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No. 64477-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EMILY L. MORATTI, a minor, by and through her Litigation
GUARDIAN AD LITEM GERALD R. TARUTIS

Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON; FARMERS
INSURANCE EXCHANGE,
and DOES 1 through 10 et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAY V. WHITE

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	3
IV.	STATEMENT OF CASE	5
	A. Farmers Denied A Claim And Closed Its File Without Investigating Its Insured’s Liability For The Negligent Non-Delegable Duty To Install Smoke Detectors In Rental Property Where A Fire Caused Catastrophic Burns To Emily Moratti.....	5
	B. After Failing To Respond To Moratti’s Lawyers, Farmers Finally Told Them Not To Submit A Settlement Package Because Its Liability Decision Was Final.	8
	C. Farmers Only Investigated Its Insured’s Liability After Moratti Was Forced To Sue Its Insured, And Quickly Recognized Its Insured’s Significant Exposure To Personal Liability.	13
	D. The Trial Court Set Aside The Jury’s Finding That Farmers Was Liable For Its Bad Faith Breach Of The Duty To Investigate And Settle.	14
V.	ARGUMENT.....	17
	A. The Trial Court Erred In Granting Judgment As A Matter of Law And Vacating The Jury’s Verdict On A Bad Faith Claim Filed Less Than Three Years After Entry Of Judgment Against Farmers’ Insured.....	17
	1. The Trial Court Could Not Enter Judgment As A Matter of Law On The Basis Of A Defense That Was Never An Issue At Trial Because It Was Eliminated On Summary Judgment.....	18

2.	The Statute Of Limitations On A Tort Claim For Breach Of The Duty To Investigate And Settle Accrues When Judgment Is Entered Against The Insured.....	19
B.	The Trial Court Erred In Granting Farmers' Alternative Motion For A New Trial On The Basis Of A Discretionary Evidentiary Ruling And An Instruction That Accurately Stated An Insurer's Obligation Of Good Faith.	22
1.	The Trial Court Properly Instructed The Jury That The Duty Of Good Faith Requires An Insurer To Conduct Settlement Negotiations, Evaluate Settlement, And Communicate Offers To Its Insured.	24
a.	Instruction 11 Accurately Stated The Law, And Was Supported By Substantial Evidence That Farmers Breached The Duty To Settle.	24
b.	Farmers Failed To Propose Accurate Instructions.	29
c.	Farmers Was Not Prejudiced.....	30
2.	The Trial Court Properly Excluded Evidence That Lipscomb Had Unsuccessfully Sued His Broker For Malpractice After Repeatedly Balancing Its Probative Value Against The Potential To Confuse And Mislead The Jury Under ER 403.	34
C.	The Trial Court Erred In Granting Judgment As A Matter Of Law On The CPA Claim Against Farmers.	39
D.	Moratti Should Be Awarded Her Attorney Fees At Trial And On Appeal.	41

E.	Any New Trial Should Be Conducted By A New Superior Court Judge Who Is Not Bound By The Trial Court’s Evidentiary Rulings And Instructions.....	43
1.	Instructions Defining And Allocating The Burden To Prove The Elements Of Bad Faith.	43
2.	Evidence Of Proximate Cause.	44
3.	Precluding Evidence Of “Harm.”	45
4.	Evidence Of Reasonable Settlement.....	46
5.	Evidence Farmers’ Adjuster Failed To Comply With Its Claims Manual.	47
6.	Any New Trial Should Be Conducted By A Different Superior Court Judge.....	48
VI.	CONCLUSION.....	49

APPENDICES:

App. A:	Order Granting Farmers’ Post-Trial Motion for Judgment as a Matter of Law and Vacating Judgment on Verdict (CP 4901-02)
App. B:	Order Granting Farmers’ Motion for New Trial and Vacating Judgment on Verdict (CP 4903-04)
App. C:	Order Denying Defendants’ Second Motion for Summary Judgment re Statute of Limitations and <i>Res Judicata</i> (CP 3477-78)
App. D:	Special Verdict Form (CP 4372)
App. E:	Judgment on Verdict (CP 4610-13)
App. F:	Court’s Instruction No. 11 (CP 4324-25)

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Carpenter v. Automobile Club Interinsurance Exchange</i> , 58 F.3d 1296 (8th Cir. 1995).....	21
<i>Faigin v. Kelly</i> , 184 F.3d 67 (1st Cir. 1999).....	36
<i>Fischer v. State Farm Fire and Casualty Co.</i> , 2006 WL 1148511 (W.D. Wash. 2006), <i>aff'd in part, rev'd in part on other grounds</i> , 272 Fed.Appx. 608 (9th Cir. 2008)	20
<i>Greycas, Inc. v. Proud</i> , 826 F.2d 1560 (7th Cir.1987), <i>cert. denied</i> , 484 U.S. 1043 (1988)	36
<i>McSherry v. City of Long Beach</i> , 423 F.3d 1015 (9th Cir. 2005)	48, 49
<i>United States v. Sears, Roebuck & Co., Inc.</i> , 785 F.2d 777 (9th Cir.), <i>cert. denied</i> , 479 U.S. 988 (1986)	49
<i>Vanderloop v. Progressive Cas. Ins. Co.</i> , 769 F.Supp. 1172 (D. Colo.1991)	21

STATE CASES

<i>Adcox v. Children's Orthopedic Hosp. & Med. Ctr.</i> , 123 Wn.2d 15, 26, 864 P.2d 921 (1993)	38
<i>Allstate Ins. Co. v. Campbell</i> , 334 Md. 381, 639 A.2d 652 (1994)	21
<i>August v. U.S. Bancorp</i> , 146 Wn. App. 328, 190 P.3d 86 (2008), <i>rev. denied</i> , 165 Wn.2d 1034 (2009).....	19
<i>Besel v. Viking Ins. Co.</i> , 146 Wn.2d 730, 49 P.3d 887 (2002)	44, 46
<i>Browne v. Cassidy</i> , 46 Wn. App. 267, 728 P.2d 1388 (1986).....	18

<i>Bruchfiel v. Boeing Co.</i> , 149 Wn. App. 468, 205 P.3d 145, <i>rev. denied</i> , 166 Wn.2d 1038 (2009).....	29
<i>Bush v. Safeco Ins. Co.</i> , 23 Wn. App. 327, 596 P.2d 1357 (1979).....	20, 21
<i>Castle & Cooke, Inc. v. Great American Ins. Co.</i> , 42 Wn. App. 508, 711 P.2d 1108, <i>rev. denied</i> , 105 Wn.2d 1021 (1986).....	20
<i>Christansen v. Puget Sound Nav. Co.</i> , 138 Wash. 239, 244 Pac. 569 (1926).....	31
<i>City of Seattle v. Richard Bockman Land Corp.</i> , 8 Wn. App. 214, 505 P.2d 168, <i>rev. denied</i> , 82 Wn.2d 1003 (1973).....	30
<i>Coleman v. Dennis</i> , 1 Wn. App. 299, 461 P.2d 552, <i>rev. denied</i> , 77 Wn.2d 962 (1970).....	35
<i>Crabb v. National Indem. Co.</i> , 87 S.D. 222, 205 N.W.2d 633 (1973).....	21
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	33
<i>Estate of Bordon v. Dept. of Corrections</i> , 122 Wn. App. 227, 95 P.3d 764 (2004), <i>rev. denied</i> , 154 Wn.2d 1003 (2005).....	38
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 543 P.2d 338 (1975).....	20
<i>Gingrich v. Unigard Sec. Ins. Co.</i> , 57 Wn. App. 424, 788 P.2d 1096 (1990).....	40
<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (1994), <i>aff'd</i> 127 Wn.2d 401, 899 P.2d 1265 (1995).....	29, 30
<i>Hovet v. Allstate Ins. Co.</i> , 135 N.M. 397, 89 P.3d 69 (2004).....	21

<i>Hsu Ying Li v. Tang</i> , 87 Wn.2d 796, 557 P.2d 342 (1976).....	42
<i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995).....	30
<i>Jarvis v. Farmers Ins. Exchange</i> , 948 P.2d 898 (Wyo. 1997)	21
<i>Johnson v. Howard</i> , 45 Wn.2d 433, 275 P.2d 736 (1954).....	23
<i>Kelley v. Great Northern Ry. Co.</i> , 59 Wn.2d 894, 371 P.2d 528 (1962).....	31
<i>Lyster v. Metzger</i> , 68 Wn.2d 216, 226, 412 P.2d 340 (1966).....	35
<i>Manning v. Loidhamer</i> , 13 Wn. App. 766, 538 P.2d 136, <i>rev. denied</i> , 86 Wn.2d 1001 (1975)	42
<i>Marriage of Muhammad</i> , 153 Wn.2d 795, 108 P.3d 779 (2005).....	48
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	40, 41
<i>Mathies v. Blanchard</i> , 959 So.2d 986 (La. Ct. App. 2007)	21
<i>Mavroudis v. Pittsburgh-Corning Corp.</i> , 86 Wn. App. 22, 935 P.2d 684 (1997).....	32
<i>Mayer v. City of Seattle</i> , 102 Wn. App. 66, 10 P.3d 408 (2000), <i>rev. denied</i> , 142 Wn.2d 1029 (2001).....	19
<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 882 P.2d 157 (1994).....	32
<i>Meredith v. Hanson</i> , 40 Wn. App. 170, 697 P.2d 602 (1985).....	26
<i>Miller v. Yates</i> , 67 Wn. App. 120, 834 P.2d 36 (1992)	24

<i>Miotke v. City of Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984).....	42
<i>Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007).....	44, 46
<i>Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.</i> , 165 Wn.2d 255, 199 P.3d 376 (2008).....	46
<i>Nungesser v. Bryant</i> , 283 Kan. 550, 153 P.3d 1277 (2007).....	21
<i>Olympic S.S. Co., Inc. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	4, 41, 42
<i>Richards v. State Farm Mut. Auto. Ins. Co.</i> , 252 Ga. App. 45, 555 S.E.2d 506 (2001)	21
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	47
<i>Safeco Ins. Co. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	44
<i>Salois v. Mutual of Omaha Ins. Co.</i> , 90 Wn.2d 355, 581 P.2d 1349 (1978).....	41
<i>Sandbulte v. Farm Bureau Mut. Ins. Co.</i> , 343 N.W.2d 457 (Iowa 1984).....	21
<i>Savage v. State</i> , 72 Wn. App. 483, 864 P.2d 1009 (1994), <i>aff'd in part, rev'd on other grounds</i> , 127 Wn.2d 434, 899 P.2d 1270 (1995).....	47, 48
<i>Schneider v. City of Seattle</i> , 24 Wn. App. 251, 600 P.2d 666 (1979), <i>rev. denied</i> , 93 Wn.2d 1010 (1980).....	23
<i>Schwindt v. Commonwealth Ins. Co.</i> , 140 Wn.2d 348, 997 P.2d 353 (2000).....	20
<i>Smith v. Rich</i> , 47 Wn.2d 178, 286 P.2d 1034 (1955).....	24

