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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 340881

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Leo J. Driscoll, Petitioner

v.

WASHINGTON STATE INSURANCE COMMISSIONER,
TIAA-CREF Life Insurance Company, Metropolitan
Life Insurance Company, Respondents

BRIEF OF PETITIONER

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I. INTRODUCTION

A. This appeal *solely* pertains to Count 3 of the application for an adjudicative proceeding and demand for hearing that petitioner Leo J. Driscoll (“Driscoll”) filed with the respondent state agency (the “OIC”) on 9-19-2014. Count 3 (AR 288-290) alleges that the Insurance Commissioner has authority, grounds, cause, and duty to hold a hearing to consider the OIC’s issuance of an order pursuant to RCW 48.18.100(3) and (4) and RCW 48.18.110(1) that withdraws the OIC’s approval of the insurer’s use of certain long-term care insurance (“LTCL”) “Policy Schedule” forms. Those include forms issued to Driscoll and his spouse in July 2012 that reflect the commissioner’s failure to disapprove a request for a 41% premium rate-increase of such policies that was not accompanied by statutorily-required information needed for that approval.

RCW 48.18.100(3) in part provides: “*The commissioner may withdraw any approval at any time for cause.*” Para. 3.13 (AR 290) of Count 3 alleges that cause exists for the commissioner to issue notice of a hearing to consider an order that (a) Withdraws approval of the rate filing for the 41% rate-increase request filing prospectively pursuant to RCW 48.18.030(3), and (b) Directs that the insurer cease use of the changed “Policy Schedule” forms.

B. Driscoll here seeks review of the *1/23/15 Order* issued by the Presiding Officer of the OIC's Hearings Unit (AR 001-006) insofar as that order dismissed Driscoll's demand for hearing of Count 3 filed with the OIC. Driscoll also seeks judicial review of final orders of the Superior Court (CP 82-84; CP 85-86), issued on judicial review of the *1/23/15 Order*. The Superior Court addressed an issue not raised before the administrative tribunal (Adm. Tribunal") and ruled that the "filed rate doctrine" bars each of Driscoll's claims, including Count 3 (CP 85-86; CP 82-84)..

C. *Waste Management v. Utilities and Transportation Commission*, 123 Wn.2d 621, 869 P.2d 1034(1994) holds that review by the Court of Appeals of agency proceedings

"is to be on the agency record without consideration of the findings and conclusions of the superior court. The one exception is in regard to matters where the superior court takes additional evidence under RCW 34.05.562 or examines an issue not raised before the agency under RCW 34.05.554. In each such instances, where the information needed for review is contained in the superior court record of proceedings, not the agency record, the appellate tribunal will look to the superior court record."

II. ASSIGNMENTS OF ERROR

No. 1: The Adm. Tribunal's finding in para. 17 of the *1/23/15 Order* that RCW 48.04.010(3) required that the Driscolls' demand for hearing be filed within 90 days after the Driscolls first received

notice of the OIC's approval of the rate increase filing is erroneous and inapplicable as to Count 3.

No. 2: The Adm. Tribunal's findings in the second sentence of para. 18 of the *1/23/15 Order* that implies that RCW 48.04.010(3) imposes a deadline for filing Driscoll's demand for hearing of Count 3 are in error.

No. 3: The first sentence of para. 13 of the *1/23/15 Order* is an ambiguous finding that erroneously may imply that on June 10, 2011 MetLife submitted to OIC *all* information required by law for the OIC to approve MetLife's rate-increase request.

No. 4: Issuing the *1/23/15 Order* was error in that it is based in material part upon inconsistent, irreconcilable declarations of material facts by the same declarant.

No. 5: Para. 8 of the *1/23/2015 Order* erroneously finds: "*The facts set forth in this Order are either undisputed or are taken in the light most favorable to the Driscolls. . . . * * **"

No. 5-A: Para. 17 of the *1/23/2015 Order* erroneously finds that "*(u)nder RCW 48.04.010(3)*" the Driscolls were "*required to file their demand for hearing within ninety days – that is, not later than March 10, 2012*" insofar as that finding relates to Count 3.

No. 5-B; Para. 18 of the *1/23/2015 Order* erroneously finds that the Driscolls' Demand for hearing did not comply with the filing

deadline of RCW 48.04.010(3), insofar as that finding applies to Count 3.

No. 6: The finding in para. 20 of the *1/23/15 Order* that Driscoll had a reasonable opportunity to be heard by the Commissioner under RCW 48.19.310 is erroneous.

No. 7: Para. 20 of the *1/23/15 Order* errs insofar as it finds that RCW 48.19.310 is applicable to the issues of Count 3.

No. 8:[Deleted]

No. 9: The finding in para. 19 of the *1/23/15 Order* that RCW 4.16.130 is applicable is erroneous as to Driscoll's claims made under Count 3.

No. 10: Assuming *arguendo* that a statute of limitations applies to Driscoll's claims under Count 3, paragraph 19 of the *1/23/15 Order* errs in finding that such cause of action accrued no later than 12-9-2011.

No. 11: Para. 12 of the *1/23/15 Order* erroneously finds that MetLife "assumed" the Driscolls' LTCL policies.

No. 12: Para. 20 of the *1/23/15 Order* errs in finding that the Driscolls' demand for hearing of Count 3 should be dismissed as a matter of law.

No. 13: Para. 20 of the *1/23/15 Order* is erroneous in impliedly

holding that the findings and rulings thereof apply to Count 3.

No. 14: Finding No. 2 of the 11-25-2015 Order of the Superior Court (CP 85-86) erred in finding that the Filed Rate Doctrine bars Driscoll's Count 3 claim.

No. 15: The Superior Court erred by entering the order of 1-14-2016 (CP 82-84) that denied Driscoll's Motion for Reconsideration of the court's 11-25-2015 Order (CP 85-86).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. When and by what means did Driscoll receive notice of the information that MetLife did or did not submit to OIC in support of MetLife's request for OIC approval of the rate-increase filing? (Assignments of Error 1, 2, 3, 12, 13).

