

68342-0

68342-0

NO. 68342-0-I

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

GORDON WOODLEY,

Appellant,

vs.

USAA CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF APPELLANT

Philip A. Talmadge, WSBA #6973
Randy Perry, WSBA #20680
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Gordon Woodley, WSBA #7783
Woodley Law Offices
512 Sixth Street South
Suite 101
Kirkland, WA 98033
(425) 453-2000

Attorneys for Appellant Woodley

2012 SEP 12 PM 3:48
DEPT. OF COMM. & TRADE
STATE OF WASHINGTON
K

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii-iii
A. INTRODUCTION	1
B. RESPONSE TO USAA STATEMENT OF THE CASE	2
C. ARGUMENT	10
(1) <u>A Six-Year Statute of Limitations Applies to Claims on Accounts Receivable</u>	10
(2) <u>Woodley’s Third Party Beneficiary Claim Is Subject to a Six-Year Statute of Limitations</u>	13
(3) <u>Woodley Has Established a Factual and Legal Basis for Recouping His Fees For Legal Services From USAA</u>	20
(4) <u>Attorney Fees</u>	23
D. CONCLUSION.....	25

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730,
49 P.3d 887 (2002).....15

Bush v. Safeco, 23 Wn. App. 327, 596 P.2d 1357 (1979).....19

Carver v. Hanoch (King County Cause No. 03-2-08180-9).....1

Castle & Cooke, Inc. v. Great American Ins. Co.,
42 Wn. App. 508, 711 P.2d 1108, *review denied*,
105 Wn.2d 1021 (1986)19

Deep Water Brewing, LLC v. Fairway Resources Ltd.,
152 Wn. App. 229, 215 P.3d 990 (2009),
review denied, 168 Wn.2d 1024 (2010).....18

Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.,
105 Wn.2d 878, 719 P.2d 120 (1986).....17, 18

Donald B. Murphy Contractors, Inc. v. King County,
112 Wn. App. 192, 49 P.3d 912 (2002)17, 18

Dragt v. Dragt/DeTray, LLC, 139 Wn. App. 560,
161 P.3d 473 (2007), *review denied*,
163 Wn.2d 1042 (2008)22

Greer v. Northwestern Nat. Ins. Co., 109 Wn.2d 191,
743 P.2d 1244 (1987).....15

Griffin v. Allstate Ins. Co., 108 Wn. App. 133,
29 P.3d 777 (2001), *review denied*,
146 Wn.2d 1005 (2002)21, 22

Kim v. Moffett, 156 Wn. App. 689, 234 P.3d 279 (2010).....17

Lybecker v. United Pacific Ins. Co., 67 Wn.2d 11,
406 P.2d 945 (1965).....19

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998)20, 21, 22, 23

Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643,
272 P.3d 802 (2012).....20, 21, 22, 24

Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington,
162 Wn. App. 495, 254 P.3d 939 (2011),
review denied, 173 Wn.2d 1022 (2012).....14, 16, 17

<i>National Sur. Corp. v. Immunex Corp.</i> , 162 Wn. App. 762, 256 P.3d 439 (2011), <i>review denied</i> , 173 Wn.2d 1006 (2012)	21
<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	23, 24, 25
<i>Prudential Prop. and Cas. Ins. Co. v. Lawrence</i> , 45 Wn. App. 111, 724 P.2d 418 (1986).....	22
<i>Public Util. Dist. No. 1 v. Int'l Ins. Co.</i> , 124 Wn.2d 789, 881 P.2d 1020 (1994).....	22
<i>Safeco Ins. Co. of America v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	15
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	10, 12
<i>Vikingsstad v. Baggott</i> , 46 Wn.2d 494, 282 P.2d 824 (1955)	18

Statutes

Laws of 1989, ch. 38 § 1	12
Laws of 2007, ch. 124 § 1, eff. July 22, 2007.....	11, 12
Laws of 2007, ch. 124 § 2.....	11
RCW 4.16.040 (1989).....	12
RCW 4.16.040	11, 12
RCW 4.16.040(1).....	19
RCW 4.16.040(2).....	11, 13

Rules and Regulations

RAP 18.1.....	23, 25
---------------	--------

A. INTRODUCTION

This case is about an insurance company that refuses to pay an outstanding account receivable to a lawyer who rendered services and, as a result, saved the company from having to pay substantial damages for injuries sustained by claimants in an auto accident. Insurer USAA refused to pay attorney Gordon Woodley for services he rendered in defending USAA's insureds, Tara and David Hanoch, from claims by Herman Carver and his wife, and Western Ports Transportation, Inc., in *Carver v. Hanoch* (King County Cause No. 03-2-08180-9).

