

FILED
SUPREME COURT
STATE OF WASHINGTON
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NO. 95827-1

SUPREME COURT OF THE STATE OF WASHINGTON
from the
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
NO. 346714

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT
AND NATURAL GUARDIAN OF BRAYAN MARTINEZ,
A MINOR,

Respondent,

v.

CONSUELO PRIETO MARISCAL,

Petitioner.

**SECOND SUPPLEMENTAL BRIEF OF
CONSUELO PRIETO MARISCAL**

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I. INTRODUCTION

Petitioner Consuelo Prieto Mariscal respectfully submits this supplemental brief in accordance with the Court's January 7, 2019 request.

II. STATEMENT OF ISSUES AND ANSWERS

Are there any rules in Washington governing “commingling” of PIP claim files and liability claim files? If so, what remedies, if any, may a court impose for improper commingling?

Preliminarily, this is not the appropriate case to address these issues. There is insufficient factual record or focused briefing upon which to articulate a rule, and the relevant insurer is not a party to the case. To answer the questions directly, there is no prohibition on the use of factual information for different claims, and there is no need for any “remedy” aside from the already-existing option of exclusion from evidence at trial.

III. SUPPLEMENTAL STATEMENT OF THE CASE

Ms. Diaz appealed the trial court's admission of evidence of a prior inconsistent statement. Ms. Diaz only assigned error to the trial court's ruling that the statement was not hearsay. The Court of Appeals affirmed the ruling on hearsay, but nonetheless reversed and remanded, holding that the trial court should have extended work product protection to the document containing the statement. *Barriga Figueroa v. Prieto Mariscal*, 3 Wn. App. 2d 139, 414 P.3d 590, *rev. granted*, 191 Wn. 2d 1004 (2018).

The document at issue is a form application for Personal Injury Protection (“PIP”) insurance benefits for Ms. Diaz’s son, Brayan. Because of the scope of the PIP statute, Ms. Diaz was able to apply for PIP benefits for Brayan through Ms. *Prieto’s* insurer. *See* RCW 48.22.005(5)(b)(ii). Ms. Diaz’s attorneys filled out the application, and submitted it to Ms. *Prieto’s* insurer, and the insurer paid PIP benefits to Brayan. VRP 12-13. The application form called for a description of the accident. VRP 469-71. The description of the accident provided was inconsistent with descriptions later given by Ms. Diaz and Brayan. CP 1, 2; CP 165-67; CP 12. Ms. *Prieto’s* counsel offered, and the trial court admitted, a partially redacted version of the form at trial. VRP 120-1; 135.

In its opinion, the Court of Appeals suggested that Ms. Diaz suffered an injustice when it assumed Ms. *Prieto’s* insurer “commingled” the claim file for the PIP coverage extended to Brayan with the file pertaining to Ms. *Prieto’s* defense for the lawsuit. *Barriga*, 3 Wn. App. 2d at 148. Ms. Diaz now urges this Court to use this case as a vehicle to articulate new rules about an insurance company’s ability to use ordinary incident facts when it is adjusting claims under multiple coverages. Supp. Brief of Respondent at 15-16. Using this case — where the insurer is neither a party, nor alleged to have breached a duty to its insureds — to create insurance bad faith law would be inappropriate. The proper forum

for determining the propriety of claim file “commingling” is a lawsuit between Ms. Diaz and the insurer. In fact, that very case exists and is stayed pending the outcome of this appeal.¹

IV. ARGUMENT

A. The Propriety of “Commingling” Is an Issue of Insurance Law that is Beyond the Scope of this Appeal

The only issue before this Court on appeal is whether this PIP application is work product. It is clearly not, because as this court held in *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 295 P.3d 239 (2013), documents prepared in the ordinary course of claim handling are presumed to not be work product. Ms. Diaz never offered any evidence to overcome that presumption. Indeed, Judge Korsmo’s dissent recognized that the application was just a “run-of-the-mill business record.” 3 Wn. App. 152. That is the issue; there are several reasons why that issue can, and should, be decided without regard to what Ms. Prieto’s insurer did with the PIP application after Ms. Diaz’s lawyers submitted it.