B. Are the provisions of RCW 48.04.010(3) applicable to the demand for hearing of Count 3 made by Driscoll as a person aggrieved by the commissioner's alleged failures of duty to act as alleged in paras, 1.61-1.63 of Driscoll's application, AR 276-7, as supplemented by para. 5-D-(3) of the motion relating thereto. AR 248-250, (Assignments of Error 1, 2, 3, 5-B, 12, and 13).

C. **Appendix 1** of this Brief identifies the provisions of Ch. 48.19

RCW that Driscoll alleges in Count 3 are mandatory requirements that are applicable to MetLife's request for the OIC's approval of the subject rate increase modification. *Was MetLife's filing with the OIC of the proposed rate increase accompanied by sufficient information to permit the commissioner to determine whether it meets those requirements?* [Assignments of Error 3, 4, 12, and 13].

D. Appendix 2 of this Brief sets forth verbatim paragraphs 1.32, 1.33, 1.34., 1.35, and 1.36 of Driscoll's Application (AR 270-271). **Appendix 3** of this Brief quotes verbatim para.18 of the declaration of OIC actuary Scott Fitzpatrick dated 11-07-2014 that reference paragraphs 1.32, 1.33, 1.34. 1.35, and 1.36 of Driscoll's Application filed with the OIC. (AR 244). **Appendix 4** of this Brief quotes verbatim paragraphs 17-21 of Scott Fitzpatrick's declaration dated 1-16-2015 (AR 053). *Are the referenced paragraphs of the two declarations of Scott Fitzpatrick contradictory and irreconcilable as to whether MetLife's request for approval of the rate increase was accompanied by all information required by RCW 48.19.040(1) and (2)?* (Assignments of Error 3, 4, 5, 5-A, 12, and 13).

E. Should the OIC's summary judgment motion have been

denied because the declarations in support of the motion are conflicting and irreconcilable as to whether MetLife's request to the OIC for the OIC's approval of the rate increase filing was accompanied by sufficient information to permit the commissioner to determine whether the request meets the requirements of RCW 48.19.040(1) and (2) and RCW 48.19.030(3)(a) ? (Assignments of Error 3, 4.5, 5-A, 12,13).

F. What information was submitted to the Adm. Tribunal below as to efforts made by MetLife or by OIC, if any, to ascertain the past and prospective loss experience of the LTCI policy forms subject of MetLife's rate increase request "*in those states which are likely to produce loss experience similar to this state*" , in keeping with the provisions of RCW 48.19.030(3)(a)?

G. Were all facts set forth in the Adm. Tribunal's Summary Judgment order (AR 001-006) either undisputed or taken in the light most favorable to Driscoll? (Assignments of Error 4, 5, 5-A, 12).

H. The *1/23/15 Order* was based on alternate grounds including that the Driscolls had a reasonable opportunity to be heard under RCW 48.19.310 as parties "*aggrieved by application of an insurer's rating system*". The OIC did not identify any aspect of the insurer's

“*rating system*” that it contends was a cause of grievance to the Driscolls. Did the Adm. Tribunal err in dismissing Count 3 on the grounds that the Driscolls did not avail themselves of the procedures of RCW 48.19.310? [Assignments of Error 6, 7, 12].

I. . When did a statute of limitations (if any) *accrue* that is applicable to Driscoll’s grievances that are the subject matter of Count 3? [Assignments of Error 9, 10, and 12].

J. Assuming *arguendo* that a statute of limitations applies to Count 3, is that statute RCW 4.16.080(2), the 3 year statute of limitations? [Assignments of Error 9, 10, and 12].

K. What evidence in the record supports the finding in para. 12 of the Summary Judgment order that MetLife “assumed” the LTCI policies issued to the Driscolls? [Assignments of Error 11 and 12].

L. Did the *filed rate doctrine* bar the superior court from granting the relief that Driscoll seeks in Count 3? (Assignments of Error 13 and 14).

IV. STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY

1. On 9-19-2014, Driscoll, acting *pro se*, filed with the OIC the application for an adjudicative proceeding with four (4) counts (AR

256-294) including a demand for hearing of Count 3 (AR 261). The application alleged that Driscoll was acting on behalf of the marital community of Driscoll and Mary T. Driscoll pursuant to RCW 4.08.030 to protect their community-owned property interests in LTCI policies issued to them in 2002 by T-C Life (AR 262-263). Mary T. Driscoll's Declaration approving Driscoll's pursuit of the Application was filed with the Application (AR 292).

2. On 10-08-2014, Hon. Judge George Finkle (Ret.), Presiding Officer of the administrative proceeding issued an "Order on Pre-Trial Conference" (AR 251-254) that permitted (but did not require) that notice of the proceedings be given to T-C Life, MetLife, and the state Attorney General. *Id.* Driscoll's motion to amend and supplement the grounds for the demand for hearing (AR 248-250) was granted by order dated October 28, 2014 (AR 246-247).

3. By notice dated 10-31-2014, Driscoll notified T-C Life and MetLife of the pendency of the Application for Adjudicative Proceedings, Demand for Hearing, Orders, and of other matter relating to such proceedings, by serving written notice and copies thereof upon the Insurance Commissioner as statutory agent for T-C Life and for MetLife as authorized foreign insurers (AR 018-

026). The Commissioner accepted service on 11-03-2014 and mailed duplicate copies to T-C Life and MetLife pursuant to RCW 48.02.200 and RCW 48.05.200 (*id.*) . T-C Life did not appear in the proceedings. MetLife appeared by providing for the record MetLife's declaration and exhibits (AR O55-060).

4. OIC Staff served and filed a Motion for Summary Judgment on all counts (AR 167-245) together with exhibits and declarations (*id.* and AR.162-166). Driscoll's Response to the Motion (AR 070-092) with exhibits and declarations were served and filed (AR 070-161). OIC Staff' served and filed their Reply to such Response together with exhibits and declarations in support (AR 027-061).

