

65322-9

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No. 65322-9-I

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION I

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant,

v.

TARYN BARQUEST, on behalf of herself and all others similarly
situated,

Respondent.

APPELLANT'S OPENING BRIEF – REDACTED VERSION

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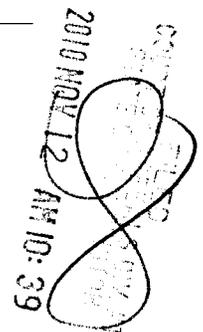


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I. INTRODUCTION AND SUMMARY

In this class action, Farmers Insurance Company of Washington (“Appellant” or “Farmers”) seeks reversal of the trial court’s flawed summary judgment order that fundamentally misconstrued the duties owed by Washington insurers to their insureds under Personal Injury Protection (“PIP”) coverage. *See* CP 1068-1070. By granting summary judgment to the Plaintiff, the trial court declared Farmers in bad faith to the entire class and has denied Farmers the right to continue investigating questionable claims before making additional payments. The trial court’s ruling will deny insurers the legal right to ascertain, through reasonable investigation, whether a specific treatment is eligible for PIP before paying for it. This effectively mandates payment of ineligible claims and is contrary to Washington law.

As the Commissioner’s ruling granting review highlighted, “the record on summary judgment does not reflect that Farmers always or often lacked a good faith reason to engage in additional investigations of the individual PIP claims of the class members. To the contrary, the record on summary judgment includes specific instances of a good faith basis to request [Independent Medical Examinations (“IMEs”)]. . . .” *See* Commissioner’s Ruling Granting Discretionary Review at 5 (“Commissioner’s Ruling”). The overwhelming factual record here

demonstrates that Farmers had legitimate, reasonable bases to request an IME and gather more information about certain claims before making payments. The PIP statute and regulations do not require an insurer to pay all PIP claims, no matter how specious or doubtful, until a full investigation is completed.

The trial court's legal conclusion that Farmers acted in bad faith by suspending payments while it continued its investigations through IMEs is based on an erroneous reading of Washington's insurance regulations. WAC 284-30-395, on which the trial court primarily relied, explicitly states that it "applies only where the insurer relies on the medical opinion of health care professionals to deny, limit, or terminate medical and hospital benefit claims." Plaintiff, however, does not challenge Farmers' "reliance on the medical opinion of health care professionals." Here, Plaintiff challenges Farmers' suspension of payments before it received these medical opinions, which are called IME reports, and come later. Quite simply, "WAC 284-30-395 does not apply to the practices complained of by the class members," *see* Commissioner's Ruling at 7, and thus, it was improper for the court to rely upon this regulation to hold, as a matter of law, that Farmers acted in bad faith.

WAC 284-30-380 explicitly provides standards when the insurer "needs more time to determine whether a first party claim should be

accepted or denied” and demands notice to the insured – not payment – under these circumstances. The trial court’s ruling that Farmers must pay all claims before it completes its investigation, even when Farmers has reasonable and legitimate reasons to question specific claims, is unsupported by Washington law and requires reversal.

It is also unclear why the trial court relied upon WAC 284-30-395 as the basis for its ruling because Plaintiff did not move on the basis of WAC 284-30-395 and instead alleged that Farmers’ suspension of benefits pending IMEs violated WAC 284-30-330. WAC 284-30-330 prohibits “refusing to pay claims without conducting a reasonable investigation.” *See* WAC 284-30-330(4). However, the factual record demonstrates that Farmers did not “refus[e]” payment by requesting IMEs; quite the opposite, Farmers paid the medical bills of every single class member up until the point when it sought to gain additional information about certain questionable claims before making a continuing payment decision. And even then it always paid any medical bills which were suspended if the evidence demonstrated that the treatment was reasonable and necessary. At a minimum, Plaintiff’s argument based on WAC 284-30-330 disregards the numerous factual issues that must be resolved before any determination can be made that Farmers’ continued investigation of any class member was “unreasonable.”

There was simply no evidence in the record on summary judgment that Farmers acted unreasonably or overemphasized its own interests as to any class member, including Plaintiff herself. The factual records of specific PIP files demonstrated that Farmers' decisions to request class members to attend IMEs and suspend their benefits until the IME results were received were based upon reasonable investigation and adequate information. *See* Commissioner's Ruling at 7 ("Most significantly, the abusive and bad faith use of IMEs alleged by the class members is not reflected in the facts considered on summary judgment.") In order to prove that Farmers acted in bad faith, Plaintiff must establish that Farmers acted unreasonably, failing to "give 'equal consideration' to the insured's interests." *See Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005). However, the factual record in this case clearly demonstrates that Farmers' decisions to request class members to attend IMEs and suspend benefits were based upon reasonable investigation and adequate information. Indeed, the record on summary judgment had no evidence that Farmers acted in bad faith or breached its duty to a single class member, including Plaintiff herself. At a minimum, to determine whether Farmers failed to meet its good faith obligation in any PIP case (much less in all cases) requires considering facts of each PIP file. This, in itself, precludes summary judgment in favor of the

entire class. The trial court's sweeping ruling has no basis in the record and warrants correction.

The trial court misinterpreted Washington law by requiring PIP insurers to pay claims before the insurer can determine if the claim is eligible. By requiring PIP insurers to pay first and investigate later, the trial court eliminated Farmers' right to have a meaningful investigation of PIP claims and effectively created PIP coverage by estoppel. This is contrary to the Washington Supreme Court's categorical rejection of estoppel in first-party insurance claims. *See Coventry Assoc. v. Amer. States Ins. Co.*, 136 Wn.2d 269, 284, 951 P.2d 933 (1998); *St. Paul Fire & Marine Ins. Co. v. Onvia*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008). The duty of good faith similarly does not require insurers "to pay for claims not actually covered." *Torina Fine Homes v. Mut. of Enumclaw*, 118 Wn. App. 12, 18, 74 P.3d 648 (2003). "The extension of [its] ruling is that until a full investigation is completed, an insurer is compelled to pay all PIP claims no matter how specious or doubtful." Commissioner's Ruling at 7. The trial court's ruling declared Farmers in bad faith for "assert[ing] the right to investigate before deciding whether to pay for [the]

treatment”¹ – the conduct which the regulations and case law allow. It is a far departure from Washington law and should be corrected.

