Supreme Court No. 101403-1

Court of Appeal Cause No. 82788-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ANDREW HAMBLIN,

Respondent,

v.

NATIONAL GENERAL INSURANCE COMPANY and INTEGON PREFERRED INSURANCE COMPANY,

Appellants,

PETITION FOR REVIEW

WATHEN | LEID | HALL | RIDER, PC
Rick J Wathen, WSBA #25539
William L. Weber III, WSBA #28867
Attorneys for Appellants National General Insurance and Integon Preferred Insurance Company
222 Etruria Street
Seattle, WA 98109
Telephone: (206) 622.0494

I. IDENTIFY OF PETITIONER……..1

II. COURT OF APPEALS DECISION…….1

III. ISSUE PRESENTED FOR REVIW……..…1,2

IV. STATEMENT OF THE CASE…….2

A. Overview…….2

B. Integon Fully Defended Without a Reservation of Rights……..……...4

C. Hamblin Files Suit Against Tortfeasor……5

D. Hamblin Files Suit Against Integon……...…..5

E. Police Report as Evidence……...…...….6

F. Verdict…….……9

G. Attorney Fees and Costs……...….9

V. ARGUMENT…….11

A. The Admission of the Police Report into Evidence Conflicts with this Court's Prior Rulings and the Statute……...…….11

B. The Court of Appeals decision is in conflict with Multiple Washington Supreme Court Decisions, Including *Olympic Steamship* and its Progeny……..16

VI. CONCLUSION……..…19

APPENDIX……..…..21

TABLE OF CASES AND AUTHORITIES

Washington Cases:

Colo. Structures, Inc. v. Ins. Co. of the W., 125 Wn. App. 907, 928, 106 P.3d 815 (2005)……19

Colorado Structures, Inc. v. Insurance Co. of the Wes, 161 Wn.2d 577, 606, 167 P.3d 1125 (2007)……...18,19

Dayton v. Farmers Ins. Grp., 124 Wn.2d 277, 280-81, 876 P.2d 896 (1994))……...….19

Gendler v. Batiste, 174 Wn.2d 244, 274 P.3d 346 (2012)…....13

Godfrey v. Hartford Cas. Ins. Co., 142 Wash. 2d 885,889, 16 P. 3d 617 (2001)……18

Guillen v. Pierce County, 144 Wn. 2d 696, 31 P.3d 28 (2001).....12,13

Leingang v. Pierce County Med. Bureau, Inc., 131 Wash. 2d 133, 147, 930 P. 2d 288 (1997)……....17

Matsyuk v. State Farm Fire & Cas. Co., 173 Wash. 2d 643, 659-60, 272 P. 3d 802 (2012)……..….18

McGreey v. Oregon Mutual Insurance Company, 128 Wash. 2d 26, 33, 904 P. 2d 731 (1995.)……17

Olympic Steamship v Centennial Ins. Co. 117 Wn.2d 37, 811 P.2d 673 (1991)…….....9,16,17,18,19

Rice v. Offshore Sys., Inc. 167 Wn.App. 77, 272 P.3d 865 (2012)……..……..…13,14

Statutes:

RCW 46.52.60…….15,16

RCW 46.52.080..... 11,12,14,15

Court Rules:

CR 26(b)(1)……...13

I. IDENTITY OF MOVING PARTY

National General Insurance Company and Integon Preferred Insurance Company, defendants in the trial court and the appellants in the Court of Appeals, ask this Court to grant the petition for review of the Court of Appeals decision identified in part II.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its decision on September 26, 2022. (A copy of the published opinion is attached as Appendix A.)

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals decision affirming admission of the police report into evidence conflicts with this Court's prior decisions and RCW 46.52.080. Review is warranted pursuant to RAP 13.4(b)(1).

2. The Court of Appeals decision affirming admission of the police report is an issue of substantial public interest because police reports are routinely excluded in practice by trial courts relying on RCW 46.52.080. Review is warranted pursuant to RAP 13.4(b)(4).

3. The Court of Appeals decision awarding *Olympic Steamship* fees in the absence of a coverage dispute conflicts with multiple prior decisions of this Court.

Review is warranted pursuant to RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

A. Overview

On February 6, 2016, an intoxicated Castillo-Garcia approached an intersection and grazed the rear bumper of a vehicle operated by Karen Sumner that was in the left turn lane. CP 630. Mr. Castillo-Garcia's vehicle continued unabated several feet into the intersection striking Andrew Hamblin's vehicle. Mr. Castillo-Garcia was insured by National General/Integon (herein after "Integon") with a single combined limit $100k policy. CP 2 (trial Exh). Ms. Sumner incurred minimal damages and settled her claim for $693. CP 547. That left $99,307 available within the combined limit of the policy to indemnify Castillo-Garcia. Integon accepted coverage, defended without reservations, and paid the policy limit before suit was filed in this matter.

Eventually, Hamblin made a policy limits demand to Mr. Castillo-Garcia's carrier. TR Exh pg-2 -336. Hamblin entered

into a covenant judgment with Castillo-Garcia wherein in exchange for an assignment of bad faith rights, he would agree to not collect on the judgment. CP 204-216. The settlement terms also stated that Castillo-Garcia would be compensated a percentage of the settlement (later held to be unenforceable as against public policy in the first appeal).

Nevertheless, the trial court approved a $1.5 million settlement in a reasonableness hearing. At trial in this matter, Integon was not permitted to point out to the jury that a finding of bad faith necessarily meant an award of 1.5 million in damages RP 199-205 .

Hamblin brought bad faith, negligent claims handling, breach of contract, IFCA, and CPA claims against Integon. through the assignment. CP 251. The jury found that Integon acted in bad faith (though they were not permitted to decide proximate cause or determine or if Integon had rebutted the presumption of harm) and found breach of contract with damages in the amount of $3,027. The jury did not find any damages

associated with negligent claims handling, IFCA or CPA. CP 1725-1726, Special Verdict Form. Appendix B.

Post-trial, the trial court awarded attorney fees to Hamblin that total nearly $500k plus $35k in costs. CP 1696-1699. The trial court's order is silent as to the basis of the award. Attached as Appendix C is the court's order. Other then not awarding a Lodestar multiplier, the trial court awarded everything requested by counsel.

B. Integon Fully Defended Without a Reservation of Rights.

At all times, Integon provided Castillo-Garcia with a full defense and without a reservation of rights. CP 176. Mr. Castillo-Garcia was insured by Integon through a $100k single limit policy. CP 264. Mr. Castillo-Garcia failed to report Hamblin's claim to Integon. Instead, Integon learned of Hamblin's claim when it received a policy limits demand on November 4, 2016. TR exh 18. Following this notification, Integon made efforts to contact Mr. Castillo-Garcia, but Mr. Castillo-Garcia did not respond. CP 815. Mr. Castillo-Garcia made no effort to

communicate with Integon until after suit was filed against Mr. Castillo-Garcia on December 12, 2016.

Despite Mr. Castillo Garcia's non-responsiveness, Integon made best efforts to work with Plaintiff Hamblin to settle the claim. Integon extended a settlement offer to Plaintiff Hamblin on December 5, 2016, but it was rejected. CP 621.

C. Hamblin Files Suit Against Tortfeasor

Hamblin filed suit against Mr. Castillo-Garcia on December 12, 2016. CP 86. Instead of working with his insurance company to defend against the claims, Mr. Castillo - Garcia entered into negotiations with Hamblin and agreed to assign any bad faith claims Castillo-Garcia might have against Integon to Hamblin. Hamblin and Castillo-Garcia then entered into a settlement on September 25, 2017 for an agreed amount well in excess of Mr. Hamblin's damages: $1.5 million. CP 204-216.

D. Hamblin Files Suit Against Integon

Plaintiff Hamblin filed suit against Integon on April 2, 2018. CP 251-262. Hamblin's Complaint asserted the causes of

action of Negligence, Breach of Contract, Violation of the Consumer Protection Act (CPA), Breach of Duty of Good Faith and Violation of the Insurance Fair Conduct Act (IFCA). CP 257-259.

Integon brought two pretrial motions in limine barring Hamblin admitting the police report in as evidence. CP 1019-1026, MILs. The trial court admitted into evidence a redacted (reference to intoxication redacted) version police report in. CP 981-982 TR EXH 3 order on the MILs.

E. Police Report as Evidence

The Castillo Garcia policy was a $100k single limit policy. TR EXH pg. 1. Meaning, the policy had limits of $100k per accident, regardless of the number of claims arising from that accident. Here, the accident involved Mr. Castillo Garcia entering the intersection ricocheting off Ms. Sumner's vehicle and then into the Hamblin vehicle: one accident. CP 869-872, police report. Castillo Garcia reported to Integon he fell asleep and rear-ended Sumner and pushed her into Hamblin. CP 460,

diary note. Castillo Garcia did not testify at trial. In fact, there were no witnesses, lay or expert, that discussed any aspect of the dynamics of the accident. Based on the police report the trial court allowed Hamblin to argue there were two accidents which improperly opened the door to the jury to conclude there was bad faith conduct by Integon.