5. The Adm. Tribunal's Order granting the OIC's Motion for Summary Judgment was issued and filed 1-23-2015 (AR 001-006). Para. 1 of that Order (AR 002) identified the entirety of the four (4) count Application as the "Demand". The Order (AR 001-006) did not specify the count(s) of the application to which each finding or conclusion of that Order applies. (*id.*)

6. Driscoll's Petition for Reconsideration of the Order granting the OIC'S Motion for Summary Judgment was filed 2-02-2015 (AR 014-017) and was denied by Order dated 2-10-2015 (AR 008-009).

7. On 3-12-2015 Driscoll filed in the Superior Court the "Petition for Judicial Review of Final Agency Orders and of Failure of the

Agency to Perform Duties Required by Law to be Performed.” (CP 89-111). The Petition was served by delivery of a copy to the Insurance Commissioner’s Service Process Coordinator on 3-12-2015 (CP 122) and by U.S. Postal Service mailings to the Attorney General, T-C Life, and MetLife (CP 122,123).

8. On 3-24-2015 Driscoll filed in the Spokane County Superior Court the “Amended Petition for Judicial Review of Final Agency Orders and Other Agency Action.” (CP 1-23) with attachments (CP 24-33). Copies were served by delivery of a copy to the Insurance Commissioner’s Service Process Coordinator on 3-24-2015 (CP 80) and by U.S. Postal Service mailings on that day to the Attorney General and counsel for T-C Life and MetLife (CP 67). The OIC, T-C Life, and MetLife each appeared and participated in the Superior Court judicial review proceedings (e.g., see CP 85-86), all of which were before the Hon. Judge Harold D. Clarke, III.

9. In conducting that judicial review, the Superior Court examined and ruled on an issue relevant to this appeal that was not raised before the Adm. Tribunal by any of the parties to the administrative proceedings, i.e., applicability, if any, of the *filed rate doctrine* to Driscoll’s claims under review by that Court [CP 85-86].

MetLife and T-C Life first asserted the *filed rate doctrine* defense in their 6-12-2015 brief filed in the court proceedings (CP 156-210).

10. At the 8-28-2015 hearing, the Superior Court orally ruled that the *file rate doctrine* applies to Driscoll's claims under review by that court (RP 12-15). The Superior Court's written order of 11-25-2015 found that Driscoll's claims: Are time-barred by RCW 48.04.010(3); Are barred by the *filed rate doctrine* (CP 70- 71); and, further, that the court "*did not reach the parties' remaining arguments*" (id). The 11-25-2015 order also ruled:

" *The Court ORDERS that the Final Order of the Commissioner entered on January 23, 2015, and the order denying reconsideration entered on February 10, 2015, are AFFIRMED in their entirety*". (id.)

11. Pursuant to CR 59(b) and CR 52(b), on 12-07-2015 Driscoll filed a motion (CP 72-79) for reconsideration and Amendment of the Superior Court's order of 11-25-2015 . The motion was denied by the Superior Court's order of 1-14-2016 (CP 82-84). On 2-09-2016, Driscoll's filed notice of appeal to Division III of the Court of Appeals (CP 81) to seek review of the afore-stated 11-25-2015 and 1-14-2016 orders of the superior court and the afore-stated 1-23-2015 order of the Administrative Tribunal. (id.)

B. STATEMENT OF FACTS

1. On June 10, 2011, MetLife submitted to the OIC a written

request on behalf of that the OIC approve a 41% increase in the premium-rates of LTCI policy forms identified as the series LTC .04 policy forms issued by T-C Life in this state during 2001-2004. (AR 163-4); it is undisputed that those include LTCI policy forms issued to Driscoll and to Driscoll's spouse Mary T. Driscoll effective as of August 1, 2002 (AR 262-4).

2. Undisputed para. 15 of the Adm. Tribunal's Summary Judgment Order (AR 001-006) finds that "*On December 9, 2011, the Driscolls received notice from MetLife that the rate filing had been approved by the OIC.*" Undisputed para. 1.12 of Driscoll's Application for hearing alleges that

"The 12/09/2011 notice did not include information as to the reasons or justification for the increase other than to assert that "The long-term care insurance industry has faced significant challenges to pricing these types of policies." [AR 264].

3. Undisputed para 1.29 of Driscoll's Application alleges:

"On or about July 16, 2012, applicant first became aware that electronic records of that rate increase application and of information submitted to OIC in support of it were available electronically in SERFF state Tracker file #230615 (pkoa). Aided by the OIC, applicant's (sic) subsequently accessed the #230615 filing and applicant's review thereof disclosed the following materials (pkoa):" (listing omitted here) (AR 268-9).

4. Undisputed para. 1.30 of Driscoll's Application alleges:

"The above referenced materials in OIC State Tracker File # 230615 included all information that was submitted to OIC in

support of the request for the the 41% increase in premium-rates for the Subject Forms.” AR 269.

5. On November 7, 2014, OIC Staff filed a Motion for Summary Judgment (AR 167-193) seeking dismissal of all 4 counts of Driscoll’s application. Paragraph 18 of the Declaration of OIC Actuary Scott Fitzpatrick dated 11-07-2014 (AR 242-245) filed in support of the Motion declares that:

“18. Leo and Mary Driscoll (Petitioners) allege in paragraphs 1.31 through 1.57.2 that MetLife failed to provide certain information in the rate filing. *Demand for Hearing*, pgs.14-18. However, this is a mistaken interpretation of how this information is provided to the Office of the Insurance Commissioner. The information is provided as actuarial calculations that are located within the Actuarial Memorandum and not as a written explanation. For example, information alleged to be missing in Petitioners’ paragraphs 1.32, 1.33, 1.34, 1.36, 13.7 (sic) are found on pages 12 through 15 of the Actuarial Memorandum alleged to be missing in paragraph 1.35 can be found in the Actuarial Memorandum at page 19.”