USAA's policy obligated it to defend the Hanochs against lawsuits and claims brought by third parties. Woodley's work from September 2002 until January 2005 focused on defending against claims asserted against the Hanochs in the Carver lawsuit. Woodley was instrumental in obtaining a successful result; defending the Hanochs throughout the case, getting the case bifurcated into binding arbitration on only the liability issue, defending them at the arbitration hearing, and obtaining a judgment of dismissal of all claims. The arbitrator ruled that the accident was 100% the fault of Western Ports Transportation, Inc. and the driver of its tractor/trailer. No fault was found on Mrs. Hanoch's part. As a result, the trial court then entered a final judgment dismissing all claims against the Hanochs.

Following the entry of the judgment on January 25, 2005, Woodley sent an invoice to USAA on January 31, 2005. Woodley has carried this account receivable from USAA since that date because USAA has refused to pay for the services rendered of which it was fully cognizant. The present lawsuit was timely filed on January 10, 2011, less than six years after submission of the invoice to USAA and the final judgment dismissing all claims against the Hanochs. The trial court here erred in dismissing Woodley's action.

B. RESPONSE TO USAA STATEMENT OF THE CASE¹

Following a three vehicle accident on Interstate 5 on September 11, 2002, Tara Hanoch went to see attorney Gordon Woodley on September 25, 2002, seeking protection from legal liability and recovery for her personal injuries sustained in that accident. CP 275, 278, 293.

Woodley recognized that before any action could be taken regarding Hanoch's injuries, responsibility for the accident had to be established. CP 278. If she was the cause of the accident, the Hanochs would be liable for the injuries to others and their insurer, USAA, would be required to indemnify them. *See* CP 389. There was a factual dispute

¹ While many of the facts recited here were presented in Woodley's opening brief, they are reiterated to refute USAA's incorrect assertion in its response that Woodley provided no benefit to USAA, that he did virtually no work on the case, and that USAA did all the case preparation.

as to who caused the collision. CP 278. Hanoch contended, as it was later found, that her vehicle had been struck by the Western Ports tractor/trailer. CP 278, 340-44. The driver of the tractor/trailer contended that his vehicle was hit by Hanoch. CP 278.² Liability was either 100% against Hanoch or 100% against Western Ports. CP 248, 278. All efforts to establish that Western Ports was responsible for the accident *benefitted* USAA since it would only be required to indemnify and pay damages to the Carvers if it was found that Hanoch was liable. CP 279.

The same day that Tara Hanoch contacted Woodley, he talked with USAA claims adjuster Arlys Reynolds, informing her that an accident reconstructionist should be retained to take measurements of the vehicle before it was destroyed. CP 144, 278-79. Reynolds agreed to keep the vehicle but deferred on getting a reconstruction expert. CP 144, 277. From that point on, USAA was aware that Woodley was defending Hanoch and that his efforts were beneficial to USAA. CP 144.

Thereafter, Woodley and Reynolds frequently communicated about matters concerning the accident. CP 148-49. On October 10, 2002, Reynolds informed Woodley that the truck driver was blaming Hanoch for

² The collision between Hanoch's car and the truck forced Hanoch's car into another traffic lane where it was struck by a third vehicle, injuring that vehicle's occupants, the Carvers. CP 277.

the accident. CP 150-51. Woodley affirmed to Reynolds that Hanoch was adamant she was not at fault. CP 515.

On October 18, 2002, Reynolds talked to reconstruction expert John O'Callaghan and sent him photos and statements for review and to determine if he thought further work was warranted. CP 152. On October 22, Reynolds informed the Western Ports truck driver that USAA would not accept liability. CP 153. The truck driver told her that he was turning the matter over to his lawyer. CP 153. On October 25, 2002, Reynolds was notified that the Carvers had obtained counsel. CP 153. By the end of October 2002, USAA admitted it had coverage, acknowledged that there were two potential claimants against the Hanochs, and that these claimants had retained counsel to pursue their rights. CP 153, 156, 173, 183. Reynolds case diary entry for October 29 noted that she had discussed the case with the legal department and that there was a "good possibility suit will be filed if semi co. does not step forward." CP 157. At that time, USAA continued to rely on Woodley's services and did not hire co-counsel. *See* CP 279.