The trial court’s ruling is also inconsistent with Washington law because there is no evidence that Farmers’ interpretation of the PIP regulations was “unreasonable, frivolous, or untenable,” as is required for a finding of bad faith. *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 23, 25 P.3d 997 (2001); *see also Smith v. Ohio Cas. Ins. Co.*, 37 Wn. App. 71, 74, 678 P.2d 829 (1984) (mere denial of coverage where a debatable question of coverage exists does not constitute bad faith). Plaintiff has wholly failed to identify any Washington precedent prohibiting the challenged conduct. Plaintiff’s failure is not surprising, however, because Washington’s regulations explicitly recognize that an insurer may need to continue its investigation under certain circumstances – as Farmers does through IMEs. *See* WAC 284-30-380. Because there is no basis to conclude that Farmers’ position was “unreasonable, frivolous, or untenable” as to the entire class, the trial court’s summary judgment ruling was improper. Summary judgment on the bad faith claim should have been granted to Farmers.

¹ Commissioner’s Ruling at 7.

II. ASSIGNMENT OF ERROR

The trial court erred in entering the Order on Motions for Partial Summary Judgment, CP 1068-1070, which (1) denied Farmers' motion for partial summary judgment regarding the bad faith claim and (2) granted Plaintiff class' motion for partial summary judgment on the duty and breach elements of the bad faith claim.

III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

A. Whether, under Washington law, when the PIP insurer's initial investigation reasonably indicates that a specific treatment may be ineligible for coverage, the PIP insurer can suspend payment for such treatment pending the results of the IME?

B. Whether the trial court erred by ruling, as a matter of law, that Farmers acted in bad faith to the entire class of PIP insureds when all individual claim files in the record on summary judgment demonstrated that Farmers had a reasonable basis to question the eligibility of claimants' treatments for PIP coverage?

C. Whether the trial court erred by ruling, as a matter of law, that PIP insurers must pay all claims before determining their eligibility, effectively creating PIP coverage by estoppel?

D. Whether the claim of bad faith can be premised on a duty that is not firmly established in Washington law and is, at most, debatable?

E. Whether the trial court erred by denying Farmers' motion for summary judgment where Farmers acts in accordance with Washington law by requesting IMEs before making some payment decisions where legitimate questions arise regarding certain claims?

IV. STATEMENT OF THE CASE

A. Procedural History

Plaintiff filed this class action lawsuit in February 2006, alleging claims under the Consumer Protection Act, insurance regulations, and common law. CP 3-19.² The parties cross-moved for partial summary judgment on the bad faith claim. Plaintiff sought partial summary judgment on the duty and breach elements of that claim. CP 1467-1487. In her motion, opposition to Farmers' motion, and proposed order, Plaintiff relied on WAC 284-30-330(4), which prohibits "refusing to pay claims without conducting a reasonable investigation." CP 1469, 1487, 951. At oral argument, class counsel expressly disclaimed reliance on WAC 284-30-395. RP 4/2/2010 at 38:15-18. Farmers also sought summary judgment of the bad faith claim. CP 808-833.

² In July 2009, the trial court certified a CR 23(b)(3) class of PIP claimants whose benefits were "'denied', 'withheld' and/or 'suspended' pending completion of an 'independent medical examination.'" CP 697-700, 701-202, 290-293. This Court denied discretionary review of the certification order, but noted that "the issue is close" and identified many "problems" with the class, such as its inclusion of individuals "who claimed injuries, whether or not they actually sustained any injury." CP 1761, 1766.

B. The Record On Cross-Motions For Partial Summary Judgment

The trial court's record on cross-motions for partial summary judgment included evidence that Farmers' claims representatives investigate each PIP claim to determine whether a particular treatment reflected in each submitted medical bill is reasonable, necessary, and related to the accident. CP 1770-1774. Each claim is examined "individually based upon the information and documentation" Farmers receives. CP 1776. Each bill, too, "is evaluated individually as it comes in." CP 1774. When a question arises as to whether a treatment reflected in a submitted medical bill is reasonable, necessary, or related to an accident, a claims representative may request an IME. CP 1772-1773.

The IME allows the claims representative to obtain important medical information from a medical doctor about an insured's medical condition, current treatment, and future prognosis after that doctor's examination of that insured. CP 1772-1773. IMEs also provide a mechanism through which a claims representative can obtain "additional documentation" such as chart notes or medical reports relating to an insured's symptoms and treatment. *Id.* Claims representatives view the IMEs as the "last resort" and request them sparingly, in fewer than 10 percent of PIP cases. CP 1771-1772, 1700, 1640.

There is no specific formula that dictates the circumstances under which a claims representative decides to order an IME. The decision is individual, based upon the facts in each claim file. CP 1770-1771, 1700. For example, a claims representative may question whether a particular treatment is related to the motor vehicle accident at issue because the insured has a preexisting condition contributing to his or her symptoms, or because the treatment appears excessive in light of the insured's reported symptoms, the type of accident, and/or lack of significant physical damage to the car. CP 1640, 1584.

Sometimes, concerns may arise due to a lack of progress or improvement in the insured's condition despite continued treatment. CP 1646. In such instances, a claims representative may request an IME to obtain a second opinion to help determine whether there is another cause of the insured's pain or other symptoms that is not being appropriately treated. *Id.* Another factor that may lead a claims representative to request an IME is a significant gap in the insured's treatment, either immediately after the accident or during an existing treatment. CP 1579. However, the precise reasons why a claims representative may decide to request an IME are claim-specific and depend on the facts of each case. CP 1640. To understand why an IME was requested in a specific case requires "going through [a] particular file and putting the investigation log

notes together and reviewing the independent medical exam reports and the doctor's treatment notes." CP 1779.

When an IME is scheduled, the IME physician (or other medical professional) is asked to evaluate both past and future treatments and opine on their reasonableness, necessity, and relationship to the accident. Of the approximately 10 percent of PIP cases that involved an IME, Farmers suspended payment of PIP benefits pending the IME report in 82.9 percent of cases. For 47.4 percent of claimants who had an IME, the IME report concluded that no further treatment was reasonable or necessary, for 34.9 percent of claimants who had an IME, the IME report recommended different future treatment, and for 17 percent of claimants the IME report concluded that certain treatment prior to the IME was not reasonable, necessary, or related to the accident. CP 998-1012 at 1008. However, the particular recommendation and conclusions reflected in each IME report are unique to the medical facts in each file. "Each IME is different. The results are different. There's numerous combinations that you can get." CP 1780.