6. Applicant ‘s Response to OIC Staff’s Motion for Summary Judgment (AR 070-092), filed by Driscoll 12-16-2014, includes these contentions of Driscoll made at paragraph 3.5 (AR 077):

“3.5. The “actuarial calculations in Exhibits I, II, and III of the June 6, 2011 Actuarial Memorandum that Mr. Fitzpatrick references in paragraph 18 of his declaration are not secret or opaque symbols known only or decipherable only by professionally-qualified members of his profession and specialty - - rather, they are words

and data that are understandable to persons of average intelligence who read the "English" language, including the undersigned. Exhibits I, II, and III do not state or convey what Mr. Fitzpatrick says they do in paragraph 18 of his declaration."

7. OIC Staff's Reply (AR 027-048) to Driscoll's Response to OIC Staff's Motion for Summary Judgment, dated and filed January 20, 2015, was accompanied by and referenced the "Second Declaration of Scott Fitzpatrick" (AR 051-054). Paragraphs 17 and 18 of that Second Declaration of Scott Fitzpatrick declare and read as follows:

"17. Amongst other arguments, Leo and Mary Driscoll (Petitioners) allege that the filing should not have been approved because the filing did not include Washington specific rates."

"18. Washington specific rates were not filed with the rate filing because those rates would be statistically inaccurate and misleading. Between all three MetLife policy product lines (series .02, .03, and .04) only fifty-five were sold to Washington consumers." (AR 053)

8. The record of the proceeding before the Adm. Tribunal does not include any evidence or contention that *prior to July 16, 2012* Driscoll had actual or constructive notice or knowledge of the information that was submitted (or not submitted) by MetLife to the OIC in support of MetLife's rate increase request (AR 001-AR 294).

9. On 12-09-2011, the Driscolls received written notice from

MetLife that the OIC had approved MetLife's rate- increase request (AR 005, para. 15); on 9-19-2014, Driscoll's demand for hearing of Count 3 was filed with the OIC (AR 002-003; AR 255).

10. The record of the administrative proceedings below does not include evidence or information that identifies an aspect of the insurer's insurance rating system that was a cause of Driscoll's grievances alleged in Count 3 (AR 012-294); no such evidence or information is identified in the Summary Judgment order. (AR 001-006). The MetLife June 6 2011 Actuarial Memorandum, OIC Exhibit 2, para. 8, pg. 4 states: "*Premiums do not vary by occupation or sex. Premiums do vary by plan design, payment method, and the selection of additional riders.*" (AR 202). Count 3 does not allege that Driscoll is aggrieved by application of that criteria or any other rating criteria of the insurer. AR 288-290.

V. ARGUMENT

A. THE FILED RATE DOCTRINE DOES NOT BAR THE RELIEF SOUGHT BY COUNT 3 AND DOES NOT REQUIRE DISMISSAL OF COUNT 3

1. Unlike *McCarthy Finance v. Premera*, 183 Wn.2d 936,

347 P.3d 872 (2015), Count 3 does not include a claim for damages and does not seek refund of premiums paid. AR 288-290. Count 3 seeks *prospective* relief only - - relief that would require the Commissioner to withdraw the OIC's approval of the insurer's use of changed "Policy Schedule" forms issued by the insurer (*id.*). If new "Policy Schedule" forms are to be issued (as proposed by Count 3) they will reflect rates that are approved by the OIC. The relief sought in Count 3 does not propose or require that a court determine the *reasonableness* of approved rates or that the insurer charge rates other than rates that are approved by the OIC. (*id.*).

2. *Tenore v. AT & T Wireless Services*, 136 Wn. 2d 322, 335, 962 P. 2d 104 (1998), identifies the purpose of the doctrine:

"The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities, charge only those rates approved by the agency." (with *ftn. cite* to *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78, 101 S. Ct 2925, 2930, 69 L. Ed. 2d 85).

Count 3 does not seek relief that violates those stated purposes of the doctrine. At the August 28, 2015 hearing, Driscoll argued:

"The Filed Rate Doctrine is simply not applicable, because we're not asking this Court to set the rates, we're asking this court to return the matter back to the administrative agency so that it can set the proper rates, which it has not done," (RP, pg. 10, L.13-17).

3. The Court expressed concerns that a court decision to remand

the disputed rate-setting issues to the agency would require the Court to “*make some determination that the process was flawed*”. . . “*my sense is that the process is inherent in the rate.*” (RP 13, lines 20-23); otherwise, the court said, claimants would challenge the *process* and not the rate, and “*the doctrine would just disappear.*” (RP 14, Lines 16-18).

4. Driscoll’s Motion for Reconsideration of the Court’s 12-25-2015 Order, at CP 78, para, I, posited that:

“ . . . a judicial ruling that the filed rate doctrine bars or pre-empts administrative adjudatory hearings under RCW 48.04.010 (and/or judicial appellate review of the adjudicative process under Part V of the Administrative Procedures ACT, Ch. 34.05 RCW) would encourage and promote inadequately-supported rate filings and inadequate OIC review of rate filings to the financial detriment of policyholders who are virtually dependent upon such processes and protections.”

5. This court should rule that the filed rate doctrine does not bar the court from reviewing and requiring correction of agency error that occurs in the process of rate-setting because: (a) Count 3 does not ask the court for relief that would require the court to reevaluate the reasonableness of the rate that has been approved by the agency ; (b) Granting relief sought under Count 3 would not be inconsistent with the purposes of the Filed Rate Doctrine as set forth in *Tenold* and in *McCarthy*, supra.; and (c) important public interests,

including protection of the intangible property rights of LTCI policyholders in the stability of the premium rates of their policy forms, are served by the availability of judicial review of the process by which requests for premium-rate increase of such policy forms are reviewed and are approved or disapproved by the OIC.