<i>Stark v. Celotex Corp.</i> , 58 Wn. App. 940, 795 P.2d 1165, <i>rev. denied</i> , 115 Wn.2d 1020 (1990)	31
<i>Tank v. State Farm Fire & Casualty Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	43
<i>Taylor v. State Farm Mutual Automobile Ins. Co.</i> , 185 Ariz. 174, 913 P.2d 1092 (1996).....	21
<i>Truck Ins. Exch. v. Century Indem. Co.</i> , 76 Wn. App. 527, 887 P.2d 455 (1995).....	25, 26, 29
<i>Wlasiuk v. Whirlpool Corp.</i> , 81 Wn. App. 163, 914 P.2d 102 932 P.2d 1266 (1997).....	32
<i>Woo v. Fireman's Fund Ins. Co.</i> , 137 Wn. App. 480, 154 P.3d 236 (2007).....	47
<i>Woo v. Fireman's Fund Ins. Co.</i> , 161 Wn.2d 43, 164 P.3d 454 (2007).....	42

STATUTES

RCW 19.86.090	39-41
RCW 48.01.030	40
RCW 59.18.060	9, 11

RULES AND REGULATIONS

CR 50	2, 17, 18, 23, 39
CR 59	23, 24, 34, 35, 37
ER 103	38
ER 403	1, 23, 34-36, 39
KCLCR 7	43
KCLCR 56	43
WAC 284-30-330.....	43

OTHER AUTHORITIES

14 L. Orland & K. Tegland, *Wash. Prac., Trial Practice*
§ 333 (4th ed. 1986)24

44A *Am Jur. 2d Insurance* § 1913 (2001)21

McCarthy, *Recovery of Damages for Bad Faith*, §2.53
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Comment WPI 320.05, *Wash. Supreme Court Comm.*
on Jury Instructions, 6A *Wash. Prac.* (5th Ed. 2005)25

WPI 320.0525, 26, 33

I. INTRODUCTION

Farmers failed to investigate or communicate with its insured before denying a claim for serious burns suffered by an infant in its insured's rental property, rebuffing the efforts of the child's attorneys to settle the claim in the months after the fire. As a result, the insured was sued, and could not settle the underlying tort action until years later, and only by paying \$600,000 of his own funds, agreeing to a stipulated judgment that Farmers concedes was reasonable and not the result of fraud and collusion, and assigning to the plaintiff his bad faith and CPA claims against Farmers.

The trial court dismissed the CPA claim, concluding that the insured's \$600,000 contribution to the settlement was not "injury to business or property." The trial court then took away the jury's verdict against Farmers on the bad faith claim, reached after a four-week trial, reversing a ruling by another superior court judge who had held, based on established law, that the bad faith claim was timely because it was brought within three years after entry of judgment in the underlying tort action. Alternatively, the trial court granted Farmers a new trial because it changed its mind on an ER 403 evidentiary ruling made during trial, and because it believed there was insufficient evidence to instruct the jury that Farmers had a duty to act in good faith in attempting to settle, as well as in

investigating, claims against its insured. This court should reverse, reinstate the judgment on the jury's verdict, and award attorney fees to plaintiff.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error Related To Dismissal Of Bad Faith Claim:

1. Order Granting Farmers' Post Trial Motion for Judgment as a Matter of Law, and Vacating the Judgment on Verdict (CP 4901-02) (App. A)

2. Order Denying Plaintiff's Motion for Reconsideration Re: Statute of Limitations. (CP 5062-63)

B. Assignments Of Error Related To Dismissal Of CPA Claim:

1. Ruling Granting Farmers' Motion for Judgment as a Matter of Law. (8/17 [AM] RP 61)

2. Order Denying Plaintiff's Motion for Judgment Under CR 50. (CP 5023-24)

3. Order Denying Plaintiff's Motion for Attorney Fees and Costs. (CP 4896-4898)

4. Order Granting Defendant's Motion For Reconsideration of Order Granting New Trial Re: Plaintiff's CPA Claim. (CP 5064)

C. Assignment Of Error Relating To Alternative Grant Of New Trial:

Order Granting Farmers' Motion For New Trial and Vacating Judgment On Verdict. (CP 4903-04) (App. B)

D. Conditional Assignments of Error: To preserve the right to challenge erroneous rulings that did not prejudice plaintiff because the jury returned a verdict in her favor, appellant assigns error to:

1. Court's Instructions 7, 8, and 9 (CP 4320-22) and the failure to give Plaintiff's Proposed Instructions 11, 19 or 24. (CP 4026, 4034, 4039)

2. Court's instruction to jury not to consider impairment to credit as evidence of harm to insured. (CP 4327; 8/6 [AM] RP 98, 8/6 [PM] RP 69-70, 8/10 [AM] RP 99-100)

3. Court's denial of plaintiff's motion, and reconsideration, to re-open or allow rebuttal. (8/17 [AM] RP 18-23, 8/12 [PM] RP 81-82)

4. Order Granting Farmers' Motion in Limine No. 10. (CP 3793)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err in granting judgment as a matter of law, vacating the jury's verdict, and reversing another superior court judge's ruling on summary judgment that plaintiff's claim for insurance bad faith was timely because it was brought within three years after entry of judgment against the insured in the underlying tort action?

2. Did the trial court err in granting a new trial on the basis that a single discretionary evidentiary ruling made under ER 403 in the course of a 4-week trial was erroneous, and on the basis of an instruction that accurately stated the insurer's obligation to attempt to settle in good faith, when the insurer did not submit a correct instruction and was able to argue its theory of the case under the instruction given?

3. Did the trial court err in granting judgment as a matter of law on a Consumer Protection Act claim against an insurer on the grounds that the insured's settlement payment of \$600,000 did not establish injury to the insured's "business or property"?

4. Is plaintiff entitled to attorney's fees under the Consumer Protection Act, *Olympic Steamship*, or principles of equity?

5. If a new trial is necessary, should this case be remanded to a new superior court judge who is not bound by the previous trial court's instructions and evidentiary rulings?

IV. STATEMENT OF CASE

A. Farmers Denied A Claim And Closed Its File Without Investigating Its Insured's Liability For The Negligent Non-Delegable Duty To Install Smoke Detectors In Rental Property Where A Fire Caused Catastrophic Burns To Emily Moratti.

On May 1, 2002, 16-month-old Emily Moratti was severely burned over 70% of her body when an unattended candle started a fire in the bedroom of the rental home where Emily lived with her mother and grandfather. Emily's catastrophic injuries could have been prevented had there been a working smoke detector near her bedroom. There was none. William Lipscomb, Emily's landlord, had a non-delegable duty to supply and document properly functioning smoke detectors in the rental home under state and municipal law. (7/29 RP 58-60)

Mr. Lipscomb had property and liability insurance with defendant Farmers Insurance Company. (CP 26-60, 891-901) He made a property claim for the destruction of the rental property the day of the fire. Farmers also opened a bodily injury liability claim file on the day of the fire, based on information that a severely burned infant was in Harborview Medical Center as a result of the fire. (Ex. 59; 7/30 [AM] RP 72-73)

The property claim was assigned to a "large loss" team headed by an experienced property adjuster, Heath Abel. (7/30 [AM] RP 82) Because Mr. Lipscomb's liability insurance limits for this rental unit were

listed as \$100,000, despite the severity of Emily's injuries, the liability claim was randomly assigned to an adjuster in the branch office with eight months experience, Renee Becker. (7/30 [AM] RP 44, 67, 8/3 [AM] RP 28) Farmers assigned claims to its liability "large loss" unit of more experienced adjusters based upon the amount of insurance coverage, rather than the amount of its insured's exposure. (7/30 [AM] RP 68-69, 8/3 [AM] RP 32-33) Ms. Becker's authority to handle claims without a supervisor's approval was limited to \$5,000. (7/30 [AM] RP 61) She had never handled a claim approaching this one in severity. (8/3 [AM] RP 28, 124)

On May 13, 2002, attorney Brad Johnson wrote to Ms. Becker, advising Farmers that he represented Emily and inquiring what Mr. Lipscomb's liability insurance limits were. (Ex. 3) Ms. Becker did not respond to Mr. Johnson's letter in the next two weeks. But Farmers' adjusters had a 30-day "goal" for making liability decisions. (7/30 [AM] RP 149) On May 29, 2002, 29 days after the fire, Ms. Becker wrote Mr. Johnson that she had concluded that Lipscomb was not negligent, and that she was closing the injury claim. (Ex. 7) She also sent Mr. Lipscomb a letter telling him the injury claim file was being closed:

It has come to our attention that the fire department has completed their investigation of the above mentioned loss. They have found no negligence on your part. I am

therefore closing the injury to Emily Woodrow under the liability portion of your policy.

(Ex. 6)

Ms. Becker did not close Emily's claim as the result of any investigation that Farmers had performed. (7/29 [PM] RP 58, 102) She did not visit the scene, took no statements, and did not interview Mr. Lipscomb. (7/30 [AM] RP 97-98) Instead, Ms. Becker had talked to Farmers employee Tim McGrath on the day she closed the claim. (7/30 [AM] RP 85-99) Ms. Becker did not know what Mr. McGrath's job was, and she knew the primary property loss adjuster was Mr. Abel. (7/30 [AM] RP 82) Nevertheless, Farmers' claim log entry for May 29, 2002 reported that Ms. Becker had:

[T]alked to Tim McGrath, in property. He said that the fire dept. completed their investigation, and found that the cause of the fire was the tenant leaving a lit candle in the baby's room. Therefore there is no negligence on the part of our insured. I sent a letter to the claimant's attorney and to the insured stating that I am closing injury claim to Emily Woodrow.

(Ex. 59 at 30)

The sole basis for Ms. Becker's denial and closure of this claim was her conversation with Mr. McGrath. (7/30 [AM] RP 99) In fact, neither Mr. McGrath nor Ms. Becker had seen a Seattle Fire Department report. (7/30 [AM] RP 98, 7/30 [PM] RP 3, 30-31) The Seattle Fire

Department had not completed its investigation, nor had it (or would it) make any determination of Mr. Lipscomb's negligence. (7/29 [PM] RP 128, 7/30 [PM] RP 30)

Farmers' property adjuster had also commissioned a "cause and origin" investigation of the blaze, designed to detect fraud and arson and identify subrogation opportunities. (7/30 [AM] RP 86) Mr. Lipscomb gave Farmers' adjusters an *unsigned* preprinted lease containing the stock smoke detector acknowledgment, which as an experienced landlord he knew was required. (8/5 [PM] RP 40, 45) Mr. Lipscomb told the investigator that he had made arrangements through a workman to have smoke detectors installed. (7/30 [PM] RP 104, 8/5 [PM] RP 42) No one asked him the workman's name. (8/5 [PM] RP 42) No one interviewed the workman. (8/3 [PM] RP 66-67) Farmers' investigation of the fire also had not been completed when Ms. Becker denied Emily's claim and closed the liability claim file on May 29, 2002. (7/30 [PM] RP 34-35, 111)

B. After Failing To Respond To Moratti's Lawyers, Farmers Finally Told Them Not To Submit A Settlement Package Because Its Liability Decision Was Final.