The trial court's record on summary judgment included evidence of several individual PIP claim files where Farmers requested an IME and suspended PIP payments pending the IME's outcome. The circumstances

of their claim files relevant to Farmers' request for an IME and the interim suspension of payments are summarized below.

1. [REDACTED]

[REDACTED] submitted a PIP claim to Farmers on February 7, 2006. CP 1640. [REDACTED] received (and Farmers paid for) several months of chiropractic and massage therapy for neck and back pain. Despite the treatment, her pain worsened. CP 1641. Farmers paid for an MRI, which did not reveal any significant abnormalities. *Id.* Dr. Kirk Dawson, an osteopathic doctor who monitored her treatment, attributed her increased pain to the chiropractic treatment and instructed her to discontinue such treatment. *Id.* Despite Dr. Dawson's instructions, [REDACTED] received at least two subsequent chiropractic treatments. *Id.* On April 3, 2006, [REDACTED] was released from all treatment but insisted on returning to treatment in June of 2006. CP 1643.

Wendy White, the Farmers' claims representative handling [REDACTED] claim, informed [REDACTED] on June, 2, 2006 that Farmers was requesting an IME and suspending benefits pending the IME's results. Prior to Farmers' decision, two of [REDACTED] own doctors expressed concern that her subjective complaints were not supported by any objective justification. CP 1642, 1653, 1655 (noting a "definite concern that the objective measurement of her deficits and the

degree of her complaints subjectively are not matching,” and recommending an IME). Given these concerns by [REDACTED] own doctors, Ms. White testified she “would not have been doing [her] job properly if [she] had not then questioned the reasonableness and necessity of [REDACTED] treatment and set up an IME.” CP 1642.

On July 22, 2006, Dr. Richard Rivera, D.C., of Objective Medical Assessment Corporation, an independent IME provider, conducted an IME of [REDACTED] and concluded that “[t]his claimant does not require any additional treatment for injuries or conditions arising out of the motor vehicle accident” and that “[t]reatment to date has not been reasonable or necessary.” CP 1644, 1674.

2. [REDACTED]

[REDACTED] submitted a PIP claim in connection with an accident that occurred on May 8, 2004. CP 1700. Vicki Gandara, Farmers’ claims representative, reviewed the file and noted that the accident was low-impact and that [REDACTED] was receiving both chiropractic and massage therapy. *Id.* In order to evaluate the reasonableness and necessity of these treatments, Ms. Gandara requested that [REDACTED] doctor fill out a Short Form Medical Report (“SFMR”), which provides information about the intended treatment plan.

Id. The completed SFMR indicated that treatment would occur twice a week for 30 days and one to two times a week thereafter. CP 1700-1701.

Concerned that ██████████ treatment continued far longer than SFMR indicated, Ms. Gandara notified her of the IME request. CP 1701. ██████████ did not initially cooperate with the scheduling attempts by the IME provider. *Id.* This, too, concerned Ms. Gandara because attempts to delay the IME often indicate that the treatments being received are not be reasonable, necessary or related to the accident. *Id.* On September 7, 2004, Farmers sent ██████████ a letter stating that her bills were being “held pending the outcome of our investigation.” CP 1701, 1717.³

The IME was performed by Dr. David L. Nicholes, D.C., who concluded that after her initial chiropractic visit, ██████████ should have received a home exercise program, and that “no treatment beyond that initial visit . . . was reasonable, necessary, or related to this motor vehicle accident.” CP 1702, 1726-1732. He stated that “[w]hile ██████████ may have an underlying rotator cuff problem, it is not related to the motor vehicle accident of May 8, 2004, on a more probable than not basis.” CP 1732.

³ The specific language of the letters to class members related to their IMEs varied. So did the language of the prior letters, depending on the specific information that was missing in each claim file. The trial court ignored these differences by addressing Farmers’ communication with class members as a matter of law across the class.

3. [REDACTED]

[REDACTED] submitted a PIP claim in connection with an accident that occurred on April 19, 2007. *See* CP 1579. In July 2007, the claim was reassigned to Farmers' claim representative Matthew McClintock. *Id.* [REDACTED] chiropractor indicated that treatment would be continuing twice weekly. *Id.* However, at that point Farmers had not yet received photographs of the damaged vehicle. At the end of September, after reviewing the photographs, Mr. McClintock determined that the accident at issue was of moderate impact. CP 1580. Because [REDACTED] chiropractor confirmed that treatment had decreased, Mr. McClintock decided to reassess the claim in another two months. He sent a SFMR to the chiropractor to assess [REDACTED] prognosis and treatment plan. *Id.*

[REDACTED] chiropractor refused to complete the SFMR because [REDACTED] lawyer had directed him not to do so. This was the first time in Mr. McClintock's experience when an attorney interfered with the completion of a SFMR. He became concerned that [REDACTED] was not being completely forthcoming about his injuries and that his treatment might not have been reasonable, necessary or related to the accident. CP 1581.

On or about November 9, 2007, after consulting with a registered nurse and his supervisor, Mr. McClintock called [REDACTED] attorney and informed her that an IME was needed to support treatment and that benefits were being suspended until the IME results. CP 1581. Dr. Rivera performed an IME of [REDACTED] on January 4, 2008. His report stated that “[n]one of the treatment rendered to the claimant’s lumbar spine has been reasonable and necessary.” CP 1582, 1602-1603. Dr. Rivera also concluded that massage therapy treatment “beyond six months ha[d] not been reasonable and necessary.” CP 1603.

4. [REDACTED]

[REDACTED] submitted a PIP claim to Farmers on July 29, 2005, and received chiropractic and massage therapy treatment several times per week for soft-tissue injury. CP 1644-1645. Despite repeated representations from [REDACTED] providers that treatment would soon end, she continued to receive treatment from two providers more than one year after the accident. CP 1645. Farmers’ claims representative, Wendy White, believed that such intensive and extended treatment after a minor injury was highly unusual. CP 1645-1646. Neither of [REDACTED] providers requested an MRI or CT scan to determine if there were any other injuries causing her pain. CP 1646. Based on these concerns, on

July 27, 2006, Ms. White sent [REDACTED] a letter requesting that she attend an IME and suspending her benefits. CP 1646.