First, how Ms. Prieto’s attorney obtained the PIP application is not a question germane to the issue on appeal. In fact, the way in which Ms. Prieto’s attorney obtained the PIP application is not even a fact found

¹ *Diaz Barriga Figeroa v. State Farm Fire & Cas. Co.*, U.S. Dist. Ct., E.D. Wash., No. 4:17-cv-5057SMJ. See appendices A and B hereto. Note: the stay imposed by appendix B has been extended by 11/20/2018 order. See https://ecf.waed.uscourts.gov/cgi-bin/DktRpt.pl?956843290821867-L_1_0-1

in the record below. This Court should not assume facts not found in the record, especially when they do not pertain to the issue at hand.

Second, Ms. Prieto's insurance company is not a party to this lawsuit. As Judge Korsmo's dissenting opinion notes, "if the plaintiff was damaged by some unlawful act, the remedy should be to sue the insurer for damages." *Barriga*, 3 Wn. App. 2d 139 at n.4. Ms. Diaz is already suing the insurer in another case. Here, Ms. Prieto is just an insured, who owes no duty of good faith to Ms. Diaz, and who cannot speak for her insurance company or represent its interest.

More importantly, there is no theory of liability that could attach to Ms. Prieto, individually, for her insurance company's violation of rules against "commingling," even if such rules existed. Any hypothetical relief for violating those rules, if such rules existed, would far exceed the scope of this case. *See Dang v. Ehredt*, 95 Wn. App. 670, 677, 977 P.2d 29 (1999) (arguments raised in appellate court for the first time are not considered out of fairness to the trial court and opposing parties). This Court should decline any opportunity to decide this case on other grounds or make new law without sufficient evidentiary context.

B. There Is No Washington Legal Authority that Prohibits “Commingling” of Factual Information

This Court requested supplemental briefing on the rules regarding the suggested “commingling” of Ms. Diaz’s PIP claim file and Ms. Prieto’s liability claim file. There are none. Rather, there is dicta in *Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), that, when taken out of context, can be construed as an admonishment against commingling UIM and liability files. However, Washington cases after *Ellwein* make it clear that “commingling” of PIP and liability information is in no way improper.

At the outset, however, it is important to remember the evidence in question: a PIP application containing a statement of a party opponent concerning an incident. This is organic evidence — like photographs, diagrams, medical records, and witness statements — that is routinely discovered and offered in evidence, and then admitted or excluded by the trial judge pursuant to the rules of evidence. It is not attorney-client communication, attorney mental impressions, expert opinion, or anything of a similar sensitive nature, and nothing in the record suggests otherwise.

1. The Statement in *Ellwein v. Hartford* is Not a Rule of General Application

In *Ellwein*, the question at issue was whether a UIM insurer violates its duty of good faith by hiring an expert for its insured to aid in

the insured's liability representation, and then retaining that same expert to aid in its defense of an insured's UIM claim arising out of the same accident. *Ellwein*, 142 Wn.2d at 778. Nancy Ellwein was injured in an auto accident when her car was hit by an oncoming vehicle while she was attempting to make a left turn. *Id.* at 768. Mrs. Ellwein sued the other driver and made a UIM claim under her own auto policy. *Id.*

As part of its investigation of the auto accident, Mrs. Ellwein's insurer hired an accident reconstruction expert. *Id.* at 769. Based on the expert report, the insurer took the position with the other insurance carriers involved that Mrs. Ellwein was not at fault. *Id.* at 769-70. After Mrs. Ellwein's lawsuit against the other driver settled, her insurer used the same expert to defend against her UIM claim and assert that she was at fault. *Id.* at 770-71. Mrs. Ellwein sued her insurer, alleging it acted in bad faith by "misappropriating" the accident reconstruction expert that was originally hired to support her defense.

This Court likened the expert witness relationship to that of an attorney hired by an insurer to represent the insured in a liability case. In both cases, only the insured is the client and both are hired to support the insured's defense at a time when the insurer owes a duty to not self-deal. It was in this specific context that this Court made the following comment:

Finally, we find it particularly troubling that the insurer may “commingle” the liability representation file with the UIM file in such a way. If the insurer truly “stands in the shoes” of the tortfeasor, the benefits of the adversarial relationship should be accompanied by its costs. UIM insurers should be prohibited from using or manipulating an expert where it would be unable to do so if it were, in fact, the tortfeasor.

