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ORIGINAL

NO. 68342-0-I

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

GORDON WOODLEY,

Appellant,

vs.

USAA CASUALTY INSURANCE COMPANY,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

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

USAA's policy obligated it to defend the Hanochs against lawsuits and claims brought by third parties. Woodley’s work from September 2002 until January 2005 was almost exclusively devoted to defending against claims asserted against the Hanochs in the Carver lawsuit. Woodley was instrumental in obtaining a successful result; defending David and Tara Hanoch throughout the case, getting the case bifurcated into binding arbitration on only the liability issue, defending them at the arbitration hearing, and obtaining a judgment of dismissal of all claims. The liability phase of the case was sent to binding arbitration before the Hon. Roselle Pekelis (Ret.). Justice Pekelis ruled that the accident was 100% the fault of Western Ports Transportation, Inc. and the driver of its

tractor/trailer. No fault was found on Mrs. Hanoch's part. As a result, the trial court then entered a final judgment dismissing all claims by the Carvers, Western Ports, and its driver against the Hanochs.

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

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting USAA's summary judgment motion and denying Woodley's cross-motion for summary judgment.

(2) Issues Pertaining to Assignments of Error

1. Is Woodley's claim for fees an account receivable subject to a six-year statute of limitations? (Assignment of Error Number 1)

2. Is Woodley a third party beneficiary under the insurance policy and entitled to recoup his fees from USAA under that written contract? (Assignment of Error Number 1)

3. Is Woodley entitled to recover his attorney fees in this action and on appeal?

C. STATEMENT OF THE CASE

The Carver lawsuit arose from a three-vehicle accident that occurred on Interstate 5 on September 11, 2002. CP 14, 277. Tara Hanoch was driving southbound when her vehicle collided with a tractor/trailer operated by Western Ports Transportation, Inc. (“Western Ports”). CP 277. The collision forced Hanoch’s car into another lane where it was struck by a car driven by Herman Carver. CP 277. The Carvers both sustained injuries. CP 277. The full extent of the Carvers’ injuries was not ascertained during the liability phase of the case when Woodley was involved.¹ USAA was informed that Mr. Carver claimed soft tissue injuries to the neck. CP 249. Mrs. Carver claimed injuries to the left knee requiring a knee replacement, soft tissue injuries and disc

¹ The responsibility for working up this aspect of the case was ostensibly that of Alan Peizer, an insurance defense lawyer paid by USAA to represent the Hanochs. CP 280-81, 389. Peizer did not serve a request for a statement of damages or interrogatories to the Carvers until September 2004, almost *a year* after suit had been filed. CP 282, 346-49, 351-68. The case was then bifurcated with liability to be determined in binding arbitration. CP 282.

herniations but without recommendation for surgery, a 50% hearing loss, loss of bladder control, headaches, and double vision. CP 249, 277-78. The Carvers disclosed sixteen medical providers for Mrs. Carver and five medical providers for Mr. Carver in their witness disclosure. CP 278, 320-24. The significance of this is the *Carvers had very substantial injuries* which USAA would have been required to pay for if Hanoch was liable. CP 277-78.

In addition to the Carver injuries, Tara Hanoch was also injured rather severely in the accident and her vehicle was a total loss. CP 278. Although she was taken to Harborview, Hanoch gave immediate notice to USAA of the accident and Arlys Reynolds was the USAA adjuster assigned to the case. CP 278-89. On September 25, 2002, Tara Hanoch went to Woodley “to protect her” from legal liability. CP 278. *See also*, CP 275, 293. She also desired to recover for her personal injuries. CP 278.

In initially evaluating the case, Woodley recognized that before any action could be taken in regard to Hanoch’s injuries, responsibility for the accident had to be established. CP 278. Obviously, if Hanoch caused the accident, she would have no ability to pursue her own claim for personal injuries. CP 278. If she was the cause of the accident, the Hanochs would be liable for the injuries to others and USAA would be

required to indemnify them. *See* CP 389. There was a factual dispute as to who caused the collision. CP 278. Hanoch contended, as it was later found, that her vehicle had been struck by the Western Ports tractor/trailer. CP 278, 340-44. The driver of the tractor/trailer contended that his vehicle was hit by Hanoch. CP 278. Thus, liability was either 100% against Hanoch or 100% against Western Ports. CP 248, 278. Before the liability arbitration, insurance defense co-counsel Alan Peizer informed USAA of this all or nothing proposition. CP 248. All efforts to establish that Western Ports was responsible for the accident *benefitted* USAA since it would only be required to indemnify and pay damages to the Carvers if it was found that Hanoch was liable. CP 279.