Dr. Richard Rivera, D.C., of Objective Medical Assessment Corporation, conducted an IME of [REDACTED] on August 28, 2006, and submitted a report to Farmers, concluding “[REDACTED] does not need further treatment. There are no objective examination findings warranting further treatment as directly related to the motor vehicle accident.” CP 1646, 1696.

5. [REDACTED]

[REDACTED] submitted a PIP claim to Farmers on November 11, 2005. CP 1583. On her Application of Benefits, [REDACTED] indicated that she had been treated at a hospital immediately after the accident and that her treatment was complete. *Id.* However, more than two months after the accident and more than one month after [REDACTED] indicated she was no longer being treated, she sought chiropractic treatment. *Id.* Subsequently, [REDACTED] chiropractor sent Farmers chart notes noting that [REDACTED] had preexisting back pain for which she was treated from 2003 to 2005. CP 1584. Due to concern about the two-month gap in treatment and the existence of a preexisting back injury, Mr. McClintock requested that [REDACTED] attend an IME and informed her attorney that Farmers was suspending

payments. *Id.* Dr. Rivera performed an IME of [REDACTED], concluding that “[t]reatment to date has not been reasonable and necessary” and that [REDACTED] “had been overdiagnosed and overtreated by [her chiropractor] with direct reference to the October 23, 2005, automobile accident.” CP 1585, 1634.

6. Plaintiff Taryn Barquest

Plaintiff failed to mention any facts relating to herself in her motion for summary judgment or reply. In fact, the trial court’s order shows that it did not even consider Plaintiff’s own declaration when granting summary judgment in her favor. CP 1068-1070. Although Plaintiff broadly asserts that Farmers failed to pay some medical bills and that she was unable to receive some medical care, *see* CP 6-7, there is absolutely no record evidence on her motion that Farmers acted in bad faith.

Plaintiff submitted to the trial court no admissible evidence as to any class member on her motion for summary judgment or the reply.⁴ The trial court struck eight declarations that Plaintiff submitted because none of the declarants were made available for depositions as requested by

⁴ She vaguely referred to “prior pleadings, declarations, and exhibits on file” but cited no specific documents to support her motion. CP 1470.

Farmers. CP 1048-1049. The only evidence before the trial court on Plaintiff's own motion was submitted by Farmers.

C. The Trial Court's Ruling

After oral argument, the trial court granted Plaintiff's motion for summary judgment "on the issue of violation of a WAC, violation of duty, and breach of duty." RP 4/2/2010 at 77:3-7. The court's ruling was apparently based on WAC 284-30-395(1) – a different regulation from the one Plaintiff relied on in her briefs and oral argument, and cited in her proposed order. *See* RP 4/2/2010 at 70:11-19; CP 1069. Thereafter, the court issued a written order. CP 1068-1070.

Farmers successfully petitioned for discretionary review. CP 1076-1077. In concluding that the trial court's order was erroneous, the Commissioner found that "WAC 284-30-395 does not apply to the practices complained of by the class members." Commissioner's Ruling at 7. The trial court's order was based on the premise that Farmers was "systematically and excessively using IMEs as a pretext to avoid or delay paying medical expenses and to cause breaks in treatment that claimants are entitled to under their PIP coverage." *Id.* However, the record on summary judgment "does not document those allegations." Specifically,

the record on summary judgment does not reflect that Farmers always or often lacked a good faith reason to engage in additional investigations of the individual

PIP claims of the class members. To the contrary, the record on summary judgment includes specific instances of a good faith basis to request IME exams even though Farmers had previously made some PIP payments on behalf of the claimant.

Id.

The Commissioner also concluded, addressing the trial court's interpretation of the statistical evidence, that "it is a misreading of the statistical evidence to conclude that Farmers insists on IMEs even though it knows it has it wrong 82 percent of the time." Commissioner's Ruling at 6. Farmers requests IMEs of less than 10 percent of PIP claimants. The statistical evidence indicates that, in almost half of the instances (47.7%), the IME recommends no further treatment is reasonable, necessary or related to the accident. For a third of the PIP claimants (34.9%) who have an IME, the medical professional conducting the exam recommends a change in the treatment. As to 17 percent, the IME results in a determination that treatment was not reasonable, necessary, or related to the accident. *See id.* Additionally, the Commissioner found that there is no documentation confirming more than a few instances [less than 0.5%] of a delay or break in the treatment as a result of the IME exams," with "no evidence any treatment providers have suspended treatment."

Id. at n.4.

V. ARGUMENT

This Court reviews summary judgment orders *de novo*. *Sheikh v. Choe*, 156 Wn. 2d 441, 447, 128 P.3d 574 (2006). A grant of summary judgment should be affirmed only where, when considering “all facts in the light most favorable to the nonmoving party. . . based on all of the evidence, reasonable persons could reach but one conclusion.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007) (genuine issues of material fact regarding injury and causation precluded summary judgment).

A. The Trial Court’s Ruling Imposes On PIP Insurers The Duty To Pay Claims Before Investigation Is Complete That Is Not Recognized By Washington Law

1. The Trial Court Misinterpreted And Misapplied WAC 284-30-395

The trial court’s legal conclusion that Farmers acted in bad faith by suspending payments for medical services while it continued to investigate whether these services were eligible for PIP coverage is based on an erroneous reading of Washington’s insurance regulations. The trial court relied principally upon WAC 284-30-395, which provides conditions for an insurer’s decision to “deny, limit, or terminate” medical benefits. *See* RP 4/2/2010 at 70:11-22. However, WAC 284-30-395 explicitly states that it “applies only where the insurer relies on the medical opinion of health care professionals to deny, limit, or terminate medical and hospital

benefit claims.” WAC 284-30-395.⁵ Critically, the decision to suspend payments pending the completion of an IME with a health care professional is not the same as a decision to deny, limit or terminate medical claims based on the “medical opinion” of that “professional.” Indeed, “the central tenet of Barquest’s argument is that Farmers acts in bad faith if it does not pay PIP benefits up to the time it completes its investigation” – and not after it receives the results of such investigation. Commissioner’s Ruling Re: Certification at 4 (emphasis added). Accordingly, WAC 284-30-395 does not apply to the practices complained of by the class members.