Reynolds's case diary entry for November 7, 2002 noted that reconstructionist O'Callaghan "does not think anything to be gained by inspecting the vehicles personally." CP 159. The following day, Woodley informed Reynolds that he had retained reconstruction expert John Hunter

who would go out and take measurements of the Hanoch vehicle. CP 159, 279. Reynolds later identified the matter in a January 2, 2003 email noting:

This is the one where he [Woodley] was pushing for a recon report and PIRL [O'Callaghan's company] said it wouldn't prove anything.

CP 239.

On January 13, 2003, Western Ports' insurer informed USAA that it was denying all claims against its insured and Hanoch was responsible for the accident. CP 241. Based on its own legal department's analysis, USAA had anticipated months earlier that a lawsuit was coming unless Western Ports "step[ped] forward." CP 157. When Western Ports confirmed that it would not assume responsibility for the accident, USAA then knew that a lawsuit was coming. CP 241. Nevertheless, USAA continued to rely on Woodley's efforts for their insureds and did not hire co-counsel. CP 279. On March 27, 2003, Woodley informed Reynolds that Hunter had advised him that he had all he needed at that point to facilitate his analysis.³ CP 169, 279.

On April 16, 2003, Woodley called Reynolds and told her that Herman Carver's lawyer would be filing suit against both the Hanochs and the Western Ports truck driver. CP 171, 280. At that time, Woodley

³ Reynolds had been trying to dispose of the car since November 2002 to avoid storage costs. CP 165, 239, 243, 279.

informed USAA that the Hanochs needed legal representation to protect their interests, that he would accept service on their behalf, and that he would be willing to continue defending David and Tara Hanoch. CP 171, 280. USAA never said no to Woodley; Reynolds merely said she would pass all the information on to the USAA litigation unit. CP 171, 280.

Later, in July 2003, in response to queries from the USAA subrogation unit, Reynolds reported that she had spoken to accident reconstructionist O'Callaghan and that he "could not tell who changed lanes," which was what allegedly caused the accident. CP 182, 248, 343. Because O'Callaghan's oral opinion was equivocal and unhelpful, USAA decided that it would not pay for a written report. CP 182. In discovery, USAA never produced a report from the USAA accident reconstructionist. Thus, USAA provided no expert report and no useful expert opinion to support the conclusion that Hanoch, its insured, was not responsible for the accident. *See* CP 248. It was Woodley's expert, John Hunter, that carried the day to establish that Hanoch was not liable, thereby saving USAA thousands of dollars. *See* CP 344.

In July 2003, USAA's legal unit was clearly aware of the information Woodley had provided that the Carvers were going to sue the Hanochs. CP 183. Reynolds had passed the information along to the

USAA litigation unit and a conscious choice was made not to provide the Hanochs legal representation. CP 171, 183.

On September 22, 2003, the Carvers served their lawsuit on Woodley, who accepted service on behalf of the Hanochs and sent a notice of appearance. CP 280, 327. Woodley immediately notified USAA and sent them the summons and complaint. CP 185, 280.

After the suit was filed, USAA hired Alan Peizer to also defend the Hanochs. CP 280. Peizer did not substitute for Woodley; co-counsel Peizer filed an association of counsel and thereafter he and Woodley worked cooperatively. CP 280-81, 329-30, 332-38. Woodley was active in the case and did extensive work which was detailed in the invoice and billing sent to USAA.⁴ CP 285-93, 322-38.

From its inception until the final judgment on liability, practically no work was done on the damages portion of the case. CP 282. Peizer did not seek a statement of damages from the Carvers or send them interrogatories which would probe damages until September 2004. CP 282, 346-68. The case was then bifurcated and liability tried in arbitration

⁴ Woodley worked on the answer denying liability and filed a counterclaim and cross-claim for Hanoch's damages in order to preserve those claims. CP 280, 332-39. Woodley prepared the answers to plaintiffs' interrogatories, prepared the Hanochs for depositions and defended them, attended the depositions, and examined and prepared John Hunter, the expert, for his deposition and defended it, Woodley was able to have the case bifurcated into binding arbitration for the liability phase and he prepared the defense brief on the liability issues. CP 280. Woodley worked on the prehearing statement of proof, kept out a damaging video Western Ports wanted to use, examined witnesses, examined Tara Hanoch, and argued the case for the defense. CP 281-82.

in December 2004. CP 282, 340-44. Thus, all of the work in the case until January 2005 was on liability, which USAA had a duty to defend.⁵ CP 389.