Id. at 766.

There are reasons why the Court’s comment about the troubling “commingling” in *Ellwein* does not equate to a general rule prohibiting commingling. First, this statement is not a judicial holding. Second, the reasoning behind this statement is specific to the facts of the *Ellwein* case and centers on the unique expert witness relationship. A “run-of-the-mill” application for PIP benefits submitted to an insurance company has no similarity to the work performed by an accident reconstruction expert on behalf of an insured. This Court should not extrapolate a general rule about “commingling” from its prior comment in *Ellwein* because the meaning of that comment is context-dependent.

2. Commingling Information in a PIP and UIM Claim File Is Not Improper

It is clear that the statement in *Ellwein* is not a rule of general application because a subsequent Washington case held that “commingling” of information among a PIP and UIM file is not improper. In *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 223 P.3d 1180

(2009), Ms. Kim made a claim under both her PIP and UIM coverages. Allstate requested a PIP IME, which ultimately supported its denial of Ms. Kim's claims based on the policy's void for fraud provisions. *Id.* at 344. The IME report was used in both the PIP and UIM investigations, which Ms. Kim argued should not have been commingled due to the insurer's "differing positions" on each claim. *Id.* at 363. The court held that *Ellwein* was inapposite to the facts in *Kim* because the insurer ordered the IME to "verify and corroborate the severity and nature of [the insured's] existing injuries, not their cause." *Id.* at 365.

Importantly, the court also held that because the IME **belonged to the insurer**, the insurer was free to use it in both claims. *Id.*² This is an important fact that distinguishes *Ellwein* from all other cases addressing commingling, as the insurer in *Ellwein* was commingling an expert witness that "belonged" to the insured.

Here, like in *Kim*, the purpose of the PIP application at the time it was submitted to Ms. Prieto's insurer was to verify and corroborate that Brayan's accident fell within the scope of the PIP coverage. To do that, the application need only contain enough information to show that Brayan

² Similarly, in *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004), this Court recognized that the PIP independent medical examination was the work product of the PIP insurer, not the examined insured, and so the insurer had the right to assert or waive the immunity, not the insured.

was hit by Ms. Prieto. The purpose of the PIP application was not to determine the cause of the accident. Ms. Diaz's attorneys' decision to include more information than that was their choice, not the insurer's requirement. Regardless, the PIP application belongs to Ms. Prieto's insurer and it should be free to share that information with itself.

3. There is No Duty to Avoid Commingling in Other Situations

Though *Kim* is applicable here and stands for the proposition that an insurer can commingle information, even information as sensitive as an IME report, several other insurance cases applying Washington law have found that there is no duty to avoid commingling in other situations.

For example, there is no duty to avoid commingling an insurer's tort-defense and coverage-dispute files. See *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 395, 823 P.2d 499 (1992) (no judicial holding regarding duty to avoid commingling); *American Capital Homes, Inc. v. Greenwich Ins. Co.*, 2010 WL 3430495, at *6 (W.D. Wash.) (assigning single adjuster to defense and coverage functions was not bad faith); *Berkshire Hathaway Homestate Ins. Co. v. SQI, Inc.*, 132 F. Supp. 3d 1275 (2015) (insurer's commingling does not amount to bad faith). There is also no duty to avoid commingling the defense claim files of multiple defendant-insureds where they allege conflicts of interest between them.

Specialty Surplus Ins. Co. v. Second Chance, Inc., 412 F. Supp. 2d 1152, 1169 (2006) (W.D. Wash.) (commingling of multiple defense files does not constitute bad faith).

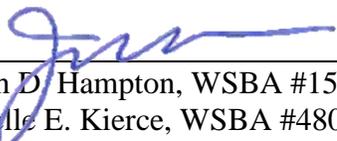
Of course, all of these additional cases that address commingling have one thing in common — they are insurance cases. In this case, Ms. Prieto’s insurer is not a party and Ms. Prieto does not represent its interests.