B. THE 90-DAY TIME REQUIREMENTS OF RCW 48.04.010(3) THAT APPLY TO A DEMAND FOR HEARING BY A PERSON WHO IS AGGRIEVED BY A “written order of the commissioner” ARE INAPPLICABLE TO A DEMAND FOR HEARING BY “any person aggrieved by any act, . . . or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, . . .” as provided in RCW 48.04.010(1)(b).

1. Para. 3.12 of Count 3 of Driscoll’s Application (AR 290) alleges that Driscoll “*is adversely impacted and aggrieved by the ongoing use of the changed “Policy Schedule” forms issued to*” Driscoll and spouse. Para 3.5 of Count 3 alleges that OIC’s

“ . . . approval of the subject rate-increase and changed Policy Schedule forms was unfounded because insufficient information was provided to OIC to show that the proposed increase (reflected in each Policy Schedule form) complied with all applicable laws and all regulations issued by the Commissioner pursuant to the Insurance code.” (AR 289).

2. The grounds for Driscoll’s Demand for Hearing of Count 3, as supplemented and amended (AR 248-250), specify alleged failures of duty of the commissioner to act as required by provisions of the

insurance code and regulations (id), including failure to fully review the unfounded rate increase request for compliance with applicable laws and regulations (id).

3. Had the legislature intended that specific time limitations should apply to filing a demand for hearing made to the commissioner by a person who is aggrieved by any acts or failure of the commissioner to act, the legislature could/would have made that clear in framing the several sub-sections of RCW 48.04.010. Instead, 90 time limitations were specified solely in subsection (3) that expressly and unambiguously refers to demands for hearing made by persons aggrieved by a written order of the commissioner. The maxim “*expressio unius est exclusio alterius*” compels the conclusion that the 90-day time limitations of RCW 48.04.010(3) apply solely to the subject matter of that subsection, i.e., grievance arising from “a written order of the commissioner” as opposed to grievance arising from the commissioner’s “act” or “failure to act” as set forth in RCW 48.04.010(1). See *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999) cited with approval in *Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn. 2d 737, 750, 313 P. 3d 1037 (2014).

4. Furthermore, the inclusion of the word “thereon” in RCW

48.04.010(3) is consistent only with the construction that the time limitations of that subsection apply only to the subject matter of subsection (3), i.e., the moving party's grievance caused by a written order of the commissioner.

5. The implication of para. 18 of the summary judgment order (AR 001-006) that RCW 48.04.010(3) imposed a deadline for filing of Driscoll's demand for hearing of Count 3 is in error because that subsection does not apply to that demand.

C. DRISCOLL WAS NOTIFIED OF THE RATE INCREASE ON 12-09-2011 BUT ONLY RECEIVED NOTICE SUBSEQUENT TO JULY 16, 2012 THAT METLIFE'S RATE-INCREASE REQUEST WAS NOT ACCOMPANIED BY INFORMATION REQUIRED BY LAW FOR THE OIC TO APPROVE THAT REQUEST.

1. Undisputed para, 1.29 of Driscoll's Application (AR 268), re- alleged in para 3.1 of Count 3 (AR 288), alleges that

"On or about July 16,2012, applicant first became aware that electronic records of that rate increase application and of information submitted to OIC in support of it were available electronically in *SERFF* STATE Tracker file #230615 (pkoa) . Aided by OIC, applicant's (sic) subsequently accessed that #230615 filing . . . * * *,"

2. The administrative record of the proceedings before the Adm. Tribunal does not include evidence or contention by any party that prior to July 16, 2012, Driscoll received notice that MetLife's rate increase request to the OIC was not accompanied by

information required by law [i.e., by RCW 48.19.040(1)-(2) and RCW 48.19.030(3)(a)] that Driscoll alleges was required for the OIC to approve the MetLife request. (AR 001-294).

D. OIC ACTUARY FITZPATRICK'S SECOND DECLARATION INDIRECTLY AND EFFECTIVELY ADMITS THAT METLIFE'S RATE-INCREASE REQUEST WAS NOT ACCOMPANIED BY SUFFICIENT INFORMATION TO PERMIT THE COMMISSIONER TO DETERMINE WHETHER IT MEETS THE REQUIREMENTS OF RCW 48.19.030(3)(a), AS REQUIRED BY RCW 48.19.040(1) AND (2).

1. Paragraphs 17 and the statement in para. 18 of OIC Actuary Scott Fitzpatrick's Second Declaration (AR 051-054) that states "*Washington specific rates were not filed with the rate filing*" (AR 053) indirectly and effectively admit that MetLife's rate increase filing did not include Washington specific rate information showing that due consideration had been given to the loss-experience of the LTCI policy forms within the state of Washington or in combination with loss experience of the subject forms in "*those states likely to produce loss experience similar to that in this state*", as required by RCW 48.19.030(3)(a).

1. That Mr. Fitzpatrick's statement in para. 18 of that declaration "*Washington specific rates were not filed with the rate filing*" (AR 053) refers to "loss experience within the state" - - as

used in RCW 48.19.030(3)(a) - - is made clear (a) by his references to “ *insurance loss ratios within states*” in the accompanying paragraph 19 (AR 053, line 11); (b) by his statement that “*RCW 48.19.030 permits an insurer to use loss experience from other states*’ in his paragraph 21 (id., lines 19-20); and, (c) by the overall context of paragraphs 17 to 21 of that declaration (AR 053).

2. The court reviews an order of summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if “the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” WAC 10-08-135. The court views all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn. 2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, (id.)

E. ERRONEOUS CONTENTIONS IN THE SECOND SENTENCE OF PARAGRAPH 18 AND IN PARAGRAPHS 19-22 OF FITZPATRICK’S SECOND DECLARATION (AR 051-054) COULD NOT BE CONTOVERTED BY DRISCOLL BECAUSE OF THE BELATED, UNTIMELY ASSERTION OF SUCH CONTENTIONS.