The arbitration on liability demonstrated Woodley's crucial role and how USAA was benefitted. Peizer informed USAA on December 1, 2004, immediately before the arbitration, that the issue boiled down to whether Hanoch caused the accident by improperly changing lanes in front of the Western Ports truck, or whether the truck caused the accident by improperly changing lanes into Hanoch's lane of travel. CP 252. Peizer told USAA, "Accident reconstruction experts have been lined up on all three sides, each expert naturally espousing opinions on behalf of their own retained clients." CP 253. USAA never obtained an expert who would defend the Hanochs and USAA. CP 182, 279. The expert supporting the Hanoch position was John Hunter, retained by Woodley when USAA would not do so, who inspected the car and took measurements when the USAA specialist (O'Callaghan) declined to do so, and who formed an opinion that supported Hanoch's position. Woodley prepared Hunter for his testimony. CP 159, 169, 182, 279, 281-82.

⁵ Peizer's role was limited. CP 281. He never met with the Hanochs except when Woodley was preparing them for deposition and at the arbitration. CP 281. He did examine at some depositions, added comments to Hanoch's answer, which Woodley had drafted, and participated in arbitration. CP 82, 281. His entire defense bill was approximately \$15,000. CP 281.

Woodley defended the deposition. CP 281-82. The importance of Hunter's testimony on the outcome was specifically noted in the arbitrator's opinion, which found no liability attributable to Hanoch:

The significance of the physical evidence was the subject of dispute amongst the respective experts called by the defendants. Ms. Hanoch's expert, John Hunter, was more persuasive. Not only was the extent of his experience more compelling, his position that the physical evidence was not conclusive in and of itself, but was consistent with the truck having crossed into the Volvo [Hanoch's car] was explained and made sense.

CP 344.

Following the arbitration decision, Peizer immediately informed USAA of the significance of the victory on liability, acknowledging Hunter's testimony and Woodley's role in obtaining that victory. CP 255-57.⁶ After the arbitration decision, the trial court entered a final judgment on January 25, 2005, dismissing all claims against the Hanochs. CP 297-307. After the court entered the judgment, Woodley sent USAA his invoice for his services on January 31, 2005.⁷ CP 285. Other than paying for costs related to John Hunter, USAA refused to pay Woodley. CP 277, 283. He has carried the account receivable since. CP 277. USAA knew

⁶ Peizer noted the evidence presented at the arbitration hearing, including "testimony from *our* accident reconstruction expert John Hunter." CP 256 (emphasis added).

⁷ The invoice states that it is for "Legal Services Rendered Re: Liability Only". CP 285. The invoice was addressed to the Hanochs and contains a notation that reads: "This invoice will be submitted to your insurer USAA for payment under your liability policy." *Id.*

there was an account receivable because Woodley's March 9, 2005 letter to USAA confirmed it.⁸ CP 295.

After all efforts to get USAA to pay for the defense of David and Tara Hanoch failed, Woodley filed this action in the King County Superior Court on January 10, 2011. CP 276-77. On October 14, 2011, USAA filed a summary judgment motion arguing that Woodley's claims were barred by the three-year statute of limitations. CP 20-30. Woodley then filed a cross-motion for summary judgment arguing that a six-year limitation period applied. CP 213-32. Both motions were heard on January 20, 2012. RP 4. The trial court granted USAA's summary judgment motion and denied Woodley's summary judgment motion. CP 439. Woodley appealed. CP 440.

C. ARGUMENT

(1) A Six-Year Statute of Limitations Applies to Claims on Accounts Receivable

USAA contends that because it had no written contract with Woodley a three-year statute of limitations applied barring all of Woodley's claims. Citing *Tingey v. Haisch*, 159 Wn.2d 652, 655, 152 P.3d 1020 (2007), USAA contends that "No contract means no accounts

⁸ After Woodley concluded his successful defense work for David and Tara Hanoch, he began substantive work on Tara Hanoch's injury claim. CP 292. Woodley pursued Hanoch's personal injury claim under a separate cause number and that case settled for \$110,000. CP 283.

receivable.” Response at 13. But USAA’s argument fails to acknowledge the development of law regarding accounts receivable.

There is no dispute that Woodley sent an invoice to USAA on January 31, 2005, asking to be paid for the legal services he rendered in defending the Hanochs, or that USAA was obligated to defend the Hanochs. Woodley asked USAA for payment by sending it an invoice. In doing so, he created *an account receivable* that has yet to be paid.⁹ This lawsuit was filed on January 10, 2011, less than six years after USAA was invoiced and the account receivable created. Thus, the six-year statute of limitations for an account receivable contained in RCW 4.16.040 controls.¹⁰

In 1989, the Legislature amended RCW 4.16.040, the six-year statute of limitations, and added a new category for accounts receivable

⁹ Woodley’s subsequent March 9, 2005 billing to USAA, CP 295, establishes that USAA knew Woodley had a receivable.