V. CONCLUSION

There is simply no rule in Washington that prohibits “commingling” of information related to claims made under different coverages provided by the same policy. All courts that have been presented with this issue have unanimously found that an insurer’s comingling of information is not improper. Accordingly, there are no recognized remedies for improper commingling. The only appropriate remedy for Ms. Diaz is to sue Ms. Prieto’s insurer directly, which she is already doing in a separate case.

RESPECTFULLY SUBMITTED this 8th day of February, 2019.

BETTS, PATTERSON & MINES, P.S.

By: 
Joseph D. Hampton, WSBA #15297
Michelle E. Kierce, WSBA #48051
Attorneys for Consuelo Prieto Mariscal

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on February 8, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Second Supplemental Brief Of Consuelo Prieto Mariscal; and**
- **Certificate of Service.**

<i>Counsel for Figueroa:</i>	<input checked="" type="checkbox"/>	Appellate Filing Portal
Brian J. Anderson	<input type="checkbox"/>	U.S. Mail
Ned Stratton	<input type="checkbox"/>	Hand Delivery
5861 W. Clearwater Avenue	<input type="checkbox"/>	Telefax
Kennewick, WA 99336	<input type="checkbox"/>	UPS
George M. Ahrend	<input checked="" type="checkbox"/>	Appellate Filing Portal
Ahrend Law Firm PLLC	<input type="checkbox"/>	U.S. Mail
100 E Broadway Avenue	<input type="checkbox"/>	Hand Delivery
Moses Lake, WA 98837	<input type="checkbox"/>	Telefax
	<input type="checkbox"/>	UPS

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of February, 2019.

Valerie D. Marsh

Valerie D. Marsh

APPENDIX A



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MICHAEL J. KILLIAN
FRANKLIN COUNTY CLERK

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SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF FRANKLIN

MONICA DIAZ BARRIGA FIGUEROA
as parent and natural guardian of BRAYAN
MARTINEZ, a minor,

Plaintiff,

v.

STATE FARM FIRE AND CASUALTY
COMPANY, a foreign insurance company,

Defendant.

NO. 16 250882 11

COMPLAINT FOR BREACH OF CONTRACT
AND INSURANCE BAD FAITH

COPY

COMES NOW Plaintiff BRAYAN MARTINEZ, a minor, by and through his attorneys,
Ned Stratton and Brian Anderson of ANDERSON LAW PLLC, and for causes of action against
Defendant above-named, and each of them, jointly and/or severally, for damages, complain and
allege as follows:

I.

IDENTIFICATION OF PARTIES

1.1 MONICA DIAZ BARRIGA FIGUEROA, as parent and natural guardian of BRAYAN
MARTINEZ, a minor, Plaintiff.

Plaintiff was at all times relevant and material hereto a resident of Pasco, Franklin
County, in the State of Washington.

1.2 STATE FARM FIRE AND CASUALTY COMPANY, a foreign insurer, Defendant.

COMPLAINT FOR BREACH OF CONTRACT
AND INSURANCE BAD FAITH - I

ANDERSON LAW
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1 Defendant STATE FARM FIRE AND CASUALTY COMPANY (hereinafter "State
2 Farm") was at all times material and relevant hereto a foreign insurance company
3 domiciled in Illinois and licensed to do business in the State of Washington, in and
4 around Franklin County. At all times material and relevant hereto, Defendant State Farm
5 was engaged in the business of issuing casualty, property, and vehicle insurance in the
6 State of Washington, and in and around Franklin County, Washington.

7
8 **II.**

9 **JURISDICTION AND VENUE**

10 2.1 Jurisdiction and venue properly lie in Franklin County Superior Court based upon the fact
11 that Plaintiff resided in, and suffered harm in the underlying incident, within Franklin
12 County, Washington, and that Defendant STATE FARM FIRE AND CASUALTY
13 COMPANY was at all times material and relevant hereto licensed to do business and was
14 conducting business in and around Franklin County, Washington, at the time of the
15 accident giving rise to this claim. Venue is proper in Franklin County pursuant to RCW
16 4.12.025(3) and RCW 4.12.020(3).