Emily's attorneys continued to pursue her claim, and in particular the likelihood that Mr. Lipscomb was liable because there was no working smoke detector outside Emily's bedroom when she was burned. On July

17, 2002, Jeff Herman, an associate in Mr. Johnson's office, wrote Ms. Becker enclosing a copy of RCW 59.18.060, which requires landlords to provide smoke detectors. (Ex. 11) Mr. Herman asked Ms. Becker for a copy of the mandatory tenant smoke detector acknowledgment required by state law and municipal regulation. (Ex. 11; 8/6 [PM] RP 43-44)

Ms. Becker did not respond to Emily's attorneys. (8/6 [PM] RP 44) Nor did she inform Mr. Lipscomb that Emily's attorneys were still pursuing the claim she had closed months earlier after falsely telling Mr. Lipscomb the Fire Department had found "no negligence" on his part. (8/5 [PM] RP 47, 59-65)

Two weeks later, on August 6, 2002, Mr. Herman wrote to Ms. Becker again. He once again asked for information about Mr. Lipscomb's insurance policy limits. Mr. Herman also told Ms. Becker that he had learned that there was no signed smoke detector notice for the rental property where Emily had been burned. (Ex. 12)

Now, on August 12, 2002, Ms. Becker wrote to Mr. Lipscomb that it was "crucial" she get the signed lease for the property. (Ex. 231) Other than form letters warning him that his "cooperation" was required under Farmers' insurance contract, this is the first time anyone in Farmers' liability claims unit had attempted to contact Mr. Lipscomb. (7/30 [AM] 80; Ex. 4) Mr. Lipscomb once again provided Farmers a copy of the

unsigned lease, which he had earlier given to the property adjuster. (8/5 [PM] RP 51) Ms. Becker once again did not respond to Emily's attorneys.

On August 21, 2002, Mr. Herman wrote Ms. Becker again. (Ex. 13; 8/6 [PM] RP 44) He told Ms. Becker that Emily's medical bills were now \$793,000, and once again requested policy limits information and the required lease and smoke detector notice. Mr. Herman also asked Ms. Becker to produce the documents showing that the Fire Department had found "no negligence" on Mr. Lipscomb's part – the justification for denying the claim cited by Ms. Becker in closing the liability file within a month of the fire. (Ex. 13)

Ms. Becker had ignored three requests for information from Emily's attorneys by summer 2002, neither responding to Mr. Herman nor telling Mr. Lipscomb the magnitude of the exposure he now clearly faced. (8/5 [PM] RP 63) Mr. Herman tried one last time to impress upon Farmers the seriousness of the liability risk faced by its insured Mr. Lipscomb, in a letter faxed to Ms. Becker on October 10, 2002. (Ex. 14) Mr. Herman for a fourth time requested policy limits information, and again asked the basis for Ms. Becker's conclusion that there was "no negligence" on Mr. Lipscomb's part. (Ex. 14; 8/6 [PM] RP 48-49)

After ignoring Mr. Herman's previous three letters for weeks, Ms. Becker responded to this letter the same day with an admission harmful to

Farmers' insured. She admitted to Mr. Herman that there was no signed smoke detector notice as required by RCW 59.18.060, but insisted that "we do not believe that violation creates negligence for this loss." (Ex. 15)

Ms. Becker did not communicate with Mr. Lipscomb about this exchange. (8/5 [PM] RP 65) By this time, Ms. Becker also knew that Farmers' investigator had possession of a single smoke detector, found without batteries by the Fire Department in the kitchen of the rental house, far from Emily's bedroom. (7/30 [AM] RP 120-21, 7/30 [PM] RP 94-95) Farmers' investigator had received the smoke detector from the Seattle Police Department the day after Ms. Becker falsely told Mr. Lipscomb that she was denying Emily's claim because the Fire Department had concluded that he had "no negligence." (7/30 [PM] RP 91; Exs. 6, 87)

Emily's lawyers had obtained an asset investigation of Mr. Lipscomb. They knew his properties were heavily encumbered and that he was subject to significant federal tax liens. (8/6 [PM] RP 55-56) They would have settled the claim at this juncture on payment of available policy proceeds and an additional \$100,000 from Mr. Lipscomb personally, if settlement could be reached quickly. (8/6 [PM] RP 57-58, 60, 68-69, 82, 8/10 [AM] RP 74-75, 8/10 [PM] RP 58-59, 99) Retired Superior Court Commissioner Stephen Gaddis testified he would have

approved such a settlement for Emily if it could have been reached in October 2002. (8/11 [AM] RP 56)

In the next two weeks, Mr. Herman drafted a 400-page settlement package to send to Farmers. (8/6 [PM] RP 61; Ex. 16) Mr. Herman called Ms. Becker on October 24, 2002, to ask if he should send the settlement package, in the hopes it might “change your mind.” Ms. Becker told Mr. Herman not to bother, claiming that Farmers had “made our liability decision,” and that the “liability decision is final.” (Ex. 16; 7/30 [AM] RP 125, 8/6 [PM] RP 62-64)

There is no record that Ms. Becker ever consulted with her superiors at Farmers before denying Emily’s claim. Neither Ms. Becker nor anyone else at Farmers did any additional investigation before finally denying Emily’s claim in October 2002. Neither Ms. Becker nor anyone else at Farmers advised Mr. Lipscomb that she had rejected Emily’s attorneys’ efforts to explore settlement. Neither Ms. Becker nor anyone else at Farmers advised Mr. Lipscomb of the enormous exposure to Emily’s claim he now faced. (8/5 [PM] RP 65-66, 8/11 [PM] RP 68)

C. Farmers Only Investigated Its Insured's Liability After Moratti Was Forced To Sue Its Insured, And Quickly Recognized Its Insured's Significant Exposure To Personal Liability.

Following Farmers' "final" rejection of their settlement overtures, Emily's attorneys were no longer willing to settle for \$100,000 plus liability limits. (7/29 [PM] RP 74, 8/6 [PM] RP 65) A complaint was filed on Emily's behalf against Mr. Lipscomb on July 25, 2003. (8/6 [PM] RP 70) Ms. Becker transmitted the reopened claim to her superiors in September 2003 with a note confirming that no settlement offer had been made because Farmers had "denied liab[ility] since the loss." (Ex. 18)

Once suit was commenced, Farmers reassigned Emily's liability claim to Kyle Burns, an experienced adjuster in the large loss unit. (8/5 [AM] RP 12-14) Mr. Burns met with Mr. Lipscomb and defense counsel Pauline Smetka in February 2004. (8/3 [PM] RP 91) He for the first time asked Mr. Lipscomb who he had directed to install smoke detectors. Mr. Lipscomb told him the worker was named J.R. Iribarren. (8/3 [PM] RP 66-67, 8/5 [AM] RP 42-43)

Mr. Burns after this single meeting decided to offer Farmers' policy limits. (8/3 [PM] RP 64-65, 8/5 [AM] RP 45) Mr. Burns thought Mr. Lipscomb would be a poor witness, and that it was likely he would be found liable for Emily's injuries. (8/5 [AM] RP 46-47) Mr. Burns, unlike

Ms. Becker, understood that because Emily was too young to be negligent, Mr. Lipscomb would be jointly and severably liable for Emily's catastrophic injuries, regardless of her mother's potential liability for leaving the candle unattended in her room, or the workman's failure to install a smoke detector. (8/5 [AM] RP 36-37, 45-46) On March 15, 2004, Mr. Burns sent Mr. Lipscomb an "excess letter," for the first time advising him to obtain his own counsel because Emily's claim might have a value exceeding his policy limits. (Ex. 25)

On April 19, 2004, Farmers for the first time disclosed policy limits to Emily's attorneys, and offered \$100,000 to settle the case. (Ex. 30) This offer, made over two years after Emily was burned and after plaintiff had incurred extensive costs, was rejected. (8/6 [PM] RP 74-75)

Defense counsel finally spoke to Mr. Lipscomb's worker, J.R. Iribarren, in June, 2005. (8/3 [PM] RP 69) Mr. Iribarren denied ever doing any work in the rental house, and specifically denied ever putting in any smoke detectors. He told defense counsel, "you don't want me on the stand. I'll bury you." (8/3 [PM] RP 70-71)

D. The Trial Court Set Aside The Jury's Finding That Farmers Was Liable For Its Bad Faith Breach Of The Duty To Investigate And Settle.

Mr. Lipscomb retained private counsel. On January 27, 2007, Mr. Lipscomb agreed to a settlement providing for a \$17,000,000 judgment in

Emily's favor with a covenant not to execute, agreed to pay \$600,000 of his personal funds, and assigned to Emily his bad faith and CPA claims against Farmers. (CP 62-74; 8/5 [PM] RP 115) Farmers was notified of, intervened, and attended the reasonableness hearing approving the stipulated judgment and settlement in November 2007. (CP 80-84, 797-99) Farmers did not contest the reasonableness of the judgment, nor the trial court's findings that the judgment was reasonable and not the product of fraud or collusion. (CP 82)

This action was commenced two months later, on January 18, 2008, alleging Farmers' bad faith and violation of the Consumer Protection Act. (CP 4) It was initially assigned to King County Superior Judge Gregory Canova, who had decided the reasonableness of the stipulated judgment and settlement in Emily's tort action. (CP 80-88) On summary judgment, Judge Canova dismissed Farmers' defenses that this action was precluded because Mr. Lipscomb had unsuccessfully sued his Farmers insurance broker for not recommending higher insurance limits (the "*Dye*" litigation) and that the statute of limitations had begun to run before the stipulated judgment was entered. (CP 3477-78) (App. C). Judge Canova also ruled that if Farmers was found by the jury to have acted in bad faith, the presumptive measure of damages was the amount of

the judgment found to be reasonable in the underlying tort action. (CP 3485)

The case was brokered to Judge Jay White for trial July 22-August 20, 2009. (CP 4368-69) After dismissing the CPA claim on the grounds that Mr. Lipscomb had not shown injury to his business or property (8/17 [AM] RP 61), the bad faith claim was submitted to the jury. The jury returned its verdict for plaintiff on August 20, 2009, finding that Farmers had acted in bad faith and caused harm to Mr. Lipscomb. (CP 4372) (App. D) The trial court entered judgment against Farmers on October 2, 2009. (CP 4610-13) (App. E)

Both parties made post-trial motions. (CP 4353, 4423, 4542) The trial court granted Farmers' motions for judgment as a matter of law, finding (directly contrary to Judge Canova's summary judgment ruling) that the statute of limitations barred the bad faith claim. (CP 4901-02) (App. A) In the alternative, the trial court granted Farmers a new trial based on his reassessment of the correctness of his jury instructions and evidentiary rulings during trial. (CP 4903) (App. B) The trial court initially recognized its error in concluding that Mr. Lipscomb's payment of \$600,000 in settlement of the underlying tort claim was not evidence of injury to business or property and granted plaintiff a new trial as well on the CPA claim. (CP 5023-24) But on Farmers' motion for

reconsideration, the trial court reversed himself and reinstated his earlier judgment as a matter of law under CR 50. (CP 5064-65)

Plaintiff appeals.