¹⁰ RCW 4.16.040 provides in relevant part:

The following actions shall be commenced within six years:

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of business of the claimant’s business or profession, whether arising from one or more transactions and whether or not earned by performance.

RCW 4.16.040(2). Laws of 2007, ch. 124 § 1, eff. July 22, 2007, which amended RCW 4.16.040(2) to include the quoted language, also provided in another section of the same chapter that: “This act applies to all causes of action on accounts receivable, whether commenced before or after the effective date of this section.” Laws of 2007, ch. 124 § 2.

incurred in the ordinary course of business. Laws of 1989, ch. 38 § 1. No written contract is necessary and the six-year limitation provision is applicable to attorney fees. Our Supreme Court so held in *Tingey*. In that case, attorney Tingey sued his clients for non-payment of legal fees incurred on an hourly basis. There was no written fee contract. *Id.* at 655. The attorney brought suit after three years. The Court held that an account receivable means “amounts due a business on account from customers who have bought merchandise or received services.” *Id.* at 659-60. The Court held that attorney fees which were invoiced satisfy this meaning of an account receivable and are governed by the six-year statute of limitations. In reaching that result, the Court noted that as long as the business or profession carried the receivable on its books, the six-year limitation applied. It noted the Legislature’s intent to broaden the circumstances under which business debts were subject to a six-year statute of limitations. *Id.* at 662.

After *Tingey* was decided, the Legislature amended RCW 4.16.040 to define an account receivable. When *Tingey* was decided, the statutory provision contained no definition and stated, “The following actions shall be commenced within six years: . . . (2) An action upon an account receivable incurred in the ordinary course of business.” *See* former RCW 4.16.040 (1989). Five months after the *Tingey* decision, the Legislature

amended the statute to define an account receivable as “any obligation for payment incurred in the ordinary course of claimant’s business or profession, whether arising from one or more transactions and whether or not earned by performance.” Laws of 2007, ch. 124 § 1, effective July 22, 2007.

By using the words *any obligation for payment*, the Legislature abolished any need for direct contract privity. Thus, as long as an account receivable is created on *any* basis, the six-year limitation applies. This would include an unjust enrichment claim since USAA received the benefit of Woodley’s work for which it has not paid. That work resulted in USAA not having to pay thousands of dollars on the claims against its insureds.

Here, there is no dispute that USAA was invoiced, Woodley has treated this as an account receivable from USAA, USAA received the benefit of his services,¹¹ and less than six years elapsed before suit commenced. Accordingly, the six-year provision of RCW 4.16.040(2) controls and Woodley’s claims are not time barred.

(2) Woodley’s Third Party Beneficiary Claim Is Subject to a Six-Year Statute of Limitations

¹¹ There is no dispute that USAA benefitted from the testimony of accident reconstructionist John Hunter, who was secured and prepared by Woodley.

USAA dismisses Woodley's third party beneficiary analysis by asserting that Woodley is not the insured and has no standing to assert a bad faith claim. USAA misconstrues Woodley's argument. Woodley's opening brief argues that under *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 504, 254 P.3d 939 (2011), *review denied*, 173 Wn.2d 1022 (2012), USAA had a duty to make a good faith effort to defend as soon as it was reasonably likely that Hanoch might be liable, that USAA breached that duty, and that under the circumstances of this case Woodley was entitled to recoup his defense fees as a third party beneficiary under the written insurance contract between USAA and Hanoch.

As of April 2003, Woodley informed USAA that the Carvers' lawyer said he was going to sue the Hanochs and that they needed legal representation. CP 171, 280. USAA's litigation unit decided not to provide counsel until a lawsuit was actually filed. In the meantime, they relied on Woodley to inform them when the lawsuit was actually filed. CP 183. Although USAA belatedly hired defense co-counsel, Alan Peizer, it was fully cognizant that Woodley was defending and protecting the interests of its insureds, the Hanochs, during the period before the action was commenced. USAA had the benefit of Woodley's services.

Under these circumstances, USAA breached its duty to defend. It should have provided legal counsel as soon as it knew litigation was likely. USAA's duty arose when it was specifically informed a lawsuit was going to be filed, a duty it breached by deliberately deciding not to provide the Hanochs a lawyer.