17 **III.**

18 **FACTS**

- 19 3.1 On or about October 30, 2013, Consuelo Prieto Mariscal, drove her 2004 Nissan Quest
20 Van south on 400 Block of North Cedar in Pasco, Franklin County, Washington, and ran
21 over minor child BRAYAN MARTINEZ's right leg.
- 22 3.2 Consuelo Prieto Mariscal was insured by a policy issued by Defendant State Farm, policy
23 number 2017-081-47, which was in full force and effect on October 30, 2013, the date on
24 which Plaintiff sustained injuries.
- 25 3.3 The State Farm policy provided a benefit of \$10,000 per person in no-fault coverage for
26 personal injury protection ("PIP").
27
28
29

- 1 3.4 As a pedestrian Plaintiff BRAYAN MARTINEZ was covered under the State Farm
2 policy which provided a benefit of \$10,000 per person in no-fault coverage for personal
3 injury protection ("PIP").
- 4 3.5 Defendant State Farm shared portions of the first party PIP file with the third party
5 liability adjuster and third party attorney.
- 6 3.6 Defendant State Farm actively worked against their insured BRAYAN MARTINEZ in
7 order to defeat other portions of the insurance policy coverage.
- 8 3.7 Defendant State Farm failed to deal fairly with the insured Plaintiff BRAYAN
9 MARTINEZ, and did not give equal consideration *in all matters* to the insured's interests.
- 10 3.8 Defendant State Farm acted in bad faith and violated RCW 48.01.030 which requires
11 insurance companies in Washington to act in "good faith, abstain from deception, and
12 practice honesty and equity in all insurance matters."
- 13 3.9 Defendant State Farm placed its financial interests above those of its insured, Plaintiff
14 BRAYAN MARTINEZ, in bad faith, in violation of its quasi-fiduciary duty to its
15 insured, and in breach of its contract.
- 16

17 IV.

18 CAUSES OF ACTION

19 A. BREACH OF CONTRACT AND TORTIOUS INTERFERENCE WITH
20 PLAINTIFF'S THIRD PARTY CLAIM

- 21
- 22 4.1 Defendant State Farm extended first party PIP benefits to Plaintiff BRAYAN
23 MARTINEZ.
- 24 4.2 Defendant State Farm used portions the first party PIP file to interfere in Plaintiff's third
25 party liability claim.
- 26
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COMPLAINT FOR BREACH OF CONTRACT
AND INSURANCE BAD FAITH 3

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1 4.3 Defendant State Farm breached its contract with Plaintiff BRAYAN MARTINEZ when it
2 acted in bad faith and interfered with his third party claim.

3
4 **B. VIOLATION OF THE CONSUMER PROTECTION ACT**

5 4.4 Defendant State Farm violated the Consumer Protection Act in its handling of Plaintiff
6 BRAYAN MARTINEZ's claim.

7 4.5 Defendant State Farm's use of the first party PIP file to defeat their insureds third party
8 claim constituted an unfair or deceptive act or practice; which occurring in the insurance
9 trade or commerce; this constitutes a violation of public interest; and caused substantial
10 injury to plaintiff and his third party claim;

11 **C. BAD FAITH**

12 4.6 Defendant State Farm acted in bad faith in its handling of Plaintiff BRAYAN
13 MARTINEZ's claims.

14 4.7 Defendant State Farm had a duty to deal with Plaintiff BRAYAN MARTINEZ in good
15 faith, at least with regard to the first party PIP coverage.

16 4.8 Defendant State Farm breached its duty of good faith to BRAYAN MARTINEZ by
17 sharing the PIP file with the third party adjusters and with defense counsel in the third
18 party action in bad faith.

19
20 **D. BREACH OF FIDUCIARY DUTY**

21 4.9 Defendant State Farm owed Plaintiff BRAYAN MARTINEZ a fiduciary duty as a first
22 party insured under its PIP policy.

23 4.10 Defendant State Farm breached its fiduciary duty to Plaintiff BRAYAN MARTINEZ
24 when it became more concerned about its own economic interests than Plaintiff
25 BRAYAN MARTINEZ's interests.

26 4.11 Defendant State Farm acted in bad faith and breached its fiduciary duty to Plaintiff
27 BRAYAN MARTINEZ when it sought to limits its payout on Plaintiff's claims by
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COMPLAINT FOR BREACH OF CONTRACT
AND INSURANCE BAD FAITH

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1 sharing Plaintiff's first party PIP file with the third party adjusters in an attempt to defeat
2 coverage.