V. ARGUMENT

A. **The Trial Court Erred In Granting Judgment As A Matter of Law And Vacating The Jury's Verdict On A Bad Faith Claim Filed Less Than Three Years After Entry Of Judgment Against Farmers' Insured.**

The trial court erred in vacating the jury's verdict and dismissing the insurance bad faith claim under CR 50 as barred by the statute of limitations on the grounds that Mr. Lipscomb's bad faith claim accrued when Farmers tendered policy limits. (CP 4901) Because another superior court judge had dismissed Farmers' statute of limitations defense on summary judgment before trial, any factual issues regarding accrual of the bad faith claim were never tried to the jury. (CP 3478) The trial court's post-trial grant of judgment for Farmers also was erroneous as a matter of law because a claim for insurance bad faith accrues when an adverse judgment is entered against the insured, and plaintiff filed her bad faith claim as the assignee of Farmers' insured on January 18, 2008, only two months after entry of judgment in the underlying personal injury action. (CP 4, 86) The trial court's order granting judgment as a matter of law thus is both procedurally flawed and substantively erroneous.

1. The Trial Court Could Not Enter Judgment As A Matter of Law On The Basis Of A Defense That Was Never An Issue At Trial Because It Was Eliminated On Summary Judgment.

The court's authority to grant judgment as a matter of law is limited to cases in which "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis" for the jury to decide the issue. CR 50(a)(1). As Farmers' statute of limitations defense was dismissed on summary judgment, the issue was not decided by the jury, nor was plaintiff "fully heard" with respect to the statute of limitations. The trial court could not grant judgment as a matter of law under CR 50 on this issue that was never tried. *Browne v. Cassidy*, 46 Wn. App. 267, 269-70, 728 P.2d 1388 (1986). Neither could it overturn another superior court's prior summary judgment ruling without establishing new facts or circumstances and explaining why they were not previously presented. KCLCR 7(b)(7) and KCLCR 56(c)(5).

In entering judgment as a matter of law, the trial court necessarily resolved the factual issue when Mr. Lipscomb knew or should have known all essential elements of his claim for bad faith. (CP 4901) Issues concerning what Mr. Lipscomb knew or should have known must be determined by the trier of fact on the basis of evidence at trial, not on the basis of legal argument concerning a factual issue that was removed from

the jury's consideration two months before trial. *See August v. U.S. Bancorp*, 146 Wn. App. 328, 343 ¶ 42, 346 ¶ 56, 190 P.3d 86 (2008) (reversing summary judgment under Securities Act statute of limitations; unsophisticated plaintiff's inquiry notice that his investments were mishandled was disputed issue of fact), *rev. denied*, 165 Wn.2d 1034 (2009); *Mayer v. City of Seattle*, 102 Wn. App. 66, 76-78, 10 P.3d 408 (2000) (whether defendant put plaintiff on notice to inquire as to toxicity of fill material was disputed issue of fact), *rev. denied*, 142 Wn.2d 1029 (2001). This court should reverse the trial court's judgment as a matter of law and reinstate the jury's verdict.

2. The Statute Of Limitations On A Tort Claim For Breach Of The Duty To Investigate And Settle Accrues When Judgment Is Entered Against The Insured.

The trial court's decision to vacate the jury's verdict and dismiss the bad faith claim as a matter of law was legally as well as procedurally erroneous. The 3-year statute of limitations for breach of an insurer's duty of good faith does not begin to run until a judgment is entered against the insured in favor of a third party because, regardless whether the insured knew, or should have known, that the insurer has acted improperly, an insured does not suffer damages until a judgment is entered in favor of the plaintiff on the underlying claim. The trial court's contrary holding here (*see* 10/26 RP 44) was legal error.

Washington follows the general rule that a cause of action for breach of the duty of good faith “does not accrue until third-party litigation involving the insured has ended in a final judgment.” *Bush v. Safeco Ins. Co.*, 23 Wn. App. 327, 329, 596 P.2d 1357 (1979). This rule is consistent with the established principle that a cause of action in tort does not accrue until the plaintiff suffers damages, because “the mere danger of future harm, unaccompanied by a present damage, will not support a negligence action.” *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975) (negligence claim against insurance agent for wrongful cancellation of policy accrues when insurer refuses to indemnify plaintiff for loss). See also *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000) (contract claim for wrongful denial of first party coverage accrues when insurer rejects claim).

In *Bush*, this court held that a cause of action for breach of either the duty to defend or to indemnify “accrues for purposes of the statute of limitation when the final judgment is entered.” 23 Wn. App. at 330. Accord, *Castle & Cooke, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 512, 711 P.2d 1108, *rev. denied*, 105 Wn.2d 1021 (1986) (“the statute of limitations in a duty to defend case commences to run from the time a final judgment is rendered in the underlying lawsuit.”); *Fischer v. State Farm Fire and Casualty Co.*, 2006 WL 1148511 (W.D. Wash. 2006),

aff'd in part, rev'd in part on other grounds, 272 Fed.Appx. 608 (9th Cir. 2008). The **Bush** court followed the rule adopted by “[m]ost courts which have considered the issue of when the statute of limitations begins to run on an action against an insurance company. . . .” 23 Wn. App. at 329. “Those jurisdictions that have addressed the issue have held that an insured’s claim for its insurer’s bad faith refusal to settle accrues when the excess judgment in the underlying case become final.” **Taylor v. State Farm Mutual Automobile Ins. Co.**, 185 Ariz. 174, 913 P.2d 1092, 1095-96 (1996).¹ *Accord*, 44A *Am Jur.2d Insurance* § 1913 & n. 17 (2001).

¹ In addition to the 19 cases, including **Bush v. Safeco Ins. Co.**, 23 Wn. App. 327, 596 P.2d 1357 (1979), cited by the Arizona Court in **Taylor v. State Farm Mutual Automobile Ins. Co.**, 185 Ariz. 174, 913 P.2d 1092, 1096 n. 5 (1996), the following jurisdictions also follow the rule that a bad faith action does not accrue until the excess judgment in the underlying case becomes final: **Carpenter v. Automobile Club Interinsurance Exchange**, 58 F.3d 1296, 1300-01 (8th Cir. 1995) (breach of duty to settle under Arkansas law); **Vanderloop v. Progressive Cas. Ins. Co.**, 769 F.Supp. 1172, 1175 (D. Colo.1991) (breach of duty to settle under Colorado law); **Richards v. State Farm Mut. Auto. Ins. Co.**, 252 Ga. App. 45, 555 S.E.2d 506, 508 (2001) (entry of judgment against insured required before bad faith claim accrues); **Sandbulte v. Farm Bureau Mut. Ins. Co.**, 343 N.W.2d 457, 462-63 (Iowa 1984) (action for violation of duty to defend accrues on date judgment is entered); **Nungesser v. Bryant**, 283 Kan. 550, 153 P.3d 1277, 1285 (2007) (action against insurer cannot be brought until conclusion of underlying tort action); **Mathies v. Blanchard**, 959 So.2d 986, 988-89 (La. Ct. App. 2007) (same); **Allstate Ins. Co. v. Campbell**, 334 Md. 381, 639 A.2d 652, 659 (1994) (same); **Hovet v. Allstate Ins. Co.**, 135 N.M. 397, 89 P.3d 69, 76-77 (2004) (same); **Crabb v. National Indem. Co.**, 87 S.D. 222, 205 N.W.2d 633, 638 (1973) (breach of duty to settle accrues upon entry of excess judgment); **Jarvis v. Farmers Ins. Exchange**, 948 P.2d 898, 901-02 (Wyo. 1997) (action for failure to settle does not accrue until entry of excess judgment against insured). *See also* McCarthy, *Recovery of Damages for Bad Faith*, §2.53 (5th Ed. 1990 & 2010 Supp.).

The trial court's reasoning that the bad faith claim accrued three years *before* entry of judgment on the underlying tort claim, when Farmers tendered its policy limits into the court registry, makes for poor public policy, and should be rejected as a matter of law. The trial court's order requires an insured to sue before liability has been adjudicated, while the insurer is still providing a defense, and while the insurer could still negate its insured's liability by settling the case, obtaining a favorable jury verdict, or paying an amount in excess of policy limits on its insured's behalf. Such a rule would force an insured to sue in derogation of a policy's "no action" clause, which in this case prevented Mr. Lipscomb from suing Farmers until his obligation to pay had been "determined by final judgment or agreement . . ." (CP 44) By requiring an insured to sue his or her insurer before suffering any harm, the trial court's ruling encourages premature and unnecessary litigation before liability is established against the insured on the underlying claim and undermines the insured's contractual duty of cooperation.

B. The Trial Court Erred In Granting Farmers' Alternative Motion For A New Trial On The Basis Of A Discretionary Evidentiary Ruling And An Instruction That Accurately Stated An Insurer's Obligation Of Good Faith.

This court should also reverse the trial court's order granting a new trial and vacating the jury verdict, entered as an alternative to its order

granting Farmers' motion for judgment as a matter of law pursuant to CR 50(c) and CR 59(a). (CP 4903-04) (App. B) The trial court concluded that it had erred in instructing the jury that the duty of good faith requires an insurer to timely evaluate any settlement offers and communicate them to its insured, and in excluding under ER 403 evidence that Mr. Lipscomb had unsuccessfully sued his broker and Farmers for malpractice in procuring liability insurance with limits of only \$100,000. (CP 4903-04; 10/26 RP 45-47; *see* CP 4324-25 (Inst. 11 (App. F)), 4374-75 (Farmers' motion for new trial)) This court gives no deference to the trial court's order granting a new trial where, as here, it "is predicated upon rulings as to the law, such as those involving the admissibility of evidence or the correctness of an instruction . . .". *Johnson v. Howard*, 45 Wn.2d 433, 436, 275 P.2d 736 (1954); *Schneider v. City of Seattle*, 24 Wn. App. 251, 255, 600 P.2d 666 (1979), *rev. denied*, 93 Wn.2d 1010 (1980) (both reversing orders granting new trial and reinstating verdict). The trial court's original rulings were not grounds to set aside the jury's verdict after a four-week trial.

1. The Trial Court Properly Instructed The Jury That The Duty Of Good Faith Requires An Insurer To Conduct Settlement Negotiations, Evaluate Settlement, And Communicate Offers To Its Insured.