Tara Hanoch's decision to employ Woodley was a reasonable response to the situation in which she found herself. Washington law is clear that when an insurer breaches its duty to defend an insured, the insured is entitled to take whatever steps necessary to protect its interests because "when an insurer has refused to defend its insured, it is in no position to argue that the steps the insured took to protect [it]self should inure to the insurer's benefit." *Greer v. Northwestern Nat. Ins. Co.*, 109 Wn.2d 191, 204, 743 P.2d 1244 (1987).¹² See also, *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002); *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 397, 823 P.2d 499 (1992)

¹² The supplementary payments part A of the Hanochs' USAA policy as to liability states in pertinent part:

In addition to our limit of liability, we will pay on behalf of a covered person: . . .

6. Other reasonable expenses incurred at our request.
7. All defense costs we incur.

CP 390.

(rejecting insurer argument that insured could not enter into covenant judgment with claimant to avoid exposure).

USAA's breach of its duty to defend occurred even in the absence of a demand from the claimant. *Moratti*, 162 Wn. App. at 495. This Court held the "duty to settle is intricately and intimately bound up with the duty to defend and to indemnify," *id.* at 504, and rejected USAA's precise argument that it had no obligation to defend the Hanochs until a lawsuit was filed against them:

We can give no credence to [insurer's] assertion that it did not have to respond until 2004 because no settlement offer or demand was made or suit filed until then.

Id. at 504. This court found that the insurer had a duty to make a good faith effort to settle as soon as it was reasonably likely that the insured may be liable. In doing so, it equated the duty to settle with the duty to defend and found the duty to defend "must be prompt and timely." *Id.* at 503.

In light of these insurer duties summarized in *Moratti*, USAA had a duty to defend as soon as it was reasonably likely that a lawsuit would be filed, which was certainly as early as January 2003, and clearly so when informed in April by Woodley that a lawsuit was forthcoming. USAA failed to provide counsel and breached its duty to defend the

Hanochs. As in *Moratti*, USAA cannot rely on the fact that it provided a defense when an actual lawsuit was filed.

Here, USAA breached its duty. That breach caused the Hanochs to seek protection and help from Woodley. Woodley responded to fill the defense void left by USAA's breach. Under these circumstances, Woodley became a third party beneficiary of the insurance agreement between the Hanochs and USAA and is entitled to recoup his defense fees from USAA under the written insurance contract.

USAA contends there is no evidence that USAA and Hanoch intended that Woodley be a third party beneficiary of the written insurance contract. But USAA's argument ignores the appropriate objective test for determining such intent. Creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 886, 719 P.2d 120 (1986); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 196, 49 P.3d 912 (2002). The test of intent is not whether the parties desired to confer a benefit upon the third person or advance his interests but is an objective one: whether performance under the contract would necessarily and directly benefit the third party. *Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010). *Donald B. Murphy*,

112 Wn. App. at 196. *See also, Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 255-56, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). Our Supreme Court has explained the “intent” necessary to create a third party beneficiary contract as follows:

“If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person ... The ‘intent’ which is a prerequisite of the beneficiary’s right to sue is ‘not a desire or purpose to confer a particular benefit upon him,’ nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him.... So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity. In short, the motive, purpose, or desire of the parties is a quite different thing from their intention.”

Del Guzzi Const. Co., 105 Wn.2d at 885-87 (quoting *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955)).

Here, the insurance policy obligates USAA to “settle or defend . . . any claim or suit” for compensatory damages against the insured. CP 389. As a practical matter the insurance policy contemplates that the insurer will provide an attorney to the insured and pay for that attorney. Thus, the insurer’s performance under the contract necessarily and directly benefits the attorney defending the insured, thereby making such defense attorney a third party beneficiary of the insurance contract.

It has been expressly held that a third party beneficiary of a written contract who has a right to sue on the contract is governed by the six-year statute of limitations.¹³ *Lybecker v. United Pacific Ins. Co.*, 67 Wn.2d 11, 18, 406 P.2d 945 (1965). Regarding a duty to defend under an insurance contract, the statute of limitations does not begin to run until there is a final judgment in the underlying lawsuit. *Bush v. Safeco*, 23 Wn. App. 327, 329, 596 P.2d 1357 (1979); *Castle & Cooke, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 512, 711 P.2d 1108, *review denied*, 105 Wn.2d 1021 (1986). Here, the underlying final judgment was entered on January 25, 2005. Woodley's lawsuit was commenced less than six years from that date.