3
4 **V.**

5 **ABSENCE OF COMPARATIVE FAULT**

6 5.1 Defendant State Farm and its agents are therefore individually and/or jointly and
7 severally 100% liable for minor child BRAYAN MARTINEZ's damages resulting from
8 its breach of contract, its bad faith, its violation of the consumer protection act, and its
9 breach of its fiduciary duty.
10

11
12 **VI.**

13 **ABSENCE OF NON-PARTY "AT FAULT" ENTITIES**

14 6.1 Defendant is the only "at fault" entity or potentially "at fault" entity (as that defined in
15 RCW 4.22.015) in this action. There are no non-party "at fault" entities who are in any
16 way or percentage "at fault" in this action and/or for the minor child's damages resulting
17 therefrom.
18

19 **VII.**

20 **DAMAGES**

21 7.1 As a direct and proximate result of the causes of action alleged herein, the minor child,
22 BRAYAN MARTINEZ suffered substantial damages and is entitled to be compensated
23 therefore.

24 7.2 As a direct and proximate result of the actions alleged herein the minor child BRAYAN
25 MARTINEZ has suffered and will continue to suffer substantial general damages, which
26 damages may include but are not limited to mental and emotional distress, inconvenience,
27 and mental and emotional pain and suffering, and is entitled to be compensated therefore.
28

29 **VIII.**

COMPLAINT FOR BREACH OF CONTRACT
AND INSURANCE BAD FAITH - 5

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RELIEF SOUGHT

- 8.1 For an award of damages compensating Plaintiff BRAYAN MARTINEZ for the above-detailed damages in an amount to be proven at trial.
- 8.2 For an award of damages compensating Plaintiff's costs and attorney fees herein in an amount to be proven at trial.
- 8.3 For attorney fees and costs allowed per *Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673 (Wash. 1992).
- 8.4 For an award of treble damages, cost and fees, under the Consumer Protection Act (RCW 19.86.090).

WHEREFORE Plaintiff prays for judgment over and against Defendant State Farm and its agents, jointly and severally, by way of money damages for all causes of action pled, and for all injuries and damages allowed, provided for and permitted by the common law and statutory law of the State of Washington, in such amount as shall be determined by the finder of fact under the evidence presented at trial, together with such other damages, to include Plaintiff's costs and attorney's fees, pre-and post-judgment interest on all fixed and liquidated damages where appropriate (e.g., property damage, rental car expenses, past wage loss and fixed medical expenses), and such other and further relief as the Court may deem just and equitable under the circumstances of the case at time of trial herein, or post-trial.

DATED THIS 12 day of Oct, 2016.

ANDERSON LAW PLLC
 By Ned Stratton Brian Anderson
 Ned Stratton, WSBA #42299
 Brian Anderson, WSBA #39061
 Attorneys for Plaintiff

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COMPLAINT FOR BREACH OF CONTRACT
 AND INSURANCE BAD FAITH - 6

APPENDIX B

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

MONICA DIAZ BARRIGA
FIGUEROA, as parent and natural
guardian of B.M., a minor,

Plaintiff,

vs.

STATE FARM FIRE & CASUALTY
COMPANY, a foreign insurance
company,

Defendant.

No. 4:17-CV-05057-SMJ

STIPULATION MOTION FOR
ORDER STAYING PROCEEDINGS

NOTED FOR HEARING:
NOVEMBER 30, 2017
WITHOUT ORAL ARGUMENT

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, Ned Stratton of ANDERSON LAW PLLC on behalf of the Plaintiff Monica Diaz Barriga Figueroa, as parent and natural guardian of B.M., a minor, and Laura Hawes Young and Heather M. Jensen of LEWIS BRISBOIS BISGAARD & SMITH, LLP, on behalf of Defendant State Farm Fire and Casualty Company, agree and stipulate to a stay proceedings in this matter, including discovery and all matters set forth in the Scheduling Order (Document 16) filed with this Court on June 29, 2017, pending a decision and/or resolution of the Court of Appeals, Division III, Cause No. 346714, which arises from Benton County Superior Court Cause