In addition, the trial court misinterpreted WAC 284-30-395 when it concluded that Farmers may “deny, limit or terminate” PIP benefits only prospectively. To the contrary, Washington law permits insurers to “suspend” benefits for services when the insurer has a reasonable basis to continue investigating a claim. For example, in *Albee v. Farmers Ins. Co.*, 92 Wn. App. 866, 874, 967 P.2d 1 (1998), the court affirmed summary judgment in favor of Farmers where Farmers had a “reasonable basis” to “suspend” benefits pending an IME. The court in *Albee* relied on *Huntt v. State Farm Mut. Auto. Ins. Co.*, 527 A.2d 1333 (Md. Ct. Spec.

⁵ Indeed, the regulation states that the “standards apply to an insurer’s consultation with health care professionals when reviewing the reasonableness or necessity of treatment.” WAC 284-30-395.

App. 1987), which also recognized insurers' right to continue investigating certain claims through IMEs before making payments. *See Hunt*, 527 A.2d at 1335 ("it would be impossible in many cases for an insurer to determine whether a PIP claimant's expenses were 'reasonable' and for 'necessary' services" without the right to request IMEs prior to paying certain claims); *see also Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 363, 223 P.3d 1180 (2009) ("under . . . her PIP policy, Allstate can require that [Plaintiff] submit to an IME as a condition of receiving coverage").

Courts have clarified that "the Washington Legislature and the Insurance Commissioner envisioned that an insured might, or perhaps generally would, become liable for medical or hospital expenses before the insurer makes a decision on a claim." *Sadler v. State Farm Mut. Auto. Ins. Co.*, 2008 U.S. Dist. LEXIS 71665 at *31 (W.D. Wash. 2008), *aff'd*, 2009 U.S. App. LEXIS 24316 (9th Cir. 2009). Any argument that Farmers must pay for all past medical services, despite the evidence that such services were ineligible for PIP coverage, so as not to chill insureds' future treatment, contradicts both the plain language of the regulations and Washington case law. Nothing in WAC 284-30-395 precludes insurers from examining treatments the insureds already received – and expenses already "incurred" – for compliance with the eligibility criteria. *See*

WAC 284-30-395(1).⁶

Indeed, interpreting WAC 284-30-395 to prevent Farmers from continuing its investigation before making some payments stands in direct conflict to WAC 284-30-380. WAC 284-30-380 specifically proscribes standards for situations where the insurer needs time to investigate whether a first party claim should be accepted or denied. *See* WAC 284-30-380(3). In such cases, the insurer is permitted to continue its investigation so long as it adequately communicates with its insureds. WAC 284-30-380(3) (“If the insurer needs more time” to determine whether to pay a first-party claim, it must notify the first party claimant “within fifteen working days after receipt of the proofs of loss giving the reasons more time is needed” and update the insured periodically). In granting review, the Commissioner agreed WAC 284-30-380 authorizes the conduct challenged here. *See* Commissioner’s Ruling at 5-6.

Critically, when an insurer seeks additional time to continue its initial investigation of questionable claims so it can make an informed decision, the insurer is not obligated to pay the claims anyway, as the trial court incorrectly ruled. There is no duty to pay before the investigation is

⁶ Moreover, although the trial court recognized that, under *Sadler*, an insurer is not required to “pre-approve benefits” (RP 4/2/2010 at 71:17-23), it overlooked the fact that *Sadler* also establishes an insurer’s right to complete its investigation of certain questionable claims – by requesting IMEs or otherwise – in order to determine eligibility for PIP coverage before paying such claims. *See Sadler*, 2008 U.S. Dist. LEXIS 71665 at 31.

complete. *See Downie v. State Farm*, 84 Wn. App. 577, 586, 929 P.2d 484 (1997) (holding that WAC 284-30-380 expressly permitted State Farm to request the insured to attend an examination under oath before deciding whether to accept or reject a claim because State Farm communicated its “need for additional investigation” and kept the insured updated throughout the process; the “need for additional investigation was a reason for [insurer’s] inability to accept or deny within 15 days” as required by WAC 284-30-380). *See also Keith v. Allstate Indem. Co.*, 105 Wn. App. 251, 255, 19 P.3d 1077 (2001) (recognizing insurer’s right to continue investigation before paying where it had “sufficient information to suspect the possibility of a fraudulent claim”).⁷

Farmers acts in accordance with this regulation. For example, upon determining that it needed additional information regarding the claim submitted by [REDACTED], a class member, Farmers sent [REDACTED] a letter explaining that her bills were “being held pending the outcome of our investigation” because she was continuing treatment for several months after a minor vehicle accident. *See* CP 1701 at ¶10, CP 1717 at

⁷ *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 98 Wn. App. 487, 493, 983 P.2d 1129 (1999), *aff’d* 142 Wn.2d 784, 16 P.3d 574 (2001), on which Plaintiff relied in her summary judgment briefing, recognized that there may be a need for an insurer to delay payment, so long as the insured is properly informed throughout the process. Plaintiff here has not alleged that Farmers failed to properly inform its insureds and the evidence shows that Farmers satisfied this obligation. *See, e.g.*, CP 1702-1704 at ¶¶12, 20; CP 1581-1582 and 1584 at ¶¶14, 17, 28; CP 1642-1643, CP 1646-1647 at ¶¶18, 33, 36.

Ex. D. This does not demonstrate any bad faith and is exactly what the regulation contemplates. The trial court's reliance on and misinterpretation of WAC 284-30-395 to require payment before the insurer completes its initial investigation of questionable claims contravenes WAC 284-30-380 and warrants correction.

2. WAC 284-30-330(4) Does Not Prohibit Farmers From Continuing Its Investigation Of Certain Claims Before Making Payments

In her motion for summary judgment, Plaintiff did not argue that Farmers violated WAC 284-30-395. RP 4/2/2010 at 38:15-18. Rather, she sought a ruling that the suspension of payments pending the IME “violates WAC 284-30-330(4)’s prohibition on denying claims before completing a reasonable investigation. . . .” CP 951, 1469, 1487 (emphasis added). WAC 284-30-330 fails to save Plaintiff’s bad faith claim.