The trial court erred in holding that it committed an error of law in giving Instruction No. 11 (CP 4324-25) (App. F), defining an insurer's duty of good faith. (CP 4903-04) (App. B) An order granting a new trial based on alleged instructional error is reviewed de novo under CR 59(a)(8) as a question of law. See *Smith v. Rich*, 47 Wn.2d 178, 182, 286 P.2d 1034 (1955); *Miller v. Yates*, 67 Wn. App. 120, 125, 834 P.2d 36 (1992). The instruction must not only be erroneous as a matter of law, but it must "be prejudicial to the rights of the defeated party." *Miller*, 67 Wn. App. at 125, citing CR 59(a)(8); 14 L. Orland & K. Tegland, *Wash. Prac., Trial Practice* § 333 (4th ed. 1986). Farmers established neither legal error nor prejudice in the instant case.

a. Instruction 11 Accurately Stated The Law, And Was Supported By Substantial Evidence That Farmers Breached The Duty To Settle.

In addition to describing the insurer's duty of reasonable investigation, Instruction No. 11 told the jury that an insurer has a duty to conduct settlement negotiations in good faith, and to timely evaluate and communicate settlement offers to its insured:

The duty of good faith requires an insurer to:

- (1) Perform a reasonable investigation and evaluation of a claim against its insured;
- (2) If its investigation discloses a reasonable likelihood that its insured may be liable, make a good faith effort to settle the claim. This includes an obligation at least to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand;
- (3) Evaluate settlement offers as though it bore the entire risk of any judgment in excess of the policy limits;
- (4) Timely communicate its investigations and evaluations, and any settlement offers, to its insured; and
- (5) If the settlement demand exceeds the insurer's policy limits, communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and exercise good faith in deciding whether to pay its own limits.

An insurer who fails to fulfill any of these duties fails to act in good faith.

(CP 4324-25)

Instruction No. 11 mirrored WPI 320.05, which “is based on the principles set forth in *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn. App. 527, 887 P.2d 455 (1995).” Comment WPI 320.05, *Wash. Supreme Court Comm. on Jury Instructions*, 6A Wash. Prac. at 294 (5th Ed. 2005). The instruction should be used “when an insured claims the insurer fails to use good faith efforts to explore settlement or settle within policy limits in a case in which the insured was exposed to an excess verdict.” Note on Use, WPI 320.05, 6A Wash. Prac. at 293. This was precisely plaintiff’s

theory in the instant case. *See Meredith v. Hanson*, 40 Wn. App. 170, 174, 697 P.2d 602 (1985) (“Each party is entitled to have the trial court instruct on its theory of the case.”)

The *Truck* case upon which WPI 320.05 is based imposed liability for breach of the duty of good faith where the insurer failed to attempt to settle a lawsuit that exposed its insured to personal liability. The primary insurer could have settled the case for \$500,000 but did not tender its limits until after its insured had been found liable for \$2.8 million at trial. The excess insurer then negotiated a \$2.1 million settlement and sued the primary insurer for bad faith. The court reversed a summary judgment in favor of the primary insurer, which could be liable for bad faith if it had failed to make a good faith effort to settle the case:

There is evidence [defense counsel] advised Truck of the likelihood of a substantial damages award against WEC, although there is evidence he questioned whether WEC would be found liable. There is evidence Mr. Fox’s attorneys would have considered an offer of less than \$1 million, and Century would have been willing to make the necessary contribution to the settlement amount. Thus, a trier of fact could find Truck breached its duty to make a good faith effort to settle the case.

Truck Ins. Exch., 76 Wn. App. at 534.

The trial court erroneously held that Instruction No. 11 was an error of law justifying a new trial on the grounds that there was “insufficient evidence for a reasonable jury to find a settlement ‘demand’

or ‘offer’ was ever made,”² and that the instruction was “inadequate and confusing because it used the terms ‘settlement offer’ and ‘settlement demand’ without definition or distinction.” (CP 4903) The trial court’s reasoning cannot support the order granting a new trial because each subsection of Instruction No. 11 was supported by the evidence presented to the jury.

There was ample, if not overwhelming, evidence that Farmers had failed to “perform a reasonable investigation and evaluation” of Emily’s claim against its insured. This is the first duty of an insurer, as the jury was told in subsection (1) of Instruction No. 11. Farmers’ “obligation at least to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available” under subsection (2) was also supported by overwhelming evidence that Farmers failed to conduct any settlement negotiations whatsoever, and affirmatively rejected plaintiff’s attempt to negotiate. Indeed, Farmers conceded that subsections (1) and (2) of Instructions No. 11 were “correct statements of the law and there are facts to support those” parts of the instruction. (10/16 RP 57)

Under subsection (3), an insurer must “evaluate settlement offers.” Farmers refused to do so, telling Emily’s lawyers not to bother sending

² The trial court struck from its new trial order Farmers’ proposed language stating that there was “no” evidence to support the instruction, interlineating its finding of “insufficient” evidence. (CP 4903) (emphasis added).

Farmers the detailed settlement package they had already prepared because its “liability decision was final” and would not be reconsidered. (Ex. 16; 7/30 [AM] RP 125, 8/6 [PM] RP 64-65) Under subsection (4), an insurer also must “timely communicate its investigations and evaluations, and any settlement offers.” Farmers kept the reasons (if any) for its conclusion that Mr. Lipscomb faced “no liability” to itself, and did not disclose that it had told Emily’s lawyers that it would not consider a settlement offer. (8/11 [PM] RP 68)

Finally, under subsection (5), “if the settlement demand exceeds the insurer’s policy limits,” an insurer must both communicate the offer to its insured, and “ascertain whether the insured is willing to make the necessary contribution.” Here, Farmers knew that Emily’s damages exceeded Mr. Lipscomb’s limits, knew that her lawyer had prepared a settlement demand, and deprived Mr. Lipscomb of the opportunity to achieve a settlement for a \$100,000 personal contribution that would have eliminated any further exposure. When Emily filed a lawsuit in 2003, Farmers’ adjuster acknowledged that there had been no settlement discussions because “we have denied liab[ility] since the loss.” (Ex. 18; 7/30 [AM] RP 126-27)

The trial court’s order would wrongly limit this bad faith claim to a breach of the duty to investigate, and would preclude plaintiff from

arguing her theory that Farmers also “breached its duty to make a good faith effort to settle the case.” *Truck Ins. Exch.*, 76 Wn. App. at 534. Instruction No. 11 accurately instructed the jury that an insurer has a duty to make a good faith effort to settle the case, and allowed each side to argue its theory of the case. See *Bruchfiel v. Boeing Co.*, 149 Wn. App. 468, 491 ¶ 54, 205 P.3d 145 (reinstating judgment on jury’s verdict and reversing judgment notwithstanding verdict; trial court’s instructions had accurately stated law), *rev. denied*, 166 Wn.2d 1038 (2009).

b. Farmers Failed To Propose Accurate Instructions.

Farmers did not itself propose instructions that accurately stated the law governing its good faith obligations, but instead proposed as instructions argumentative assertions why its investigation and refusal to conduct settlement negotiations were *not* a breach of the duty of good faith. (e.g., CP 3883-84, 3896-97, 3901-02, 3913. See 8/13 [AM] RP 17, 8/17 [AM] RP 124-39) For this reason alone Farmers cannot complain of the instructions the trial court gave. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 75, 877 P.2d 703 (1994) (“If a party is dissatisfied with an instruction, it is that party’s duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure.”), *aff’d*, 127 Wn.2d 401, 899 P.2d 1265 (1995).

c. Farmers Was Not Prejudiced.

Moreover, Farmers was not prejudiced by Instruction No. 11. First, the trial court had no obligation to define in its instructions the terms “settlement offers” or “settlement demands,” which have a common and well known meaning. Its initial refusal to do so is reviewed for abuse of discretion. *Goodman*, 75 Wn. App. at 76 (definition of “continuing violation” is “fairly self-evident” and did not require definition); *City of Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 217, 505 P.2d 168 (terms “floating home” and “floating home moorage” are “commonly understood words [that] require no definition”), *rev. denied*, 82 Wn.2d 1003 (1973). Farmers did not in fact initially propose any definition of these terms. Only *after* the jury began its deliberations, and in response to a jury question regarding the terms “settlement offer” and “settlement demand” and “who is it coming from,” (CP 4444), did Farmers propose to instruct the jury that the term refers to “settlement demand or offer of settlement made by Emily Moratti, or her attorneys, to Farmers in the underlying injury case.” (CP 4438)

The trial court did not manifestly abuse its discretion in refusing Farmers’ belated instruction, and in referring the jury to the instructions already given. (CP 4445) *See Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 93-94, 896 P.2d 682 (1995). Farmers erroneously relied on the

jury's question in arguing that the court's instruction was confusing (CP 4378; 10/16 RP 57). Its argument "overlooks the frequency with which juries ask for clarifying instructions, and the frequency with which trial courts tell them to rely on the instructions already given." *Stark v. Celotex Corp.*, 58 Wn. App. 940, 943, 795 P.2d 1165, *rev. denied*, 115 Wn.2d 1020 (1990).

Second, any error in instructing the jury on Farmers' duty relating to settlement "offers" and "demands" is harmless because Instruction No. 11 correctly stated the law, and Farmers was free to argue its theory that its duty to communicate and evaluate settlement offers never arose in the absence of a firm offer from Emily's lawyers. *See Christansen v. Puget Sound Nav. Co.*, 138 Wash. 239, 244-45, 244 Pac. 569 (1926) (where first part of instruction "was manifestly proper and appropriate," latter portion of instruction stating that employer could not delegate its duty to provide a safe work place, though "an unnecessary statement of the law" because there was no evidence of delegation, was harmless); *accord, Kelley v. Great Northern Ry. Co.*, 59 Wn.2d 894, 904-05, 371 P.2d 528 (1962). Here, Farmers argued its defense theory that its duty did not arise because "[p]laintiff never made a settlement demand," (8/17 [PM] RP 68), and because "[y]ou can't evaluate a settlement offer that doesn't get made. The plaintiff didn't make an offer to evaluate." (8/17 [PM] RP 83) *See*

also 8/17 [PM] RP 84 (“these alleged bad faith allegations rest on some type of settlement negotiations or offers or demands that didn’t get made.”) Instruction No. 11 neither prevented Farmers from arguing its theory nor misled the jury.

Third, Farmers cannot establish prejudice given the overwhelming evidence and Farmers’ concession that there was evidence to support a verdict that it had breached its duties to perform a reasonable investigation and evaluation of Emily’s claim and to make a good faith effort to settle the claim under paragraphs (1) and (2) of Instruction No. 11. (10/16 RP 57) Where, as here, there is sufficient evidence to support liability on one or more alternative grounds (*see* Arg. § B.2.a, *supra*), the jury’s verdict must stand because the reviewing court cannot know upon which ground the jury based its decision. *See Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 173, 914 P.2d 102 (1996), 932 P.2d 1266 (1997) (where verdict form did not require jury to specify which sections of employee handbook contained enforceable promises of employer, “if we find substantial evidence of a breach of any promise of specific conduct, the verdict will be sustained”); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 10-11, 882 P.2d 157 (1994) (affirming verdict based on two alternative theories where appellant conceded that one of the theories was properly before the jury). *See also Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22,

36, 935 P.2d 684 (1997) (where "jury rendered a single monetary verdict on both the strict liability product-warning claim and the negligent failure-to-warn claim," instructional error on "negligent failure to warn claim would not affect the judgment.").