On the day he was contacted by Tara Hanoch, Woodley talked with USAA, initially dealing with Reynolds. CP 144, 279. At that time, Woodley informed USAA that an accident reconstructionist should be retained to take measurements of the vehicle before it was destroyed. CP 144, 279. Reynolds agreed to keep the vehicle but deferred on getting a reconstruction expert. CP 144, 277. From that point on, USAA was aware of Woodley, knew what he was doing, and that what he was doing was beneficial to USAA. CP 144.

On October 8, 2002, Reynolds wrote Woodley informing him that she would determine if a reconstruction report was necessary after taking

witness statements. CP 148. The following day, Reynolds talked to Woodley to see if he had completed taking photos and measurements. CP 149. She reiterated USAA would not agree to a reconstruction expert at that point, USAA had taken title to the Hanoch vehicle, and needed to dispose of the car before USAA had to pay for storage. CP 148-49. On October 10, 2002, Reynolds talked to Woodley and said the truck driver was blaming Hanoch for the accident. CP 150-51. Woodley affirmed to Reynolds that Hanoch was adamant she did nothing wrong. CP 515.

On October 18, 2002, Reynolds talked to reconstruction expert John O'Callahan and agreed to send him photos and statements for review and to determine if he thought further work was warranted. CP 152. On October 22, Reynolds talked to the Western Ports truck driver. CP 153. She informed him USAA would not accept liability. CP 153. She reported, "He said he would be turning over to his lawyer." CP 153. On October 25, 2002, Reynolds was notified that the Carvers had obtained counsel, Ralph Maimon. CP 153. Thereafter, she referred to the Carvers as "innocent party." CP 156, 173, 183. On October 29, 2002, Reynolds noted there were "No coverage issues." CP 156. Thus, by the end of October 2002, USAA admitted it had coverage and that there were two potential claimants against the Hanochs who retained counsel to pursue their rights. CP 153, 156. Reynolds noted that on October 29 she

“Discussed [with] legal and good possibility suit will be filed if semi co. does not step forward.” CP 157. Critically, USAA continued to rely on Woodley's services and did not hire co-counsel at that time. *See* CP 279.

Reynolds stated in her declaration that she met with reconstruction expert O'Callaghan, he did not think Hanoch was at fault, and he wanted to see the vehicle. CP 119. Her statements were *contradicted by her own notes*, including the one of November 7, 2002, which stated he [O'Callaghan] “does not think anything to be gained by inspecting the vehicles personally.” CP 159. The following day, November 8, Woodley informed Reynolds that he had retained reconstruction expert John Hunter who would go out and take measurements of the Hanoch vehicle. CP 159, 279. Thereafter, Reynolds/USAA began an effort to dispose of the vehicle. CP 279. On February 7, 2003, Reynolds noted “legal approved” of a letter she wanted to write to Woodley stating that the vehicle would be released for sale on March 8, 2003, and, if it was needed, the Hanochs or Woodley could buy back their own damaged car. CP 165, 279.

On January 2, 2003, Reynolds noted in an email that she had left Woodley messages that the free storage ended the following week for the Hanoch vehicle and that she asked if he would assume the storage cost. CP 239. Contrary to the statements contained in Reynolds' declaration, she wrote the following about the USAA accident reconstruction expert:

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

CP 239.

On January 13, 2003, USAA was informed by Western Ports' insurer that it was denying all claims against its insured and Hanoch was responsible for the accident. CP 241. Based upon its own analysis from USAA's legal unit discussed above, a lawsuit was coming unless Western Ports "step[ped] forward." CP 157. USAA then knew Western Ports would not assume responsibility for the accident and a lawsuit was coming. CP 241. USAA continued to rely on Woodley's efforts for their insureds and did not hire co-counsel. CP 279. In the meantime, USAA continued its campaign to dispose of the Hanoch vehicle and on February 7, 2003, sent a letter approved by its legal department stating that if the car was to be retained, Woodley could purchase it. CP 165, 243. On March 27, 2003, Woodley informed Reynolds that Hunter had advised him that he had all he needed at that point to make his analysis. CP 169, 279.

On April 16, 2003, Woodley called Reynolds and told her that Herman Carver's lawyer would be filing suit against both the Hanochs and Mr. Al-Ruwaye, the Western Ports driver. CP 171, 280. Carver's lawyer said he had no choice because he did not want an empty chair. CP 171. At that time, Woodley informed USAA that the Hanochs needed legal

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

In the meantime, USAA pursued a subrogation claim for the damage to Hanoch's vehicle. CP 181-82. In doing so, the subro unit tried to find pictures and the purported report from the USAA accident reconstruction expert. CP 181-82. The photos could not be located but Reynolds printed them from her field system for use by USAA subro unit. CP 181-82. In her declaration, filed on behalf of USAA, Reynolds stated:

I spoke to Mr. Woodley in June 2003 and I was informed there had been no lawsuits started. I also had our accident reconstruction specialist, Mr. O'Callaghan write a report.