The police report uses the singular "the collision" to describe the occurrence. "The cause of *the collision* was the impairment of D-1". CP 630-633 No evidence was offered that Castillo Garcia regained control after the Sumner impact or that he otherwise took some action to back up and pull around the Sumner vehicle, or that he was fleeing the scene creating a separate proximate cause before the Hamblin impact.

Rob Dietz was Hamblin's bad faith expert. He is not an accident reconstructionist and made no attempt to ever reconstruct the accident. RP 1186-87. Nevertheless, he was permitted to testify to the jury that he believed there was bad faith conduct by the Integon adjuster for failing to investigate the

accident as two auto accidents despite his not even understanding the basic facts of the accident. RP 1184-85. He offered no testimony as how Integon's investigation should have been different or that it likely would have resulted in a different decision.

Throughout trial and specifically during closing argument attorney Kinstler referred a number of times to there being two accidents and therefore bad faith conduct by Integon for offering $99,374 of the remaining $100k policy. "We all know what happened. This comes from the police report." RP 1741. "Mr. Castillo Garcia hit the back of the Sumner vehicle. He went to the left. He accelerated, went into the intersection and blasted Andrew Hamblin broadside in the intersection. That's two accidents." RP 1742. "…even if they occurred closely related in time." RP 1761. "We know from the [police report] diagram he [Castillo Garcia] then went around her [Karen Sumner] to the left. He then accelerated towards the intersection, ran the red light, and broadsided the Hamblin vehicle. That's two $100,000

limits. So, I know it's only $600. But still, National [Integon], this is pattern and practice." RP 1761-1762

The jury was not allowed to determine whether Integon's conduct proximately caused any damage to Castillo-Garcia. CP 1725-1726.

F. Verdict

This case proceeded to trial on Monday, March 29, 2021. The jury found the tort of breach of good faith. The jury was not permitted to deliberate proximate cause of damages or the effect of the settlement amount. The jury found a breach of contract in the amount of $3,027.00 (This amount is coincidentally the amount of premiums charged to by Mr. Castillo-Garcia as stated in the declaration pages. Hamblin didn't argue this was the measure of damages.). The jury found no damages for IFCA, CPA, or negligence. CP 1725-1726.

G. Attorney Fees and Costs

Hamblin, in his request for fees, stated that he was entitled to fees under *Olympic Steamship v Centennial Ins. Co. 117 Wn.2d 37, 811 P.2d 673 (1991).* 1272-1274,1425. Hamblin only

prevailed on the common tort of bad faith and a simple breach of contract claim for $3,027. Appx C. He did not prevail on CPA or IFCA claims. *Id*. The court awarded $472,915.50 in attorney fees to Hamblin and Castillo Garcia. CP 1696-1699. The order does not segregate fees awarded between Hamblin and Castillo Garcia's counsel. *Id*.

In addition, the court awarded all the costs requested by Hamblin order despite Hamblin citing to any authority, without providing any invoices in support or the amounts were ever paid 1422-1431. CP 1534-1536 motion. Hamblin sought $35,523.29 in costs. The trial court awarded $35,635.56. CP 1696-1699

Beecher, Castillo-Garcia's private counsel, sought compensation for time spent crafting a settlement agreement that was deemed against public policy. CP 1337-1350. The trial court awarded this time and the Court of Appeals affirmed.

The trial court awarded $472,915.50 in attorney fees on June 14, 2021 even though the plaintiff only prevailed on claims of the tort of breach of good faith and breach of contract. CP

1696-1699 The court never ruled that there was a denial of coverage or that this lawsuit was necessary to obtain the benefits of the policy. *Id*.

The Trial Court also awarded costs of $35,635.56 but failed to articulate what costs were being awarded or why. CP 1696-1699. Plaintiff never submitted any invoices or receipts for any costs. CP 1534-1536. Several of the costs requested were awarded without authority. CP 1696-1699.

V. ARGUMENT

A. The Admission of the Police Report into Evidence Conflicts with this Court's Prior Rulings and the Statute.

RCW 46.52.080 reads in part:

> No such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident**.**

In this case, the trial court admitted into evidence the police report and the Court of Appeals affirmed. This Court has ruled on ***discoverablility*** of a police report but has not yet squarely ruled on the ***admissablility*** of a police report. There are

two cases in which this Court did address the scope of RCW 46.52.080. In each of those decisions, this Court recognized the statute's prohibition against a police report being used as evidence. A closer review of the cases indicates that the issue resolved only dealt with ***discoverability*** under various Public Disclosure Request statutes and not the issue of ***admissibility*** at trial as plainly set forth by the legislature.

For example, *Guillen v. Pierce County,* 144 Wn. 2d 696, 31 P.3d 28 (2001) addressed the issue of whether a governmental agency was required to produce accident reports and other statistical data gathered for specific intersections. *Id.* at 632. The Washington Supreme Court never approved the admissibility of these reports at trial.

However, this Court did specifically limit its holding to discoverability while recognizing the reports are not admissible at trial: "[W]hile RCW 46.52.080 exempts accident reports prepared by persons involved in accidents from public disclosure ***or admission as evidence in certain trials,*** we hold they remain

discoverable." *Id.* at 633. [emphasis added] The entire decision in *Guillen* related to discoverability, not admissibility at trial. This Court clearly acknowledged that distinction when it stated: "[B]ut the very fact that this statute ***expressly bars admission of these reports at trial*** without also barring their pretrial discovery is a strong indication that such reports are not "privileged" in the sense of being exempt from CR 26(b)(1)." *Id.* at 640. [emphasis added]

In the lower court, Respondent relied upon *Gendler v. Batiste,* 174 Wn.2d 244, 274 P.3d 346 (2012). *Gendler* again involved production of other accident reports pursuant to a Public Records Act disclosure request. *Id.* at 246. Just like *Guillen, supra.* The *Gendler* court addressed disclosure/discoverability and did not address admissibility at the trial.

Respondent also relied upon *Rice v. Offshore Sys., Inc.* 167 Wn.App. 77, 272 P.3d 865 (2012) in an attempt to defeat the plain language of the statute. The *Rice* court upheld introduction

of the police reports related to the police response to a fire and not an automobile accident. *Id.* at 83. The *Rice* court recognized: "As *Rice* claims RCW 46.52.080 bars the police reports' admission. This provision expressly applies only to vehicle accidents—" *Id.* at 870-871. The reports at issue in *Rice* were not vehicle accident reports, but rather, response reports to a fire, and as such, the statute didn't apply.

It is worth noting that in each of the cases the court recognized the statute's prohibition of admissibility at trial.

This issue is also of substantial public importance. As this Court is aware, the vast majority of traffic accident litigation involves a police report generated as some point. In practice, routinely, trial court's exclude introduction of police reports based upon the plain language of RCW 46.52.080. See Appendix D. Appendix D is a list of orders whereby trial courts routinely exclude police reports. The court of appeals decision creates confusion among litigants for the practical application of the statute. This is an issue of substantial public interest in that

litigants and the lower courts need certainty as to the application of RCW 46.52.080.

The purpose behind RCW 46.52.060 and the hearsay rules of evidence, indicate that police reports should not be admissible as evidence for civil trials. Responding police officers rarely witness the accident itself and, as in this case, are not qualified accident reconstruction experts. This case illustrates the harm caused by disregarding the statute and hearsay problems with introducing the police report into evidence. Following admission, the trial court instructed the jury:

> The police report contains hearsay, which means that neither the police officer who made the report or persons who gave statements to the officer are making their statements in the courtroom. Hearsay evidence often is not admissible. In this case, however, the report is admissible not to establish the truth of matters asserted in the report, but to show that Defendant National General received the report, when it was received, and to inform actions Plaintiff contends Defendant did or did not take based on information the report contains. RP 550.

The police report provided none of this information. The police report didn't show that National General received the

report or when, and it didn't provide any information about what National General did or did not take. Instead, all along, the police report was being used to argue that two accidents occurred when in fact there was only one.

This Court should accept discretionary review to resolve the application of RCW 46.52.060. Integon believes the court of appeals decision is contrary to this Court's earlier acknowledgements and also that it is an issue of substantial public interest for all litigants.

B. The Court of Appeals decision is in conflict with Multiple Washington Supreme Court Decisions, Including *Olympic Steamship* and its Progeny.

In the absence of a statutory or contractual provision, the only basis for an award of attorney fees is pursuant to the equitable doctrine articulated by this court in *Olympic Steamship v Centennial Ins. Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991). *Olympic Steamship* holds that an attorney fee award is required if an "insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract." *Id.* at

53. This Court has made it clear that in order to qualify for an award of attorney fees pursuant to *Olympic Steamship*, there must be an underlying coverage dispute. In this case, there was no coverage dispute, there was no failure of the duty to defend and Integon had paid the full policy limits before this lawsuit was filed. The trial court awarded fees and that decision was upheld by the Court of Appeals. In doing so, the Court of Appeals decisions is in direct conflict with several Washington Supreme Court decisions.

In the absence of a coverage dispute or duty to defend, Washington law does not allow an award of *Olympic Steamship.* "Coverage disputes include both cases in which the issue of coverage is disputed and cases in which the 'extent of the benefit provided by an insurance contract' is at issue. *Leingang v. Pierce County Med. Bureau, Inc.,* 131 Wash. 2d 133, 147, 930 P. 2d 288 (1997) *quoting McGreey v. Oregon Mutual Insurance Company,* 128 Wash. 2d 26, 33, 904 P. 2d 731 (1995.) In this case, it remains undisputed to this day that Integon accepted full

coverage, defended without any reservation of rights and paid its policy limits before suit was filed in this case.

This Court's ruling in *Matsyuk v. State Farm Fire & Cas. Co.,* 173 Wash. 2d 643, 659-60, 272 P. 3d 802 (2012) further illustrates this point when this court held:

> "An insured cannot claim attorney fees where the dispute is over the extent of the insured's damages or factual questions of liability." *Id.* at 658, citing *Godfrey v. Hartford Cas. Ins. Co.,* 142 Wash. 2d 885,889, 16 P. 3d 617 (2001). The *Godfrey* Court recognized that a dispute over the amount of coverage does not allow for an award of attorney fees under *Olympic Steamship. Id.* at 899.

The Div I decision in this case conflicts with the Div. II decision in *Colorado Structures, Inc. v. Insurance Co. of the West*: The Div. II court stated:

> Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a *coverage dispute*. This case *would be* in the nature of a claims dispute if West had agreed to pay under the bond, but had a factual dispute with Structures as to the amount of the payment.
> 161 Wn.2d 577, 606, 167 P.3d 1125

(2007) (first and second emphasis added) (citing *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994)).

The court in *Colorado Structures* then quoted Judge Morgan's opinion in the case, which observed, "'*Olympic Steamship* applies when an insurer or similar obligor contests the meaning of a contract, *but not* when it contests other questions as, for example, its liability in tort or the amount of damages it should pay.'" *Id.* at 606-07 (quoting *Colo. Structures, Inc. v. Ins. Co. of the W.*, 125 Wn. App. 907, 928, 106 P.3d 815 (2005)).

This court should accept review to correct the Court of Appeals' decision, which conflict with this court's numerous prior decisions.

VI. CONCLUSION

Based on the above arguments and authorities, National General and Integon respectfully request this Court grant National General and Integon's Petition for Review, reverse the Court of Appeal's decision.

I certify that this memorandum contains 3,228 words, in compliance with the RAP18.17.

Respectfully submitted this 26th day of October, 2022.

WATHEN | LEID | HALL | RIDER, P.C.
/s/ Rick J Wathen
Rick J Wathen, WSBA #25539
/s/ William L. Weber III
William L. Weber III, WSBA #28867
Attorneys for Appellants National General & Integon
222 Etruria Street, Seattle, WA 98109
Tel: (206) 622-0494
rwathen@cwlhlaw.com
wweber@cwlhlaw.com

APPENDIX TO
PETITION FOR REVIEW

Document	**Page No.**
Appendix A: Published Opinion	1 - 32
Appendix B: Special Verdict Form	33 - 34
Appendix C: Order Granting Plaintiff's Motion for Fees and Costs, and Motion to Amend the Judgment	35 - 38
Appendix D: List of Orders	39

Certificate of Service

I, Sonia Chakalo, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that I caused to be filed on October 26, 2022, an original Petition for Review (a copy of which is attached) with the Court of Appeals Division I, and a copy of the aforementioned document was also served on:

COUNSEL FOR PLAINTIFF: Andrew Kinstler, WSBA No. 12703 Kevin Khong, WSBA #46474 Helsell Fetterman LLP 1001 4th AVE, STE 4200 Seattle, WA 98154-1154 Ph. 206.292.1144 (main) AKinstler@helsell.com kkhong@helsell.com	**[X] E-Mail** [ ] 1st Class U.S. Mail [ ] Legal Messenger [ ] Facsimile
COUNSEL FOR DEFENDANT CASTILLO: Brent W. Beecher, WSBA No. 31095 Hackett Beecher & Hart 601 Union St Ste 2600 Seattle, WA 98101 Direct: 206/787-1828 Phone: (206) 624-2200	**[X] E-Mail** [ ] 1st Class U.S. Mail [ ] Legal Messenger [ ] Facsimile

Fax: (206) 624-1767 beecher@lasher.com	

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

DATED this 26th day of October, 2022, at Seattle, Washington.

/s/ Sonia Chakalo
Sonia Chakalo, Legal Assistant
schakalo@cwlhlaw.com

FILED
9/26/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISON ONE

ANDREW HAMBLIN, Respondent, v. LUIS CASTILLO GARCIA, individually, and NATIONAL GENERAL INSURANCE COMPANY, a foreign insurance company, and INTEGON PREFERRED INSURANCE COMPANY, Appellants.	No. 82788-0-I DIVISION ONE PUBLISHED OPINION

COBURN, J. — Driver Louis Castillo Garcia T-boned a car driven by Andrew Hamblin causing long-term injuries. After Castillo Garcia's insurer, National General Insurance Company (National), declined a demand for a $100,000 coverage policy limit, Hamblin reached a $1.5 million covenant judgment settlement agreement with Castillo Garcia who agreed to assign all claims against National to Hamblin. Following trial and a judgment of more than $2.4 million, National appeals asserting the trial court erred in its award of partial summary judgment in favor of Hamblin as well as several evidentiary rulings related to whether the underlying multiple-car incident could be characterized as

two accidents. National also challenges the trial court's award of attorney fees and costs. We affirm.

FACTS

On February 6, 2016, an intoxicated Castillo Garcia[1] lost control of his car. He hit the vehicle of Karen Sumner and then crashed into 19-year-old Hamblin's car. As a result of the accident, Hamblin sustained long-term injuries requiring medical intervention.

Castillo Garcia was insured by National[2] and his policy included a $100,000 coverage limit. In November 2016, Hamblin sent National a settlement demand letter, offering to settle his case for the policy limit of $100,000 in exchange for releasing his claims against Castillo Garcia. The letter provided a detailed history of Hamblin's injuries with treatment and prognosis along with attached medical records and bills. The letter explained that Hamblin had been diagnosed with bilateral Thoracic Outlet Syndrome, that surgery was in the near future, and that physical therapy treatment had been discontinued until after surgery. The letter explained that Hamblin's medical bills through August 10, 2016 totaled $16,731.80 and would significantly increase with additional treatment and surgery. Without reading the demand letter, National rejected the offer, and instead made a counteroffer for $21,000, which Hamblin rejected.

[1] We refer to the insured as "Castillo Garcia" instead of just "Garcia," consistent with his attorney's reference to his client.

[2] Our reference to National also includes Integon Preferred Insurance Company, and we do not delineate between these entities. Integon Preferred was National's underwriting company. Below, National told the trial court to refer to the two insurance companies as National General and the court explained to the jury that the companies were "the same entity for trial purposes."

In December 2016, Hamblin filed a negligence complaint against Castillo Garcia for his personal injuries. Hamblin's attorney indicated that he intended to seek a $2 million judgment. "Because Castillo Garcia's attorneys found themselves 'in a difficult position,' they used a defense attorney LISTSERV to find an attorney with no relationship to National to counsel Castillo Garcia." Hamblin v. Castillo Garcia, 9 Wn. App. 2d 78, 83, 441 P.3d 1283 (2019). Brent Beecher began assisting Castillo Garcia in early August 2017. Id. In September 2017, Hamblin and Castillo Garcia reached a covenant judgment settlement agreement providing that Castillo Garcia stipulate to a $1.5 million judgment and assign all claims against National to Hamblin in exchange for Hamblin agreeing not to enforce an excess judgment "against any of Castillo Garcia's assets other than his rights against his insurer(s)." Id.

The parties notified National of their settlement agreement. National intervened. Following a reasonableness hearing, superior court found the settlement reasonable.[3] The court found that given the extent and expense of Hamblin's injuries, it was "entirely possible that a jury would return a verdict [for $1.5 million] if not higher. Drunk drivers are not popular with juries." The court entered a judgment against Castillo Garcia for $1.5 million.

[3] Courts apply the Chaussee factors to determine if a settlement is reasonable, Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 803 P.2d 1339 (1991), which include: "[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released." Id. at 512 (quoting Glover for Cobb v. Tacoma Gen. Hosp., 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)).

National appealed the superior court's finding of reasonableness and entry of judgment. This court affirmed the finding that the $1.5 million settlement amount was reasonable and that the settlement was negotiated without bad faith or collusion. Hamblin, 9 Wn. App. 2d at 88.[4]

In March 2020, Hamblin filed an amended complaint for damages and declaratory relief against National and Castillo Garcia. Hamblin alleged that National engaged in negligence, breach of contract, breach of good faith duty, breach of the Consumer Protection Act (CPA), and breach of regulatory and statutory duties including the Insurance Fair Conduct Act (IFCA). Hamblin also asserted that the $1.5 million covenant judgment was the presumed damages applicable to the case. Hamblin also asked for attorney fees and costs permitted under Olympic S.S. Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 811 P.2d 673 (1991), the CPA, IFCA, and "other applicable law."

In February 2021, Hamblin filed a motion for partial summary judgment regarding damages, arguing that if National was found to have acted in bad faith, the covenant judgment set the floor on the damages the jury could award at trial. National responded, arguing that the covenant judgment set a rebuttable presumption of harm, and "[o]ne such way of rebutting the presumption of damages and/or harm is to show that Mr. Castillo-Garcia was not harmed to the extent being claimed." National focused its argument on challenging Hamblin's

[4] We also held that a severable global settlement provision awarding Castillo Garcia 10 percent of the total settlement was unreasonable and that the assigned post-judgment interest rate was incorrect. Hamblin, 9 Wn. App. at 88-92. In September 2019, the superior court issued an amended order consistent with our ruling.

contention that the $1.5 million covenant judgment set the floor, not the ceiling for damages. During oral argument, the court asked National to clarify whether it was adding another element: harm suffered by Hamblin. National clarified that it was not and explained that "[b]ecause the issue for this jury in this matter will be if there was bad faith, how much harm did National General cause to Mr. Castillo Garcia. Mr. Hamblin as the assignee is entitled to collect those amounts." National did not dispute that the covenant judgment established a presumption of harm, but nevertheless it did not respond to the summary judgment motion by presenting any evidence on how it would attempt to rebut that presumption.

The trial court granted Hamblin's motion for partial summary judgment. The court concluded that the $1.5 million judgment established the minimum amount of damages the jury could award if it found National acted in bad faith. The parties proceeded to trial.

One issue at trial was whether Castillo Garcia caused one or two accidents. The parties did not dispute that the policy limited liability coverage to a $100,000 combined single limit for both bodily injury and property damage "for each person injured in any one accident." National contended that the incident was a single accident that involved two vehicles so the full policy limit of $100,000 was not available to Hamblin as $625.90 had already been distributed to Sumner. Hamblin argued that National failed to exercise good faith in investigating and treating the incident as two accidents. The investigating officer's report included a diagram and narrative of what happened based on witness interviews. According to the report, Castillo Garcia was third in a line of

stopped vehicles in a left-turn lane at an intersection with a red light. The vehicle driven by Sumner was directly in front of Castillo Garcia when he suddenly went left of center, striking the rear of Sumner's vehicle, before accelerating and passing the other stopped vehicle in his lane, and entered the intersection while the light was still red. Castillo Garcia struck the side of Hamblin's vehicle which was going through the intersection with a green light. Neither the officer, Castillo Garcia, Hamblin nor any witnesses to the incident testified at trial.

As a motion in limine, National asked the trial court to exclude the police report because it was not a business record, "irrelevant," "prejudicial," "hearsay," and its admission was prohibited by RCW 46.52.080. The trial court denied the motion. The court accepted Hamblin's proffer that it was not offering the report for the truth of the matter asserted but offered as National's business records to establish what it knew at the time it made its decisions on Hamblin's claim. The court denied National's motion but announced it would provide a limiting instruction to address the hearsay issue when the report was offered.[5]

National also moved in limine to preclude Hamblin from asserting that there was more than "one [car] accident." The court concluded that the question of whether the incident constituted one or two accidents was a question of fact and denied National's motion in so far as Hamblin should be given "the chance to present."

[5] Prior to the court's ruling, the parties asked the court to clarify whether the court's ruling, if it was excluding the police report, extended to information from it that became part of National's claim file. The court stated, "I don't think there's any question that the claim file is a business record." National does not challenge the admission of exhibits or portions of the claim file as business records.

At trial, Hamblin questioned National's corporate representative, claims manager Bradley Gibbs. During the questioning of Gibbs, Hamblin entered the police report into evidence. Gibbs acknowledged that the police report was in the company's claim file for Castillo Garcia and that National had reviewed it. Hamblin went through the police report narrative in detail with Gibbs.

After National reminded the court about the limiting instruction, the court instructed the jury:

> The police report contains hearsay, which means that neither the police officer who made the report or persons who gave statements to the officer are making their statements in the courtroom. Hearsay evidence often is not admissible. In this case, however, the report is admissible not to establish the truth of matters asserted in the report, but to show that Defendant National General received the report when it was received and to inform actions Plaintiff contends Defendant did or did not take based on information the report contains.

Hamblin also questioned Gibbs about the company's claim notes from March 2016 that indicated National received and reviewed the police report and that the narrative stated Castillo Garcia struck a vehicle in the rear, "then went left of center into intersection, running red light," and then struck another vehicle. Later Hamblin successfully moved to admit Exhibit 34 and asked Gibbs about his notes in that exhibit. Gibbs confirmed that the note was his description of the accident:

> Mr. Castillo Garcia had fallen asleep at the wheel before waking up and accelerated. He was stopped in the left turn lane at the intersection of 148th Northeast and Northeast 20th Street. He then accelerated, causing a minor rear-end collision to the left corner of the vehicle ahead of him before proceeding left of center straight into the intersection, causing a T-bone collision with the claimant vehicle on the claimant's passenger side.

National did not make a hearsay objection or request a limiting instruction.[6]

Gibbs also testified that he was not aware of National agents or its counsel performing any analysis of Washington State law on what constitutes separate accidents.

At trial, Hamblin also introduced testimony from his insurance industry expert, Robert Dietz. In preparation for trial, Dietz reviewed National's claim file and previous testimony from National employees. Hamblin asked Dietz about the issue of two accidents:

> Q. Did you see any evidence in the claim file that National General considered whether there were two accidents here, rather than one accident?
>
> A. There's nothing in the claim file that addresses that.
>
> Q. Did National General have an obligation to investigate[?]
>
> A. Well, given the facts of the accident here, as I understand it – and I don't know that it's refuted – Mr. Garcia hit another car that was parked on the road in the rear, I guess, and then from there crossed over through an intersection, missed another vehicle, and then hit Mr. Hamblin's vehicle.
>
> So then – then we consider, well, all right, was that one occurrence, one incident, or two? Because if it's two incidences, two occurrences, Mr. Garcia's policy would allow a hundred thousand dollars times two.
>
> Q. Would it be a hundred thousand on each accident?
>
> A. Correct.

National did not object to this testimony.

[6] The court overruled National's "ongoing objection" to admitting Exhibit 34. The record indicates that the standing objection related to National's motion in limine that Hamblin should be precluded from offering any evidence of conduct by National that occurred outside what National describes as a 30-day policy limits demand. National does not assign error to the court's denial of this motion in limine.

During cross-examination, National asked Dietz about the characterization that there were two accidents:

> Q. Did you review any Washington law before you gave your opinion on there being a potential for two accidents?
>
> A. Yes. I'm familiar with the Greengo v. PEMCO case.
>
> Q. And doesn't that decision stand for the proposition if you look whether or not there's been a difference in time of the two events?
>
> A. Yeah. It has to do with basically whether or not there's a broken chain of events.
>
> Q. And there was no evidence in this case that there was a broken chain of events between Mr. Castillo Garcia striking the first car and striking Mr. Hamblin's vehicle; isn't that correct?
>
> A. I don't agree with you. No.
>
> Q. Okay. Did the police agree with me?
>
> A. Well, the police are hearsay to begin with.
> I know what the facts are. And the facts are he hit a car, then he – then he accelerated through an intersection, passed another vehicle, and then crossed the – crossed over the center line and hit Mr. Hamblin.
> And by way of example, let's just say he keeps driving for another 30 minutes. Is that still the same occurrence as he's hitting many other cars? The point I'm making, sir, is there was no analysis, there was no thought process to that at all.
>
> Q. I think you just made my point. If he had traveled a half an hour down the road, that might be a second accident; would you agree with me?
>
> A. Well, I – I agree that I thought there likely could be two occurrences in this one.
>
> Q. Okay.
>
> A. Which is why the insurance company's job is to seek, find, analyze coverage for the benefit of the insured.

National later asked Dietz where he got the information about the accident:

> Q. All of your understanding about what occurred in this accident, where did you get that information from?
>
> A. From the claims file.
>
> Q. And is the claims file reflecting what is in the police report?
>
> A. I don't know. It may.

National then questioned Dietz's earlier description on direct that Castillo Garcia struck a "parked" car in reference to the vehicle driven by Sumner:

> Q. Could you perhaps be mistaken about your understanding of what occurred in the accident?
>
> A. Well, only to the extent that either the parked car was parked or not parked. But the fact of the matter is, is there were two impacts, and they occurred over a period of time.

National did not object, move to strike or request a limiting instruction. On redirect, Dietz was asked to read out loud the narrative from the police report to refresh his memory that the vehicle driven by Sumner was in the turn lane and was not parked. National did not object. Hamblin then asked Dietz to opine on what he viewed as the proximate cause of the two vehicle impacts. National objected noting that Dietz was not qualified as an accident reconstruction expert. After the court sustained the objection, Hamblin clarified that he was asking Dietz based on "his experience as a claims professional evaluating information that is provided to claims professionals as part of the claim file." Over National's objection, the court allowed the testimony "on the basis of Mr. Dietz being an expert claims adjustor" and "based on his experience in that capacity." Dietz then testified that the cause of the impact to Sumner's vehicle was a "rear-end

impact." He then described the impact to Hamblin's vehicle as "that's a whole separate incident there . . . that is a T-bone accident in the middle of an intersection that follows the initial incident involving the rear-end car."

During closing argument, Hamblin argued,

> We all know what happened. This comes from the police report, which we know has been objected to as hearsay. And that's fair. But you'll see as we go through this that National General adopted this description as the description of the accident. So whether it was hearsay or not, they chose to rely on this description. And all of their witnesses agreed that they did this.
>
> And so Mr. Castillo Garcia hit the back of the Sumner vehicle. He went to the left. He accelerated, went into the intersection and blasted Andrew Hamblin broadside in the intersection. That's two accidents. The cause of the first accident was stopping behind Ms. Sumner and then hitting her car. The cause of the second accident where Mr. Hamblin was not yet injured, there was a new accident later on where Mr. Castillo accelerated towards the intersection, ran the red light and hit Andrew Hamblin's vehicle. . . .
>
> So how did National treat this accident? This is from National's claim notes. Luis Castillo Garcia was stopped at the intersection behind the vehicle driven by Karen Sumner. He accelerated, striking the rear of the Sumner vehicle. We know from the diagram he then went around her to the left. He then accelerated towards the intersection, ran the red light, and broadsided the Hamblin vehicle. That's two $100,000 limits.

National did not object.

The court instructed the jury that Hamblin and Castillo Garcia had previously reached an agreed settlement of $1.5 million in damages to Hamblin as a result of injuries caused by the underlying vehicle collision. The jury also was told that National had participated in an evidentiary hearing in which the court found the agreed settlement reasonable and negotiated without collusion or bad faith and that National had placed $99,374.10 in the registry of the court toward payment of that judgment. In its measure of damages, the court

instructed the jury that it "may consider the value of the underlying judgment entered against Mr. Castillo Garcia in the amount of $1,500,000."

The jury returned its verdict. It concluded that National (1) failed to act in good faith; (2) did not violate the Insurance Fair Conduct Act; (3) violated the Consumer Protection Act; (4) engaged in negligence, and (5) breached its contract. The jury was asked to assign damages to claims 2 through 5, to which they awarded damages only for the breach of contract claim in the amount of $3,027.[7] Prior to the verdict, Hamblin indicated to the court and National that he would not seek anything above the $1.5 million covenant judgment regardless of the damages awarded by the jury.

The court entered the principal judgment against National in the amount of $1,400,627.90[8] with interest owed in the amount of $546,685.16. Hamblin also filed a motion for attorney fees and costs for both his counsel's firm, Helsell Fetterman LLP, and Beecher's firm, Hackett Beecher & Hart. Hamblin asserted several bases for the fees: Olympic, the CPA, and RCW 48.30.15(3) and (5). Hamblin requested attorney fees and costs totaling $683,827.54 to Helsell Fetterman LLP and $52,892.27 to Hackett Beecher & Hart.

National filed a response arguing the court should deny the attorney fee and cost request. National argued the request was "replete with block billing, duplicative work and excessive time." National contended that the reasonable attorney fees were significantly lower than the amount requested, that the hourly

[7] Castillo Garcia's 12-month premium was $3,027.

[8] This was the balance after subtracting National's previous payment of $99,374.10 in the court registry.

rate of the plaintiff's attorneys was unreasonable, that the court should deny the use of a multiplier, and that Beecher, Castillo Garcia's personal counsel, should be denied all fees. National claimed that some time entries lacked specificity and that the charges included work done on unsuccessful claims, and duplicative or excessive work. National also asserted that Hamblin failed to set forth any awardable costs under RCW 4.84.010.

The trial court granted the motion for fees and costs with some reductions. The court entered several findings of fact including the hourly rates billed for all attorneys and staff was "reasonable," noting that the two partner-level attorneys who had the highest hourly rate had "considerable experience and skills in the matters required in this case." The court specifically noted,

> In making the lodestar award, the Court has relied upon its extensive familiarity with this case and has considered the factors set forth under RPC 1.5(a), including (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the fee customarily charged in Seattle for similar legal services; (3) the amount involved and the results obtained; (4) the experience, reputation, and ability of Plaintiff's counsel; and (5) the contingent nature of the fee. Additionally, the Court considered the discovery complexity and multiple motions, hearings, and proceedings limiting other work and the efforts to avoid any wasteful or duplicative time.

The court also made the following findings:

6. Plaintiff was successful in his bad faith and breach of contract claims, all of which shared a common core of facts and circumstances with Plaintiffs other interrelated claims;

7. Plaintiffs IFCA claim also shares a common core of facts and circumstances with his other claims, but Plaintiff has removed attorney hours spent on solely the IFCA claim;

8. Plaintiff has been conservative in presentation of the attorney hours spent on this case, and has taken reasonable steps to avoid and

reduce claims that might involve duplicative, non-productive or wasteful matters;

9. The hours awarded and summarized as set out in the Kinstler[9] and Beecher declarations, which are incorporated herein, are reasonable and necessarily incurred for the successful resolution on each of the interrelated causes of action;

10. The expenses and costs summarized on in the Kinstler and Beecher declarations, incorporated herein, are reasonable and necessarily incurred for the successful resolution of the bad faith, contract and other intertwined cause of action;

The trial court rejected Hamblin's request to apply a 1.5 multiplier. Aside from rejecting the multiplier, the trial court otherwise granted the motion for attorney fees of $472,915.50 and costs of $35,635.56, as requested. The final amended judgment totaled $2,455,864.

National appeals.

DISCUSSION

Motion for Partial Summary Judgment

National argues that the trial court erred by granting Hamblin's motion for partial summary judgment because it precluded the company from rebutting the presumption of harm at trial and removed from the jury the question of whether National's conduct caused harm to Castillo Garcia. We disagree.

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). Conclusory statements of fact are insufficient to defeat a summary judgment

[9] Attorney Andrew Kinstler of Helsell Fetterman, LLP represented Hamblin.

motion. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 430, 38 P.3d 322 (2002). A court may award judgment "if the if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." CR 56(c). We review summary judgment decisions de novo. Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 914, 169 P.3d 1 (2007).

Where an insurer violates its duty to act in good faith and fails to settle a claim against its insured, the insured is entitled to assign its bad faith claim to an injured party. Hamblin, 9 Wn. App. 2d at 84. If a court determines a covenant judgment between an insured and an injured party is reasonable, the judgment amount sets the presumptive recovery on a bad faith claim. Id. The insurer becomes liable for the settlement amount, even if the amount exceeds the contractual policy limits. Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 735-36, 49 P.3d 887 (2002).

Where an insured meets the burden to show an insurer acted with bad faith, the court imposes a presumption of harm. Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 390, 823 P.2d 499 (1992). Though the covenant judgment may insulate an insured from liability, the judgment "constitutes a real harm because of the potential effect on the insured's credit rating . . . [and] damage to reputation and loss of business opportunities[.]" Id. at 399 (quoting Barr v. Gen. Accident Grp. Ins. Co. of N. Am., 360 Pa. Super. 334, 342, 520 A.2d 485 (1987)). The presumption of harm is rebuttable, but the insurer carries the burden to "prove its acts did not prejudice the insured." Id. at 392. While this may be an

"almost impossible burden" for the insurer, "[a]s between the insured and the insurer, it is the insurer that controls whether it acts in good faith or bad. Therefore, it is the insurer that appropriately bears the burden of proof with respect to the consequences of that conduct." Mut. of Enumclaw Ins. Co., 161 Wn.2d at 921.

National asserts that it was improper for the trial court to rule on Hamblin's partial summary judgment motion for damages because it was entitled to rebut the presumption of harm at the time of trial. National is incorrect.

National focuses most of its briefing on arguing that our decision in Miller v. Kenny—holding that the amount of a reasonable covenant judgment sets a floor on the damages a jury may award in an insurance bad faith case—was limited to that case because the insurer agreed to the amount of damages and did not appeal the granting of summary judgment. Miller v. Kenny, 180 Wn. App. 772, 782, 325 P.3d 278 (2014). Miller, however, is not the only case that held a reasonable covenant judgment sets the presumptive measure of damages on a bad faith claim. See Hamblin, 9 Wn. App. 2d at 84; Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 771-72, 287 P.3d 551 (2012) (holding that a reasonable covenant judgment establishes the presumptive measure of damages against the insured in a subsequent bad faith action and that there is no constitutional right to have that amount re-decided by a jury); Besel 146 Wn.2d at 736 (holding that a covenant judgment provides a presumptive measure of the insured's harm); Gosney v. Fireman's Fund Ins. Co., 3 Wn. App. 2d 828, 855, 419 P.3d 447 (2018) (following Bird and Miller in recognizing that the role of the jury is to make

a factual determination of an insured's bad faith damages other than and in addition to the covenant judgment).

Despite its contention otherwise, nothing prevented National from rebutting the presumption of harm. It was simply required to establish that it could do so by responding to Hamblin's summary judgment motion as to that issue. At the summary judgment hearing, National offered nothing to rebut the presumption of harm against Castillo Garcia. National could not point to any evidence that the $1.5 million outstanding judgment against its insured did not harm or prejudice him.

The trial court properly granted Hamblin's motion for partial summary judgment because National did not raise any genuine issue of material fact as to whether the covenant judgment harmed Castillo Garcia if the jury found National acted in bad faith.

Admission of Police Report

National contends that the trial court abused its discretion by admitting the police report into evidence, in violation of RCW 46.52.080 and evidentiary rules against hearsay. We review a trial court's decision to admit evidence for an abuse of discretion. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. Id. at 668-69. A trial court's decision is manifestly unreasonable if it adopts a view no reasonable

person would take. Id. at 669.

A. RCW 46.52.080

National contends that RCW 46.52.080 precludes the admission of police reports in civil cases and because the trial court admitted such evidence, it is now entitled to a new trial. We disagree.

RCW 46.52.080 states that

> All required accident reports . . . shall be without prejudice to the individual so reporting . . . . No such accident report or copy thereof shall be used as evidence in any trial, civil or criminal, arising out of an accident . . . .

We have previously held that RCW 46.52.080 protects the confidentiality of reports "made by persons involved in an accident." Superior Asphalt & Concrete Co. v. Dep't of Lab. & Indus., 19 Wn. App. 800, 806, 578 P.2d 59 (1978).

These "accident reports" created by individuals—who have a duty to make an accident report pursuant to RCW 46.52.030[10]—are separate and distinct from accident reports created by police under RCW 46.52.070.[11]

Our state Supreme Court has recognized this distinction. Guillen v. Pierce County, 144 Wn.2d 696, 713-15, 31 P.3d 628, 34 P.3d 1218 (2001)

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[10] "Accident reports. (1) Unless a report is to be made by a law enforcement officer under subsection (3) of this section, the driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to the property of any one person to an apparent extent equal to or greater than the minimum amount established by rule adopted by the chief of the Washington state patrol in accordance with subsection (5) of this section, shall, within four days after such accident, make a written report of such accident[.]"

[11] "Police officer's report. (1) Any police officer of the state of Washington or of any county, city, town, or other political subdivision, present at the scene of any accident or in possession of any facts concerning any accident whether by way of official investigation or otherwise shall make report thereof in the same manner as required of the parties to such accident and as fully as the facts in his or her possession concerning such accident will permit."

(acknowledging that "accident reports and supplemental reports" in RCW 46.52.080 refers to reports prepared pursuant to RCW 46.52.030(1) or .040 by persons involved in the accidents, not to official "police officer's reports" or "investigator's reports" prepared pursuant to RCW 46.52.030(3) or .070), rev'd in part on other grounds, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).

We reject National's contention that the trial court violated RCW 46.52.080 by admitting the police report for a purpose other than for the truth of the matter asserted.

B. Hearsay and limiting instruction

National next asserts that the trial court abused its discretion by admitting the police report because it contained hearsay. We disagree.

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802. A statement is not hearsay, however, where if a party offers evidence for a purpose other than to prove the truth of the matter asserted. Ang v. Martin, 118 Wn. App. 553, 561, 76 P.3d 787 (2003). To determine whether an out-of-court statement is offered for a non-hearsay purpose, we examine whether the purpose was relevant. Bengtsson v. Sunnyworld Int'l, Inc., 14 Wn. App. 2d 91, 102, 469 P.3d 339 (2020).

The trial court denied National's motion to exclude the police report because it ruled the evidence was admissible for a non-hearsay purpose to show

what National did and did not do when it had the information in the police report.

Hamblin argued, among other bases, that National's failure to properly investigate the claim violated the minimum standards of conduct for insurance companies and constituted bad faith, which in turn supported each of Hamblin's claims. Castillo Garcia initially reported that he fell asleep at the wheel, rear-ended a car, and that car pushed into another car. This version was completely contradicted by the police report. Whether the incident involved one accident or two accidents determined whether the policy limit that applied to Hamblin and Sumner totaled $100,000 or was $100,000 each. National received the police report in March of 2016 but maintained up through trial that only one accident occurred. The fact that National was aware that the police report contradicted Castillo Garcia's version of events was relevant to Hamblin's theory of the case.

National did not object to the trial court's limiting instruction and even reminded the court to give the limiting instruction. The court admitted the police report while instructing the jury that it is not to establish the truth of matters asserted in the report but to show that National received the report when it was received and to inform actions Hamblin contends National did or did not take based on information the report contained. Though National argues that the jury improperly considered whether the police report was "truthful," we presume jurors follow the court's instructions. Terrell v. Hamilton, 190 Wn. App. 489, 504, 358 P.3d 453 (2015).

The trial court did not abuse its discretion by admitting the police report

with the limiting instructions.

Admission of Evidence Regarding Two Accidents

National contends that the trial court abused its discretion to allow Hamblin to argue that there were two accidents. National maintains that the court should have ruled there was one accident, as a matter of law, and that the trial court erred by allowing Hamblin's expert Dietz to testify that there were two accidents and by allowing Hamblin to argue the same in closing. We disagree.

Washington State follows the "cause theory" to determine whether two collisions are considered two "accidents" for insurance purposes:

> Under our approach if each accident, collision, or injury has its own proximate cause then each will be deemed a separate "accident" for insurance policy purposes even if the two accidents occurred coincident, or nearly coincident, in time. . . . If, however, the collisions or injuries were all caused by a single, uninterrupted proximate cause, then the multiple collisions or injuries will be deemed a single accident.

Greengo v. Pub. Emps. Mut. Ins. Co., 135 Wn.2d 799, 813-14, 959 P.2d 657 (1998). "Proximate cause is generally a fact question for the jury, but if reasonable minds could not differ, these factual questions may be determined as a matter of law." Meyers v. Ferndale Sch. Dist., 197 Wn.2d 281, 289, 481 P.3d 1084 (2021).

The trial court denied National's pretrial request to prevent Hamblin from arguing that there was more than one car accident because Hamblin presented the issue as a "legitimate question of fact." The jury trial right guarantees the right to have a jury "resolve questions of disputed material fact." Schuck v. Beck, 19 Wn. App. 2d 465, 519, 497 P.3d 395 (2021).

The trial court was correct in concluding that the question of whether the incident constituted one or two accidents was a question of fact appropriately submitted to the jury.

A. Dietz' testimony regarding two accidents

National further contends that the trial court abused its discretion by permitting Hamblin's insurance expert Dietz to testify that there were two accidents. We disagree.

During direct, Dietz did not testify that there were two accidents, he merely testified that "[G]iven the facts of the accident here . . . we consider . . . was that one occurrence, one incident, or two? Because *if it's two incidences*, two occurrences, Mr. Garcia's policy would allow a hundred thousand dollars times two." (Emphasis added.) It was National that asked Dietz specifically whether there were two accidents by attempting to get Dietz to agree with National's counsel that there was no broken chain of events between Castillo Garcia striking the first car and striking Hamblin's car. Dietz responded that he disagreed. Dietz further testified on cross that there were "two impacts" and they "occurred over a period of time." This was a non-responsive answer to National asking him about his belief that Castillo Garcia had hit a parked car. But National did not move to strike the non-responsive answer.

National contends that Dietz was not an accident reconstruction expert, and his testimony should have been limited by precluding him from offering opinions which were ostensibly accident reconstruction testimony that there were two accidents. National argues that the inadmissible police report allowed Dietz

to opine that there were two accidents and National acted in bad faith which prejudiced National.

"Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike is made." ER 103(a)-(1); Faust v. Albertson, 167 Wn.2d 531, 547, 222 P.3d 1208 (2009).

First, National waived any claim as to Dietz's non-responsive statement during cross that "there were two impacts and they occurred over a period of time" and Dietz's reading of the narrative of the police report on redirect because National failed to object to both those instances.

Second, the trial court did not abuse its discretion in allowing Dietz to testify that the second impact was "a whole separate incident" as proper expert opinion.

Evidence rules permit expert witnesses to form opinions based on otherwise inadmissible evidence so long as the facts are the type reasonably relied on by experts in that field. ER 703; Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 275, 215 P.3d 990 (2009). National does not challenge the trial court's finding that Dietz was an expert claims adjustor and testified based on his experience in that capacity.

Furthermore, National's failure to investigate for two accidents was not the only basis for Dietz to opine that National acted in bad faith. Dietz also testified that it was inconsistent with industry standards for National to delegate the obligation to resolve a claim to the injured party and that the company failed to

meet the standard of "conducting a prompt and reasonable investigation," in part, by not reading the demand letter and not conducting an independent investigation of the medical facts of Hamblin's injury. Dietz stated that National's offer of $21,000 to settle Hamblin's claim did not meet the standard of a "competent, thorough review of the claims presented." He also concluded that National did not make a good faith effort to settle Castillo Garcia's claim once it understood the company was liable. Dietz also testified that the person responding to Hamblin's claims at National was handling too many claims at one time.

The trial court did not abuse its discretion by permitting Dietz to testify in his expert capacity.

Even if Dietz's testimony as to the two accidents was improper, any error was harmless because Hamblin established several other bases to support its claim that National acted in bad faith that were not predicated on whether the incident involved one or two accidents.

B. Hamblin's reference to two accidents during closing argument

National also takes issue with Hamblin's arguing two accidents in closing. But National did not object to the challenged arguments.

Details of Castillo Garcia's car accident were admitted into the record through Gibbs who testified about his own notes in National's claim file. National did not object to Gibbs' testimony or the admission of his notes in the claim file. Through Gibbs' testimony, the jury heard that Castillo Garcia was stopped and then struck the car ahead of him causing a minor rear-end collision to the left

corner before proceeding left of center straight into the intersection, causing a T-bone collision with Hamblin.

In closing, Hamblin reminded the jury that in referring to the police report, it had been objected to as hearsay, "[a]nd that's fair." Hamblin also spoke of the police report in the context of National adopting the police report's description as their own description of the accident. The second time Hamblin described the accident, he clarified that it was from National's claim notes.

An attorney has wide latitude to make reasonable inferences from the evidence during closing argument. M.R.B. v. Puyallup Sch. Dist., 169 Wn. App. 837, 860, 282 P.3d 1124 (2012). Hamblin argued a reasonable inference that National relied on the police report about the accident.

Attorney Fees and Costs

National challenges the trial court's award of attorney fees on several grounds and asks that this court deny Hamblin's request for fees on appeal.

We review a trial court's legal basis for awarding attorney fees de novo, and we review the decision to award attorney fees and whether such fees are reasonable for an abuse of discretion. Cook v. Brateng, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014). The party seeking fees bears the burden to show the fees are reasonable. Berryman v. Metcalf, 177 Wn. App 644, 657, 312 P.3d 745 (2013).

A. Applicability of Olympic

The trial court based its authority to award attorney fees under Olympic, 117 Wn.2d 37. National argues that Hamblin was not entitled to attorney fees under Olympic, because there was "never a coverage dispute." We disagree.

Trial courts may award a party attorney fees and costs when authorized to do so by a contract, statute, or a recognized ground in equity. Berryman, 177 Wn. App at 656. The Washington State Supreme Court recognized the right of an insured party to recover its attorney fees where an insurer "refuses to defend or pay the justified action or claim of the insured." Olympic, 117 Wn.2d at 52. Olympic authorizes an award of attorney fees related to claims of *coverage* rather than the *value* of the claim. Woo v. Fireman's Fund Ins. Co., 150 Wn. App. 158, 175-76, 208 P.3d 557 (2009). Coverage disputes include issues regarding the "application of an insurance policy" or the "scope" or "extent of the benefit" in an insurance contract. Colorado Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 606, 167 P.3d 1125 (2007); Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 147, 930 P.2d 288 (1997). Where coverage is at issue, all that is necessary to recover fees under Olympic is that "the insurer compels the insured to assume the burden of legal action to obtain the full benefit of the insurance contract." Leingang, 131 Wn.2d at 148-49.

Hamblin's claims against National were a coverage dispute. The issues requiring resolution at trial were related to whether National failed to comply with its duty to protect its insured from liability by appropriately applying Castillo Garcia's insurance policy and properly analyzing the scope of its liability for the

events of February 6, 2016. National's actions in denying the application of a payout based on two accidents was the basis for Castillo Garcia and Hamblin seeking legal assistance to obtain the full benefit of National's insurance contract with Castillo Garcia.

National insists that there was not a coverage dispute because the company "always accepted coverage and paid policy limits before suit was filed." National points to its deposit of $99,374.10 into the court registry, which was the policy limit amount for one accident minus what had been paid to Sumner. But National's interpretation, that the company was only liable for one accident rather than two, is precisely the *coverage* issue Hamblin was challenging at trial and the basis for which National became liable for attorney fees under Olympic. National's deposit of an amount it determined was the extent of its liability did not immunize the company from Hamblin's claims.

National, citing Norris v. Church & Co., Inc., 115 Wn. App. 511, 513, 63 P.3d 153 (2002), also contends that Hamblin is not entitled to attorney fees because tort claims do not give rise to an award of fees. Norris involved a fraudulent concealment claim. Id. at 514. Norris is inapposite. The Washington Supreme Court has held that attorney fees in insurance claims such as Hamblin's are recoverable. Olympic, 117 Wn.2d at 52.

B. Attorney fees to Beecher

National also challenged the attorney fees owed to Castillo Garcia's personal counsel, Brent Beecher. Without citing any authority, National contends that the court should not grant Beecher attorney fees because he did not

participate in trial, did not file any claims on behalf of Castillo Garcia, and did not defend against the claims of Hamblin. National did not otherwise challenge with any specificity as to the work claimed by Beecher.

The Washington Supreme Court extended "the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend or pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against the insured." Olympic, 117 Wn.2d at 52. As the court explained,

> When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer. Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured. Further, allowing an award of attorney fees will encourage the prompt payment of claims.

Id. at 52-53. Beecher participated in some depositions as counsel of record, defended the deposition of Castillo Garcia taken by National, and responded to discovery directed to Beecher. Once it was known that Castillo Garcia would not be participating at trial, Beecher did not include time related to trial preparation other than meeting the minimum requirements of the court's scheduling orders. The trial court properly determined that Olympic provided a basis to award attorney fees to Beecher. Thus, we need not address Hamblin's suggestion that the award is recoverable damages[12] under the CPA.

[12] See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 760-61, 162 P.3d 1153 (2007) (when attorney fees are recoverable as damages, it is the finder of fact that determines the amount of damages).

C. Fees and costs reasonable

National next contends that some of Hamblin's attorney fees and costs were unreasonable.

An attorney is not permitted to charge an unreasonable fee. Berryman, 177 Wn. App. at 660 (citing RPC 1.5)). "A determination of reasonable attorney fees begins with a calculation of the 'lodestar,' which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Berryman, 177 Wn. App. at 660. But the lodestar can include only hours "reasonably expended" and hours must be discounted where spent on '"unsuccessful claims, duplicated effort, or otherwise unproductive time."' Id. at 662 (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

When reviewing fee affidavits from counsel, "[c]ourts must take an active role in assessing the reasonableness of fee awards[.]" Id. at 657 (quoting Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998)). Trial court findings on reasonable fees cannot be conclusory, but rather, "must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." Id. at 658. A trial court's failure to address unreasonable billing concerns may result in reversible error. Id. at 658-59.

National asserts that the trial court improperly included fees related to the IFCA and CPA claims upon which Hamblin was unsuccessful at trial. We disagree.

First, IFCA was the only claim the jury did not find in favor of Hamblin. Second, the trial court found that the IFCA claim shared a common core of facts and circumstances with Hamblin's other claims.

"An award of attorney fees may be limited to fees attributable to successful claims if the claims brought are unrelated and separable. In contrast, when parties prevail on any significant issue inseparable from issues on which the parties did not prevail, a court may award attorney fees on all issues." Dalton M, LLC v. N. Cascade Tr. Servs., Inc., 20 Wn. App. 2d 914, 962, 504 P.3d 834 (2022).

Regardless, as the trial court noted in its findings, Hamblin's attorneys removed the fees solely related to the IFCA claims.

National also claims that Hamblin's attorney fees were unreasonable because of its hourly rate, block billing, duplicative work, and excessive time. Hamblin's attorneys elected to charge their 2018 hourly rate even though their rates increased in 2020. Hamblin submitted a declaration of support from Toby Marshall, an attorney from a different firm who is familiar with complex civil litigation and reviewed the billing records and history of the Hamblin litigation. Marshall opined that the rates requested for the work performed was reasonable.

In the trial court's issued findings and conclusions, it found that the attorney and staff hourly rates were reasonable and Hamblin took steps to "avoid and reduce claims that might involve duplicative, non-productive or wasteful matters," and that the hours expended on Hamblin's case were reasonable. Among other things, the court considered the "time and labor" required in Hamblin's case, the "novelty and difficulty of the questions involved," the skills

required to litigate the case and the experience of Hamblin's counsel, as well as the "fee customarily charged in Seattle for similar legal services." The court specifically noted that Hamblin's fee request was "carefully crafted." But despite awarding Hamblin all of his fees, the court declined Hamblin's request to apply the lodestar multiplier. The trial court did not abuse its discretion in awarding attorney fees.

National next asserts that the trial court improperly awarded costs as to Helsell Fetterman LLP.

Below, National objected to Hamblin's attorney costs on the basis that the costs had not been itemized or determined to be awardable costs under RCW 4.84.010. National maintains this argument on appeal, and contends that certain costs for consultants, depositions, and mediations were improperly awarded.

RCW 4.84.010 defines the costs that are allowed to a prevailing party. The statute limits costs that may be recovered by a party, such as filing and notary fees, fees to obtain records, witness fees, and certain deposition fees. RCW 4.84.010. However, where a court awards reasonable attorney fees under Olympic, it "necessarily includes all expenses incurred to establish coverage under an insurance policy and is *not limited to those expenses enumerated as recoverable statutory costs in RCW 4.84.010*." Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 134, 26 P.3d 910 (2001) (emphasis added).

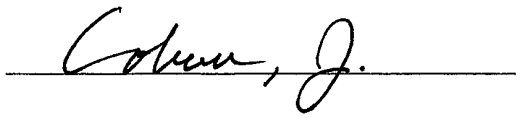
Hamblin submitted an invoice of costs as part of his attorney's declaration. The trial court found that "the expenses and costs summarized on in [Hamblin

and Castillo Garcia's attorneys'] declarations . . . are reasonable and necessarily incurred for the successful resolution of the bad faith, contract, and other intertwined cause of action[.]" Because the court elected to award fees on equitable grounds under Olympic, the court was not limited to awarding costs under RCW 4.84.010.

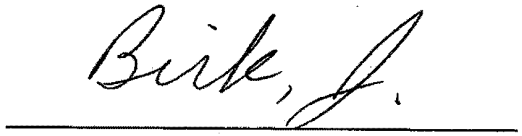
D. *Attorney fees on appeal*

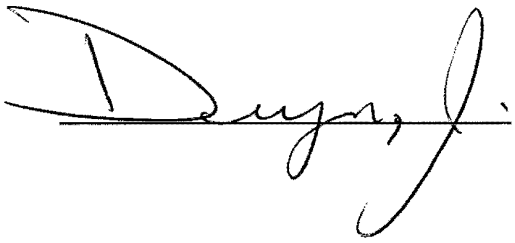
Hamblin also requests fees on appeal under RAP 18.1. Similar to the trial court, we also grant Hamblin his attorney fees on appeal under Olympic.

We affirm.



WE CONCUR:





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

ANDREW D. HAMBLIN, Plaintiff, vs. NATIONAL GENERAL INSURANCE COMPANY, a foreign insurance company, and INTEGON PREFERRED, a foreign insurance company, Defendants	NO. 16-2-29779-0 SEA (Consolidated with 18-2-08559-4SEA) **Special Verdict Form**

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

QUESTION 1: Did Plaintiff prove that Defendants National General/Integon Preferred failed to act in good faith as described in the Instructions?

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

(INSTRUCTION: Go to Question 2.)

QUESTION 2: Did Plaintiff prove his claims against Defendants on the following claims, as described in the Instructions, considering each claim separately?

ANSWER:

Insurance Fair Conduct Act	_____ **YES**	_X_ **NO**
Consumer Protection Act	__X_ **YES**	____ **NO**
Negligence	__X___ **YES**	____ **NO**
Breach of Contract	__X___ **YES**	____ **NO**

(Instruction: If you answered "yes" to any of the claims set forth in Question 2, answer Question 3 only as to each claim for which you answered "yes." For any claim to which you answered "no," do not answer any additional questions related to that claim. If you answered "no" to all claims listed in Question 2, notify the bailiff that you have reached your verdict).

Question 3: For any claim for which you answered "yes" in Question 2, state the amount of damages to Mr. Castillo Garcia, if any, that were proximately caused by Defendants National General/Integon Preferred by violation of that claim?

ANSWER:

Insurance Fair Conduct Act **$_____**

Consumer Protection Act **$_____**

Negligence **$_____**

Breach of Contract **$____$3,027_____**

(Instruction: If you entered a damage amount in two or more of the claims listed above, answer Question 4. If you did not enter a damage amount in two or more of the claims listed above, skip Question 4 and notify the bailiff that you have reached your verdict).

Question 4: What is the total amount of damages to Mr. Castillo Garcia proximately caused by Defendant National General/Integon Preferred?

ANSWER: $ _____

(Instruction: This question is to ensure the jury does not duplicate damages. If in Question 3 you awarded Mr. Castillo Garcia damages on two or more claims, but the injury he suffered was the same or overlapped on two or more of the claims, the total amount of damages entered in Question 4 should reflect the award associated with the same injury suffered only once.

DATE: _4/21/2021	_____Michael Sheppard_____ _
	Presiding Juror

Presiding Juror's signature attested on the record.

Judith Ramseyer

Judith H. Ramseyer

~~The Honorable Susan J. Craighead, Dept. 18~~

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

ANDREW D. HAMBLIN, Plaintiff, vs. NATIONAL GENERAL INSURANCE COMPANY, a foreign insurance company, and INTEGON PREFERRED INSURANCE COMPANY, Defendants.	NO. 16-2-29779-0 SEA (Consolidated with 18-2-08559-4SEA) **ORDER GRANTING PLAINTIFF'S MOTION FOR FEES AND COSTS, AND MOTION TO AMEND THE JUDGMENT** ~~(PROPOSED)~~

THIS MATTER came before the Court pursuant to Plaintiff's post-verdict motion for fees and costs, and motion to amend the judgment. The Court has fully considered the Motion, together with all papers submitted in support of the Motion, and the remainder of the Court's files and records in this case, and having presided over this trial, the Court has personal and firsthand familiarity with the nature of the case, the risks involved, the quality of the representation and the difficulties encountered by the Plaintiff and his counsel in successfully obtaining the judgment against Defendants.

In making the lodestar award, the Court has relied upon its extensive familiarity with this case and has considered the factors set forth under RPC 1.5(a), including (1) the time

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the fee customarily charged in Seattle for similar legal services; (3) the amount involved and the results obtained; (4) the experience, reputation, and ability of Plaintiff's counsel; and (5) the contingent nature of the fee. Additionally, the Court considered the discovery complexity and multiple motions, hearings, and proceedings limiting other work and the efforts to avoid any wasteful or duplicative time. ~~All of these considerations support the reasonableness and multiplier applied to the carefully crafted fee application. Accordingly, no multiplier has been applied to award of fees and costs for this action pending since 2018.~~ These factors are adequately compensated in Plaintiff's

Now, therefore, the Court makes the following findings of fact and Orders based thereon:

I. FINDINGS AND CONCLUSIONS:

1. Attorney Andrew Kinstler's hourly rate of $450 is reasonable;
2. Attorney Lauren Parris Watts' hourly rate of $350 is reasonable;
3. Attorney Michelle Su's hourly rate of $225 is reasonable;
4. Paralegal Jessica Ritts' hourly rate of $190 is reasonable;
5. Attorneys Andrew Kinstler and Lauren Parris Watts are both partner-level attorneys with considerable experience and skills in the matters required in this case;
6. Plaintiff was successful in his bad faith and breach of contract claims, all of which shared a common core of facts and circumstances with Plaintiff's other interrelated claims;

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Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

7. Plaintiff's IFCA claim also shares a common core of facts and circumstances with his other claims, but Plaintiff has removed attorney hours spent on solely the IFCA claim;

8. Plaintiff has been conservative in presentation of the attorney hours spent on this case, and has taken reasonable steps to avoid and reduce claims that might involve duplicative, non-productive or wasteful matters;

9. The hours awarded and summarized as set out in the Kinstler and Beecher declarations, which are incorporated herein, are reasonable and necessarily incurred for the successful resolution on each of the interrelated causes of action;

10. The expenses and costs summarized on in the Kinstler and Beecher declarations, incorporated herein, are reasonable and necessarily incurred for the successful resolution of the bad faith, contract and other intertwined cause of action; and *

~~11. The lodestar multiplier of 1.5 is appropriate~~ given the contingent representation and risks this matter presented at the inception and throughout the three years of non-payment, and the exceptional quality of representation provided to Plaintiff by his counsel. Although the verdict was substantial, at the time of accepting the case it was a significant risk and given the quality of the representation an upward adjustment is set out above.

Based on the above findings, it is ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's Motion for an award of attorney's fees and costs is hereby GRANTED;

* 11. The Court did not consider your comments submitted by Defendants, which improperly invade the confidential deliberative process.

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

2. Plaintiff is the prevailing party on all intertwined causes of actions, including the bad faith and breach of contract claims, requiring the Court to award reasonable fees and costs;

3. Plaintiff is awarded attorney's fees in the amount of ~~$701,084.25;~~ 472,915.50.

4. Plaintiff is awarded expenses in the amount of $35,635.56; and

5. This award of costs and fees shall bear interest at the rate of 5.25%.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for entry of an amended judgment reflecting this award is GRANTED.

DATED this 14 day of June, 2021

Judge Judith Ramseyer

Presented by:

HELSELL FETTERMAN, LLP

By Andrew J. Kinstler
Andrew J. Kinstler, WSBA No. 12703
Lauren Parris Watts, WSBA No. 44064
Attorneys for Plaintiff

HELSELL FETTERMAN
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
206.292.1144 WWW.HELSELL.COM

Case Name	Motions in Limine	Date MIL Granted
Palmer v Rauch King County Superior Court No. 17-2-19936-2 SEA	The police report is not admissible at trial. RCW 46.52.080	10/22/2018
Weaver v Allstate et al King County Superior Court No. 18-2-14328-4 SEA	The police report is not admissible at trial. RCW 46.52.080	6/06/2019
Santiago v Lewis King County Superior Court No. 18-2-04599-1 SEA	The police report is not admissible at trial. RCW 46.52.080	10/02/2019
Bredl v Misaengsay King County Superior Court No. 17-2-10030-7 SEA	The police report is not admissible at trial. RCW 46.52.080	2/03/2020
McCray v Cryderman King County Superior Court No. 18-2-01485-9 KNT	The police report is not admissible at trial. RCW 46.52.080	7/08/2019
White v Ackley King County Superior Court No. 17-2-16687-1 KNT	The police report is not admissible at trial. RCW 46.52.080	6/25/2018
Vincini v Cho King County Superior Court No. 17-2-18964-2 SEA	The police report is not admissible at trial. RCW 46.52.080	9/17/2018

COLE WATHEN LEID HALL P.C.

October 26, 2022 - 1:03 PM

Transmittal Information

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Appellate Court Case Number:	82788-0
Appellate Court Case Title:	National General Insurance Company, App v. Andrew Hamblin, Respondent

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