1. At AR 040-042, OIC Staff’s Reply to Petitioner’s Response

contends that it would have been unavailing for MetLife to file Washington specific loss ratio information. The Reply cited and relied on the 1-16-2015 declaration of OIC actuary Scott Fitzpatrick (AR 051-054) which included that contention.

2. Paras. 19 to 25 of that declaration asserts the factual and legal applicability of a theory (the “Bayesian Credibility Theory”) which had never been referenced previously by the OIC in the administrative proceeding below .(AR 001-294). Driscoll had no feasible opportunity to controvert that declaration prior to entry of the summary judgment order three days later. AR 001-006. The belated, untimely assertion of those contentions requires that they be disregarded by the court in reviewing the summary judgment order, *R.D. Merrill Co. v. Pollution Bd.*, 137 Wn.2d. 118, 147,148, 969 P. 2d 459 (1999).

3. **Appendix 1** of this Brief sets forth the provisions of Ch. 48.19 RCW that Driscoll contends are mandatory, unambiguous statutory requirements that apply to MetLife’s request for the OIC’s approval of the rate increase of the subject policy forms. Applicable here are these rulings of *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn. 2d 392, 396, 103 P.3d 1226. (2005) that govern the interpretation of unambiguous statutes:

“Statutory interpretation is a question of law that is reviewed de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. *Bravo v. Dolsen Cos.*, 125 Wn. 2d 745, 752, 888 P.2d 147 (1995); *Wash. Fed'n of State Employees v. State Pers. Bd.*, 54 Wn.App 305, 309, 773 P.2d 421 (1989). A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable." *State v. Hahn*, 83 Wn. App 825, 831, 924 P.2d 392 (1996).”

F. NO INFORMATION WAS SUBMITTED TO THE TRIBUNAL AS TO ANY EFFORTS MADE BY METLIFE OR BY THE OIC TO ASCERTAIN LOSS EXPERIENCE OF THE POLICY FORMS IN THIS STATE OR “*IN THOSE STATES WHICH ARE LIKELY TO PRODUCE LOSS EXPERIENCE SIMILAR TO THIS STATE*” IN KEEPING WITH RCW 48.19.030(3)(a). AR 001-294

1. The reasonable inference to be drawn from those facts is that no such effort was made by MetLife or by the OIC. The failure to make such effort should be deemed to preclude and estop respondents from claiming that it was necessary or legally permissible for MetLife and/or the OIC to rely on the nation-wide loss experience of the policy forms rather than the loss experience of the forms in this state and in “*those states which are likely to produce loss experience similar to this state.*” RCW 48.19.030(3)(a)..

G. COUNT 3 DOES NOT ALLEGE AND THE OIC HAS NOT SHOWN THAT DRISCOLL IS AGGRIEVED BY THE APPLICATION OF THE RATING SYSTEM OF THE INSURER OF THE LTCI POLICIES ISSUED TO DRISCOLL AND SPOUSE. THE ADM. TRIBUNAL ERRED IN DISMISSING COUNT 3. RCW 48.19.310 DOES NOT APPLY TO COUNT 3.

1. Para. 20 of the summary judgment order (AR 001-00) finds that the Driscolls had a reasonable opportunity to be heard under RCW 48.19.310. That statute provides a process that may be pursued by a person who is aggrieved by application of the insurer's rating system, e.g., ratings as the relative age or sex of the insured. Count 3 does not include any allegation that Driscoll and/or his spouse are aggrieved by the application of any aspect of their LTCI insurer's rating system that is applicable to the LTCI policies issued to them. In asserting the defense of RCW 48.19.310, the OIC made no showing that Driscoll was aggrieved by the insurer's application of the insurer's rating system and/or that RCW 48.19.310 provides a process for review or hearing of the subject matter of Count 3. The processes of RCW 48.19.310 are inapplicable to Count 3 and this court should so find.

H. THE FINDING IN THE SUMMARY JUDGMENT ORDER THAT RCW 4.16.130, THE 2-YEAR STATUTE OF LIMITATIONS, IS APPLICABLE IS ERRONEOUS AS TO DRISCOLL'S CLAIMS MADE UNDER COUNT 3.

1. Assuming arguendo that a statute of limitation is applicable to Driscoll's claims for relief under Count 3, that statute would be RCW 4.16.080(2), the three-year statute of limitations that is applicable to causes of action for injuries to a person's *intangible* property rights and interests. Here, the first injury to Driscoll's rights and interests in respect to the policies did not occur until:

(a) On or after July 27, 2012 when the changed "Policy Schedule" forms were received by the Driscolls (as alleged in para. 1.17 of Driscoll's application (AR 265), and re-alleged by para 3.1 of Count 3 (AR 280) , or

(b) On or after August 1, 2012 when the rate- increase was first implemented as to the policies of Driscoll and spouse.

2. Paragraphs 1.68 to 1.75.3 of the application, re-alleged in Count 3, allege the existence of intangible property rights that Driscoll and spouse have in and to the continuation of the initially scheduled benefits and rates set forth in the original "Policy Schedule" form except as was otherwise expressly or impliedly agreed by the parties. AR 235.

3. No evidence has been provided, or finding made, that injury to those intangible property rights occurred and “cause of action” accrued more than three (3) years prior to 9/19/ 2014, the date when petitioner filed Count 3 with the OIC’s Hearing Unit. AR 255.

4. *Stenberg v. Pacific Power & Light*, 104 Wn. 2d 710, 709 P.2d 793 (1985), involving an indirect injury, retraces the evolution that took place in WA case law toward recognizing the applicability and full scope of RCW 4.16.080(2) rather than to defer to RCW 4.16.130, the 2 year catch-all statute. By its’ terms, RCW 4.16.080(2), is applicable to causes of action for injury to personal property “,or for any other injury to the person or rights of another not hereinafter enumerated”. *Stenberg*, 104 Wn.2d at 711:

“We hold RCW 4.16.080(2) applies to causes of action claiming both direct and indirect injuries to the person or rights of another and overrule the direct/indirect injury distinction promulgated in the case of *NORTHERN GRAIN & WAREHOUSE CO. v. HOLST*, 95 Wash. 312, 163 P. 775 (1917) and its progeny.” .