CP 120 (paragraph 13). While it is true that USAA kept relying on Woodley to tell them if a lawsuit was filed, Reynolds' statements about the accident reconstruction expert were misleading. What happened is reflected in the USAA claim file. On June 30, the subrogation unit asked Reynolds about the accident reconstruction "report." CP 181. Reynolds informed them she had received a "verbal report." CP 181. Reynolds then said she would have the expert write up a report to send to the subro unit. CP 181. The following day, Reynolds called the subro unit and said

she spoke to accident reconstructionist O'Callaghan and he “could not tell who changed lanes,” which was what allegedly caused the accident. CP 182, 343; *see also*, CP 248. Because of this opinion from the USAA reconstructionist, the subro unit decided USAA “will NOT pay for a report.” CP 182. In discovery, USAA never produced a report from the USAA accident reconstructionist. Thus, it appears fair to conclude that contrary to Reynolds’ declaration statements, *there was no report and no useful opinion to support the conclusion that Hanoch, its insured, was not responsible for the accident.* *See* CP 248. It was Woodley’s expert, John Hunter, that carried the day to establish that Hanoch was not liable, thereby saving USAA thousands of dollars. *See* CP 344 (arbitrator’s decision noting Hunter’s testimony was particularly persuasive).

In July 2003, USAA’s legal unit was clearly aware of the information Woodley provided that the Carvers were going to sue the Hanochs. CP 183. Reynolds had passed the information along to the USAA litigation unit and a conscious choice was made not to provide the Hanochs legal representation. CP 171, 183. Reynolds wrote in her claim diary:

CD Carver is innocent party. His attorney told NI’s atty [named insured’s attorney Woodley] that he would be filing suit, but NI has not been served to date. Lit Unit declined file until suit actually filed. NI’s attorney [Woodley] assures me he will call immediately upon service.

CP 183.

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

After the suit was filed, USAA hired Alan Peizer to also defend the Hanochs. CP 280. Peizer did not substitute for Woodley; co-counsel Peizer filed an association of counsel. CP 280, 329-30. Thereafter, Peizer and Woodley worked cooperatively. CP 280-81, 332-38. Woodley was active in the case and did extensive work which was detailed in the invoice and billing sent to USAA. CP 285-93, 322-38. He worked on the answer which was filed, denying liability. CP 332-39. He also filed a counterclaim and cross-claim for Hanoch's damages in order to preserve those claims. CP 280, 332-39. Woodley prepared the answers to plaintiffs' interrogatories, prepared the Hanochs for depositions and defended them, attended the depositions, and examined and prepared John Hunter, the expert, for his deposition and defended it, Woodley was able to have the case bifurcated into binding arbitration for the liability phase and then he prepared the defense brief on the liability issues. CP 280. Woodley worked on the prehearing statement of proof, kept out a

damaging video Western Ports wanted to use, examined witnesses, examined Tara Hanoch, and argued the case for the defense. CP 281-82.

From its inception until the final judgment on liability, practically no work was done on the damages portion of the case. CP 282. Peizer did not seek a statement of damages from the Carvers or send them interrogatories which would probe damages until September 2004. CP 282, 346-68. The case was then bifurcated and liability tried in arbitration in December 2004. CP 282, 340-44. Thus, *all of the work in the case until January 2005 was on liability*, which USAA had a duty to defend.² CP 389.

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

The arbitration regarding liability demonstrates the crucial role Woodley played and how USAA was benefitted. As Peizer informed USAA on December 1, 2004, immediately before the arbitration, the issue

² Further, David Hanoch had no affirmative claims. Thus, all work done on David's behalf by Woodley clearly benefitted USAA since he and the marital community were insureds.

boiled down to whether Hanoch caused the accident by improperly changing lanes in front of a semi-tractor trailer owned by Western Ports and driven by Al-Ruwaye, or whether the semi-tractor trailer caused the accident by improperly changing lanes into Hanoch's lane of travel. CP 252. Peizer told USAA, "Accident reconstruction experts have been lined up on all three sides, each expert naturally espousing opinions on behalf of their own retained clients." CP 253. USAA never obtained an expert who would defend the Hanochs and USAA. CP 182, 279. The expert supporting the Hanoch position was John Hunter, retained by Woodley when USAA would not do so, who saw the car and took measurements when the USAA specialist declined to do so, and formed an opinion that supported Hanoch's position. Woodley prepared him for his testimony. CP 159, 169, 182, 279, 281-82. Woodley defended the deposition. CP 281-82. The importance of Hunter's testimony was specifically noted in Justice Pekelis's opinion, which found no liability attributable to Hanoch:

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

CP 344.

