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No. 64477-7

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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

Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

I. INTRODUCTION

When an unattended candle tragically caused a fire that injured William Lipscomb's tenant, Emily Moratti, Lipscomb notified Farmers, his insurer. Farmers opened a file, investigated, incorrectly concluded that Lipscomb could not be liable, and informed Moratti in October 2002 that it was closing its file. Moratti made no settlement demand to Farmers then or at any time. In July 2003, when Moratti sued Lipscomb, Farmers defended Lipscomb without a reservation of rights and, in April 2004, authorized Lipscomb to use his policy limits of \$100,000 as he saw fit.

Lipscomb, despite requests from Moratti's attorneys, would not negotiate settlement at any time before Farmers offered its limits. Instead, he sued Farmers and his insurance agent (Dye) seeking to raise his policy limits. In 2007, after losing that suit, Lipscomb settled with Moratti for \$17 million and a covenant not to execute, plus a personal contribution of \$600,000. Moratti, as Lipscomb's assignee, then sued Farmers.

Moratti asserts that Farmers' October 2002 determination that Lipscomb could not be liable constituted a "fork in the road," establishing beyond recourse Lipscomb's liability for the full amount of Moratti's damages. That is, Moratti argues that Farmers' mistake was irrevocable and that, even if Farmers' failure to offer its limits before April 2004 made no difference to the outcome, Farmers is presumed to have harmed

Lipscomb rendering Farmers liable to the full extent of Lipscomb's liability, without regard to limits.

Farmers did not refuse to settle; it was not offered an opportunity to settle. No presumption of harm arises, and Moratti's failure to prove that Farmers' conduct resulted in the settlement between Moratti and Lipscomb is fatal to her bad faith claim, as it is to her CPA claim. Even if a presumption were to apply to the bad faith claim, however, the undisputed evidence established that Farmers' conduct did not cause the settlement. The policy limits were available to Lipscomb at all times that he was willing to settle.

Moratti's "fork in the road" is a fiction, without legal or factual significance. If, however, Moratti can base her claims against Farmers on a "fork in the road," establishing all elements of Lipscomb's claim against Farmers in October 2002, then the statute of limitations has run on those claims.

The trial court's considered rulings should be upheld. Should this Court decide to reverse, several trial court rulings that were rendered moot by the dismissal need to be addressed to ensure efficient proceedings on remand and reduce the possibility of a second appeal.

II. COUNTERSTATEMENT OF ISSUES RELATED TO MORATTI'S ASSIGNMENTS OF ERROR

1. Are the statutes of limitations on tort and CPA claims *not* involving an ongoing breach triggered when the insured is aware of all facts relevant to the claim?
2. In a case where the plaintiff's theory rests on an unproven assertion that the insurer's actions prevented early settlement, is a new trial warranted when evidence explaining why the insured chose not to settle is improperly excluded, and when a jury instruction confuses the jury and allows a verdict on improper grounds?
3. Did the trial court properly grant judgment as a matter of law on Moratti's CPA claim when no evidence regarding causation of injury to business or property was adduced?
4. Is a plaintiff entitled to attorney fees under the doctrine applying to suits to obtain the benefits of insurance coverage when coverage is not at issue, or under equitable principles that would apply only to Lipscomb?
5. Should this Court reassign this case to a different trial judge when there is no evidence of bias or unfairness or the appearance of either?

III. ASSIGNMENTS OF ERROR¹

1. The trial court erred in entering its order in limine dated July 27, 2009, prohibiting Farmers from presenting evidence regarding Lipscomb's suit against Farmers and his insurance broker.
2. The trial court erred in giving Jury Instruction 11.
3. The trial court erred in giving Jury Instruction 12.
4. The trial court erred in assessing the postjudgment interest rate in the judgment dated October 2, 2009.
5. The trial court erred in ruling, in its October 26, 2009, order granting Farmers' motion for judgment as a matter of law, that a question of fact existed as to whether Farmers' conduct proximately caused harm to Lipscomb.

IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Does an insurance third-party bad faith claim alleging negligent investigation and not a failure to defend, indemnify, or settle require the plaintiff to prove causation under authority of *St. Paul Fire & Marine Insurance Co. v. Onvia, Inc.*? (Assignments of Error 3, 5)

¹ Farmers is not aggrieved by the trial court's final orders in this case, which concluded that Moratti did not prove her CPA claim and that her bad faith claim was barred by the statute of limitations. If this Court affirms the trial court, then Farmers' assignments of error are moot.

2. A. Did Moratti fail to meet her burden to present any evidence that Farmers' claim closing proximately caused Lipscomb to settle with Moratti for \$17 million plus a personal contribution of \$600,000? (Assignments of Error 3, 5)

B. Alternatively, if a presumption of harm applies, does the undisputed evidence that Moratti made no settlement demand and, had she done so, Lipscomb would not have agreed to settle at any time before Farmers offered its limits, establish as a matter of law that Farmers' conduct could not be the proximate cause of the Moratti-Lipscomb settlement? (Assignments of Error 3, 5)

3. Is a new trial warranted when a jury instruction is offered that has no basis in evidence and it is impossible to determine whether the jury's verdict rests on proper or improper grounds? (Assignment of Error 2)

4. Is a new trial warranted when a jury instruction contains critical undefined terms that confused the jury and the trial court refuses the jury's request to define them? (Assignment of Error 2)

5. In a case where the plaintiff's theory rests on an unproven assertion that the insurer's actions prevented early settlement, is a new trial warranted when evidence explaining why the insured chose not to settle is improperly excluded? (Assignment of Error 1)

6. Should the rate of postjudgment interest for a judgment based entirely on tort be calculated according to the tort judgment statute or according to a contract that was not the subject of the litigation?

(Assignment of Error 4)

V. STATEMENT OF THE CASE

A. Factual Background

On May 1, 2002, 16-month-old Emily Woodrow, now Moratti,² suffered serious burns in a house fire. CP 95, 99. At the time of the fire, Emily lived with her mother, Michelle Woodrow, and Michelle's father, Rick Woodrow, in a house rented from William Lipscomb. CP 99. Lipscomb was insured under a Landlord Protectors Package issued by Farmers. CP 117-51. The policy provided both property and liability coverage, with liability at a maximum of \$100,000 per occurrence. CP 121. Lipscomb notified Farmers of the loss on May 1, 2002. Ex. 59 at 1.³

Farmers opened separate files for Lipscomb's property claim and for a potential liability claim arising out of Moratti's injuries. The liability claim was assigned to claims adjuster Renee Becker. 7/30 (AM) RP 41. The Woodrows retained attorney Brad Johnson to represent Moratti. 8/10 (PM) RP at 55-56. Johnson wrote to Becker on May 13, 2002, confirming

² After the fire, Emily was adopted by her grandmother, and she is now known as "Emily Moratti." CP 95.

³ Exhibit 59 consists of a series of Farmers' claim notes paginated consecutively in the upper right hand corner of the document.

his representation of Moratti and requesting information about Lipscomb's policy limits. Ex. 3. Becker responded the same day informing Johnson that Farmers was investigating the claim and that she would keep him updated regarding the status of the investigation. Ex. 210. Becker requested copies of Moratti's medical bills as well as reports and updates on her treatment. *Id.* Johnson never provided this information. 7/30 (AM) RP 141-42. Becker also notified Lipscomb that Moratti's family had retained counsel and explained that a lawsuit might be filed against him on Emily's behalf. Ex. 4.

Farmers property adjuster Heath Abel hired Jack Shouman of Fire Protection Consultants to investigate the cause of the fire. 7/30 (PM) RP 73. The investigation revealed the cause to be an unattended candle in Moratti's bedroom.⁴ *Id.* at 129-30.

Farmers adjuster Tim McGrath told Becker about the investigator's conclusion regarding the origin of the fire. Becker's case note states, "[McGrath] said that the fire dept completed their investigation, and found that the cause of the fire was the tenant leaving a lit candle in the baby's

⁴ Moratti asserts, without citation to the record, that her injuries could have been prevented if there had been a working smoke detector near her bedroom. App. Br. at 5. Whether a smoke detector would have made any difference has never been established.

room.⁵ Therefore there is no negligence on the part of our insured.” Ex. 59 at 30. On May 29, Becker wrote separately to Johnson and Lipscomb informing them that the fire department had completed its investigation and determined that Lipscomb was not negligent and that Farmers would therefore be closing the liability claim. Exs. 6, 7.

Johnson’s associate, Jeff Herman, responded to Becker’s letter on July 17, 2002. Ex. 11. Herman noted that RCW 59.18.060 required that Lipscomb provide a written smoke detector notice to his tenants and that the notice be signed by both Lipscomb and the tenants. Herman asked Becker to forward copies of the lease agreement and signed smoke detector notice. *Id.* Becker made repeated attempts to obtain a signed copy of the lease agreement from Lipscomb. Ex. 59 at 32, 35, 45, 47; Ex. 231; 7/30 (PM) RP 7-11. In a letter to Herman dated October 10, 2002, Becker explained that she had just learned that Lipscomb did not have a signed copy of the agreement. Ex. 15. She noted that, while this might constitute a violation of RCW 59.18.060, Farmers did not believe the violation meant that Lipscomb could be held liable for the fire. *Id.* Becker added that she had contacted Lipscomb’s counsel in an attempt to

⁵ Becker mistakenly ascribed this conclusion to the fire department instead of Shouman. In fact, the fire department had not completed its investigation by this time. The fire department subsequently confirmed Shouman’s conclusion regarding the cause of the fire. CP 1959-60.

obtain authorization for the release of information regarding Lipscomb's policy limits. *Id.*

On October 24, 2002, Herman spoke with Becker and asked Farmers to reconsider its conclusion that Lipscomb had no liability. Ex. 16. According to Herman, Becker stated that Farmers had made its decision. *Id.* Herman then purportedly asked whether Farmers would change its decision if Herman sent a demand package. *Id.* Herman had prepared a detailed demand letter stating that Moratti would agree to settle the case for \$15 million. CP 1228-45. According to Herman, Becker responded by stating, "Our liability decision is final." Ex. 16.

Becker's testimony differed from Herman's. Becker testified she did not recall the October 24, 2002, conversation, although she might have told Herman that Farmers' liability decision was final based upon the information Farmers had at that time. 7/30 (AM) RP 124. Becker said she would not have told Herman not to send the demand package. *Id.* at 124-25.

Herman elected not to send the settlement demand to Farmers. 8/10 (AM) RP 34. After October 24, 2002, he did not communicate with Farmers at all. 8/10 (AM) RP 35. Nine months later, on July 25, 2003, Moratti filed suit against Lipscomb. CP 285. Farmers learned of the lawsuit in September 2003 and agreed to defend Lipscomb without a

reservation of rights. 8/3 (PM) RP 81. Farmers retained defense counsel to defend Lipscomb, including attorney Pauline Smetka. 8/3 (PM) RP 56.

In October 2003, Kyle Burns, the new adjuster on the liability claim, asked to meet with Smetka and Lipscomb to discuss the claim. 8/4 (PM) RP 70; 8/5(AM) RP 13. Because of Lipscomb's unavailability, the meeting did not take place until February 2004. 8/4 (PM) RP 70. Following the meeting, Burns authorized Smetka to offer the policy limits to settle Moratti's claim. 8/5 (AM) RP 45-47. Burns based this decision, in large part, upon his determination that a jury would not find Lipscomb to be a credible witness. *Id.*

In a letter dated April 19, 2004, Smetka tendered the \$100,000 limits of Lipscomb's policy to Herman. Ex. 30. She received no response to her letter and never received any demand on behalf of Moratti. 8/3 (PM) RP 101-02. Smetka and her law firm continued to defend Lipscomb. 8/3 (PM) RP at 118.

On January 27, 2007, Lipscomb agreed to a settlement with Moratti that included a \$17 million judgment with a covenant not to execute on that judgment, an assignment of Lipscomb's claims against Farmers, and an agreement by Lipscomb to pay \$600,000 of his personal funds. CP 62-74. Following a determination that the settlement was reasonable (which Farmers did not oppose), the King County Superior

Court entered judgment on the settlement on November 21, 2007. CP 177-79.

B. Procedural Background

Moratti filed suit against Farmers on January 18, 2008, asserting claims for bad faith and violation of the CPA. CP 4-88. The case went to trial in July 2009. At the close of evidence, Farmers moved for judgment as a matter of law seeking the dismissal of Moratti's bad faith and CPA claims. CP 3919-4000. The trial court dismissed Moratti's CPA claim because she had not established all of the elements necessary to prove that claim. 8/17 (AM) RP 61. Thereafter, the jury returned a verdict in favor of Moratti on her bad faith claim. CP 4372.

Following the verdict, Farmers renewed its motion for judgment as a matter of law. CP 4453-4541. Farmers also filed a motion for new trial in the alternative. CP 4373-4452. Moratti filed a post-trial motion for judgment as a matter of law regarding her CPA claim. CP 4542-94. The trial court granted Farmers' motion for judgment as a matter of law and dismissed Moratti's bad faith claim on statute of limitation grounds. CP 4901-02. The court also granted Farmers' motion for a new trial and granted Moratti a new trial on her CPA claim. CP 4903-04, 4922-23.

Moratti moved for reconsideration of the order granting Farmers' motion for judgment as a matter of law, and Farmers moved for

reconsideration of the order granting Moratti a new trial. CP 4905-10, 4911-32. The court denied Moratti's motion and granted Farmers' motion. CP 5062-63, 5064-65. As a result, both Moratti's bad faith and CPA claims were dismissed pursuant to CR 50. Moratti now seeks review by this Court of the rulings dismissing her claims.⁶ She also seeks "conditional" review of certain rulings made by the trial court during the course of trial.

VI. ARGUMENT

A. The trial court correctly dismissed Moratti's CPA claim because she failed to establish injury to business or property.

1. Standard of Review

When reviewing a CR 50 order granting judgment as a matter of law, this Court applies the same standard as the trial court.⁷ A motion for judgment as a matter of law should be granted when (1) the nonmoving party has been fully heard with respect to an issue and (2) no legally sufficient basis exists for a reasonable jury to find in favor of the nonmoving party with respect to that issue.⁸ "Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence in

⁶ At the time Moratti filed her notice of appeal, the trial court had not yet made all of its post-trial rulings. Farmers filed a notice of cross-appeal with respect to rulings as to which it was aggrieved. Because the trial court ultimately dismissed both of Moratti's claims as a matter of law, Farmers is no longer aggrieved by any of the trial court's decisions and therefore withdraws its cross-appeal.

⁷ *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997).

⁸ CR 50.

the light most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to support a verdict for the nonmoving party.”⁹

2. The covenant judgment does not constitute injury to business or property.

Injury to business or property is an essential element of a CPA claim.¹⁰ Thus, if a claimant cannot make a prima facie case of such injury, judgment as a matter of law on a CPA claim is warranted.¹¹

Moratti asserts that the covenant judgment against Lipscomb “indisputably” constitutes injury to business or property. App. Br. at 40. Moratti is wrong. In *Safeco Insurance Co. of America v. Butler*,¹² the Washington Supreme Court ruled that there might be CPA injury despite a covenant judgment, such as damage to the insured’s credit rating and reputation or loss of business opportunities.¹³ But this presumes that the judgment itself does not constitute an injury to the insured. The Court did not, as Moratti suggests, hold that the judgment itself constitutes harm.

⁹ *Sing*, 134 Wn.2d at 29.

¹⁰ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

¹¹ *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 610, ¶ 22, 224 P.3d 795 (2009).

¹² 118 Wn.2d 383, 823 P.2d 499 (1992).

¹³ *Id.*, 118 Wn.2d at 397. As discussed in Section VI.F.3 below, Moratti waived the right to assert such damage in this case.

In fact, this Court has recognized that a judgment not paid or owed by the insured is not “injury to business or property.” In *Werlinger v. Clarendon National Insurance Co.*,¹⁴ this Court dismissed bad faith and CPA claims against an insurer on the ground that, as a matter of law, the insureds did not suffer any harm from the insurer’s alleged bad faith handling of a liability claim.¹⁵ The Court explained that, because the insureds had filed for bankruptcy before the accident, they were shielded from personal liability and thus could not have been injured by the insurer’s alleged delay in resolving coverage issues.¹⁶

Similarly, in this case, Lipscomb had no obligation to pay the \$17 million covenant judgment (the \$600,000 personal contribution is discussed below). The terms of the settlement agreement expressly provided that Moratti would not “enforce or execute upon any judgment” against Lipscomb. CP 160. Under this Court’s reasoning in *Werlinger*, the amount of the covenant judgment therefore cannot constitute injury to Lipscomb’s business or property.

¹⁴ *Werlinger v. Clarendon Nat’l Ins. Co.*, 129 Wn. App. 804, 130 P.3d 593 (2005), *rev. denied*, 157 Wn.2d 1004, 136 P.3d 759 (2006).

¹⁵ *Id.*, 129 Wn. App. at 809, ¶ 13.

¹⁶ *Id.*, ¶¶ 12, 13.

3. Moratti presented no evidence to establish that Farmers' bad faith caused Lipscomb to agree to pay \$600,000.

Moratti asserts that Lipscomb's obligation to pay \$600,000 constitutes "injury to business or property" to satisfy that element of her CPA claim. App. Br. at 40. She ignores, however, that she must also prove causation—that the \$600,000 to Lipscomb's business or property would not have occurred but for Farmers' unfair or deceptive acts.¹⁷

Moratti claims the causation requirement has been satisfied because the jury found that "Farmers' failure to act in good faith proximately caused damage to Mr. Lipscomb." App. Br. at 40 (quoting CP 4372). However, the jury was instructed to *presume* causation regarding the bad faith claim,¹⁸ and that presumption did not transfer to Moratti's CPA claim, where she still had the burden of proof. The jury was instructed, with regard to Moratti's bad faith claim, to presume a causal link between Farmers' alleged bad faith conduct and the damages assessed in the reasonableness hearing. Therefore, the jury's determination of proximate cause as to the bad faith claim was aided by a

¹⁷ *Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125, 144, ¶ 27, 225 P.3d 929 (2010); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, ¶ 57, 170 P.3d 10 (2007).

¹⁸ Instruction 12 stated: "If you find that Farmers failed to act in good faith, then the law presumes that William E. Lipscomb was damaged, and you are bound by that presumption unless you find by the preponderance of the evidence that William E. Lipscomb was not damaged." CP 4326.

presumption. That determination did not transfer to Moratti's CPA claim, in which she had the burden of proof unaided by a presumption.

In fact, there is no causal link between Farmers' initial 2002 actions and Lipscomb's promise to pay Moratti \$600,000, and Moratti proved none. Lipscomb settled with Moratti in 2007, long after Farmers tendered a defense and policy limits. Also, Farmers did not cause Moratti's injuries or Lipscomb's negligence. In order to prove causation under the CPA, Moratti must be able to prove that Farmers' acts or omissions caused Lipscomb to pay for his fault,¹⁹ and Moratti offered no such proof. The evidence at trial established that Moratti would not have settled upon payment of Farmers' \$100,000 limits; Moratti required that Lipscomb pay some amount (alleged by Moratti to be \$100,000) toward settlement in addition to his liability limits. 8/6 (PM) RP 114; CP 1332-33, 1736. Lipscomb did not testify he would have settled in 2002 if the opportunity had been provided.²⁰ The record is devoid of any evidence

¹⁹ See *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12-13, ¶ 27, 206 P.3d 1255, *rev. denied*, 167 Wn.2d 1007, 220 P.3d 209 (2009) (dismissal of insured's CPA claim upheld where insured failed to show payment of its own funds in settlement was attributable to insurer's bad faith).

²⁰ Moratti failed to proffer such testimony from Lipscomb in her case in chief, and the trial court denied her request to reopen her case to submit that evidence. 8/17 (AM) RP 18. Moratti assigns "conditional" error to the court's exclusion of the proffered testimony, but offers no authority or argument. App. Br. at 44-45. Washington appellate courts do not consider assignments of error that are not supported by reference to the record and argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

that, even if Moratti had offered to settle upon payment of the policy limits plus \$100,000 from Lipscomb, Lipscomb would have agreed to the settlement. There is no evidence in the record to prove that Farmers caused Lipscomb to lose an opportunity to settle for a personal payment of \$100,000. That failure of evidence is fatal to a showing of proximate cause.

Moreover, a minor settlement requires guardian ad litem review and court approval, and both require that the settlement maximize the recovery from the defendant.²¹ Former Court Commissioner Gaddis testified that he would have required an SGAL to determine and report on Lipscomb's ability to pay and, if that amount was more than \$100,000, he would not have approved a settlement in which Lipscomb paid only \$100,000. 8/11 (PM) RP 17-18. Moratti failed to offer any evidence as to Lipscomb's ability to pay at the relevant time (2002-03).²²

On appeal, Moratti suggests that the *entire* amount Lipscomb agreed to pay (\$600,000) was caused by Farmers' conduct. App. Br. at

²¹ SPR 98.16W.

²² In August 2002, Moratti retained an investigator to obtain information regarding Lipscomb's assets. 8/12 (AM) RP 24. Both the investigator and Moratti's then-attorneys testified that the investigation was preliminary and incomplete. 8/10 (AM) RP 27-31; 8/12 (AM) RP 25-33; Ex. 92. We know that Lipscomb later agreed to pay \$600,000 (CP 157) and, at time of trial, had paid \$400,000 (8/5 (PM) RP 88), which tends to prove he had more than \$100,000 available to pay Moratti's claims in 2003, but there was no other evidence to establish what, in fact, Lipscomb could have paid or would have been willing to pay at any earlier time.

40-41. Moratti never asserted that position in the trial court. As stated by Moratti below, “Given the testimony at trial, plaintiff agrees the true harm to Lipscomb related to the personal contribution should be viewed as \$500,000.00, not the full \$600,000.00, since he would still have had to make a \$100,000.00 personal payment if Farmers had handled the claim in good faith.” CP 5427.²³ Moratti should not now be heard to argue against her own logic.

In sum, Moratti bore the burden of proving the injury or damages proximately caused by Farmers’ alleged violation of the CPA and failed to do so. Under these circumstances, the trial court did not err in dismissing Moratti’s CPA claim pursuant to CR 50, and its decision should therefore be affirmed.²⁴

B. Moratti’s bad faith and CPA claims are time-barred.

1. Standard of Review

Following trial, the trial court granted Farmers’ renewed motion for judgment as a matter of law seeking dismissal of Moratti’s bad faith

²³ See also Moratti’s supplemental interrogatory answer, which states that Lipscomb’s personal contribution damages are the difference between what Lipscomb could have settled for before the “fork in the road” and the \$600,000 he agreed to settle for, “believed to be on the order of \$500,000.00.” CP 3194-99.

²⁴ At a minimum, the issue should be remanded to the trial court to permit a jury to decide the proximate cause issue. Moratti’s request for judgment as a matter of law on this issue must be rejected.

claim.²⁵ Again, the standard of review with respect to CR 50 motions is de novo.²⁶

2. If there was a “fork in the road” in October 2002, Moratti’s claims are barred by the statutes of limitations.

Moratti has taken the position that a “fork in the road” occurred on October 24, 2002, when, she claims, Farmers declined to discuss settlement. *See, e.g.*, CP 941, 2003, 3419-20. As Moratti’s counsel stated during a pre-trial colloquy with the trial court, once Farmers denied Lipscomb’s liability in October 2002, “That is when the party was over for Mr. Lipscomb. You could stick a fork in him right then, because his goose was cooked. . . . The game was over, finished, because of what went on in the first four months.” 7/22 (AM) RP at 56. Counsel reiterated this theme during the opening and closing statements to the jury. 7/29 (AM) RP 9-11, 49-50, 52-53; 8/17 (PM) 32.

Farmers does not agree that an irrevocable “fork in the road” existed beyond which point nothing could have occurred to prevent the \$17 million settlement more than four years later. However, if the Court

²⁵ Because the court had previously dismissed Moratti’s CPA claim as a matter of law, Farmers did not seek relief with respect to that claim.

²⁶ Moratti argues the trial court erred in granting Farmers’ CR 50 motion because the statute of limitations defense had been dismissed before trial. App. Br. at 18. In support of this assertion she cites KCLR 7(b)(7) and 56(c)(5). These rules apply when a party makes the same motion to a different judge. Here, Farmers sought relief under CR 50 following a trial; it did not resubmit a motion for summary judgment, and the rules cited by Moratti therefore do not apply.

accepts Moratti's theory—that Farmers' conduct in 2002 proximately caused Lipscomb's settlement in 2007—then her claims are barred by the three-year statute of limitations for her bad faith claim²⁷ and the four-year statute of limitations for her CPA claim²⁸ because she did not file suit until more than five years after the “fork in the road.” CP 4.

a. *Moratti has been fully heard regarding the statute of limitations issue.*

Moratti argues she has not been “fully heard” on the statute of limitations issue because the trial court dismissed this defense before trial. App. Br. at 23. She ignores the fact that she had *seven* opportunities to argue the issue to the trial court before, during, and after trial.²⁹ CP 602-26, 2764-87, 4249-57, 4614-41, 4905-10, 4975-82, 5005-13.

Moratti claims that the jury did not have an opportunity to decide whether the discovery rule applied to toll the statutes of limitations on her claims. App. Br. at 18-19. Moratti neglects to mention she did not rely upon the discovery rule below.³⁰ She cannot now raise the issue for the first time on appeal.³¹

²⁷ RCW 4.16.080(2).

²⁸ RCW 19.86.120.

²⁹ Moratti filed responses to two pre-trial motions for summary judgment by Farmers, responses to Farmers' two CR 50 motions, a motion for reconsideration and reply challenging the trial court's dismissal of Farmers' bad faith claim, and a response to Farmers' motion for relief from judgment regarding her CPA claim.

³⁰ During the hearing on Farmers' first motion for summary judgment, Moratti's counsel characterized the argument that the discovery rule applied as “something

Even if Moratti had argued the discovery rule below, no reasonable jury could find that the rule extends the statute of limitations in this case. The discovery rule applies to toll the accrual of a cause of action until the plaintiff “knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim.”³² The plaintiff is charged with the knowledge that a reasonable inquiry would have discovered and bears the burden of proof to show that the facts constituting his or her claim were not and could not have been discovered by due diligence within the applicable limitations period.³³ A prospective plaintiff who reasonably suspects, or should suspect, that a specific wrongful act has occurred is on notice that legal action must be taken.³⁴ Although the application of the discovery rule ordinarily presents a question of fact, the issue can be decided as a matter of law when reasonable minds cannot differ.³⁵

the defense has sort of raised on their own so they could knock it down.” 7/14/08 RP 13. And, Moratti did not challenge Farmers’ assertion, in its post-trial CR 50 motion, that she “has consistently taken the position that the discovery rule does not apply in this case to extend the accrual date.” CP 4462.

³¹ RAP 2.5(a).

³² *Giraud v. Quincy Farm & Chemical*, 102 Wn. App. 443, 449, 6 P.3d 104 (2000), *rev. denied*, 143 Wn.2d 1005, 20 P.3d 945 (2001).

³³ *Giraud*, 102 Wn. App. at 450; *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, ¶ 8, 123 P.3d 465, *rev. denied*, 155 Wn.2d 1012, 122 P.3d 186 (2005).

³⁴ *Giraud*, 102 Wn. App. at 451.

³⁵ *Clare*, 129 Wn. App. at 603, ¶ 8.

Here, no reasonable juror could have found that the discovery rule applied to Moratti's claims.³⁶ In August 2003, Jeff Herman, Moratti's former attorney, wrote Lipscomb that he had "valid claims" against Farmers as a result of the way Ms. Becker handled his claim. CP 3078. Herman advised Lipscomb to consult his personal attorney, and Herman wrote to Lipscomb's personal attorney (Fax Duncan) in September 2003 that Farmers "denied liability without making a reasonable investigation" and Lipscomb had "valid claims against Farmers." CP 3155.

Reasonable minds could not disagree: Lipscomb was put on inquiry notice in 2003 and could have determined, by simple inquiry, the reason why he purportedly had "valid claims" against Farmers as of October 2002. Thus, as a matter of law, the discovery rule cannot apply to toll the statute of limitations on Moratti's claims.

b. Moratti filed suit more than five years after the bad faith and CPA claims accrued.

Absent application of the discovery rule, the statute of limitations begins to run on the date a cause of action accrues—i.e., when the plaintiff has the right to seek relief in the courts.³⁷ The right to apply for relief arises when the plaintiff can establish each element of the cause of

³⁶ Of course, the claims are "Moratti's" by assignment. The relevant inquiry regarding discovery is what Lipscomb, not Moratti, knew or should have known.

³⁷ *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000), *rev. denied*, 143 Wn.2d 1006, 21 P.3d 290 (2001).

action.³⁸ Moratti argues this did not occur until January 7, 2007, when Lipscomb entered into the settlement agreement with her, because he did not suffer any damage before that date, and damage is an essential element of each of her claims. App. Br. at 19.

(1) *Moratti's reliance on Bush v. Safeco Insurance Co. of America is misplaced.*

In support of her argument, Moratti relies upon this Court's decision in *Bush v. Safeco Insurance Co. of America*.³⁹ In *Bush*, the issue before the Court was whether the insured's claim against his insurer for breach of the duty to defend began to run when the judgment against him became final or when he later paid a compromise settlement. In selecting the earlier date, the Court noted that, because the breach of the duty to defend "is a continuing one, the cause of action does not accrue until the third party litigation involving the insured has ended in a final judgment."⁴⁰ The duty to defend is not at issue here and, as the trial court explicitly recognized, Farmers cured any breach of its duty to settle when it tendered the policy limits in April 2004.

Moreover, the *Bush* court expressly noted the danger attendant upon permitting litigants to control the statute of limitations, as would be the case if Moratti and Lipscomb could postpone commencement of the

³⁸ *Id.*, 101 Wn. App. at 874.

³⁹ 23 Wn. App. 327, 596 P.2d 1357 (1979).

⁴⁰ *Id.*, 23 Wn. App. at 329.

limitations period by delaying the execution of their settlement agreement.

Quoting the trial court opinion, this Court explained:

It would seem to me that the purpose of litigation of this type is to establish some finality to the judicial process. This was accomplished here in March of 1971 [when judgment was entered]. If the rule were otherwise, . . . it would be solely within the power of the judgment debtor to extend the statute of limitations for almost any period of time that he and the judgment creditor could agree on such as a payment on a deferred basis. I don't believe that is the intent of the law or the spirit of trying to dispose of litigation between the parties.⁴¹

(2) *A tort cause of action accrues when the plaintiff suffers "appreciable" harm.*

Moratti also cites the general rule that a tort cause of action does not accrue until the plaintiff suffers harm. App. Br. at 20. She defines the relevant "harm" as the settlement agreement between herself and Lipscomb and suggests that Lipscomb suffered no harm before that date.

Id.

Washington courts have recognized that the existence of appreciable harm is sufficient to trigger the statute of limitations.⁴² As this Court explained in *Hudson v. Condon*, "The running of the statute [of limitations] is not postponed by the fact that further, more serious harm

⁴¹ *Id.*

⁴² *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

may flow from the wrongful conduct” nor is it delayed “until the specific damages for which the plaintiff seeks recovery actually occur.”⁴³

In *Hudson*, two doctors formed a partnership to own and manage a medical/dental building. They jointly owned the building but individually leased space for their practices. When their relationship began to deteriorate, they took steps to sell the property. While the sale was pending, the individual leases came due, and Condon arranged to have his lease terms revised to his advantage, without Hudson’s knowledge. Hudson discovered Condon’s lease revisions no later than January 1996. Condon vacated the premises in April 1996, removing fixtures and withholding rent payments as permitted by the disputed revisions to his lease. Hudson sued Condon on February 3, 1999, for the value of the fixtures and lost rent, alleging various claims with three-year statutes of limitations.⁴⁴

In *Hudson*, the “bedrock” of the plaintiff’s claims was a breach of fiduciary duty in 1993 and 1995.⁴⁵ Although no tangible damages had occurred in January 1996, the plaintiff knew then that the defendant would be terminating the lease in April that year.⁴⁶ Accordingly, because the fact

⁴³ 101 Wn. App. at 875.

⁴⁴ *Id.*, 101 Wn. App. at 869-71.

⁴⁵ *Id.* at 874.

⁴⁶ *Id.* at 876.

of damages were no longer speculative as of January 1996, the statute of limitations began to run at that time.

As in *Hudson*, the gravamen of Moratti's claim is Farmers' alleged breach of duties owed to Lipscomb. According to Moratti, once that breach occurred, it could not be undone. Because the fact of Lipscomb's damages was no longer speculative as of October 2002, the statute of limitations began to run at that time.

If the Court accepts Moratti's theory of liability, it must also conclude that her claims are time-barred because they accrued more than five years before she filed suit.⁴⁷ The fact that Moratti's damages were not determined and quantified did not preclude suit by Lipscomb in 2003. Under Moratti's "fork in the road" theory, the injury to Lipscomb was no more speculative in October 2002 than was Hudson's claim against Condon in January 1996. Lipscomb knew, because Moratti insisted, that the claims against him could be resolved only upon "a judgment for the full amount of Emily's damages." 7/29 (AM) RP at 53. Lipscomb's responsibility for damages was no longer speculative. Lipscomb could have brought suit against Farmers to determine Farmers' obligation to

⁴⁷ Moratti cites several cases from other jurisdictions for the proposition that a claim against an insurer for breach of the duty to settle does not accrue until judgment is entered in the underlying action. App. Br. at 21. However, none of these cases holds that, when an insured has alleged he was irrevocably and irredeemably harmed by the insurer as of a certain date, that date should not start the statute of limitations running.

protect him from any judgment or reasonable settlement in excess of his policy limits.

(3) *Public policy considerations do not support Moratti's argument.*

Moratti also argues that public policy considerations support her position that her claims did not accrue until January 7, 2007. Specifically, she asserts that requiring an insured to file a bad faith action before the underlying action has been resolved “would force an insured to sue in derogation of a policy’s ‘no action’ clause.”⁴⁸ App. Br. at 22.

However, controlling Washington authority provides that a “no action” clause *does not apply* to claims against an insurer for bad faith or violation of the CPA.⁴⁹ Moreover, public policy concerns dictate against permitting an insured to effectively control the statute of limitations, as would be the case if the statute does not begin to run until the insured finalizes a settlement with the claimant. As this Court explained, “The purpose of statutes of limitations is to shield defendants and the judicial system from stale claims. When plaintiffs sleep on their rights, evidence

⁴⁸ The “no action” provision in the Farmers policy states, “We may not be sued under Coverage E—Business Liability until the obligation of the insured has been determined by final judgment or agreement signed by us.” CP 135.

⁴⁹ See *O’Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 530-31, 125 P.3d 134 (2004) (no action provision did not apply to insured’s bad faith and CPA claims); *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 878, 621 P.2d 155 (1980) (no action clause applies only to claims compensable under the contract and does not apply to insured’s CPA claim).

may be lost and memories may fade.”⁵⁰ The courts have also recognized the undesirability of permitting the plaintiff to indefinitely suspend the running of the statute of limitations when the cause of action “depends upon some act to be performed by him preliminary to commencing suit”⁵¹

As a matter of law, Moratti’s bad faith and CPA claims accrued on October 24, 2002, at the “fork in the road.” Because Moratti did not file suit until nearly five years later, her claims are barred by the applicable statutes of limitations.⁵²

C. **Alternatively, judgment for Farmers should be affirmed based on lack of causation.**

The record here provides another basis to affirm the trial court: Moratti’s failure to establish proximate cause. The issue was raised as an alternate basis in Farmers’ post-trial motion for judgment as a matter of law. CP 4459-62. The trial court granted Farmers’ motion on the statute of limitations issue but concluded there was a legally sufficient basis upon

⁵⁰ *Burns v. McClinton*, 135 Wn. App. 285, 293, ¶ 10, 143 P.3d 630 (2006), *rev. denied*, 161 Wn.2d 1005, 166 P.3d 718 (2007).

⁵¹ *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 626, 157 P.2d 302 (1945); *see also Bush*, 23 Wn. App. at 329.

⁵² Alternatively, the statute of limitations began to run no later than April 19, 2004, when Farmers tendered its policy limits and, as the trial court ruled, Farmers’ bad faith conduct ceased. CP 4901. *See Hill v. Dep’t of Transp.*, 76 Wn. App. 631, 638, 887 P.2d 476, *rev. denied*, 126 Wn.2d 1023, 896 P.2d 63 (1995) (“When a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.”).

which the jury could find that Farmers caused Lipscomb's damages. CP 4901. This conclusion was error.

1. No presumption applies to shift the burden of proving proximate cause to Farmers.

As discussed in section VI.A.3 above, Instruction 12 told the jury that, if it found that Farmers had acted in bad faith, the law presumes Lipscomb was damaged, which necessarily implies Moratti can prove the element of proximate cause solely upon proof of Farmers' bad faith. Moreover, Moratti argues on appeal that, if the case is remanded, she is entitled to what she describes as "proper" instructions on how to proceed in a bad faith investigation claim, in particular that in the context of such claims a "presumption of harm" rule applies to shift the burden of proving proximate cause to the insurer.

Moratti asserts that *Safeco Insurance Co. of America v. Butler*,⁵³ *Besel v. Viking Insurance Co. of Wisconsin*,⁵⁴ and *Mutual of Enumclaw Insurance Co. v. Dan Paulson Construction, Inc.*⁵⁵ apply to establish a presumption of harm against an insurer who fails to defend, settle, or indemnify. App. Br. at 43-44. But Moratti does not address the key cases of *Coventry Associates v. American States Insurance Co.*⁵⁶ and *St. Paul*

⁵³ 118 Wn.2d 383, 823 P.2d 499 (1992).

⁵⁴ 146 Wn.2d 730, 49 P.3d 887 (2002).

⁵⁵ 161 Wn.2d 903, 169 P.3d 1 (2007).

⁵⁶ 136 Wn.2d 269, 961 P.2d 933 (1998).

Fire & Marine Insurance Co. v. Onvia, Inc.,⁵⁷ in which our Supreme Court refused to apply the presumption of harm to cases, such as this one, involving negligent investigation.

The presumption of harm in the context of bad faith insurance cases first arose in *Butler*. The Supreme Court recognized that an insured bears the burden of proving the traditional elements of the tort of bad faith—duty, breach, causation, and harm.⁵⁸ *Butler* held, however, that because the proof of harm element of a prima facie case could be difficult to establish, a rebuttable presumption of harm will be imposed once the insured meets the burden of proving the insurer’s bad faith conduct.⁵⁹ The Supreme Court then held that the insurer, if found to have acted in bad faith, cannot rely upon its coverage defenses—a remedy the court termed “coverage by estoppel.”

In *Besel*, the Supreme Court confirmed that, (1) when an insurer refuses to settle a case against an insured, the insured can independently negotiate his own settlement and (2) a release of the insured’s personal liability does not vitiate the possibility of harm to the insured.⁶⁰ The court further held that the amount of a settlement between the claimant and the

⁵⁷ 165 Wn.2d 122, 196 P.3d 664 (2008).

⁵⁸ *Butler*, 118 Wn.2d at 389.

⁵⁹ *Id.* at 390-92.

⁶⁰ *Besel*, 146 Wn.2d at 736-37.

insured determined by a court to be reasonable is “the presumptive measure of an insured’s harm caused by an insurer’s tortious conduct.”⁶¹

Finally, in *Dan Paulson*, again involving a covenant judgment, the court addressed the circumstances under which the presumption of harm can be rebutted, concluding that the insurer failed to rebut the presumption under the circumstances of that case.⁶²

Butler, Besel, and Dan Paulson applied the presumption of harm in the situation where the insurer was defending against a third-party claim under a reservation of rights. In those cases, the insured entered into a covenant judgment with the claimant, and the insurer was found to have violated its “enhanced fiduciary duty”—applicable when an insurer is defending under a reservation of rights—as described in *Tank v. State Farm Fire and Casualty Co.*⁶³

Coventry Associates, however, involved a first-party coverage situation, where the *Tank* duty does not apply. In that case, an insurer denied coverage (correctly) after a truncated investigation. The insured sued for bad faith investigation of the claim but acknowledged that the coverage determination was, in fact, correct. Our Supreme Court held that

⁶¹ *Id.* at 738.

⁶² *Dan Paulson*, 161 Wn.2d at 922-24.

⁶³ 105 Wn.2d 381, 715 P.3d 1133 (1986). As noted in *Butler*, however, an insurer’s duty to its insured is not truly a fiduciary duty, enhanced or otherwise; it is a “quasi-fiduciary” duty in which the insurer is required to give *equal* consideration to its insured’s interests. 118 Wn.2d at 389.

the presumption of harm did not apply because, unlike the third-party context where the insurer is providing a defense and simultaneously contesting coverage, the insurer and insured in the first-party context have no potential conflict of interest.⁶⁴ The Court concluded that, in such a circumstance, neither the rebuttable presumption nor the coverage by estoppel remedy applied.⁶⁵

In *Onvia*, the Supreme Court extended the reasoning in *Coventry Associates* to the third-party context when the insurer's bad faith liability is based solely upon handling of the claim and not on the duty to defend, settle, or indemnify.⁶⁶ In that case, the insured sued and tendered the complaint to its insurer. The insurer claimed never to have received the complaint, and six months elapsed with no action by the insurer. When the amended complaint was tendered, the insurer reviewed it and denied coverage. The claimant and insured later entered into a covenant judgment for \$17.5 million, and the claimant (as assignee) sued the insurer for common law bad faith and CPA violations. The federal district court held that the insurer correctly denied its duty to defend, and it certified to the Washington Supreme Court the questions (1) whether the insurer could

⁶⁴ *Coventry Assocs.*, 136 Wn.2d at 281.

⁶⁵ *Id.* at 281, 284-85.

⁶⁶ *Onvia*, 165 Wn.2d at 133.

nevertheless be found extra-contractually liable and, if so, (2) whether the presumption of harm and the coverage by estoppel remedy applied.

The *Onvia* court held that, although a third-party insured can pursue bad faith and CPA claims in the absence of coverage for the insurer's mishandling of the claim, as in *Coventry Associates*, neither a presumption of harm nor coverage by estoppel applies. The *Coventry Associates* reasoning—that the presumption of harm and coverage by estoppel remedy cannot apply when there is no potential conflict between the insurer and insured—applies equally in the third-party context.⁶⁷ Because the insurer in *Onvia* owed no coverage to its insured, its enhanced duty to protect the insured's interests was not implicated.

The instant case is similar to *Onvia*. Farmers did not breach its duty to defend, settle, or indemnify. Although Moratti tries to characterize the 2002 file closing as a refusal to settle, the uncontroverted evidence is that it was a liability decision, not a settlement decision. Exs. 6, 7, 59 at 30. If every mishandling or negligent investigation of a claim constituted a “refusal to settle,” then the *Coventry/Onvia* decisions would be meaningless. *Coventry Associates* expressly distinguished such acts from the refusal to settle.⁶⁸ Also, Washington case law makes clear that an

⁶⁷ *Id.*

⁶⁸ *Coventry Assocs.*, 136 Wn.2d at 281.

insurer commits bad faith when it refuses to settle “within the limits of liability.”⁶⁹ Therefore, if a claimant demands settlement in excess of the liability limits, and if the insured cannot or will not pay the excess, then no settlement within the limits is possible, and there can be no bad faith “refusal to settle.”

Here, not only did Farmers fully defend Lipscomb without a reservation of rights and pay the full amount of coverage Lipscomb had paid premiums to obtain, Farmers offered to settle in April 2004 without ever having received a settlement demand. Ex. 288. Moreover, the settlement demand Moratti prepared but never sent was for \$15 million. There is no hint of a notion, much less evidence, that Lipscomb could have paid the difference between his liability limits of \$100,000 and the settlement offer Moratti would have made, but did not. Settlement within the policy limits would not have been possible in 2002 and thereafter, and Farmers did not breach its duty to settle.

What is at issue is whether the early investigation by Farmers was flawed. Given Moratti’s own characterization of the case, the presumption of harm does not apply. Moratti bears the burden of proving her alleged harm under *Coventry* and *Onvia*. Instructions 7, 8, and 9 correctly placed

⁶⁹ *Greer v. Nw. Nat’l Ins. Co.*, 109 Wn.2d 191, 203 n.6, 743 P.2d 1244 (1987); *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 718, 791, 523 P.2d 193 (1974).

the burden on Moratti to prove proximate cause, and Instruction 12 incorrectly imposed a presumption of harm.⁷⁰

Additionally, the presumption of harm cannot apply to Moratti's claim of damages for Lipscomb's personal contribution. The Supreme Court has applied the presumption only in the context of a covenant judgment, when there is a quantified amount of damages—i.e., the amount of a reasonable settlement—the insured seeks to recover from the insurer. Even in that context, the Supreme Court's decisions on the presumption of harm “do not offer a clear line of analysis.”⁷¹ The presumption has not been applied, and its application defies analysis, in a context where there is no quantified amount of damages. For example, one cannot presume that an insured suffered emotional distress as a result of an insurer's bad faith, and the remedy of coverage by estoppel is meaningless. Without the insured's proof that, in fact, he suffered emotional distress and that it has a value of \$X, there is nothing for the jury to decide or the insurer to rebut. Here, the amount that Lipscomb would have been willing to pay and a court willing to approve as his contribution to a minor settlement has not been quantified. A jury should not be permitted to speculate as to that number without proof, and Farmers could not be expected to rebut a claim

⁷⁰ Farmers timely objected to this error. 8/17 (AM) RP 123-24.

⁷¹ *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 260, 63 P.3d 198 (2003).

for damages as to which no number attaches. Moratti, as Lipscomb's assignee, necessarily bears the burden to prove what Lipscomb could have and would have paid at the relevant time.

2. Regardless whether a presumption applies, proximate cause has not been established, as a matter of law.

As discussed above with regard to the CPA claim, Moratti has failed to meet her burden to prove that Farmers' conduct was the proximate cause of the claimed damages to Lipscomb—i.e., the amount of the settlement or some amount of Lipscomb's personal contribution. Moreover, the evidence presented at trial establishes, as a matter of law, that Farmers' conduct could not have caused the settlement claimed to be Lipscomb's damages.

Moratti's bad faith claims are predicated on conduct occurring before the "fork in the road," when Farmers' claim representative Becker informed Moratti's attorneys on October 24, 2002, that she was closing her file.⁷² Thus, the question is whether Becker's conduct could be a proximate cause of the settlement between Moratti and Lipscomb. All the evidence indicates it could not be, because that evidence establishes that

⁷² As noted in the Statement of Facts above, although Moratti asserts in her opening brief that Becker refused to accept a settlement offer, the evidence was in dispute. The jury was not asked to resolve that dispute, and it is not an established "fact" that Farmers would not have responded to an offer to settle, if made by Moratti.

the case could not have settled even if Farmers had offered its limits before April 19, 2004.

Specifically, Moratti's attorney Jeff Herman testified:

- He never sent a settlement offer to Farmers (although he had prepared one) and never attempted to negotiate with Farmers after that time (8/10 (AM) RP 34);
- Herman caused a guardian ad litem to be appointed for Moratti and brought suit against Lipscomb in July 2003 (8/10 (AM) RP 35);
- Herman sent a letter to Lipscomb in August 2003, without any specific demand, to discuss settlement, and Lipscomb did not respond (8/10 (AM) RP 36-37; CP 4478);
- Herman sent a letter to Lipscomb's attorney, Fax Duncan, in September 2003, again suggesting settlement but making no demand (8/10 (AM) RP 37-38; CP 4481);
- Herman sent a second letter to Duncan in October 2003 to discuss settlement, but without making a demand (8/10 (AM) RP 39; CP 4483);
- Lipscomb's new attorney, Craig Kastner, wrote to Herman in January 2004, saying that Lipscomb had no interest in settling (8/10 (AM) RP 44-45; CP 4485);
- Herman wrote Kastner a week later to discuss settlement, without making any demand, to which Kastner did not respond (8/10 (AM) RP 45-46; CP 4487);
- Herman talked with Kastner by telephone in March 2004 about Lipscomb's lack of interest in settlement and followed up with a letter to Kastner the same day (8/10 (AM) RP 46-48; CP 4452, 4489-91);
- Lipscomb's defense attorney Smetka wrote to Herman in April 2004 offering Lipscomb's policy limits to settle, to

which Herman did not respond (8/10 (AM) RP 51; CP 4493);

- Herman wrote to Kastner in April 2004 to discuss settlement, but did not make any specific demand (8/10 (AM) RP 54-55);
- Herman ended his representation of Moratti in early 2005, at which time he heard from one of Lipscomb's personal attorneys that Lipscomb did not want to settle on the basis of a stipulated judgment (8/10 (AM) RP 58).

Thus, Lipscomb had many opportunities to settle, which he declined. Settlement was not possible without Lipscomb's contribution. The evidence is conclusive that, even if Farmers had offered to pay its limits before October 2002, the offer would not have resolved Moratti's claims against Lipscomb. Farmers offered its limits in April 2004, and any mistake it made in failing to negotiate earlier had been rectified. Farmers never withdrew its offer to make its limits available, and it made affirmative efforts to settle the claims against Lipscomb. Exs. 325, 327.

Even assuming that Farmers' closing its file was bad faith conduct, there can be no causal link between that action and the resulting independent settlement by Lipscomb. The "fork in the road" was, rather, a bump in the road on the way to full good faith participation by Farmers. There is no connection between Farmers' conduct in closing its file and Lipscomb's later decision to enter into settlement after the file has been reopened and the policy limits tendered.

D. The trial court properly granted Farmers' alternate motion for a new trial.

1. Standard of Review

In accordance with CR 50(c), the trial court ruled on Farmers' alternative motion for a new trial and granted that motion on three of the four grounds raised by Farmers. As a general rule, a trial court's decision on a motion for new trial under CR 59(a) is reviewed for abuse of discretion.⁷³ A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than an order denying a new trial.⁷⁴ When the decision granting a new trial is predicated upon an issue of law, however, the appellate court reviews the record to determine whether there has been an error in the application of the law.⁷⁵

2. Instruction 11 included issues not supported by the evidence.

Moratti challenges the trial court's ruling that Farmers was entitled to a new trial based on the erroneous Court's Jury Instruction No. 11. App. Br. at 24-34. Moratti misstates Farmers' position on these issues, and misapprehends the argument.

⁷³ *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992).

⁷⁴ *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003); *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 397 P.2d 857 (1964).

⁷⁵ *Cox*, 64 Wn. App. at 826.

- a. ***The trial court correctly ruled that three of the five items listed in Instruction 11 were not supported by the evidence.***

Moratti first argues that Instruction 11 correctly states Washington law. App. Br. at 24-26. However, that is not the issue here⁷⁶; the issue is whether the instruction was supported by the evidence.

It is well settled that jury instructions should not be given on issues not supported by the evidence.⁷⁷ Instruction 11 lists five duties of insurer good faith, stating in pertinent part that an insurer must:

- (3) Evaluate ***settlement offers*** as though it bore the entire risk, including the risk of any judgment in excess of the policy limits;
- (4) Timely communicate its investigations and evaluations and any ***settlement offers*** to its insured; and
- (5) If the ***settlement demand*** exceeds the insurer's policy limits, communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and exercise good faith in deciding whether to pay its own limits.

CP 4324-25 (emphasis added). This instruction expressly and repeatedly urges the jury to evaluate Farmers' behavior regarding "settlement offers" and "settlement demands." *Id.*

⁷⁶ Farmers does not argue that Instruction 11 misstates the law.

⁷⁷ *Bartlett v. Hantover*, 84 Wn.2d 426, 431-32, 526 P.2d 1217 (1974); *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 753-54, 375 P.2d 487 (1962).

It is undisputed, however, that Moratti never presented any settlement offers or demands to Farmers. 7/30 (AM) RP 117; 8/6 (AM) RP 109; 8/10 (PM) RP 78; 8/11 (AM) RP 67. Farmers cannot have acted in bad faith by failing to evaluate nonexistent settlement offers, to communicate to its insured regarding nonexistent settlement offers, or to take action on a nonexistent settlement demand. Because there was no evidence of any settlement offers or demands, the trial court erred in instructing the jury with respect to items 3, 4, and 5, and Farmers timely objected to this error.⁷⁸ 8/17 (AM) RP 120-21. The trial court did not abuse its discretion in determining that there was no evidence to support items 3, 4, and 5 of Instruction 11.

b. Farmers appropriately apprised the trial court of its objection.

Moratti argues that Farmers did not preserve its challenge to Instruction 11 because, despite Farmers' explicit objection to inclusion of items 3, 4, and 5, it failed to propose an identical instruction with those items removed. App. Br. at 26-29. Instruction 11 was taken from plaintiff's supplemental proposed jury instruction 22. CP 4037. Farmers

⁷⁸ Moratti asserts Farmers was required to propose a special verdict form asking the jury to decide whether Farmers had violated each of the duties set forth in Instruction 11, citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003). App. Br. at 33. But the trial court acknowledged it would not have granted Farmers' request for a special verdict form if such request had been made. 10/16 RP at 62.

timely objected to including items 3, 4, and 5 in the court's instructions. 8/17 (AM) RP 120-21. Under the circumstances, Farmers was under no obligation to submit a jury instruction identical to plaintiff's supplemental proposed instruction 22 with items 3, 4, and 5 removed. The trial court was adequately apprised of Farmers' argument and what instruction Farmers proposed under the circumstances.

c. Farmers was prejudiced by Instruction 11.

Moratti last argues that Instruction 11 did not prejudice Farmers' case. App. Br. at 30-34. Prejudicial error occurs when the jury is instructed on an issue that lacks substantial evidence to support it.⁷⁹ As one court explained, "An instruction not supported by substantial evidence cannot rationally be used by the jury. At best, it is ineffective; at worst, it invites the jury to proceed irrationally."⁸⁰ When a trial court grants a party's motion for a new trial, it is because the court deems the error to be prejudicial.⁸¹ Because the trial court is in a better position to determine the effect of an erroneous instruction on the jury, its determination that a new trial is warranted should be afforded deference.⁸²

⁷⁹ *Manzanares v. Playhouse Corp.*, 25 Wn. App. 905, 910, 611 P.2d 797 (1980); *Bean v. Stephens*, 13 Wn. App. 364, 369, 534 P.2d 1047 (1975).

⁸⁰ *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 67-68, 856 P.2d 717 (1993), *overruled on other grounds*, *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994).

⁸¹ *Zwink v. Burlington N., Inc.*, 13 Wn. App. 560, 568, 536 P.2d 13 (1975).

⁸² *See id.*, 13 Wn. App. at 568-69.

Moratti asserts the jury could have based its verdict on items 1 and 2 of Instruction 11, which are not in dispute. According to Moratti, if multiple grounds exist to support a verdict, the verdict must be sustained if any of those grounds is proper. App. Br. at 32-33.

In fact, the opposite is true. As Washington courts have repeatedly recognized, when it is impossible to determine whether the jury's verdict is based upon erroneous grounds, that uncertainty "is fatal to the verdict."⁸³ In *Manzanares v. Playhouse Corp.*, this Court reversed a judgment in favor of the plaintiff because two of the jury instructions were not supported by substantial evidence. In *Manzanares*, as in this case, the verdict form did not specify the basis for the jury's verdict, so it was impossible to determine whether the verdict rested on proper or improper grounds. Accordingly, the Court determined the defendant was entitled to a new trial.⁸⁴

⁸³ *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 472, 994 P.2d 271, rev. denied, 141 Wn.2d 1007, 16 P.3d 2000 (2000); see also *Erwin v. Roundup Corp.*, 110 Wn. App. 308, 317, 40 P.3d 675 (2002); *Manzanares*, 25 Wn. App. at 911.

⁸⁴ *Manzanares*, 25 Wn. App. at 911. Moratti cites three cases to support her assertion that the jury verdict must stand. Each is distinguishable. *Wlasiuk v. Whirlpool Corp.*, 81 Wn. App. 163, 914 P.2d 102 (1996), did not involve a challenge to a jury instruction, nor was there any indication that the instruction misrepresented the evidence or misled the jury. *Wlasiuk* was a simple sufficiency of the evidence challenge. *Id.*, 81 Wn. App. at 173. *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994) was also not an instructional challenge; the court noted that the defendant had not requested a specific instruction regarding a defense it wished to offer on appeal. *Id.*, 125 Wn.2d at 10-11. In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22,

“It is axiomatic that prejudicial error occurs where the jury is instructed on an issue that lacks substantial evidence to support it.”⁸⁵ The trial court correctly recognized that instructing the jury regarding items 3, 4, and 5 of Instruction 11 caused prejudice to Farmers, and its determination regarding the effect of the erroneous instruction should not be overturned.⁸⁶

3. Instruction 11 failed to define crucial terms.

Instruction 11 included the terms “settlement offers” and “settlement demand” and used those terms interchangeably. During deliberations, the jury asked, “What is meant by ‘settlement offer’ and who is it coming from?” and “What is meant by Settlement Demand, & who does this come from?” CP 4444. Farmers asked the trial court to define those terms, even proposing language to instruct the jury (CP 4438), but the court declined to do so. Instead, the court instructed the jury, “You are to consider these questions based upon evidence considered

935 P.2d 684 (1997), the plaintiff asserted claims for negligence (failure to warn) and strict liability. It was clear in *Mavroudis* that the jury specifically rendered verdicts on both theories, not just a general finding of liability. *Id.*, 86 Wn. App. at 27. Therefore, the Court of Appeals could conclude that at least one specific basis for liability was free from error.

⁸⁵ *Manzanares*, 25 Wn. App. at 910.

⁸⁶ Moratti asserts that the exclusion of items 3, 4, and 5 would prevent her from arguing her theory of the case—i.e., that “Farmers also ‘breached its duty to make a good faith effort to settle the case.’” App. Br. at 28-29. In fact, item 2, which is not in dispute, expressly provides that an insurer must “make a good faith effort to settle the claim” when there is a reasonable likelihood the insurer may be liable. CP 4324.

as a whole guided by the court's instructions considered as a whole." CP 4445.

Following Farmers' motion for a new trial, the trial court agreed that it should have instructed the jury further regarding the terms "settlement demand" and "settlement offer," ruling that its use of those terms "without definition or distinction" prejudiced Farmers. CP 4903. The trial court recognized the confusion engendered by the terms "settlement offer" and "settlement demand" in Instruction 11. As Farmers pointed out to the court (CP 4378-79), the jurors might reasonably conclude that the terms had different meanings—i.e., the defendant makes a "settlement offer" while the plaintiff makes a "settlement demand." It is evident that the use of those terms interchangeably in Instruction 11 confused the jury, and the trial court did not abuse its discretion in recognizing that its failure to provide additional instruction to the jury warranted a new trial.⁸⁷

4. Evidence pertaining to Lipscomb's lawsuit against his insurance broker should have been admitted.

In 2005, Lipscomb sued Farmers and his insurance broker, Dennis Dye, alleging the defendants were negligent in failing to ensure that he

⁸⁷ *State v. Wandermere Co.*, 89 Wn. App. 369, 381, 949 P.2d 392 (1997), *rev. denied*, 135 Wn.2d 1012, 960 P.2d 939 (1998) (decision whether to give additional instructions requested by jury rests with discretion of trial court).

had adequate insurance coverage to cover Moratti's claim.⁸⁸ Farmers and Dye secured summary judgment on the basis that they owed no duty to advise Lipscomb to obtain higher policy limits.⁸⁹

In the present case, Moratti filed a motion in limine seeking to exclude evidence pertaining to the *Dye* litigation. After initially denying Moratti's motion in part, the court reconsidered its ruling, citing ER 403, and excluded the evidence.⁹⁰ 7/27 (AM) RP 15. During trial, Farmers asserted that Moratti had opened the door to such evidence during testimony by Janyce Fink, Lipscomb's counsel in the *Dye* matter. CP 5513-24. The court denied Farmers' request during trial (8/10 (AM) RP 24); after the verdict, however, the court granted Farmers' motion, ruling that its decision to exclude the *Dye* evidence was prejudicial.⁹¹ CP 4904.

Evidence of the *Dye* litigation was directly probative of Farmers' causation argument. Moratti argued that Farmers' misconduct caused Lipscomb to lose the opportunity to settle the case at an earlier time for a lower amount. Farmers argued that Lipscomb would not have settled with

⁸⁸ *Lipscomb v. Farmers Ins. Co. of Wash.*, 142 Wn. App. 20, 23, ¶¶ 3, 4, 174 P.3d 1182 (2007).

⁸⁹ *Id.*, 142 Wn. App. at 23, ¶ 5.

⁹⁰ ER 403 states that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"

⁹¹ Moratti asserts Farmers improperly sought review of this ruling pursuant to CR 59(a)(1). App. Br. at 34. This rule authorizes a new trial when the trial court abused its discretion, thereby preventing the party from having a fair trial. That is precisely the situation presented here.

Moratti earlier, regardless of what Farmers did or did not do. Evidence regarding the *Dye* litigation explained *why* Lipscomb would not have settled: he was seeking to have his policy limits increased so as to avoid personally funding a settlement. *See* CP 282.

Moratti asserts that evidence of the *Dye* litigation would be unfairly prejudicial, citing the danger that a jury might give “exaggerated weight” to a judgment. App. Br. at 36. Farmers did not submit this evidence to establish that the *Dye* court correctly dismissed Lipscomb’s claims, so this danger is not present here. Moreover, the evidence was extremely probative regarding Lipscomb’s motive not to settle, and any potential prejudicial effect was readily subject to control by limiting the evidence (as Farmers proposed) or instructing the jury. The court’s discretion in applying ER 403 should not be overturned except for abuse,⁹² which is not even remotely present here.

Moratti contends that Farmers failed to make a “specific offer of proof” and thus should not have been allowed to challenge the exclusion of evidence regarding the *Dye* litigation. App. Br. at 37-38. Moratti did not raise this argument in the trial court, and this Court therefore should

⁹² *Alston v. Blythe*, 88 Wn. App. 26, 40-41, 943 P.2d 692 (1997) (decisions regarding admissibility of evidence under ER 403 reviewed for abuse of discretion); *State v. Stein*, 140 Wn. App. 43, 66, ¶ 58, 165 P.3d 16 (2007) (trial court has wide discretion in balancing probative value versus prejudice).

not consider it.⁹³ In any event, Farmers made repeated and specific requests regarding the testimony it sought to introduce, including providing the trial court with a list of the eight questions it sought to ask Lipscomb on this topic. 7/22 (PM) RP 39-40; 7/27 (AM) RP 7, 11-12, 13-14; 8/10 (AM) RP 15-17, 23-24; CP 5515. It cannot be disputed that the trial court was fully apprised of the scope and nature of the evidence sought to be introduced by Farmers.⁹⁴

The trial court correctly recognized that it had abused its discretion in excluding evidence of the *Dye* litigation pursuant to ER 403. Its determination that this error warranted a new trial should not be overturned.

E. The trial court did not abuse its discretion in declining to instruct the jury and admit evidence as requested by Moratti.

1. Standard of Review

Moratti “conditionally” assigns error to the trial court’s (1) refusal to instruct the jury that the trial court in the underlying action determined her settlement with Lipscomb to be reasonable (App. Br. at 46); (2) instruction to the jury not to consider certain elements of damage claimed by Moratti (App. Br. at 45-46); and (3) refusal to admit Farmers’ claims

⁹³ RAP 2.5(a); *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 412, ¶ 1 n.1, 213 P.3d 931 (2009).

⁹⁴ *See State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991) (formal offer of proof not required when substance of excluded evidence is apparent from the record); *see also* ER 103(a)(2).

manuals and performance reviews as exhibits (App. Br. at 47-48). These decisions are reviewed for abuse of discretion.⁹⁵ As explained below, the trial court did not abuse its discretion, and the rulings challenged by Moratti should therefore be upheld.

2. The trial court did not abuse its discretion in refusing to instruct the jury that the Lipscomb-Moratti settlement was reasonable.

Moratti submitted a proposed jury instruction stating that the King County Superior Court reviewed her settlement with Lipscomb and determined that the settlement was reasonable. CP 4024. Moratti challenges the trial court's failure to give her proposed instruction but offers no explanation as to why such an instruction would have been necessary or appropriate.⁹⁶

Moratti apparently sought to introduce this evidence to establish that the settlement was, in fact, reasonable. But the reasonableness of the

⁹⁵ *Kappelman v. Lutz*, 167 Wn.2d 1, 6, ¶ 8, 217 P.3d 286 (2009) (decision whether to give a jury instruction reviewed for abuse of discretion); *State v. Wright*, 152 Wn. App. 64, 70, ¶ 19, 214 P.3d 968 (2009), *rev. denied*, 168 Wn.2d 1017, 227 P.3d 853 (2010) (decision to give a jury instruction based on a factual dispute reviewed for abuse of discretion); *Sherman v. Kissinger*, 146 Wn. App. 855, 870, ¶ 28, 195 P.3d 539 (2008) (decision regarding admissibility of evidence reviewed for abuse of discretion).

⁹⁶ Moratti cites only to *Mutual of Enumclaw Insurance Co. v. T & G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008), for the proposition that "an insurer will be bound by the 'findings, conclusions and judgment' entered in the action against the tortfeasor when it has notice and an opportunity to intervene in the underlying action." App. Br. at 46 (quoting *T & G*, 165 Wn.2d at 263, ¶ 11). She does not explain why this rule warrants an instruction to the jury in a bad faith action against an insurer.

settlement was not at issue. As Moratti acknowledges (App. Br. at 36), moreover, a jury may give “exaggerated weight” to a judgment.⁹⁷ The trial court did not abuse its discretion in declining to give Moratti’s requested instruction.

3. The trial court did not abuse its discretion in instructing the jury not to consider emotional distress, damage to credit, or attorney fees.

As Instruction 13 explained, if the jury found that Farmers failed to act in good faith, it was to decide whether that failure proximately caused any damage to Lipscomb. CP 4327. The instruction further provided that, when determining whether Lipscomb suffered any damage, the jury was not to consider “whether there [was] any damage in the nature of emotional distress, damage to credit, or attorney fees.” *Id.* The instruction to the jury to disregard certain elements of damage was based upon the fact that Moratti had previously waived the right to assert such damage.

In order to ensure that it was prepared for trial, Farmers had insisted that Moratti provide a supplementary response to interrogatories seeking information about her alleged damages. Moratti provided this response on June 3, 2009, approximately two months before trial began.

⁹⁷ *Faigin v. Kelly*, 184 F.3d 67, 80 (1st Cir. 1999) (“A lay jury is quite likely to give special weight to judicial findings merely because they are judicial findings.”); *see also Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993) (“Judicial findings of fact ‘present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.’”) (citation omitted).

CP 3194-99. She sought compensation “for the following aspects of damage”: the judgment amount, postjudgment interest, attorney fees related to prosecution of the action and enforcement and collection of the covenant judgment, the difference between Lipscomb’s personal contribution to settlement and the amount he allegedly could have settled for, and CPA damages/attorney fees. CP 3195-96. She concluded: “All other claims for damages are waived and will not be presented at trial.” CP 3196.

Despite her express waiver, Moratti sought to introduce evidence regarding additional types of damage, including damage to Lipscomb’s credit reputation allegedly resulting from the covenant judgment. Farmers objected, noting that Moratti had never produced any documentation to support her allegations regarding such harm. CP 4928-29. In addition, Moratti had refused to permit inquiry on the issue of damages during the deposition of GAL Gerald Tarutis, citing the attorney-client privilege. 8/6 (AM) RP 96. In light of Moratti’s waiver and refusal to provide information regarding additional elements of damage, the trial court instructed the jury not to consider these items.

Moratti asserts that, if the case is remanded, the trial court should be ordered to allow testimony regarding all “harm” caused by Farmers’ breach of the duty of good faith. App. Br. at 46. Her argument must be

rejected for two reasons. First, it cannot be (and is not) disputed that the intent of Farmers' interrogatory was to ascertain the nature of the harm allegedly caused by its actions so that it could conduct the necessary discovery to determine whether (1) Lipscomb had actually sustained the alleged harm and (2), if so, whether that harm could be attributed to Farmers' conduct. Accordingly, the trial court correctly rejected Moratti's belated assertion that, although she did not intend to seek recovery of specific amounts for Lipscomb's attorney fees or damage to his credit reputation, she could still put on evidence of such damage at trial. As the trial court recognized, the issue was whether Farmers had an opportunity to rebut such evidence by conducting discovery—it obviously did not in light of Moratti's actions.

Second, even if the Court accepts Moratti's after-the-fact attempt to distinguish between "damages" and "harm," she has still waived the right to assert any harm other than that specifically alleged in her interrogatory response. In her response, she stated that she sought "compensation for the following aspects of '*damage*,'" not "*damages*," as she erroneously claims. *Compare* App. Br. at 45 *with* CP 3196. In her interrogatory response, Moratti makes no attempt to distinguish between "damage" and "harm." It is thus clear from the language of her response that Moratti alleged only the harm specifically listed in that response.

The trial court did not abuse its discretion in refusing to permit the jury to consider additional types of harm in light of Moratti's express waiver of the right to assert such harm.

4. The trial court did not abuse its discretion by refusing to admit claims manuals and performance reviews.

Moratti asserts that the trial court "wrongfully excluded evidence that Farmers' adjuster failed to comply with Farmers' own internal procedures set out in its claims manual." App. Br. at 47. In fact, the trial court permitted such evidence to be introduced. The court ruled that Moratti could ask Farmers' employees about compliance with claims manuals, and she did so. 7/23 (AM) RP 73-77; 8/3 (AM) RP 39-44, 126-29; 8/3 (PM) RP 20. The trial court also permitted Moratti's experts to refer to such manuals, so long as a proper foundation had been laid. 7/23 (AM) RP 73-77.

Moreover, Moratti *agreed* that the claims manuals and performance reviews did not need to be admitted into evidence so long as she could ask witnesses about these documents. 7/27 (AM) RP 30; 7/30 (AM) RP 6. She cannot now complain that the manuals and reviews were not admitted when she did not challenge this ruling in the trial court.

F. Moratti is not entitled to recover her attorney fees.

Moratti asserts (App. Br. at 41-42) that she is entitled to an award of attorney fees from Farmers at trial and on appeal on three grounds: under the CPA, as an extension of the *Olympic Steamship* doctrine, and in equity. She is wrong as to each.

CPA: Because Moratti is not entitled to recover under the CPA against Farmers for the reasons articulated above, she cannot recover attorney fees under that statute (RCW 19.86.090).

Olympic Steamship Doctrine: In *Olympic Steamship v. Centennial Insurance Co.*,⁹⁸ our Supreme Court held that an insured who is compelled to bring legal action to obtain coverage from his insurance policy is entitled to recover his reasonable attorney fees.⁹⁹ The rationale is that, if an insured must incur the cost of litigation to obtain coverage, he will lose the full benefits of the policy.¹⁰⁰ Here, there is no coverage dispute; Farmers provided the full benefits of the policy, defense and indemnity, to Lipscomb before this lawsuit was filed. Moratti seeks to recover extracontractual damages in tort. The *Olympic Steamship* doctrine does not apply, and there is no basis to “extend” its application to the tort of bad faith, as Moratti requests.

⁹⁸ 117 Wn.2d 37, 811 P.2d 673 (1991).

⁹⁹ *Id.*, 117 Wn.2d at 52-53.

¹⁰⁰ *Id.*

Equity: Moratti cites cases to suggest that (1) an amorphous bad faith exception and (2) the equitable indemnity (or “ABC”) exception to the American Rule come into play. Neither exception applies.

Washington courts do not recognize a generally applicable power of the courts to award attorney fees in equity.¹⁰¹ Accordingly, in *Dempere v. Nelson*, this Court held that “bad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington.”¹⁰² Moratti could have no equitable right to recover prevailing party attorney fees in pursuing her claim at law.

Moratti offers no analysis how the “ABC rule” described in *Manning v. Loidhamer*¹⁰³ applies here, and it does not apply. Nor did Moratti argue this theory below. In *Manning*, the ABC rule was described as follows:

Three elements are necessary to create liability: (1) a wrongful act or omission by A toward B; (2) such act or

¹⁰¹ *Dempere v. Nelson*, 76 Wn. App. 403, 410-11, 886 P.2d 219 (1994), *rev. denied*, 126 Wn.2d 1015, 894 P.2d 565 (1995) (citing *Asarco, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 715, 601 P.2d 501 (1979)).

¹⁰² *Id.*, 76 Wn. App. at 410. The cases cited by Moratti for application of a bad faith exception are inapposite. *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984) involved actions of a party that were fraudulent or malicious. Nothing resembling such conduct is present here. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P.2d 342 (1976) does not apply because it is a common fund case, as this Court observed in *Shoemake v. Ferrer*, 143 Wn. App. 819, 831, 182 P.3d 992 (2008), *aff'd*, 168 Wn.2d 193, 225 P.3d 990 (2010). In *Shoemake*, this Court rejected an argument like Moratti’s that an alleged breach of fiduciary duty should be recognized as an additional exception to the American Rule.

¹⁰³ 13 Wn. App. 766, 538 P.2d 136, *rev. denied*, 86 Wn.2d 1001 (1975).

omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, viz, the wrongful act or omission of A toward B. The Washington decisions discussing this rule do not clearly state that the original act or omission of A must be against B, but such is clearly implied. All of the Washington cases allowing expenses of litigation to be recovered as consequential damages involve a breach of duty by A which exposed B to litigation with C, a third person who was a stranger to the event involving A and B.¹⁰⁴

Specifically, Moratti fails to recognize that the ABC rule permits a claim for *damages* incurred by B (e.g., Lipscomb) in a *previous* action between B and C (e.g., the liability action by Moratti against Lipscomb). Farmers paid all such defense costs, and they are not at issue in this action. Here, Moratti seeks to justify her claim for attorney fees incurred in *this* action, and the *Manning* ABC rule is inapt.

In sum, Moratti has failed to state a basis for an award of fees at trial and on appeal.

G. Moratti is not entitled to reassignment to a different judge.

Moratti argues that the case, if it is remanded, should be heard by a judge other than Judge White. App. Br. at 48-49. Moratti claims that remand to a different judge is necessary because Judge White “will have difficulty setting aside a previously expressed opinion,” citing the Washington Supreme Court opinion in *In re Marriage of Muhammad*¹⁰⁵

¹⁰⁴ *Id.*, 13 Wn. App. at 769.

¹⁰⁵ 153 Wn.2d 795, 108 P.3d 779 (2005).

for this proposition App. Br. at 48. But Moratti misstates the Washington rule¹⁰⁶ and fails to articulate how Judge White would actually meet Moratti's formulation of the rule. Under her test, virtually every case in which a trial judge is reversed would require remand to a different judge.

The bar is higher in Washington. Washington courts do not lightly remove trial judges from cases but confine that extreme remedy to egregious cases of misconduct. In *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Washington State Human Rights Commission*,¹⁰⁷ our Supreme Court applied the common law test for removal of a judge and approved removal of an administrative judge where that ALJ had a job application pending before one of the litigants in the case. The Court stated that the test for removal of a judge is whether the judge could not be "fair and unbiased" or whether there was an appearance of bias or prejudice on the judge's part.¹⁰⁸ A similar standard should apply to the remand of a case to a different judge after an appeal.

¹⁰⁶ Moratti cites a Ninth Circuit case, *McSherry v. City of Long Beach*, 423 F.3d 1015, 1023 (9th Cir. 2005), for the view that, if "unusual circumstances" are present, remand to a different judge is necessary. Moratti does not demonstrate that *McSherry* controls in Washington, nor does Moratti indicate that "unusual circumstances" are present here.

¹⁰⁷ 87 Wn.2d 802, 557 P.2d 307 (1976).

¹⁰⁸ *Id.*, 87 Wn.2d at 807.

In *Santos v. Dean*,¹⁰⁹ the Court of Appeals declined to remand a case to a new judge where the party failed to present evidence of actual or potential bias, noting that the trial judge was confronted with a legal issue on which authorities were divided. Merely because a trial judge is reversed does not mean there is evidence of actual or potential bias.¹¹⁰ Washington appellate courts have remanded matters to new judges only in rare circumstances of egregious misconduct.¹¹¹

Moratti needlessly insults Judge White's impartiality and integrity. Merely because she disagrees with some of his rulings is not enough to justify a remand to a different judge. She fails to offer any evidence of bias or unfairness, or the appearance of same, as to Judge White. If remand occurs here, the case should be retained by Judge White.

¹⁰⁹ 96 Wn. App. 849, 982 P.2d 632 (1999), *rev. denied*, 139 Wn.2d 1026, 994 P.2d 845 (2000).

¹¹⁰ *Id.*, 96 Wn. App. at 857; *see also Gold Creek N. Ltd. P'ship v. Gold Creek Umbrella Ass'n*, 143 Wn. App. 191, 206, ¶¶ 28-29, 177 P.3d 201 (2008) (rejecting remand to different judge).

¹¹¹ *See, e.g., Sherman v. State*, 128 Wn.2d 164, 204-06, 905 P.2d 355 (1996) (judge had ex parte contact with physicians charged with monitoring plaintiff's chemical dependency to obtain information about the monitoring process while the judge was considering plaintiff's motion for reinstatement; remand to different judge was "the safest course"); *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) (judge's ex parte inquiry verifying seasonality of defendant's income, for purpose of restitution, clouded the proceeding and created an appearance of unfairness; remanded for sentencing by another judge).

H. If this court reinstates the judgment or remands for a new trial, it should correct the trial court's error regarding postjudgment interest.

In the interest of judicial efficiency, if this Court remands for reentry of judgment or a new trial, then it should correct the trial court's error regarding postjudgment interest.

In the October 2, 2009, judgment (which it later vacated), the trial court awarded Moratti postjudgment interest at 6.151%, based on the contract rate contained in the settlement agreement between Moratti and Lipscomb. CP 4611. The trial court erred by applying the contract rate for interest rather than the tort judgment interest rate of RCW 4.56.110(3). Moratti's only basis for recovery was in tort. Therefore, the trial court should have limited postjudgment interest to the rate set forth in RCW 4.56.110(3) applied as of the date of judgment against Farmers.

The tort judgment interest rate of RCW 4.56.110(3) applies to bad faith claims. In *Stevens v. Brink's Home Security, Inc.*,¹¹² our Supreme Court clarified that the question of which judgment interest rate applies is analyzed by looking at which statute of limitations applies. The negligence statute of limitations applies to a bad faith claim so, under the *Stevens* analysis, the tort judgment rate must apply.

¹¹² 162 Wn.2d 42, 169 P.3d 473 (2007).

Indeed, in *Woo v. Fireman's Fund Insurance Co.*,¹¹³ this Court held that the tort judgment interest rate applied to a judgment based on the tort of bad faith. In that case, the judgment was mixed between tort claims and contract claims. This Court concluded:

[S]ince the legislature chose to impose different interest rates on judgments based on what they are founded on, application of the tortious conduct interest rate to this mixed judgment best effectuates the intent of the legislature. Accordingly, application of RCW 4.56.110(3) to the entire judgment in this case is most persuasive.¹¹⁴

Here, there is no “mixed judgment” as there was in *Woo*. The judgment here is based entirely on the tort of insurance bad faith.

Therefore, the postjudgment interest rate is set by the formula of RCW 4.56.110(3) at the time of the October 2, 2009, judgment against Farmers.

Below, Moratti argued that the judgment entered against Farmers enforced the settlement agreement between Moratti and Lipscomb against Farmers and, therefore, the contract rate of interest applied, citing this Court’s opinion in *Jackson v. Fenix Underground, Inc.*¹¹⁵ In *Jackson*, the parties settled their tort claim by written contract, which recited a contract rate of interest. This Court held that the contract rate, not the tort rate, applied to the judgment. But *Jackson* does not apply here.

¹¹³ 150 Wn. App. 158, 208 P.3d 557, rev. denied, 220 P.3d 210 (2009). This was the opinion issued after remand following the Supreme Court’s decision in *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2008).

¹¹⁴ *Woo*, 150 Wn. App. at 173.

¹¹⁵ 142 Wn. App. 141, 173 P.3d 977 (2007).

Farmers acknowledges that, under authority of *Jackson*, interest on the covenant judgment against *Lipscomb* runs at the contract rate until judgment is entered against Farmers. But the judgment against *Farmers* is based upon its tort liability to pay damages, including the amount of a reasonable settlement between Moratti and Lipscomb. The amount of the judgment against Farmers (as opposed to Lipscomb) is determined as of the date it is entered. And as of that date, Farmers will owe post-judgment interest under authority of RCW 4.56.110(3) and *Woo* as in any other tort claim.

Simply put, although some part of the damages that can be recovered from Farmers derives from the covenant judgment against Lipscomb, the judgment against Farmers is a judgment based entirely on tort. RCW 4.56.110(3) applies and controls. If this Court reinstates the October 2, 2009 order, or remands for a new trial, the rate authorized by RCW 4.56.110(3) should apply postjudgment.¹¹⁶

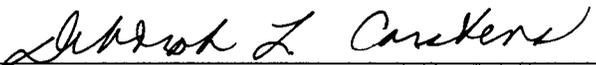
¹¹⁶ There is one final issue regarding interest not directly raised by this appeal, but of which this Court should take notice to avoid a second appeal. Postjudgment interest only applies in the period from entry of the October 2, 2009, judgment forward if this Court directs the trial court to enter the original judgment exactly as it was entered before. RCW 4.56.110. However, if this Court remands for a new trial or instructs the trial court to enter any additional findings, postjudgment interest will not accrue until entry of that second judgment. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990), *mod. denied*, 804 P.2d 1262 (1991).

VII. CONCLUSION

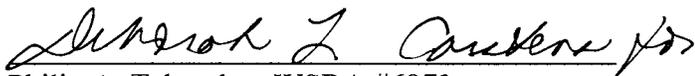
Farmers requests that the trial court's dismissal of all claims be AFFIRMED. Moratti failed to prove that Farmers' conduct caused Lipscomb damage, and the undisputed evidence is to the contrary. To the extent Moratti must rely on her "fork in the road" theory, her claims are time-barred.

DATED: July 12, 2010

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The undersigned certifies that on this 12th day of July, 2010, I

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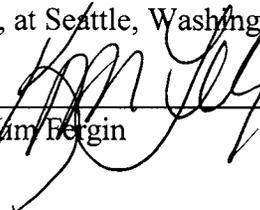
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I declare under penalty of perjury under the laws of the state of

Washington this 12th day of July, 2010, at Seattle, Washington.



Kam Bergin

12663293.1

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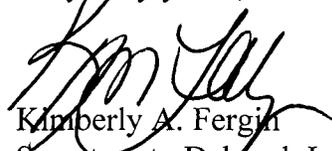
Re: *Emily Moratti, et al. v. Farmers Insurance Company of Washington, et al.*
Court of Appeals No. 64477-7

Dear Mr. Johnson:

Enclosed for filing is an original and one copy of Respondent's Brief and Motion for Leave to File Overlength Brief, and a courtesy copy of Supplemental Designation of Clerk's Papers. Please return conformed face sheets in the enclosed self-addressed, stamped envelope.

Your courtesies are appreciated.

Very truly yours,


Kimberly A. Fergin
Secretary to Deborah L. Carstens

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