Here, Farmers' proposed special verdict asked the jury whether "Farmers' conduct in the handling of Mr. William Lipscomb's claim generally . . . was unreasonable, frivolous, or unfounded." (CP 3603) Particularly where Farmers failed to propose a special verdict that would have allowed the jury to specify *how* Farmers breached its duty of good faith, it would be unfair to place upon plaintiff the burden of establishing that there was substantial evidence to support the jury's verdict on each and every alternative ground. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (general verdict for plaintiff in a multitheory case is subject to retrial if one of the theories is later invalidated only if defendant proposed a clarifying special verdict form). In light of its proposed verdict form, Farmers' concession that subsections (1) and (2) of Instruction No. 11 were supported by the law and the evidence (10/16 RP 57) bars its challenge to the Instruction.

The trial court's instructions regarding Farmers' breach of the duty of good faith, which were taken directly from WPI 320.05, accurately stated the law, were not confusing or misleading, allowed both sides to

argue their theories of the case, and were supported by substantial evidence that Farmers breached its duty to act in good faith. Further, even if each alternative ground of Instruction No. 11 was not supported by substantial evidence, Farmers did not propose instructions that accurately set out its duties, and the trial court's conclusion that Farmers was prejudiced is erroneous. This court should reinstate the judgment on the jury's verdict.

2. The Trial Court Properly Excluded Evidence That Lipscomb Had Unsuccessfully Sued His Broker For Malpractice After Repeatedly Balancing Its Probative Value Against The Potential To Confuse And Mislead The Jury Under ER 403.

The trial court also erred in setting aside the judgment on the jury's verdict and ordering a new trial based on its exclusion of evidence that Mr. Lipscomb had previously sued Farmers for his broker's professional negligence in procuring a single policy with liability limits of \$100,000 ("the *Dye* litigation"). This discretionary evidentiary decision, reached after the trial court repeatedly balanced the marginal relevance of the testimony against its potential to confuse the jury, was not an error of law that justified later overturning the jury's verdict after a four-week trial.

The trial court has no discretion to order a new trial on the basis of the exclusion of evidence under CR 59(a). CR 59(a) limits the trial court's power by enumerating nine discrete bases upon which the trial court may

order a new trial. The improper admission or exclusion of evidence is not one of those grounds. Instead, the trial court may order a new trial for “irregularity in the proceedings of the court . . . or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial,” CR 59(a)(1), and for an “error in law occurring at the trial and objected to at the time by the party making the application.” CR 59(a)(8). Where, as here, “the order granting the new trial is based upon a ruling as to the admissibility of evidence, no element of discretion is involved.” *Coleman v. Dennis*, 1 Wn. App. 299, 301, 461 P.2d 552, *rev. denied*, 77 Wn.2d 962 (1970), *citing Lyster v. Metzger*, 68 Wn.2d 216, 226, 412 P.2d 340 (1966).

In *Coleman*, the trial court set aside a jury’s verdict in favor of the plaintiff and ordered a new trial of his action for alienation of affection on the grounds that it had wrongfully excluded evidence of plaintiff’s previous adulterous conduct. This court reversed because whether the evidence was admissible in the first instance was a matter committed to the trial court’s discretion during trial, and not a question of law. Because the trial court’s original ruling excluding the evidence under ER 403 was within the range of acceptable choices, it could not be the basis for setting aside the jury’s verdict after trial. *Coleman*, 1 Wn. App. at 302.

Evidence of a judgment in a prior lawsuit poses obvious dangers of unfair prejudice under ER 403. See *Faigin v. Kelly*, 184 F.3d 67, 80 (1st Cir. 1999) (“courts, recognizing the attendant danger of jury confusion and unfair prejudice, frequently have approved the exclusion of judicial findings, convictions, and similar evidence on Rule 403 grounds.”); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir.1987) (Posner, J.) (“A practical reason for denying [judgments] evidentiary effect is . . . the difficulty of weighing a judgment, considered as evidence, against whatever contrary evidence a party to the current suit might want to present. The difficulty must be especially great for a jury, which is apt to give exaggerated weight to a judgment.”), *cert. denied*, 484 U.S. 1043 (1988). Telling the jury that Mr. Lipscomb had unsuccessfully sued Farmers and his broker in 2005 would have then required plaintiff to explain the basis of the lawsuit, the reason it was dismissed, and necessitated cautionary instructions explaining how the judgment in that case could not be considered as evidence that Farmers acted in good faith in the instant lawsuit.

The *Dye* lawsuit, which was filed in 2005, dismissed in 2006 and affirmed on appeal in 2007, had no relevance to the critical issue whether Farmers had acted in bad faith by depriving Mr. Lipscomb of the opportunity to settle the underlying tort claim in 2002. Moreover, it had

only marginal relevance to Farmers' contention that Mr. Lipscomb delayed from 2002 to 2007 in reaching a settlement that was determined to be fair and reasonable and not the product of collusion or fraud only because he sued his insurance agent in 2005. The trial court fairly considered over several days Farmers' various arguments for admissibility, including its contention that the *Dye* lawsuit was relevant to the issue of causation, ultimately deciding that its potential to "confuse or mislead the jury" (7/27 [PM] RP 9) outweighed its relevance.

The trial court carefully weighed the relevance and potential for prejudice during trial, concluding that "in any event, whether it's in or out, the jury will hear, and you'll be able to argue your theory, that he just wouldn't settle." (7/27 [AM] RP 13-15; CP 3776; *see also* 8/10 [AM] RP 24 (denying reconsideration of ER 403 ruling) Its initial ruling that Farmers was not precluded from arguing its theory that Mr. Lipscomb "just wouldn't settle," was borne out at trial. (*E.g.*, 8/10 [PM] RP 24-42 (Lipscomb cross-examination), 8/17 [PM] RP 68-70 (closing argument)) The trial court's decision to exclude this evidence after considering its potential to distract the jury was not an error of law that provided a basis for overturning the jury's verdict under CR 59(a)(8).

Moreover, Farmers' failure to make a specific offer of proof regarding what aspects of the *Dye* litigation it sought to introduce

precludes its post-trial challenge to the trial court's careful balancing during trial of relevance against the prejudicial impact of evidence of other litigation between the parties. ER 103(a)(2). An offer of proof "informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility" in the first instance. *Estate of Bordon v. Dept. of Corrections*, 122 Wn. App. 227, 246, 95 P.3d 764 (2004), *rev. denied*, 154 Wn.2d 1003 (2005), *quoting Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921 (1993). Here, Farmers never stated exactly what specific evidence it sought to introduce.

The trial court originally ruled that Farmers could ask Mr. Lipscomb whether he "brought a lawsuit against his insurance agent." (7/22 [PM] RP 45-46) After Farmers sought to offer evidence that Mr. Lipscomb previously "sued Farmers," the trial court expressed concern that it would have to explain to the jury in specific instructions "what this *Dye* case was actually about." (7/23 RP [PM] 101, 105) During trial, Farmers argued that Mr. Lipscomb "opened the door," by testifying about hiring (and paying) personal counsel, and argued generally that "the *Dye* action is a significant and relevant part of what happened here." (8/5 [PM] RP 93-94, 102) Farmers sought to ask Mr. Lipscomb whether instead of settling the underlying lawsuit, he "in fact, . . . sue[d] Farmers and [his] agent," (8/6 [AM] RP 46), without addressing the trial court's previously

expressed concerns that “any probative value is substantially outweighed by the danger of unfair prejudice or confusing or misleading the jury,” which the court reiterated when it decided to adhere to its original ruling. (8/10 [AM] RP 24)

While the trial court could have reached a different conclusion, its evidentiary ruling during trial was not an abuse of discretion. The trial court then erred in overturning the jury’s verdict on the basis of its evidentiary decision under ER 403.

C. The Trial Court Erred In Granting Judgment As A Matter Of Law On The CPA Claim Against Farmers.

The trial court erroneously refused to allow the claim for unfair or deceptive acts under Washington’s Consumer Protection Act to go to the jury by granting judgment as a matter of law at the conclusion of the evidence under CR 50. (8/17 [AM] RP 61) The jury’s finding of bad faith establishes a violation of the CPA as a matter of law. This court should direct entry of judgment against Farmers under RCW 19.86.090, or, at a minimum, remand for a trial on the CPA claim. (*See* CP 5023-24, 5064)

The trial court granted Farmers’ CR 50 motion, erroneously holding that Mr. Lipscomb’s payment of \$600,000 to settle the bad faith claim, which was financed by encumbering his real estate investments, did not establish injury to his “business or property” under RCW 19.86.090.

(8/17 [AM] RP 46, 61) After the jury’s verdict, the trial court then granted plaintiff’s motion for a new trial, recognizing that its reasoning had been erroneous as a matter of law because, as Farmers conceded, “money is property” (10/26 RP 16; CP 5023), only to reverse itself again, ultimately vacating its order granting a new trial and dismissing the CPA claim. (CP 5064)

While the trial court’s reasoning was tortuous, the resolution of this issue is simple: “An insurer’s breach of its duty of good faith, RCW 48.01.030, constitutes a per se violation of the Consumer Protection Act.” *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 433, 788 P.2d 1096 (1990). The jury was not instructed on the CPA claim, but its special verdict nonetheless establishes that “Farmers’ failure to act in good faith proximately caused damage to Mr. Lipscomb.” (CP 4372) (App. D) That “damage” – the \$17,000,000 judgment against him and the \$600,000 in personal funds he paid to settle plaintiff’s claim – indisputably constitutes “injury to business or property” under RCW 19.86.090. The term “injury” is broader than “damages,” and “will be met if the consumer’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.” *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Here, Mr. Lipscomb’s injury – the entry of a judgment against him, and his payment of \$600,000 to settle the underlying tort claim after Farmers refused to even consider negotiating a settlement – constitutes direct and quantifiable injury to his “business or property.” This court should direct entry of judgment against Farmers based on the jury’s finding that Farmers’ bad faith damaged Mr. Lipscomb. At a minimum, this court should remand for a trial on the CPA claim.

D. Moratti Should Be Awarded Her Attorney Fees At Trial And On Appeal.

Upon entry of a judgment under the CPA, plaintiff should be entitled as a matter of law to her attorney fees as a prevailing plaintiff under RCW 19.86.090. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854-55, 792 P.2d 142 (1990); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 361, 581 P.2d 1349 (1978).