Cases recognizing that the 3 year statute of limitations applies to injuries to intangible property rights of a person include *Luellen v. Aberdeen*, 20 Wn. 2d 594, 604, 148 P. 849 (1944), and *Lewis v. Lockheed Shipbuilding*, 36 Wn. App. 607, 676 P. 2d 545 (1984).

5. The court should rule that Driscoll’s claims under Count 3

are not time-barred by RCW 4.16.130.

I. NO EVIDENCE EXISTS IN THE ADMINISTRATIVE RECORD THAT METLIFE ASSUMED THE LTCI POLICIES ISSUED BY T-C LIFE TO DRISCOLL AND SPOUSE IN 2002,

As alleged in paragraphs 1.24 to 1.27 of Driscoll' Application (AR 267), Driscoll and spouse did not consent to MetLife's proposal that MetLife become the insurer by novation of the LTCI policy forms issued to them by T-C Life in 2002, No evidence exists in the administrative record to the contrary..

J. CERTAIN CLAIMED FACTS SET FORTH IN THE SUMMARY JUDGMENT ORDER (001-006) WERE NEITHER UNDISPUTED NOR TAKEN IN THE LIGHT MOST FAVORABLE TO THE DRISCOLLS AS THE NON-MOVING PARTY .

1. The claimed fact stated in para. 12 of the summary judgment order that MetLife assumed the policies issued to the Driscolls . was disputed by Driscoll as stated above;.

2. The possibly- implied claimed fact stated in para. 13 of the summary judgment order that on June 10, 2011 MetLife submitted all information required by law for the OIC to approve MetLife's rate-increase request was in conflict with admissions of fact by OIC actuary Fitzpatrick in his Second Declaration (AR 051-054) as

set forth at pgs. 15 and 22-23 of this brief.

3. The claimed fact stated in para. 17 of the summary judgment order that “(u)nder RCW 48.04.010(3)” the Driscolls were “required to file their demand for hearing within ninety days – that is, not later than March 10, 2012” was disputed by Driscoll as set forth at Pgs. 19-21 of this brief.

4. The fact implied in para. 18 of the summary judgment order that the Driscolls’ Demand for hearing was required to comply with the filing deadline of RCW 48.04.010(3) is disputed by Driscoll as stated at Pgs. 21-22 of this brief insofar as it applies to Count 3.

K. REQUEST FOR AWARD OF COSTS AND FEES

1. If Driscoll prevails: Driscoll should be awarded costs and fees incurred by Driscoll in the administrative proceedings, in the Superior Court proceedings, and in the Court of Appeals as a prevailing party as provided in Ch. 4.08 RCW and in RCW 34.05.566,

2, Driscoll will also be entitled to an award for fees and expenses incurred in those proceedings against respondents as a prevailing qualified party under and within the meaning of RCW 4.08.340, .350, and .360.

VI. REQUESTS FOR RELIEF AND CONCLUSION

1. This court should set aside and vacate the superior court orders of November 25, 2015 (CP85-86) and January 14, 2016 (CP 82-84) and enter an order that finds and rules that the filed rate doctrine does not bar the court from granting the prospective relief sought by Driscoll under Count 3. The court also should find:

(a) That Count 3 does not ask the court for relief that would require the court to reevaluate the reasonableness of the rate that has been approved by the agency ;

(b) That granting relief sought under Count 3 would not be inconsistent with the purposes of the Filed Rate Doctrine as set forth in *Tenold* and in *McCarthy*, supra.; and

(c) That important public interests, including protection of the intangible property rights of LTCI policyholders in the stability of the premium rates of their policy forms, are served by the availability of judicial review of the process by which requests for premium-rate increase of such policy forms are reviewed and are approved or disapproved by the OIC.

2. This court should set aside and vacate the Adm/ Tribunal's *Order On OIC Staff's Motion For Summary Judgment* (AR 001-006) and enter an order that finds and rules that the 90-day time

requirements of RCW 48.04.010(3) that apply to a demand for hearing by a person who is aggrieved by a “*written order of the commissioner*” do not apply to a demand for hearing by “*any person aggrieved by any act, . . . or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, . . .*” as provided in RCW 48.04.010(1)(b).

3. This Court’s order granting relief should find and rule that no evidence exists in the administrative record (AR 1-294) that shows that prior to July 16, 2012 Driscoll had notice of the information that MetLife did or did not submit to the OIC in support of the rate increase filing with the OIC

4. This court’s order should find and rule that information in OIC Actuary Scott Fitzpatrick’s Second Declaration (AR 051-054) indirectly and effectively acknowledges that MetLife’s rate increase filing did not include Washington specific rate information showing that due consideration had been given to the loss-experience of the LTCI policy forms within the state of Washington or in combination with loss experience of the subject forms in “*those states likely to produce loss experience similar to that in this state*”, as provided by RCW 48.19.030(3)(a).

5. This courts’ order should find and rule that paragraph 17

and the first sentence of paragraph 18 of Fitzpatrick' s Second Declaration (AR 053) conflict with and cannot be reconciled with paragraph 18 of his Declaration of 11-07-2015 (AR 244).

6. In that context, this court's order should also rule that granting summary judgment was unwarranted as to Count 3 because the Second Declaration of Mr. Fitzpatrick materially undermined and/or negated the reliability of paragraph 18 of his first declaration as to the key issue of whether MetLife' s rate filing was *"accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of"* Ch. 48.19 RCW, as required by RCW 48.19.040(1) and (2).

7. This courts' order should find and rule that the contentions made in the second sentence of paragraph 18 and in paragraph 19-22 of FITZPATRICK'S SECOND DECLARATION (AR O51-054) could not be controverted by Driscoll because of the belated, untimely assertion of such contentions; accordingly, that it would be inappropriate for this court to rule on the merits or significance of such contentions.