4841-1348-9234.1
STIPULATION FOR ORDER STAYING
PROCEEDINGS - 1
USDC Cause No. 4:17-cv-05057-SMJ

ANDERSONLAW
Attorneys at Law
5861 W. Clearwater Avenue
Kennewick, WA 99336
(509) 734-1345 • FAX (509) 735-4612

1 No. 14-2-50417-1. The proceedings in this case arise out of and are related to
2 the proceeding in that case, and the outcome of that case may impact this case.
3 The parties understand and agree that this stay will necessitate vacating the
4 matters currently scheduled and set forth in the Scheduling Order (Document
5 16) filed with this Court on June 29, 2017 and that those matters may be stayed
6 pending the Court of Appeals decision and/or resolution. The parties request
7 that the clerk issue a new scheduling order will be entered after the resolution
8 of Superior Court Cause No. 14-2-50417-1.
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10
11 I. FACTS
12

13 Plaintiff filed suit against State Farm in this matter asserting claims for
14 bad faith, violation of the Consumer Protection Act, tortious interference with
15 a third-party claim, and breach of fiduciary duty. ECF No. 1-3. Plaintiff B.M.
16 was involved in a bicycle/car accident on October 30, 2013. State Farm insured
17 the driver of the vehicle, Consuelo Prieto Mariscal. ECF No. 1-3 at ¶¶ 3.1, 3.2
18 . After the accident, State Farm provided personal injury protection (PIP)
19 benefits to B.M. until the coverage exhausted by payment of the applicable PIP
20 limits. *Id.* at ¶ 3.3.
21

22
23 Thereafter, B.M. sued State Farm's insured, Ms. Mariscal in Franklin
24 County Superior Court, Case No. 14-2-50417-1. State Farm provided a copy
25 of B.M.'s PIP application to counsel for Ms. Mariscal as part of its claim file
26

1 for the accident. In this lawsuit, B.M. contends State Farm's provision of the
2 PIP application to defense counsel was improper. ECF No. 1-3 at ¶ 3.5.

3 After an arbitration and a trial de novo in the liability case, the jury found
4 for Ms. Mariscal. B.M. has appealed various evidentiary issues in the
5 underlying trial to the Court of Appeals, Division III. Declaration of Ned
6 Stratton. The parties have completed briefing to the appellate court. A hearing
7 date on the underlying appeal not yet set. *See* Stratton Decl.
8
9

10 The parties have been addressing discovery and it has become clear that
11 the underlying appeal and ongoing litigation will create obstacles to discovery
12 that Plaintiff believes is necessary to litigate this claim. While State Farm does
13 not necessarily agree, it does agree that staying the action will avoid significant
14 motion practice and avoid potential prejudice to its insured Ms. Mariscal if
15 discovery is to be had of her defense counsel on issues that are on appeal
16 currently. Further, the parties agree that the results of the appeal may dispose
17 of this case in its entirety.
18
19
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21 II. ISSUES

22 Should the Court stay this action until the Court of Appeals has decided
23 the underlying appeal in order to avoid potential prejudice to State Farm's
24 insured and potential resolution of the case pending the appellate decision?
25

26 III. EVIDENCE RELIED UPON

27 4841-1348-9234.1
STIPULATION FOR ORDER STAYING
PROCEEDINGS - 3
USDC Cause No. 4:17-cv-05057-SMJ

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(509) 734-1345 • FAX (509) 735-4612

1 The parties rely on the documents in the court file and the Declaration of
2 Ned Stratton filed herewith.

3
4 IV. AUTHORITY

5
6 The Court "has broad discretion to stay proceedings as an incident to its
7 power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 707-08, 117
8 S. Ct. 1636, 137 L. Ed. 2d 945 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S.
9 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936)). When considering a motion to
10 stay, the following factors are relevant: (1) "the possible damage which may
11 result from the granting of a stay," (2) "the hardship or inequity which a party
12 may suffer in being required to go forward," and (3) "the orderly course of
13 justice measured in terms of the simplifying or complicating of issues, proof,
14 and questions of law which could be expected to result from a stay." *Wild*
15 *Fish Conservancy v. Irving*, No. 2:14-CV-0306-SMJ, 2015 U.S. Dist. LEXIS
16 179964, at *6-7 (E.D. Wash. Apr. 26, 2015) (citing *Lockyer v. Mirant Corp.*,
17 398 F.3d 1098, 1110 (9th Cir. 2005); (quoting *CMAX, Inc. v. Hall*, 300 F.2d
18 265, 268 (9th Cir. 1962)). The Court should also consider the proposed length
19 of the stay. *Id.* (citing *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000)).
20
21
22
23