For the reasons explained in Woodley's opening brief and highlighted here, the six-year statute of limitations applies to Woodley's suit on an account receivable and as a third party beneficiary of the insurance contract. Woodley's suit against USAA for fees is timely. Moreover, as explained below USAA is obligated as a matter of law to pay for Woodley's pre-tender service that benefitted USAA. For these

¹³ RCW 4.16.040(1) provides:

The following actions shall be commenced within six years:

- (1) An action upon a contract in writing or liability express or implied arising out of a written contract.

reasons, the trial court erred in granting USAA's motion for summary judgment and denying Woodley's motion for summary judgment.

(3) Woodley Has Established a Factual and Legal Basis for Recouping His Fees For Legal Services From USAA

USAA argues that it gained nothing from Woodley's efforts, and, in any event, Woodley did no more than he would have done in pursuing Hanoch's personal injury claim. Thus, there is no basis for Woodley to seek fees from USAA and no basis for Woodley's assertion of unjust enrichment. USAA also contends that it acted properly by defending Hanoch shortly after the Carvers filed suit against her.

First, it is simply not true that USAA received no benefit from Woodley's efforts. It is undisputed that Woodley secured and prepared the accident reconstruction expert, John Hunter, whose testimony proved instrumental to the arbitrator's determination that Tara Hanoch was completely fault free. That determination saved USAA thousands of dollars as Hanoch's insurer.

Further, Washington law has expressly indicated that an insurer does not get a "free ride" with respect to services offered by counsel for an insured. In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), *impliedly limited in part on other grounds as recognized in Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012), our

Supreme Court held that an insurer was obliged to reimburse an insured for fees incurred by the insured in pursuing its subrogation interest from a tortfeasor as part of the insured's broader efforts against that tortfeasor because such an action benefitted the insurer. As the *Mahler* court explained,

It is grossly inequitable to expect an insured, or other claimant, in the process of protecting his own interest, to protect those of the [insurer] as well and still pay counsel for his labors out of his own pocket, or out of the proceeds of the remaining funds. And this is precisely the view taken by the overwhelming majority of decisions, in that a proportionate share of fees and expenses must be paid by the insurer or may be withheld from its share.

Id. at 425 n.17. The situation here is comparable to that addressed in *Mahler*. See also, *Matsyuk*, 173 Wn.2d at 651 n.2.

USAA argues that it acted properly here by hiring counsel, Alan Peizer, after suit was filed against Hanoach.¹⁴ But an insured is entitled to reimbursement of *all* fees incurred prior to the tender of the case to the insurer that are necessary to defend the insured. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 142-43, 149, 29 P.3d 777 (2001), *review denied*, 146 Wn.2d 1005 (2002). See also, *National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 779-80, 256 P.3d 439 (2011), *review denied*, 173 Wn.2d 1006 (2012) (unless insurer can show substantial and actual

¹⁴ USAA contends that it competently defended "once suit was filed," asserting "[u]ntil the lawsuit was filed there was nothing to defend." Response at 19-20, 23.

prejudice resulting from insured's alleged late tender, insurer is liable for pre-tender defense costs). Similarly, insureds are entitled to reimbursement where they hire counsel to represent them after the insurer denied them a defense. In *Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 121, 724 P.2d 418 (1986), the court held the insurer had a duty to reimburse the insureds where the defense costs on covered and uncovered claims were not susceptible to proration. See also, *Public Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 810, 881 P.2d 1020 (1994) (covered and noncovered claims and damages cannot be allocated where both arise from the same factual core). Accordingly, where USAA benefitted from Woodley's efforts on behalf of Hanoch, USAA must pay its fair share of the costs incurred. See *Mahler*, 135 Wn.2d at 425 n.17; *Matsyuk*, 173 Wn.2d at 654 (*Mahler's* equitable sharing rule derives from principles of equity, not contract language). This also applies to Woodley's efforts on Hanoch's behalf before any lawsuit was actually filed. See *Griffin*, 108 Wn. App. at 142-43, 149 (insured entitled to reimbursement of pre-tender fees).¹⁵

¹⁵ USAA cites *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 161 P.3d 473 (2007), review denied, 163 Wn.2d 1042 (2008) in asserting that it did not benefit from Woodley's efforts. As discussed above, USAA received substantial benefit from Woodley's efforts and *Dragt* does not assist USAA. *Dragt* notes that enrichment alone will not trigger the doctrine of unjust enrichment, "the enrichment must be unjust under the circumstances and as between the two parties to the transaction." *Id.* at 576. *Dragt* states that three elements must be established for unjust enrichment: (1) there must be a benefit conferred on one party by another; (2) the party receiving the benefit must have