WAC 284-30-330(4) provides that an insurer may not “refus[e] to pay claims without conducting a reasonable investigation.” WAC 284-30-330(4) (emphasis added). However, the suspension of payment pending an additional investigation is not equivalent to a “refus[al] to pay . . . without . . . a[n] . . . investigation.” See WAC 284-30-330(4) (emphasis added); Commissioner’s Ruling at 6 (“The class does not establish that an insurer has denied coverage or refused to pay a claim just

because the insurer delays or suspends making a decision whether to pay a particular PIP expense until a reasonable investigation is completed.”) (Emphasis added.)

The record on summary judgment contained no evidence that Farmers, across the class, “refuse[d] to pay” claims “without conducting a reasonable investigation” in violation of WAC 284-30-330(4). As explained above, when Farmers requested that [REDACTED], a class member, attend an IME, it sent her a letter stating that her bills were being “held pending the outcome of our investigation” – and not “refused” or “denied” outright. *See* CP 1701, 1717. Letters to other class members in the summary judgment record referred to Farmers’ “right to deny payment” of certain bills “[i]f the results of the IME conclude that a change or reduction of treatment is advised” or “deny payment” of bills “pending . . . the results of the investigation.” *See* CP 1643, 1646, 1657-1658, 1684-1685. Nowhere in these letters did Farmers state that it was denying the claim outright.

Furthermore, the record demonstrates that, at a minimum, numerous factual issues must be resolved before Plaintiff can establish that Farmers’ investigation was “unreasonable” as to all class members. As detailed below, Farmers had legitimate reasons to continue

investigating certain claims by requesting IMEs in order to gain additional information before making some payment decisions.

B. The Record Demonstrates That Farmers Acted Reasonably And In Good Faith When It Scheduled IMEs And Suspended Payments In Specific Cases

Under Washington law, “when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest,” the bad faith claim must fail. *See Werlinger*, 129 Wn. App. at 808; *see also Onvia*, 165 Wn.2d at 128-129 (duty of good faith implies an “obligation of fair dealing’ and a responsibility to give ‘equal consideration’ to the insured’s interests”) (internal citations omitted). The record demonstrates that Farmers had legitimate, reasonable bases to request IMEs and suspend benefits in certain cases.

One such instance is class member [REDACTED], who submitted a PIP claim and received medical expense benefits until a Farmers’ claims representative requested an IME. CP 1640-1643, 1653-1655. The claims representative handling [REDACTED] claim requested an IME because [REDACTED] continued chiropractic treatment despite her doctor’s orders to discontinue it because it was exacerbating her condition. *See* CP 1641, 1643. Moreover, [REDACTED] own treating doctors questioned the validity of her subjective complaints, noting “definite concern that the objective measurement of her deficits and

the degree of her complaints subjectively are not matching.” *See* CP 1642, 1653. In fact, ██████████ own doctor recommended that she attend an IME even before Farmers requested one. *See* CP 1642, 1655. Clearly, these facts demonstrate that, by requesting the IME, Farmers was acting “honestly,” based on “adequate information.” *See Werlinger*, 129 Wn. App. at 808. As explained by the Farmers’ claims representative, “I would not have been doing my job properly if I had not then questioned the reasonableness and necessity of ██████████ treatment and set up an IME.” *See* CP 1642.

Similarly, ██████████ submitted a PIP claim to Farmers in connection with a moderate impact accident and received chiropractic treatment multiple times per week for several months. *See* CP 1579-1580. Farmers’ claims representative, Matthew McClintock, requested an IME when, five months after the accident, ██████████ chiropractor refused to provide Farmers with updated treatment information because ██████████ lawyer directed him not to do so. *See* CP 1580-1581. Mr. McClintock became concerned that ██████████ was not being completely forthcoming about his injuries, as this was the only instance Mr. McClintock had ever experienced where an attorney interfered in this way. *See id.* Another class member, ██████████, was asked to attend an IME after she had received chiropractic and massage therapy

multiple times each week for more than one year after sustaining a moderate injury. *See* CP 1644-1646. The claims representative who requested the IME was also concerned that neither of [REDACTED] providers referred her to another specialist or for additional testing despite her continued pain. CP 1646. She thought that an IME might help [REDACTED] ascertain other types of treatment that would be more effective. *See id.*

The undisputed facts of Farmers' IME requests such as these clearly demonstrate that "the abusive and bad faith use of IMEs alleged by the class members is not reflected in the facts considered on summary judgment." Commissioner's Ruling at 7 (emphasis added). The facts relating to class member after class member demonstrate the inevitable conclusion that Farmers conducted a thorough investigation and acted reasonably, based on adequate information, when it requested IMEs and suspended benefits. *See Kim v. Allstate Ins. Co.*, 153 Wn. App. at 356 n.3 ("Reasonableness of an insurer's actions is a complete defense to any bad faith claim by an insured.")⁸ The trial court's ruling is wholly unsupported by the record and requires reversal.

⁸ The results of the IMEs attended by these class members further validate the reasonableness of Farmers' requests, as the IME doctors concluded that the class member's ongoing and, in some cases, prior treatment was not reasonable or necessary. For example, the IME doctor who examined [REDACTED] found that she did not require additional treatment, but that "[t]reatment to date has not been reasonable or necessary." CP 1644, 1674. [REDACTED] IME revealed that "[n]one of the treatment rendered to the claimant's lumbar spine has been reasonable and necessary" and that massage therapy treatment "beyond six months has not been reasonable and necessary." CP 1582, 1594-

It is both illogical and contrary to law that Farmers' suspension of benefits could constitute "bad faith" under every possible circumstance without any regard to the specific facts of each claim. See Commissioner's Ruling at 1 ("[t]he trial court ruling broadly extends to situations where the insurer has a good faith and reasonable basis to question whether ongoing treatments are reasonable, necessary, or related to the accident.") (emphasis added). Summary judgment in favor of the entire class is improper because genuine issues of material fact must first be resolved to determine whether Farmers' suspension of benefits breached its duty of good faith to any class member. See *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 395-396, 823 P.2d 499 (1992) (affirming denial of summary judgment on petitioner's bad faith claim because numerous "question[s] of fact" existed).

