failure to meet filing deadlines, misuse of the discovery process, and misquoting or omitting material portions of documentary evidence. The purpose of this type of award is ‘to protect the efficient and

orderly administration of the legal process.’ *Mallor, supra* at 644.

Hiller Corp. V. Port of Port Angeles, 96 Wash.App. 918, 928 (1999).

E. **Before evidence is suppressed, shouldn’t a judge at least peek at it? (Or Galileo, the Pope, and the Telescope)**

Safeco argues on page 21 of Safeco’s Opening Brief that a UIM insurer’s attorney-client privileged communications and work product are not discoverable. Period. Plaintiff contends that the privilege cannot possibly be absolute; for example, suppose the Safeco communications in dispute contain language similar to:

Claimant doesn’t want to go to federal court because, as she explained, the logistics of getting live witnesses, lay and expert, to Tacoma is significant, let’s find an excuse to remove her and offer a low ball figure. She’s only part-time employed and has a baby – maybe she’ll accept. We really got nothing to lose because she’s capped at \$75,000 and we can bury her attorney in pleadings and discovery issues. He’ll be working for free. Even if a jury hits us for bad faith treble damages, the cap is still \$75,000. We’ll simply wear her down.

All of the above is clearly bad faith at the expense of Ms. Hoff but

can remain secret if Safeco is successful. Ms. Hoff suggests that making a distinction between pre – and post-litigation bad faith is not good public policy; bad faith conduct before litigation is no more prejudicial than bad faith after litigation is commenced. Similarly, Safeco and its attorneys have the right to discuss strategy and options; that freedom should not extend to unethical or unlawful conduct either before or after litigation. Hence, judicial *in camera* examinations. An even clearer email example would be:

“At the upcoming mediation, as your attorney, I recommend we place a listening device in the opposing party’s room. Suit has been filed and this communication is absolutely privileged; no one will ever be allowed to access this email, not even a judge.”

What if the mediation service discovers the bug and alerts opposing counsel? Hopefully no court would hesitate ordering an examination of the various attorneys despite any privilege because unethical, illegal conduct waives the privilege.

Absolute privileges are hard to find. When they do exist, it is usually in the context of situations where authorities have the power both to discipline and strike the offending speech or conduct from the record. *Moore v. Smith*, 89 Wn.2d 932, 937 (1978). A trial court can do neither

without reviewing the material or hearing the testimony. The attorney-client privilege is certainly not absolute. See *Escalante v. Sentry Ins. Co.*, 49 Wash.App. 375, 394 (1987), rev. denied, 109 Wn.2d 1025 (1998). *Cedell v. Farmers*, 176 Wn.2d 686 (2013). Safeco's desire for an absolute privilege is understandable but unreasonable.

Safeco also invokes the work product privilege which is subject to invasion any time the opposing party needs the information and has no other way to get it than from the party claiming the privilege. If successful in its arguments, Safeco would be afforded even greater protection from discovery than a hospital with its own in-house quality review confidentiality. See *Lowy v. PeaceHealth*, 174 Wn.2d 769 (2012).

The second argument Safeco makes on page 21 is that "a UIM insurer's post litigation conduct is not actionable to support a claim for bad faith". This statement goes far beyond the issue on this appeal: an *in camera* examination. The issue on appeal is attorney-client/work product privilege, not the result of those privileges. Put another way: scheming and plotting may or may not be privileged, depending upon how nefarious. However, the end result of those machinations is an act, a fact that is most certainly not secret. "Litigation strategy", a concept never argued and certainly not ruled on by the trial court, is not properly before this Court and

has no supporting items in the record. “Post litigation conduct” sounds like it refers to tangible acts or events, not scheming.

By analogy, when terrorists strategize the planting of a bomb in the marketplace, it is entirely different than when the bomb is detonated. The blast/event is a tangible physical piece of evidence and clearly the result of scheming but stands alone as evidence the blast took place. The jury can infer it was the product of scheming but its existence is not dependent upon exposure of the communications between the terrorists.

VII. CONCLUSION

This Court should confirm the trial court’s orders requiring Safeco to produce for *in camera* inspection every reason it had, regardless of who said what to whom, for the removal of Ms. Hoff to federal court.

DATED and respectfully submitted this 4th day of June, 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 Hoff upon the following:

By E-mail

Counsel for Petitioner

John M. Silk
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DATED at Longview, Washington this 4th day of June, 2018.

s/Sylvia Archibald _____

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