8. This courts' order granting Driscoll relief from the summary judgment order (001-006) should find and rule that: (a) no

showing was made by the OIC Staff that Driscoll was aggrieved by the insurer's application of the insurer's rating system that is applicable to the LTCI policies of Driscoll and spouse; and , (b) that no legal basis exists for dismissal of Count 3 on the grounds that the Driscolls did not avail themselves of the processes set forth in RCW 48.19.310

9. This courts' order granting Driscoll relief from the summary judgment order (001-006) should find and rule : that Driscoll's claims under Count 3 are not time-barred by RCW 4.16.130; and that if a statute of limitation is applicable to Driscoll's claims for relief under Count 3, that statute would be RCW 4.16.080(2), the three-year statute of limitations that is applicable to causes of action for injuries to a person's *intangible* property rights and interests.

Further, the court should find and rule that the first injury to Driscoll's rights and interests in respect to the policies did not occur until: (a) On or after July 27, 2012 when the changed "Policy Schedule" forms were received by the Driscolls [as alleged in para. 1.17 of Driscoll's application (AR 265), and re-alleged by para 3.1 of Count 3 (AR 280)] , or (b) On or after August 1, 2012 when the rate- increase was first implemented as to the policies of Driscoll

and spouse as stated in para. 1.10 of the application (AR 264).

Respectfully submitted August 29, 2016.



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Appendix 1 to Petitioner's Brief
(Relevant Parts of RCW 48.19.040 and RCW 48.19.030)

RCW 48.19.040

Filing required—Contents—Definition.

“(1) Every insurer or rating organization shall, before using, file with the commissioner every classifications manual, manual of rules and rates, rating plan, rating schedule, minimum rate, class rate, and rating rule, and every modification of any of the foregoing which it proposes. * * *

“(2) Every such filing shall indicate the type and extent of the coverage contemplated and must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter. * * *”

RCW 48.19.030

Making of rates—Criteria.

“Rates shall be used, subject to the other provisions of this chapter, only if made in accordance with the following provisions:
* * *

“(3) Due consideration in making rates for all insurances shall be given to:

(a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner. If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.”

Appendix 2 of Petitioner's Brief
(Text of paragraphs 1.32 to 1.36 inclusive of
Driscoll's Application, AR 270-271)

“1.32 The limited information (designedly limited by the MetLife Methodology) provided to OIC in support of the 41% rate- increase request was insufficient to show that the request complied with the applicable requirements of the Insurance Code and regulations , which insufficiencies and non-compliances are specified below:

1 .Non-Compliance with Ch. 48.19 RCW Information Requirements

1.33 RCW 48.19.040(1) requires that every insurer that proposes modification of a class rate shall file such proposal with the Commissioner. Subsection (2) provides that every such filing *“must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter.”*

1.34 The MetLife submissions to OIC accompanying the request did not address past and prospective loss experience of the series LTC.04(WA) policy forms singularly and within the state. RCW 48.19 .030(3)(a) mandates that *Due consideration in making rates for all insurances shall be given to:(a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner. If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.*

1.35 The 6/06/11 Actuarial Memorandum did not include information to OIC as to the *‘past and prospective loss experience within the state’* of any of the three forms singularly and made no showing that the omitted information for the LTC.04(WA) policy form within the state *“is not available or is not statistically credible”* as required by RCW 48.19.030(3)(a).

1.36 The 6/06/11 Actuarial Memorandum did not identify or use loss experience limited to *“. . those states which are likely to produce loss experience similar to that in this state”,* as

conditionally permitted by RCW 48.19.030(3)(a), but instead, aggregated the nationwide loss experience of all three forms combined regardless of whether such included the experience of states that were not likely “. . . to produce loss experience similar to that in this state”, contrary to the intent and directive of the legislature.”

APPENDIX 3 OF PETITIONER'S BRIEF
(Text of paragraph 18 of Declaration of OIC Actuary Scott
Fitzpatrick dated 12/07/2014)

“18. Leo and Mary Driscoll (Petitioners) allege in paragraphs 1.31 through 1.57.2 that MetLife failed to provide certain information in the rate filing *Demand for Hearing*, pgs.14-18. However, this is a mistaken interpretation of how this information is provided to the Office of the Insurance Commissioner. The information is provided as actuarial calculations that are located within the Actuarial Memorandum and not as a written explanation. For example, information alleged to be missing in Petitioners' paragraphs 1.32, 1.33, 1.34, 1.36, 1.37 are found on pages 12 through 15 of the Actuarial Memorandum and details alleged to be missing in paragraph 1.35 can be found in the Actuarial Memorandum at page 10.”

APPENDIX 4 OF PETITIONER'S BRIEF
(Paragraphs 17-21 of OIC's Actuary Scott Fitzpatrick's
Declaration Dated 1/16/2015, AR 051-054,
Served and Filed 1/20/2015)

" 17. Amongst other arguments, Leo and Mary Driscoll (Petitioners) allege that the filing should not have been approved because the filing did not include Washington specific rates."

18. Washington specific rates were not filed with the rate filing because Washington specific rates would be statistically inaccurate and misleading. Between all three MetLife product lines (series .02, .03, and .04) only fifty-five (55) policies were sold to Washington consumers.

19. Actuaries use the Bayesian Credibility Theory to determine the credibility of long-term care insurance loss ratios within states. The Bayesian Credibility Theory requires that at least 1,082 claims be currently filed on a policy form within a state to attain statistical credibility for a rate filing and loss ratio analysis. With only fifty-five (55) policies sold for the state of Washington (of which only a fraction are in claim status) credibility cannot be attained, nor could it be attained in combination with a few states.

20. Due to the small number of policies sold, in order to attain credible statistics, the analysis must be performed at the national level.

21. RCW 48.19.030 permits an insurer to use loss experience from the combined experiences of other states (including at the national level if needed) that are likely to produce loss experience similar to that in this state when the loss experience in Washington is not statistically creditable."