In addition and independently, the trial court misconstrued the common-law duty of good faith. Its ruling required Farmers to pay for treatments despite the fact that Farmers' had undisputed, reasonable bases (confirmed by the IME results) to question whether such treatments were eligible for PIP coverage. This includes claims submitted by insureds who "were never physically injured in a legitimate accident," and other

1603. Finally, [REDACTED] IME doctor concluded that she "does not need further treatment. There are no objective examination findings warranting further treatment as directly related to the motor vehicle accident." CP 1646, 1696.

fraudulent claims, a result which is clearly “troubling.” CP 1766-1767. More than troubling, this result is legally untenable. The duty of good faith does not require insurers “to pay for claims not actually covered.” *Torina Fine Homes*, 118 Wn. App. at 18. Farmers is affirmatively required to “review claims in order to detect evidence of possible insurance fraud and to investigate claims where the fraud is suspected,” RCW 48.30A.050.

Summarizing these fundamental problems with the trial court’s ruling in favor of the entire class, Commissioner stated that “[t]he extension of the trial court’s ruling is that until a full investigation is completed, an insurer is compelled to pay all PIP claims no matter how specious or doubtful.” Commissioner’s Ruling at 7-8. The class members “cite no authority supporting such a proposition,” *see id.*, and none exists. The trial court’s ruling is based on the misreading of WAC 284-30-395 and represents an overbroad and erroneous view of the duty of good faith. It is contrary to Washington law and warrants reversal.

C. By Requiring Farmers To Pay Ineligible Claims, The Ruling Mandates Coverage By Estoppel Contrary To Washington Law

The trial court erroneously required Farmers to pay all submitted claims – no matter how “specious or doubtful” they appear to be based on an initial investigation – before Farmers receives the IME results. The

ruling broadly extends to situations where the insurer has a good faith and reasonable basis to question whether ongoing treatments are reasonable, necessary, or related to the accident, and compels Farmers to pay claims which the IMEs ultimately find ineligible.⁹ As to those claims, the trial court's ruling plainly mandates PIP coverage by estoppel, in direct conflict with settled Washington law that categorically prohibits estoppel in the first-party context, including PIP. *See Coventry*, 136 Wn.2d at 285 (“We hold coverage by estoppel in the first-party context is not the appropriate remedy because, unlike third-party reservation of rights cases, the loss in the first-party situation has been incurred before the insurance company is aware a claim exists.”); *see also Onvia*, 165 Wn.2d at 133 (“no rebuttable presumption of harm can arise here . . . coverage by estoppel is not recognized in this context.”); *Van Noy*, 142 Wn.2d at 787 (PIP is a form of first-party coverage).

Additionally, the trial court's ruling disregards a critical difference between PIP coverage and health insurance. In contrast to health insurance, which covers all treatment for medical conditions regardless of their origin, PIP insurance is far narrower and only covers claims which are reasonable, necessary, and related to the accident. The trial court's

⁹ Plaintiff does not dispute any IME conclusions.

ruling improperly prevents Farmers from investigating submitted claims for compliance with these criteria.

By requiring Farmers to extend PIP coverage to ineligible claims, the trial court appeared to rely on the fact that, in many cases, the IME reports conclude that some portion of the treatment was eligible for PIP coverage. RP 4/2/2010 at 75:17-76:1.¹⁰ This ignores that the Supreme Court's prohibition of estoppel in first-party cases is absolute. Under *Coventry* and *Onvia*, an insurer cannot, as a matter of Washington law, be estopped from denying PIP coverage for ineligible claims. The trial court created this improper result when it mandated Farmers to provide PIP coverage in a significant percentage of ineligible claims, where the IME reports validated Farmers' concerns and concluded that prior treatments were not reasonable, necessary, or for injuries related to the accident.

The trial court also misinterpreted the statistical evidence in the record. The IME reports are far more comprehensive than the court implied. They do not focus on the narrow question regarding the ineligibility of the past treatment for PIP, but rather, provide a much broader view of the insured's medical condition and prognosis. Farmers' expert statistician, Sydney Firestone, analyzed a statistically valid sample

¹⁰ It is uncontroverted that Farmers pays all suspended bills if the IME concludes that the treatment was eligible for PIP.

of claims and concluded that, in 17 percent of cases, the IME determined that the treatment prior to the IME was not reasonable, necessary, or related to the accident. *See* CP 1128. In 34.9 percent of cases, the IME physician or medical professional recommended that the PIP claimant continue with different treatment than the claimant was receiving. *Id.* Finally, in 47.4 percent of cases, the IME report recommended that no further treatment was reasonable, necessary, or related to the accident. *Id.*

These figures do not support Plaintiff's claim that Farmers is wrong 82 percent of the time. *See* RP 4/2/2010 at 42:18-20. Farmers is not "wrong" to request IMEs and suspend payment when over 30 percent of the time, different treatment is needed; almost 20 percent of the time, prior treatment was not needed; and almost half of the time, no further treatment is needed. By requiring that Farmers pay for 100 percent of treatments despite this uncontroverted evidence that a significant part of these bills represent ineligible claims, the trial court has created coverage by estoppel, which is inconsistent with Washington law.

D. The Trial Court Erroneously Held Farmers In Bad Faith For A Violation Of Non-Existent Or Debatable Duties

No court in Washington (or anywhere) has ever held that an insurer acted in bad faith based on the failure to perform a duty that is not recognized by the insurance statutes, regulations, insurance policy, or case

law. The tort of bad faith can only be based upon the insurer taking an “unreasonable, frivolous, or untenable” position when investigating an insured’s claim. *Liberty Mut.*, 144 Wn.2d at 23. Plaintiff has failed to show how Farmers’ request for an IME and suspension of benefits pending the IME constitutes an “unreasonable” position or violates any other obligation under Washington law. *See Onvia*, 165 Wn.2d at 130 (claims of insurer bad faith require a duty); *Sadler*, 2008 U.S. Dist. LEXIS 71665 at *31-32, 2009 U.S. App. LEXIS 24316 at *2 (because “there is no Washington law recognizing an implied duty to preauthorize treatment under a PIP,” plaintiff could not sue for insurer’s failure to comply with such duty); *Smith v. Ohio Cas. Ins. Co.*, 37 Wn. App. 71, 74, 678 P.2d 829 (1984) (debatable questions of coverage do not give rise to claims of bad faith). When the law is uncertain or debatable, the insurer, even if wrong, is not in bad faith. *See Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452, 471, 760 P.2d 337 (1988) (“A denial of coverage based on a reasonable interpretation of the policy is not bad faith”).¹¹

Far from “unreasonable, frivolous or unfounded,” the suspension of payments for potentially ineligible treatments pending the IME results is consistent with Washington law. Nothing in the insurance regulations

¹¹ *See also Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 106, 95 P.3d 313 (2004); *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 434, 38 P.3d 322 (2002); *Ellwein v. Hartford Acc. & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled in part on other grounds by Smith v. Safeco*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003).

or case law require a PIP insurer to pay for treatments before its investigation is complete. “WAC 284 30-395 does not apply to the practices complained of,” and the “class members cite no authority supporting . . . [the proposition] that the suspension of payments pending an IME alone constitutes a denial of coverage or a refusal to pay a claim” under WAC 284-30-395 or WAC 284-30-330(4). *See* Commissioner’s Ruling at 7-8.

The regulations recognize that an insurer may need to continue its investigation and must provide notice – not payment – when this occurs. *See* WAC 284-30-380. Courts in Washington have permitted insurers to “suspend” benefits while continuing these investigations. *See Albee*, 92 Wn. App. at 874; *Kim*, 153 Wn. App. at 363 (“Allstate can require that [the insured] submit to an IME as a condition of receiving coverage”) (emphasis added); *Sadler*, 2008 U.S. Dist. LEXIS 71665 at *31 (“there is no Washington law recognizing an implied duty to preauthorize treatment”). Given that the regulations and case law have recognized that insurers may need to continue their investigations before paying claims, the law concerning Farmers’ conduct at issue here is, at the very least, debatable. This precludes the finding of bad faith as a matter of law.

Compounding the trial court’s error, it ruled that all bills submitted by medical professionals presumptively establish that the treatments are

eligible for PIP coverage. See RP 4/2/2010 at 73:3-9 (“given the fact that . . . their bills are being submitted . . . [i]t appears to me that the burden shifts to the insurer to show that the coverage is not reasonable and necessary”). This, too, is clear error. Nothing in Washington law¹² recognizes a presumption that all providers’ bills involve treatments that are reasonable and necessary, much less that all such bills necessarily involve treatments for injuries related to a covered automobile accident.¹³ In fact, the Washington Supreme Court recently rejected this presumption, explaining that medical professionals in fee-for-service practices may have incentives to provide services “some of which may not be necessary” and “often . . . lie in the gray area.” *Ambach v. French*, 167 Wn.2d 167, 178 n.5, 216 P.3d 405 (2009) (citation omitted).

The regulations and case law clearly support Farmers’ position that it has the right to continue its investigation by requesting IMEs before paying some claims. Even if the Court disagrees, there is simply no basis

¹² In the context of PIP, which is narrower than health insurance, this presumption is especially out of place. The bill may relate to treatment for a health condition that is covered by health insurance but ineligible for PIP coverage.

¹³ Although this presumption may exist in other states, such as Oregon, the Washington Insurance Commissioner chose not to adopt such regulation. Compare *Ivanov v. Farmers Ins. Co.*, 185 P.3d 417, 427 (Or. 2008) (interpreting Oregon’s PIP statute, ORS 742.524(1), which provides that “expenses of medical, hospital, dental, surgical . . . services shall be presumed to be reasonable and necessary” unless the provider has notice of the denial within 60 days).

to conclude that Farmers' position was "unreasonable, frivolous, or untenable" as to the entire class. *Liberty Mut.*, 144 Wn.2d at 23.

E. Farmers' Practices Are Authorized By Washington's Insurance Regulations And Consistent With Its Duty Of Good Faith

For these same reasons, the trial court improperly denied Farmers' own motion for partial summary judgment regarding Plaintiff's bad faith claim. CP 1070.

PIP coverage in Washington is limited to treatments which are "reasonable and necessary. . . for injuries sustained as a result of an automobile accident." RCW 48.22.005(7). Plaintiff's theory conflicts with this statute, as well as Washington's entire insurance scheme, because it requires Farmers to pay all claims, even before Farmers completes its investigation to determine whether they are "reasonable" or "necessary." Consistent with Washington law, where legitimate questions arise regarding certain claims, Farmers requests IMEs to gather more information before making payment decisions. *See* CP 1771-1772 at 31:25-32:13; CP 1238-1239 ¶6. Because Farmers does not have a duty to pay for treatments that are not reasonable, necessary, or related to the accident, Farmers has the right to investigate a claim to gather information regarding these criteria. *See Albee*, 92 Wn. App. at 874 (affirming summary judgment where Farmers had a "reasonable basis" to "suspend"

benefits pending an IME); *Torina Fine Homes*, 118 Wn. App. at 18 (duty of good faith does not require an insurer “to pay for claims not actually covered by the policy”). Moreover, as a matter of law, only violations of clearly established – as opposed to debatable – obligations give rise to claims of bad faith. *See supra* Section V.D.

Plaintiff did not come forward with any evidence that Farmers acted in bad faith under the legal standard that entitles Farmers to conduct a reasonable investigation. All record evidence indicates that Farmers acted in good faith in specific IME and payment decisions. Plaintiff offered no evidence to the contrary. Accordingly, in addition to improperly granting Plaintiff’s motion, the trial court should have granted Farmers’ motion for summary judgment.

VI. CONCLUSION

For the foregoing reasons, the trial court’s order is inconsistent with Washington law and unsupported by the record. It should be reversed, and the case remanded for entry of summary judgment for Farmers.

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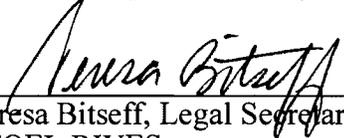
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CERTIFICATE OF SERVICE

I certify that I caused the foregoing, APPELLANT'S OPENING BRIEF – REDACTED VERSION, to be filed with the Court of Appeals (original and one copy); a copy was also sent via pdf/email to said opposing counsel and via U. S. Mail:

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