(4) Attorney Fees

USAA urges this court to reject Woodley's claim for attorney fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991),¹⁶ because that case addressed a claim for fees by an insured and not an insured's attorney.¹⁷ But, as explained in Woodley's opening brief, Woodley is effectively enforcing USAA's obligations under its insurance contract. When USAA did not properly provide a defense under its insurance contract, David and Tara Hanoch sought out Woodley to defend them and Woodley's defense services should be paid under *Olympic Steamship*. Under *Olympic Steamship*, Woodley is entitled to recover his fees in this action and on appeal. There, our Supreme Court

an appreciation or knowledge of the benefit; and (3) the receiving party must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Id.* All requirements are met. The accident reconstruction expert secured by Woodley won the day for Hanoch at the arbitration on liability, thus benefitting USAA as Hanoch's insurer. Peizer specifically informed USAA of Woodley's valuable role in securing the arbitration determination. CP 256-57, 344. Also, USAA in fairness should be required to pay for the services for which it received a benefit. *See Mahler*, 135 Wn.2d at 425 n.17 (grossly inequitable to expect an insured in the process of protecting his own interest, to protect those of the insurer as well and still pay counsel for his labors out of his own pocket).

Moreover, USAA additionally argues that any unjust enrichment or other quasi contract claims are subject to a three year statute of limitation. But, as noted in section C (1), while unjust enrichment provides an underlying foundation for Woodley's claim, his present basis for recovery is the outstanding account receivable, which is subject to a six-year statute of limitation.

¹⁶ Woodley sought fees and costs on appeal under *Olympic Steamship* and RAP 18.1.

¹⁷ Under *Olympic Steamship*, "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." 117 Wn.2d at 54.

held that the duty to defend was a contract right and its breach allowed for the recovery of attorney fees, stating: “We also extend the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend.” *Olympic Steamship*, 117 Wn.2d at 52. The case also holds that an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of the insurance contract “regardless of whether the insurer’s duty to defend is at issue.” *Id.*

Woodley is entitled as a third party beneficiary to assert the rights of his clients, the Hanochs. Moreover, if USAA is not compelled to pay its pro rata share of legal expenses, the insureds would not receive the full benefit of their coverage. Thus, this case is more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available). *See Matsyuk*, 173 Wn.2d at 659. Further, this case involves a legal question concerning interpretation of the insurance policy,¹⁸ not a factual question focusing on the size of a covered loss. *Id.* at 659-60. This too supports an award of *Olympic Steamship*

¹⁸ The policy interpretation question concerns the scope of USAA’s obligation to pay “All defense costs we incur,” in light of its duty to defend. CP 390.

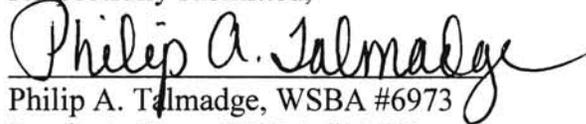
fees. *Id.* For these reasons Woodley should be awarded his fees and costs of bringing his suit and for this appeal. RAP 18.1.

D. CONCLUSION

For the reasons stated in Woodley's opening brief and reiterated in this reply, the trial court's grant of summary judgment to USAA should be reversed and this case remanded with direction to enter summary judgment in favor of Woodley. USAA saved thousands of dollars due to the defense work of Gordon Woodley. Having received this benefit, it refused to pay Woodley's outstanding account receivable for the services he provided on behalf of USAA's insured. Also, Woodley was a third party beneficiary of the contract between USAA and the Hanochs. In either event, the action is governed by a six-year statute of limitations. Woodley sought in this action to be paid for his defense work, which benefitted USAA. Woodley should be awarded attorney fees under *Olympic Steamship* and costs and reasonable attorney fees on appeal.

DATED this 12th day of September, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Randy A. Perry, WSBA #20680

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Gordon Woodley, WSBA #7783
Woodley Law Offices
512 Sixth Street South
Suite 101
Kirkland, WA 98033
(425) 453-2000

Attorneys for Appellant
Gordon Woodley

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of Reply Brief of Appellant in Court of Appeals Cause No. 68342-0-I to the following parties:

Gregory J. Wall
Wall Liebert & Lund, P.S.
1521 SE Piperberry Way, Suite 102
Port Orchard, WA 98366

Gordon Woodley
Woodley Law Offices
512 Sixth Street South, Suite 101
Kirkland, WA 98033

Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

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

Dated this 12th day of September, 2012 at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick