NO. 96536-6

SUPREME COURT OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurer doing business in Washington State,

Appellant,

V.

JOGINDER SINGH DBA AP TRANSPORT,

Respondent.

RESPONDENT JOGINDER SINGH'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Joginder Singh DBA AP Transport ("Singh") submits the following Answer to Appellant's Petition for Review pursuant to RAP 13.4(d).

This case involves an insurance company facing multiple claimants with claims that in the aggregate exceeded its insured's policy limits. The insured's policy contained a "pay-and-walk" exclusionary clause. Division I upheld longstanding Washington law requiring insurers to exercise pay-and-walk clauses in good faith and in the interests of their insured. Zurich American Insurance Company (hereafter "Zurich") requests the Supreme Court eliminate this rule and replace it with a system allowing insurers to use a pay-and-walk clause whenever they want, without considering the impact on Washington policyholders or the interests of these policyholders. This position is not supported by Washington law or public policy.

A King County jury found Zurich's handling of the claims against Singh constituted a breach of Zurich's duty of good faith, a breach of contract, and negligence. Zurich knew its decision to offer Singh's full policy limits to the Beckwith plaintiffs would strip him of coverage under the policy and leave him without the primary benefit of his insurance contract: a defense against other lawsuits. The jury's decision was based on a myriad of evidence confirming Zurich: (1) placed its own financial

interests above Singh's interests; (2) failed to investigate or evaluate the non-Beckwith claims; (3) never attempted settlement negotiations with the Beckwith plaintiffs sufficient to ascertain the most favorable terms for Singh; and (4) requested and then ignored input from Singh on its unilateral decision to offer his full policy limits to one claimant.

This Court should reject review because Zurich fails to satisfy their burden of satisfying RAP 13.4(b)(1), RAP 13.4(b)(2), or RAP 13.4(b)(4). Respondent is entitled to fees under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-54, 811 P.2d 673 (1991) and RAP 18.1.

II. COUNTERSTATEMENT OF ISSUE

A. Whether this Court should decline Zurich's invitation to jettison Washington law that requires insurers to use pay-and-walk clauses only in good faith and in the interest of their insureds?

III. COUNTERSTATEMENT OF THE CASE

Following a July 20, 2011 automobile accident, Zurich hired attorney Ken Roessler of Forsberg & Umlauf to investigate and defend Mr. Singh against all of the claims (including from the Sykes family) that arose out of the accident, not only the Beckwith matter. RP 290 (12-13-2016); RP 212 (12-20-16); CP 848. It is common for insurance companies to hire defense attorneys before a lawsuit is filed. RP 270-271 (12-13-16); RP 197 (12-12-16). Within a month of the accident, Zurich knew Singh's

policy limits would be exhausted. CP 3101. Zurich assigned Tonya Truitt ("Truitt") to handle this claim. Bob Reynolds ("Reynolds") was Truitt's supervisor.

The Beckwith plaintiffs were the first to file a lawsuit against Singh and that case proceeded with discovery. Knowing there were other claimants if Beckwith resolved, Roessler emailed Truitt stating:

> **My client, Mr. Singh, would like Zurich's cooperation in making a settlement offer of $1 million** (consisting of $999,000 from Zurich and $1,000 from Mr. Singh) to the Beckwith Estate plaintiffs to see if they will settle separately with us in exchange for a release of claims against Joginder Singh dba AP Transport and Richard Noble in this case. **I recommend making such an offer**. **Mr. Singh understandably wants to keep some indemnity money left on the Zurich policy so he can continue to get a legal defense**, while he would still be effectively tendering his "policy limit" to the Beckwith Estate plaintiffs and maximizing his chances for negotiating settlement with them and avoiding the significant excess exposure that the Beckwith Estate wrongful death claim represents.

CP 1091-1092 (emphasis in original)

In response, Zurich asked Roessler for an "updated matrix of the claimants and their damages" so it could have the "most current picture of [Zurich's] exposure." CP 221-222. Zurich wanted this to determine "who's going to be potentially making a claim" and to evaluate Zurich's future exposure. CP 2689-2692; RP 451-453 (12-13-16); RP 234-235 (12-20-16). After learning the projected defense costs for these other claims,

Zurich rejected Singh's January 11, 2013 request for cooperation and instructed Roessler to "move forward with offering the $1,000,000 policy limits" to the Beckwith plaintiffs. CP 229. This decision meant Singh would be left to fend for himself against the claims Zurich had asked Roessler to investigate and defend. Sure enough, the Sykes family sued Singh on July 16, 2014. CP 371-75.

A. Zurich Placed Its Financial Interests Over Singh's Interests

Due to the large number of potential claimants, Singh's potential defense costs were high. Under the policy, Zurich was obligated to pay defense costs. On September 9, 2011, the Zurich file handler received a budget from Roessler for $60,000 - $95,000. In the claim note she states, "there isn't any way around it." Ex 297. This confirms Zurich was looking for a way to pay Singh's limits quickly to save paying additional legal expenses. RP 288-289 (12-13-16). Upon questioning by the juror during trial, Roessler testified:

> THE COURT: Do you believe Zurich declined your proposal for the best interests of Mr. Singh?
> THE WITNESS: I would have to say no. That's a tough question, but I would have to say no. That's the reason that we recommended that Zurich go for it. We thought that was the best -- that was in the best interests of our client. So them saying no I can't say that that served the best interests of my client.

RP 52

Zurich instructed Roessler to exhaust Singh's policy limits so it could save money on defense costs. RP 287-289 (12-13-16). It has never provided the reason it refused Roessler's request for cooperation. RP 445-447 (12-13-16).

B. Zurich Failed to Involve Mr. Singh or Consider His Interests While Handling These Claims

On cases involving multiple claimants, insurance companies should give their insured input on the settlement process. RP 203 (12-19-16). Zurich knows this and agrees. CP 802, CP 840. Nevertheless, Zurich offered Singh's policy limits without (1) attempting to negotiate with the Beckwith plaintiffs, RP 385 (12-13-16); RP 283 (12-13-16); CP 2861 or (2) communicating with Singh about the demand. RP 226 (12-20-2016); CP 2832-2873. Zurich's offer was made with the knowledge Singh would be left without a defense from other claimants involved in the July 20, 2011 accident. RP 242 (12-20-2016); RP 445-447 (12-13-2016); CP 3033.

Zurich's last communication to Singh, prior to its decision to offer his policy limits to the Beckwith plaintiffs, was on September 13, 2012. It stated, in relevant part, "Zurich believes that we should consider extending a settlement offer to the Beckwith Estate and would like your input with regard to making such an offer." CP 216.

Reynolds expected Truitt to communicate with Singh about *why* the decision to offer policy limits was being made *before* the decision was

made. CP 80-81. This did not happen. Generally accepted claims handling practices in Washington require insurers to communicate or otherwise seek input from their insured before offering policy limits if the offer would eliminate the insurer's obligation to defend future claims or would otherwise adversely impact the insured. CP 1013. Zurich's own claims handling expert, David Mandt, agreed insurance companies have an obligation to communicate with the insured before paying the insured's policy limits. RP 203 (12-19-2016). Despite this, Zurich never communicated with Singh or Roessler about its unilateral decision to offer the full policy limits until *after* the decision was made. CP 816, 832. When asked why, Truitt testified, "we don't need Mr. Singh's approval to handle our claims." RP 252 (12-20-2016); CP 3089.

Reynolds does not recall if Singh's best interests were even considered before Zurich rejected Roessler's January 11, 2013 request. CP 845. Truitt testified Singh's best interests were not a consideration. CP 820.

C. Zurich Did Not Conduct Settlement Negotiations with Any Claimants

Zurich claim handlers are required to protect their insureds from excess exposures and ascertain the most favorable settlement terms for Singh. CP 809, CP 2728, CP 799. That never happened. CP 842, 1002-1004, 1015. Instead, Zurich prematurely terminated its duty to defend by exhausting Singh's policy limits in bad faith. RP 293-295 (12-13-16).

Meanwhile, the co-defendants' carrier, Alaska National, negotiated a "holdback agreement" with "[no] real pushback" from the Beckwiths' attorneys. RP 202-203 (12-12-16); CP 539-541, 1016-1024. Truitt testified she may have entered into a holdback deal before this case. CP 821. When asked why this type of deal was not negotiated for Singh, Truitt testified "it may have opened a whole other can of worms." CP 3061-3062. The Beckwiths' attorney would have conveyed a holdback-style offer to his client had Zurich presented it (RP 393 (12-13-16)), but Zurich never contacted the Beckwith attorneys to talk about settlement. RP 385.

Reynolds testified a holdback deal was better for Singh because there would be money left to deal with other claimants and an attorney to defend him who was paid by Zurich. CP 843-844. Zurich's failure to ascertain the most favorable settlement terms and premature termination of its duty to defend was contrary to Washington law and generally accepted Washington claims handling practices. CP 1030.; RP 293-295 (12-13-16).

D. Zurich Did Not Investigate the non-Beckwith Claims

Insurance companies are not permitted to "assign and resign." RP 273 (Hartmann) (12-13-16). This means the insurance claims handler cannot simply hire a lawyer and stop investigating. RP 210 (Mandt) (12-19-16). In fact, Zurich's own Best Practices confirm its case managers,

"shall not abandon the investigation of the claim to defense counsel or the litigation discovery process." Ex 33 and 34.

Zurich knew Sykes would be making a claim within weeks of the accident. RP 215 (12-20-16); CP 157. On October 10, 2011, Reynolds asked Truitt to reach out to all claimants to, "figure out exactly what type of injury each [claimant] is claiming." CP 861. Truitt never made any effort to secure releases for medical records from the Sykes' family. RP 224 (12-20-16). Zurich's conduct violated its own Best Practices and Washington law.

On July 16, 2014, Brian Sykes and his family filed suit against Singh. CP 371-375. On August 1, 2014, Zurich denied Singh's request to defend because it paid the $1,000,000 policy limits to the Beckwith plaintiffs. CP 140-142. Plaintiffs commonly file lawsuits shortly before the statute of limitations expire. RP 43 (12-15-16).

IV. ARGUMENT

A. Division I's Opinion Does Not "Expand the Duty to Defend"

Contrary to Zurich's argument, Division I's opinion does not expand the duty to defend from "suit" to "an inchoate claim that might never materialize." *Brief,* p. 9. In this case, Zurich voluntarily undertook the defense and investigation of all claims. RP 290, 212, CP 848. On July 21, 2011, Truitt mailed Singh a letter stating, "[w]e will make every effort to

settle all claims within your policy limit and secure a Release for you from every claimant." CP 146-147. Zurich hired Roessler to defend Mr. Singh and investigate all claims arising out of the July 2011 accident. CP 24 (12-15-2016); CP 212 (12-20-2012).

"Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693, 696 (2010), as corrected on denial of reconsideration (June 28, 2010). Zurich undertook the duty to investigate and defend all claims. If it was unsure about its obligation to defend, Zurich could have defended the Sykes case under a reservation of rights while seeking a declaratory judgment that it had no duty to defend. *Id.* Doing so would have given Singh the defense promised and, if coverage was found not to exist, Zurich would not be obligated to pay. *Id.*

The jury found Zurich breached its insurance contract with Singh in bad faith. When an insurance company fails to act in good faith, it requires courts "to set aside traditional rules regarding harm and contract damages because insurance contracts are different." *Kirk v. Mt. Airy Ins. Co*., 134 Wn.2d 558, 562, 951 P.2d 1124 (1998). "The insurer who in bad faith refuses to acknowledge its broad duty to defend is no less liable than the insurer who accepts the duty to defend under a reservation of rights, but

then performs the duty in bad faith." *Id.* at 564.

Division I's opinion does not, "leave insurers in Washington in limbo." *Brief,* p. 10. The answer to Zurich's bevy of questions about how insurers should handle multiple claimants on a loss where the aggregate value could exceed its insured's policy limits was provided by its own claim handling expert at trial – Do the right thing at the right time for the right reasons. RP 205 (12-19-2016).

Zurich may have avoided the position it currently finds itself in by adhering to some of the suggestions set forth in Appendix B to its brief. *See Petition for Review, Appendix B*. Specifically, the commentator[1] recommends:

1. The insurer, "should attempt to learn from the claimants how long it will be before they will be able to assess their injuries and damages, and thus allow the insurer to do the same." *Id.* at p. 18.

   <u>*What Zurich Did:*</u>

   - After receiving Mr. Hochberg's letter of representation for Sykes, Zurich never contacted him to inquire about his clients' injuries. RP 334-335.
   - Zurich made no effort to settle the Sykes' claims or investigate the

[1] The author is Douglas R. Richmond, the managing director of the largest insurance broker in the world, Aon Risk Services.

non-Beckwith claims. RP 223-224 (12-20-16) RP 274 (12-13-16).

- Reynolds asked Truitt to reach out to all claimants to "figure out exactly what type of injury each [claimant] is claiming." RP 224 (12-20-16). Truitt never did.
- Zurich never requested a medical release from Sykes or his Labor and Industries file, which was unusual. RP 335 (12-13-16).

2. "The insurer should explain its plan for resolving the **multiple claims** likely to be asserted against the insured." *Id.* (emphasis in original).

What Zurich Did:

- Zurich's last communication to Singh, before its decision to offer policy limits stated, "Zurich believes that we should consider extending a settlement offer to the Beckwith Estate **and would like your input with regard to making such an offer**. CP 216 (emphasis added). When Singh provided input (asking Zurich's cooperation in offering $999,000 to the Beckwith plaintiffs) Zurich refused and instead offered the full policy limits. CP 1091-1092, CP 299.
- Zurich never gave a reason for why it rejected Singh's request. RP 445-447 (12-13-16).

3. "[T]he insurer should keep the insured apprised of the settlement process and its strategy. As the insurer formulates it strategy for settling with individual claimants, it should consult with the insured about that

process and possible approaches. It should check with the insured as often as necessary to confirm the insured's agreement with its decisions…By involving its insured in these matters…the insurer is fulfilling its responsibility to communicate and allowing the insured the chance to protect her own interests, both of which are compelling evidence of good faith and fair dealing." *Id.* "It would stand bad faith law on its head to hold that an insurer that allows an insured to protect herself against excess liability by involving her in settlement decisions thereby breaches its duty of good faith and fair dealing." *Id.* at p. 19.

What Zurich Did:

- Reynolds reiterated Zurich had an "ongoing obligation to communicate with…Singh…" to discuss Singh's exposure and potential limits tender. Ex 297. Despite this, neither Truitt nor anyone from Zurich communicated with Singh or Roessler about its unilateral decision to offer the policy limits until *after* it decided to reject Roessler's proposal and offer limits. CP 816, 832; CP 222-223; 229.
- Zurich sent Singh a total of two letters in English[2] between August 2011 and January 2013, before it instructed Roessler to offer Singh's full policy limits to the Beckwith plaintiffs. CP 174-175; CP 215-216.

[2] Zurich knew Singh did not speak English. CP 2935. Zurich often hires translators and has approved vendors for this purpose. RP 203 (12-20-16). Despite this, Zurich never hired a translator to communicate with Singh. RP 206-207 (12-20-16).

This commentator also cites the universal rule that, "[a]n insurance company is therefore guilty of bad faith if it subordinates an insured's financial interests to its own in handling a claim or suit." *Petition for Review, Appendix B* p. 17; see also *Mut. of Enumclaw Ins. Co. v. T&G Constr. Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008). Zurich's Petition ignores the multitude of evidence the jury heard supporting the fact it put its own financial interests above its insured's best interests.

Division I correctly declined to adopt a "bright-line rule" in cases with multiple claimants involving exposure above an insured's policy limits. The reason, in Mr. Richmond's words, is because "there is no one right way for the insurer to handle such a case." *Zurich's Appendix B*, p. 17. Rather, "[a]n insurer's investigation must always be guided by reason." *Id.* at p. 18.

The rule Zurich proposes would permit insurers to "pay and walk" without regard to the impact on Washington insureds. It would eliminate the almost universal requirement to keep insureds updated and involved. It would also permit insurers to put their financial interests above their insured's interests and undo decades of law requiring Washington insurers to act in good faith and consider the interests of their insureds. Zurich's Petition for Review should be denied

B. The Jury's Finding of Bad Faith Precludes Zurich From Arguing the Sykes Claim Was Not Covered

When an insurer fails to provide a defense in bad faith, the remedy is a presumption of harm and coverage by estoppel. *Kirk*, 134 Wn.2d at 562. This is because, "[t]he bad faith requires us to set aside traditional rules regarding harm and contract damages because insurance contracts are different." *Id.* With the jury's finding of a bad faith breach, Zurich is precluded from arguing there was no duty to defend the Sykes family claim. Because Zurich did not seek review of the jury's verdict, it is undisputed Zurich denied coverage on Sykes claims in bad faith and Singh was damages.

C. Insurers Cannot Benefit From Their Own Bad Faith

"The requirement of acting in good faith cannot be rendered meaningless." *Kirk*, 134 Wn.2d at 565.. An insurer cannot and should not benefit from its failure to act in good faith. *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007)(an insurer may not rely upon its own interpretation of case law to refuse to defend."); *Coventry Assocs v. Am. States Ins. Co.*, 136 Wn.2d 269, 277, 961 P.2d 933, 936 (1998).

Zurich cannot benefit from its own bad faith decision to prematurely pay-and-walk, which deprived Singh of a defense against the Sykes lawsuit. Division I properly recognized this in its decision.

D. Singh Is Entitled To Be Made Whole

The presumptive measure of damages was the $250,000 judgment against Singh and in favor of Sykes. Zurich apparently argues this is the only damage Singh was entitled to in defending the Sykes lawsuit. This position is not supported by Washington law.

"[W]hen an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy." *Truck Ins. Exch. v. Vanport Homes, Inc*., 147 Wn.2d 751, 765–66, 58 P.3d 276 (2002)

In *Kirk*, this court held, "[t]he general rule regarding damages for an insurer's breach of contract is that the insured must be put in as good a position as he or she would have been had the contract not been breached. In the failure to defend context, recoverable damages include: (1) the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action, and (2) the amount of the judgment entered against the insured." *Kirk,* 134 Wn.2d at 561 (internal citations omitted). As set forth in *Miller v. Kenny*, 180 Wn. App. 772, 802, 325 P.3d 278 (2014):

> Once it is determined that the insurer acted in bad faith by failing to settle, typically the chief component of the insured's damage caused by that failure will be the insured's

> liability to the third party. This component is measured by the amount of the third party's covenant judgment against the insured. However, the insured's damages may include as an additional component the damages caused to him by the insurer's bad faith. Examples include the potential effect on the insured's credit rating, damage to reputation, loss of business opportunities, and loss of control of the case. *Butler*, 118 Wash.2d at 399, 392, 823 P.2d 499. Other examples are loss of interest, attorney fees and costs, financial penalties for delayed payments, and emotional distress, anxiety, and fear. *Anderson v. State Farm Mut. Ins.* Co., 101 Wash.App. 323, 333, 2 P.3d 1029 (2000). *review denied*, 142 Wash.2d 1017, 20 P.3d 945 (2001). Because bad faith is a tort, an insured is not limited to economic damages. *Anderson*, 101 Wash.App. at 333, 2 P.3d 1029, *citing Coventry Assocs. v. Am. States Ins. Co*., 136 Wash.2d 269, 284–85, 961 P.2d 933(1998).

Miller v. Kenny, 180 Wn. App. 772, 802, 325 P.3d 278 (2014)

The reasoning in *Kirk* and *Miller* is sound because bad faith is a tort. There is no basis for accepting review here.

E. Emotional Distress Damages Are Recoverable in Insurance Misconduct Cases

The Washington Supreme Court held in *Coventry Assocs. v. American States Insur. Co.* that general tort damages are available for insurance bad faith. 136 Wn.2d at 285. This rule remains unchanged after nearly two decades. *See Anderson*, 101 Wn. App. at 333 (emotional distress damages were recoverable for an insurer's bad faith committed when it refused to disclose the existence of underinsured motorist coverage to its injured insured); *Kenny*, 180 Wn. App. at 801 (2014)(emotional distress damages are available for an insurer's bad faith where it exposes its insured

to an excess judgment by failing to settle a liability claim within its insured's policy limit); *Woo*, 161 Wn.2d at 70 (2007)(the Washington Supreme Court upheld a jury's award of emotional distress damages for an insurer's bad faith where the insured offered no evidence supporting his emotional distress other than his own testimony).

Federal cases applying Washington law are in accord. *See Taladay v. Metropolitan Grp. Property and Cas. Ins. Co.,* 2016 WL 3681469 (W.D. Wash. 2016)("emotional distress damages are recoverable for an insurer's bad faith…"); *Scanlon v. Life Ins. Co. of North America*, 670 F. Supp. 2d 1181, 1196-97 (W.D. Wash. 2009)("a party can rely exclusively on his or her own testimony to establish emotional distress in a bad-faith insurance case."

Zurich relies on dicta in *Schmidt v. Coogan*, an attorney malpractice case, that did not alter the principle in *Coventry*, *Anderson*, or *Kenny* and is not controlling. 181 Wn.2d 661, 335 P.3d 424 (2014). Concerning the availability of emotional distress damages in bad faith claims, all that the Supreme Court said in *Coogan* was that it, "[had] never before addressed the availability of emotional distress damages for insurance bad faith…" *Id.* at 676.

Following *Coogan*, this Court denied review of a Division I opinion affirming a $300,000 award for emotional distress damages resulting from

an insurer's bad faith. *Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, 771, 393 P.3d 786 (2017), *review denied sub nom. Mut. of Enumclaw v. Myong Suk Day*, 188 Wn.2d 1016, 396 P.3d 348 (2017).

F. Singh is Entitled to Fees and Expenses Under RAP 18.1

RAP 18.1 and *Olympic Steamship* allow a prevailing party their attorney fees and expenses associated with an appeal. Pursuant to RAP 18.1(j), Singh requests his attorney fees and expenses and will file an Affidavit of same pursuant to RAP 18.1(d).

V. CONCLUSION

Based on the foregoing, Singh requests this Court reject Zurich's Petition for Review and award all reasonable attorney fees and costs pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of December, 2018.

MIX SANDERS THOMPSON, PLLC

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PROOF OF SERVICE

I hereby certify that on December 17, 2018 Respondent Singh's Respondent's Brief was served on counsel via email per agreement to the below named individuals:

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

DATED this 17th day of December, 2018, at Seattle, Washington.

s/Leyda Greenwood
Leyda Greenwood
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MIX SANDERS THOMPSON, PLLC

December 17, 2018 - 2:05 PM

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