Alternatively, this court should extend the holding of *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and authorize an award of attorney fees, where, as here, the insurer’s actions deprive the insured of “the full benefit of his insurance contract.” 117 Wn.2d at 53. Farmers’ flat denial of liability, its refusal to investigate, and its breach of the duty to attempt a settlement all deprived its insured of the benefits of the policy just as much as a denial of coverage.

Finally, irrespective of *Olympic Steamship*, this court should hold that an insured who establishes his insurer's breach of the duty of good faith is entitled to attorney fees as a matter of equity. Washington has long recognized an equitable exception to American rule in cases for breach of fiduciary duty, *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799-800, 557 P.2d 342 (1976), bad faith litigation conduct, *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984), and where the defendant's wrongful conduct exposes the plaintiff to litigation with a third party. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975). These equitable principles mandate an award of fees where an insurer's bad faith conduct wrongfully exposes its insured to litigation, irrespective whether it ultimately assumes its insured's defense or provides coverage.

The trial court erred in denying plaintiff attorney fees at trial. (CP 4896-97) This court should also award appellant attorney fees on appeal on any or all of these three grounds. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 70-71 ¶71, 164 P.3d 454 (2007) (prevailing bad faith plaintiff entitled to fees on appeal under CPA and common law).

E. Any New Trial Should Be Conducted By A New Superior Court Judge Who Is Not Bound By The Trial Court's Evidentiary Rulings And Instructions.

The trial court committed other serious errors that would have prejudiced plaintiff but for the fact that she prevailed before the jury. In the event that the case is remanded to the trial court, this court should address appellant's Assignments of Error D.

1. Instructions Defining And Allocating The Burden To Prove The Elements Of Bad Faith.

The trial court erred in refusing to instruct the jury that Farmers' violation of the Insurance Commissioner's regulations relating to the duty to investigate and settle claims constitute a breach of its duty of good faith. (CP 4034; 8/17 [AM] RP 106-07) Plaintiff's proposed instruction would have accurately informed the jury, for instance, that "not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become reasonably clear" is a violation of the duty of good faith. WAC 284-30-330(6). *See Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986).

The trial court should also be directed to correctly instruct the jury that Farmers has the burden of proving that its failure to act in good faith did not harm its insured. Once the insurer's bad faith has been established, an insured need not prove damages; harm is presumed and the

burden is on the insurer to rebut this presumption that its bad faith proximately damaged its insured in order avoid liability for the full amount of the reasonable settlement, including the covenant judgment. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 920 ¶ 33, 169 P.3d 1 (2007); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738-39, 49 P.3d 887 (2002); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992).

While the trial court purported to instruct the jury that upon finding that Farmers acted in bad faith, “the law presumes that William E. Lipscomb was damaged” (CP 4326), that instruction was negated by Instructions Nos. 7, 8 and 9, which erroneously placed upon plaintiff the burden of proving that Farmers’ “failure to act in good faith was a proximate cause of Mr. Lipscomb’s damages.” (CP 4322, 4320-21; 8/17 [AM] RP 94-99) In the event of a new trial, the trial court should properly define acts of bad faith and allocate the burden of proof in accord with *Butler*, as proposed in plaintiff’s Proposed Instruction Nos. 11, 19 and 24. (CP 4026, 4034, 4039)

2. Evidence Of Proximate Cause.

The trial court also erred in refusing to allow Mr. Lipscomb to testify, as a rebuttal witness, or in reopening plaintiff’s case in chief, that he would have settled the underlying claim for payment of \$100,000, had

he known that it was possible to do so. (8/17 [AM] RP 18, 8/12 [PM] RP 82; *see* CP 4202; 8/17 [AM] RP 6-7 (offer of proof)) Appellant raises this issue conditionally, in the event Farmers renews its challenge that the evidence was insufficient to establish that its failure to act in good faith proximately caused its insured harm.

3. Precluding Evidence Of “Harm.”

The trial court also improperly instructed the jury that it was not to consider any evidence that the judgment entered against Mr. Lipscomb caused him non-pecuniary harm, or impairment of his credit (CP 4327; 8/10 [AM] RP 99, 8/6 [PM] RP 69-70), based on plaintiff’s supplemental answer to an interrogatory stating that “plaintiff will ask the court and trier of fact to award full compensation for the following aspects of damages,” which included both the underlying judgment entered against him, as well as “the amount he was compelled to pay by virtue of the eventual written settlement: \$600,000.” (CP 4276-77) The trial court reasoned that because Mr. Lipscomb was not asking for additional “damages,” he was precluded from establishing that Farmers’ bad faith caused him “harm,” for instance by impairing his credit. (8/6 [AM] RP 98)

The trial court’s instruction was error because it wrongfully equated “damages” with “harm.” The jury was not asked to assess “damages” because Judge Canova properly held on summary judgment

that the amount of the judgment entered against Mr. Lipscomb in the underlying action, which was determined to be reasonable and free of fraud and collusion, established the amount of Farmers' liability should it be found to have committed the tort of bad faith. (CP 3485) See *Besel*, 146 Wn.2d at 738-39. "Harm," however, can be established in the absence of quantifiable damage, as for instance, when an insurer "creat[es] uncertainty" regarding the course of the underlying litigation. *Dan Paulson*, 161 Wn.2d at 922-23 ¶38. Should this court remand, it should direct the trial court to allow testimony concerning all "harm" caused by Farmers' breach of the duty of good faith.

4. Evidence Of Reasonable Settlement.

The trial court also erred in refusing to instruct the jury that the settlement of the underlying tort action had been "reviewed by the King County Superior Court and found to be reasonable." (CP 4024; 8/17 [AM] RP 102-03) See *Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 263 ¶ 11, 199 P.3d 376 (2008) ("an insurer will be bound by the 'findings, conclusions and judgment' entered in the action against the tortfeasor when it has notice and an opportunity to intervene in the underlying action.") (quotations omitted). Should plaintiff face a new trial on Farmers' liability for bad faith, the trial court should correctly instruct the jury.

5. Evidence Farmers' Adjuster Failed To Comply With Its Claims Manual.

The trial court also wrongfully excluded evidence that Farmers' adjuster failed to comply with Farmers' own internal procedures set out in its claims manual, (Exs. 48-56; 7/23 RP [AM] 72-74; CP 3793), and performance reviews of Ms. Becker in which she was criticized for failing to bring "problem" cases, such as this one, to the attention of her supervisors. (7/30 [AM] RP 5; Ex. 61) A defendant's failure to comply with its own standards is relevant evidence of a breach of the standard of care. *See, e.g., Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (highway design manuals and County's own standards relevant to compliance with standard of care in highway design case); *Woo v. Fireman's Fund Ins. Co.*, 137 Wn. App. 480, 490, 154 P.3d 236 (2007) (refusing to seal insurer's manual as trade secret where it "directly contradict[s] insurers' frequent claims about what is reasonable claim handling.'). Similarly, "a written memorandum . . . acknowledging the very problem [plaintiff] was relying on" to establish Farmers' liability – namely heavy caseloads, inadequate supervision, and a failure to communicate to superiors regarding high damages cases – is admissible in a negligence action. *Savage v. State*, 72 Wn. App. 483, 497, 864 P.2d 1009 (1994) (reversing trial court's exclusion of supervisor's evaluation),

aff'd in part, rev'd on other grounds, 127 Wn.2d 434, 899 P.2d 1270 (1995).

6. Any New Trial Should Be Conducted By A Different Superior Court Judge.

Any proceedings on remand should be conducted by a new superior court judge who is not bound by any of the trial court's previous rulings relating to jury instructions or the admission of evidence. Further proceedings on remand should be conducted by a new superior court judge when the original judge will have difficulty setting aside a previously expressed opinion. *See, e.g., Marriage of Muhammad*, 153 Wn.2d 795, 807 ¶ 19, 108 P.3d 779 (2005) (remanding to a new superior court judge "for the sole purpose of avoiding any appearance of unfairness or bias"). The Ninth Circuit has held that reassignment on remand is justified "if the judge has shown a personal bias or if 'unusual circumstances exist.'" *McSherry v. City of Long Beach*, 423 F.3d 1015, 1023 (9th Cir. 2005).

Such unusual circumstances are:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. If either of the first two factors is present, reassignment is appropriate.

McSherry, 423 F.3d at 1023, quoting *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 780 (9th Cir.), cert. denied, 479 U.S. 988 (1986).

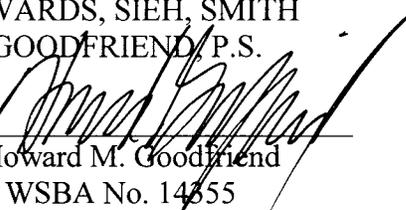
Reassignment here is necessary for all these reasons. The trial court will have a difficult time setting aside its previously expressed disagreement with the jury's verdict, and a new judge is necessary to preserve the appearance of fairness. Even in the absence of these considerations, reassignment to a judge who is not bound by the trial court's rulings would not waste or duplicate judicial resources.

VI. CONCLUSION

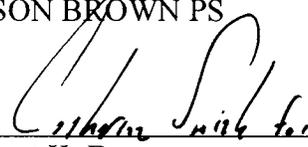
This court should reinstate the jury's verdict and judgment and remand solely for an award of fees and judgment on plaintiff's Consumer Protection Act claim.

Dated this 23rd day of April, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

DAWSON BROWN PS

By: 
Robert K. Dawson
WSBA No. 8881
Peter M. Brown
WSBA No. 31223

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 23, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Philip A. Talmadge Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jerret E. Sale Bullivant, Houser, Bailey PC 1601 Fifth Avenue, Suite 2300 Seattle WA 98101-1618	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Thomas Lether Cole Lether Wathen & Leid PC 1000 2nd Ave Ste 1300 Seattle, WA 98104-1082	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Robert K. Dawson Dawson Brown PS 1000 Second Avenue, Suite 1420 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 23rd day of April, 2010.


Tara D. Friesen

THE HONORABLE JAY V. WHITE
Hearing Date: October 16, 2009,
at 9:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EMILY L. MORATTI, a minor, by and
through her Litigation GUARDIAN AD
LITEM GERALD R. TARUTIS,

Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON; and FARMERS
INSURANCE EXCHANGE, and DOES 1
through 10 et al.,

Defendants.

No.: 08-2-03340-6SEA

ORDER GRANTING FARMERS' POST-
TRIAL MOTION FOR JUDGMENT AS A
MATTER OF LAW AND VACATING
Clerk's Action Required*

JUDGMENT
ON
VERDICT JW

Defendants ("Farmers") filed Farmers' Post-Trial Motion for Judgment as a Matter of
Law. The Court having sat as trial judge and having read the submissions of the parties in
Reply, and over argument of counsel on October 16, 2009, NOW, THEREFORE
support of and in opposition to Farmers' motion, the Court has determined and holds that:

~~The evidence in the record is sufficient to present jury~~
~~Farmers' conduct could not, as a matter of law, have proximately caused the~~
~~functions as to whether acts or omissions of Farmers constitute a~~
~~settlement entered into between GAL Tarutis on behalf of Emily Moratti and William~~
~~failure to act in good faith and whether such failure, if by~~
~~E. Lipscomb, (Pound, proximately caused any damage to~~
~~William E. Lipscomb; however,~~

~~Plaintiff's claims, as assignee of William Lipscomb, are barred by the statute~~
of limitations. Plaintiff, as reflected in the record, has shown

No act or omission that could establish Farmers' failure to
act in good faith, after Farmers tendered its policy limits
to Plaintiff's then counsel by letter dated 4-19-04 (Trico Exhibit
288) if not earlier. This lawsuit was filed January 18, 2008, more
than three years later.