24 First, the parties submit that there is a stronger possibility of damage if
25 the stay is not granted. In particular, Plaintiff believes he is entitled to delve
26

1 into information implicating work product and/or attorney-client privilege in
2 addressing the provision of the PIP file materials to defense counsel and their
3 use at trial. While State Farm does not agree on the scope of that discovery, if
4 it is discoverable, there could be considerable prejudice to State Farm's
5 insured if the liability suit is remanded for further proceedings or a new trial.
6 Moreover, Plaintiff has requested to depose Ms. Mariscal's attorney and the
7 same issues would be present in addressing that testimony.
8
9

10 Second, the hardship or inequity in moving forward would be in
11 increased cost and expense to both parties in addressing discovery motions,
12 and potential prejudice to State Farm's insured, Ms. Mariscal, if her defense
13 strategy is compromised. The parties do not see any hardship or inequity in
14 staying the action.
15
16

17 Third, the parties submit that the issues may be simplified or disposed
18 of entirely if the Court of Appeals affirms the trial court. In particular, if the
19 trial court is affirmed, the issue of Plaintiff's damages would be streamlined.
20 Further, the issue of potential prejudice to Ms. Mariscal would be eliminated
21 as there would be no underlying case subject to further litigation.
22
23

24 Lastly, while the stay may be of a longer duration, the parties do not
25 believe there is a significant risk that outweighs the benefit of staying the
26 action.
27

1 For these reasons, the parties respectfully request that the Court grant
2 the stipulated motion and stay this case for purposes of discovery and trial.

3
4 Dated this 31st day of October, 2017.

5 Presented by:

6
7 /s/ Ned Stratton
8 Ned Stratton, WSBA #42299
9 Edwardo Morfin, WSBA #47831
10 Ned@AndersonLawWA.com
11 Eddie@AndersonLawWA.com
12 ANDERSON LAW PLLC
13 5861 W. Clearwater Avenue
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15 Attorneys for Plaintiff

16
17 /s/ Laura Hawes Young
18 Laura Hawes Young, WSBA #39346
19 Heather M. Jensen, WSBA#29635
20 Laura.Young.@lewisbrisbois.com
21 Heather.Jensen@lewisbrisbois.com
22 LEWIS BRISBOIS BISGAARD
23 & SMITH, LLP
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25 Seattle, WA 98101
26 Attorneys for Defendant

27 4841-1348-9234.1
STIPULATION FOR ORDER STAYING
PROCEEDINGS - 6
USDC Cause No. 4:17-cv-05057-SMJ

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DECLARATION OF SERVICE

I hereby certify that on October 31st, 2017, I electronically filed the foregoing STIPULATION FOR ORDER STAYING PROCEEDINGS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record and provide service via electronic mail to:

Laura Hawes Young Heather M. Jensen LEWIS BRISBOIS BISGAARD & SMITH, LLP 1111 Third Avenue, Suite 2700 Seattle, WA 98101	<input type="checkbox"/> via U.S. Mail, first class, postage prepaid <input type="checkbox"/> via Legal Messenger/ Hand Delivery <input type="checkbox"/> via Facsimile (206) 436-2030 <input checked="" type="checkbox"/> via E-mail: Laura.Young@lewisbrisbois.com Heather.Jensen@lewisbrisbois.com <input checked="" type="checkbox"/> via CM/ECF
<i>Attorneys for Defendant</i>	

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this 31st day of October, at Kennewick, Washington.

By: /s/ Diane Austin

Diane Austin, Litigation Paralegal
Anderson Law PLLC
5861 W. Clearwater Avenue
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BETTS, PATTERSON & MINES, P.S.

February 08, 2019 - 1:25 PM

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Superior Court Case Number: 14-2-50417-1

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