1 Accordingly, it is hereby

2 ORDERED that, notwithstanding the jury verdict, Plaintiff's claims should be and

3 hereby are dismissed in their entirety. *The Court's Judgment on Verdict*
4 *entered October 2, 2009 is vacated. By separate order* *JW*

5 Dated this 26th day of October, 2009.

6 
7 HONORABLE JAY V. WHITE

8 *entered today, and incorporated by reference hereto,*
9 *12006771.1 Pursuant to CR 50(c), the Court, in the*
10 *Alternative, has entered its order granting*
11 *Farmers' Motion for a New Trial and*
12 *Vacating Judgment on Verdict (Alternative*
13 *Relief, CR 50(c)).* *JW*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EMILY L. MORATTI, a minor, by and
through her Litigation GUARDIAN AD
LITEM GERALD R. TARUTIS,

Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON; and FARMERS
INSURANCE EXCHANGE, and DOES 1
through 10 et al.,

Defendants.

No.: 08-2-03340-6SEA

ORDER GRANTING FARMERS'
MOTION FOR NEW TRIAL
AND VACATING JUDGMENT
ON VERDICT *JW*
(ALTERNATIVE RELIEF, CR 50CC)

Clerk's Action Required*

Defendants ("Farmers") filed Farmers' Motion for New Trial. The Court having sat
considered Farmers' Motion, Plaintiff's opposition
as trial judge and having ~~read the submissions of the parties in support of and in opposition~~
and supporting Declaration of Bob Deuron dated 10/6/09, and Farmers
to the motion, it is hereby *Reply, and having heard oral argument on*
October 16, 2009, *NOW, THEREFORE, IT IS HEREBY*

ORDERED that Farmers is entitled to a new trial on the following grounds *based upon*
The record: AS to subsections 2-5 insufficient *JW*
 Court's Instruction No. 11 was erroneous because there was ~~no~~ evidence to

support it, and Farmers was prejudiced by the error; *specifically, there was*
insufficient evidence for a reasonable jury to find a settlement
 Court's Instruction No. 11 was inadequate and confusing because it failed to
"demand" or "offer" was over made. JW
used the terms "settlement offer" and "settlement demand"
define its terms, and Farmers was prejudiced by the giving of the instruction;
without definition or distinction and therefore JW

*** See MANZANARES v. PLANTUSE CORP., 25 W. App. 905, 910 (1980).*
Compare MAUROVIC v. PITT BURGESS CORP., 86 W. App. 22, 34-36 (1997)
(error in instruction harmless where it could not affect judgment)

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The Court erred in excluding relevant evidence of the *Dye* action, and Farmers was prejudiced by the exclusion of the evidence; *The Court's ER 403 analysis to the contrary was erroneous.*

~~The Court erred in excluding relevant evidence (exhibits 247, 250, and 277) regarding Plaintiff's attorneys' intention and motivation to establish a bad faith claim against Farmers, and Farmers was prejudiced by the exclusion of the evidence.~~

FARMERS' Motion for a new trial IS GRANTED. The Court's Judgment as Verdict entered 10/2/09 IS vacated.

Dated this 26 day of October, 2009.



HONORABLE JAY V. WHITE

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THE HONORABLE GREGORY P. CANOVA
Hearing: June 19, 2009 – 1:30 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EMILY L. MORATTI, a minor, by and
through her Litigation GUARDIAN AD
LITEM GERALD R. TARUTIS,

Plaintiff,

v.

FARMERS INSURANCE COMPANY
OF WASHINGTON; FARMERS GROUP
INC., d/b/a FARMERS INSURANCE
GROUP OF COMPANIES, AND
FARMERS INSURANCE EXCHANGE,
and DOES 1 through 10 et al.,

Defendants.

No. 08-2-03340-6SEA

~~PROPOSED~~ 

ORDER DENYING DEFENDANTS'
SECOND MOTION FOR SUMMARY
JUDGMENT RE STATUTE OF
LIMITATIONS AND *RES JUDICATA*

THIS MATTER having come on regularly this day before the undersigned judge
of the above-entitled Court pursuant to Defendants' Motion for Summary Judgment Re
Statute of Limitations and *Res Judicata*; plaintiff Emily Moratti appearing by and through
her attorneys of record, DAWSONBROWN^{PS}, and defendants appearing by and through

ORDER DENYING DEFENDANTS' SECOND MOTION FOR
SUMMARY JUDGMENT RE STATUTE OF LIMITATIONS AND
RES JUDICATA — 1

DAWSONBROWN^{PS}
1000 Second Avenue, Suite 1420
Seattle, Washington 98104
phone 206-262-1444 • fax 206-264-8888

1 their attorneys of record; the Court having considered the files and records herein and
2 having further considered the following materials:

- 3 1. Defendants' Motion for Summary Judgment Re Statute of Limitations and
4 *Res Judicata*;
- 5 2. Declaration of Eric J. Neal, with exhibits attached thereto;
- 6 3. Plaintiff's Opposition to Defendants' Second Motion for Summary
7 Judgment Re Statute of Limitations and *Res Judicata* with attached
8 Declaration of Peter M. Brown and exhibits attached thereto;
- 9 4. Defendants' Reply Brief;

10 The Court having heard the argument of counsel and being otherwise advised in the
11 premises, it is hereby

12 ORDERED that Defendants' Motion for Summary Judgment Re Statute of
13 Limitations and *Res Judicata*, is DENIED.

14 THE COURT FURTHER FINDS pursuant to CR 56(d) that there is no substantial
15 controversy as to any facts which would warrant the defenses of ~~collateral~~ ^{Collateral} ~~estoppel~~ ^{Estoppel}, ~~Res Judicata~~, ~~Collateral~~ ^{Collateral} ~~Estoppel~~ ^{Estoppel}, or Statute of Limitation defenses. Accordingly, these defenses are
16 dismissed.

17 DONE IN OPEN COURT this 29th day of June, 2009.

18
19 
20 JUDGE GREGORY P. CANOVA
21

ORDER DENYING DEFENDANTS' SECOND MOTION FOR
SUMMARY JUDGMENT RE STATUTE OF LIMITATIONS AND
RES JUDICATA — 2

DAWSON BROWN^{PS}
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EMILY L. MORATTI, a minor, by and
through her Litigation GUARDIAN AD
LITEM GERALD R. TARUTIS,

Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON et al.,

Defendants.

No. 08-2-03340-6SEA

SPECIAL VERDICT FORM

FILED
KING COUNTY, WASHINGTON

AUG 20 2009

SUPERIOR COURT CLERK
BY JULIE WARFIELD
DEPUTY

We, the jury, answer the questions submitted by the court as follows

QUESTION 1: Did Farmers fail to act in good faith?

ANSWER: yes (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Did Farmer's failure to act in good faith proximately cause any damage to Mr. Lipscomb?

ANSWER: yes (Write "yes" or "no")

INSTRUCTION: Sign this verdict and notify the bailiff.

DATE: 8/20/09

[Signature]
Presiding Juror

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THE HONORABLE JAY WHITE
Hearing date: October 2, 2009 at 10:00AM
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

EMILY L. MORATTI, a minor, by and
through her Litigation GUARDIAN AD
LITEM GERALD R. TARUTIS,

No. 08-2-03340-6SEA

Plaintiff,

JUDGMENT ON VERDICT

v.

(Clerk's Action Required)

FARMERS INSURANCE COMPANY
OF WASHINGTON; FARMERS
INSURANCE EXCHANGE, and
DOES 1 through 10 et al.,

Defendants.

JUDGMENT SUMMARY

- 1. Judgment Creditor: Gerald R. Tarutis as Guardian Ad Litem for Emily Moratti, a/k/a Emily Woodrow
- 2. Judgment Debtors: Farmers Insurance Exchange and Farmers Insurance Company of Washington.

JUDGMENT ON VERDICT --- 1

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ORIGINAL

App. E

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1 through her litigation guardian ad litem Gerald Tarutis and being represented by her
2 attorneys of record Bob Dawson and Peter Brown of DAWSONBROWN^{PS}; and it appearing
3 that the jury rendered its verdict on August 20, 2009, against defendants; and the Court
4 being fully advised in the premises,

5 NOW, THEREFORE, it is hereby

6 ORDERED that judgment be entered against Farmers Insurance Exchange and
7 Farmers Insurance Company of Washington as follows:

- 8 1. Judgment shall be entered for (a) the sum of \$17,000,000 on the previous judgment
9 entered in *Woodrow v. Lipscomb* No. 03-2-31281- 9SEA (Nov. 21 2007) King
10 County Superior Court; (b) for the sum of \$500,000 for the personal obligation of
11 William Lipscomb; and (c) for prejudgment interest in the amount of
12 \$2,386,411.72, as calculated in the judgment summary, part 4, above.
- 13 2. This judgment bears interest in conformity with the designations for interest as to
14 Parts (a) and (b) as specified in the judgment summary, part 5, above.
- 15 3. Attorney's fees and costs are to be determined at a later date.

16
17 DONE IN OPEN COURT this 2nd day of October, 2009.

18 
19 _____
20 JAY V. WHITE, JUDGE
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INSTRUCTION NO. 11

An insurer has a duty to act in good faith. This duty requires an insurer to deal fairly with its insured. The insurer must give equal consideration to its insured's interests and its own interests. An insurer who does not deal fairly with its insured fails to act in good faith.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception and practice honesty and equity in all insurance matters.

In proving that an insurer failed to act in good faith, an insured must prove that the insurer's conduct was unreasonable, frivolous or unfounded. The insured is not required to prove that the insurer acted dishonestly or that the insurer intended to act in bad faith.

The duty of good faith requires an insurer to:

- (1) Perform a reasonable investigation and evaluation of a claim against its insured;
- (2) If its investigation discloses a reasonable likelihood that its insured may be liable, make a good faith effort to settle the claim. This includes an obligation at least to conduct *good faith settlement negotiations sufficient to ascertain the most favorable terms available* and make an informed evaluation of the settlement demand;
- (3) Evaluate settlement offers as though it bore the entire risk, including the risk of any judgment in excess of the policy limits;
- (4) Timely communicate its investigations and evaluations, and any settlement

offers, to its insured; and

(5) If the settlement demand exceeds the insurer's policy limits, communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and exercise good faith in deciding whether to pay its own limits.

An insurer who fails to fulfill any of these duties fails to act in good faith.