Following the arbitration decision, Peizer immediately informed USAA of the significance of the victory on liability and Woodley's role in obtaining it. CP 255-57. Peizer's December 28, 2004, letter to USAA stated:

We are delighted with the decision because it means that we are now absolved of all liability for the very serious injuries Laurie Carver sustained in the accident and because Tara Hanoch can now continue to pursue her own personal injury claims against co-defendants Al-Ruwaye and Western Ports Transportation. Rather than needing to determine the nature and extent of Laurie Carver's serious injuries, involving a knee replacement, double vision, urinary problems, etc., we can now let counsel for Western Ports Transportation and Al-Ruwaye, with his carrier's \$1 million policy limits, assess and pay those damages, as well as assess and pay Hanoch's damages.

....

As you know, this was a binding arbitration hearing on liability only; the trial on damages is scheduled to proceed on February 14, 2005. We should, however, be able to conclude our involvement in this case shortly having successfully defended Hanoch, with *the able assistance of Hanoch's personal counsel*.

CP 256-57 (emphasis added).³

Following the arbitration decision, the trial court entered a final judgment on January 25, 2005, dismissing all claims by the Carvers, Western Ports, and its driver against the Hanochs. CP 297-307. Peizer then filed a notice to withdraw on February 10, 2005. CP 380-81. After

³ Peizer listed the evidence presented at the arbitration hearing, including "testimony from *our* accident reconstruction expert John Hunter." CP 256 (emphasis added).

the court entered the judgment, Woodley sent USAA his invoice for his services on January 31, 2005. CP 285. Other than paying for costs related to John Hunter, USAA refused to pay Woodley. CP 277, 283. He has carried the account receivable since. CP 277. USAA knew there was an account receivable because Woodley's March 9, 2005 letter to USAA confirmed it. CP 295.

It was only *after* Woodley concluded his successful defense work for David and Tara Hanoch that Woodley began substantive work on Tara Hanoch's injury claim. CP 292. Western Ports did not seek her medical records until after liability was determined. CP 370-78. USAA certainly knew prior to the time it received an invoice from Woodley that liability had been the only real issue in the case and that Hanoch's personal injury claim awaited resolution of the liability issues. Peizer's pre-arbitration letter of December 1, 2004 to USAA confirmed as much, stating:

Once liability has been determined, the losing party on that issue will be "off to the races" to defend the Carvers' injury claim and, should Western Ports Transportation lose the liability issue, will also be defending Hanoch's personal injury claim, set to be tried the week of February 14, 2005.

CP 253.

After the final judgment was entered on liability, the Carvers moved to have their damage claim severed from that of Hanoch, which was granted. CP 283. A new cause number was issued for *Hanoch v.*

Western Ports Transportation, Inc., King County Cause No. 05-2-12441-5 KNT. CP 283. That case was resolved and settled in June, 2005. CP 283, 383. After Woodley concluded his defense work for David and Tara Hanoch, he then proceeded to prosecute the Hanoch personal injury claim which settled for \$110,000. CP 283.

After all efforts to get USAA to pay for the defense of David and Tara Hanoch failed, Woodley filed this action in the King County Superior Court on January 10, 2011. CP 276-77. The case was assigned to the Honorable Hollis L. Hill. On October 14, 2011, USAA filed a summary judgment motion arguing that Woodley's claims were barred by the three-year statute of limitations. CP 20-30. Woodley then filed a cross-motion for summary judgment arguing that a six-year limitation period applied. CP 213-32. Both motions were heard on January 20, 2012. RP 4. The trial court granted USAA's summary judgment motion and denied Woodley's summary judgment motion. CP 439.⁴ Woodley's timely appeal followed. CP 440.

D. ARGUMENT

(1) Standard of Review

This Court reviews the trial court's summary judgment dismissal of claims de novo. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d

⁴ The trial court also denied USAA's oral request for CR 11 sanctions. RP 36, 40.

510, 517, 210 P.3d 318 (2009) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005)). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). The reviewing court will consider all facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Atherton*, 115 Wn.2d at 516.

(2) Woodley Seeks Payment of an Account Receivable

There is no dispute that Woodley sent an invoice to USAA on January 31, 2005, asking to be paid for the legal services he rendered in defending the Hanochs, or that USAA was obligated to defend the Hanochs. Woodley asked USAA for payment by sending it an invoice. In doing so, he created *an account receivable* that has yet to be paid. Woodley's subsequent March 9, 2005 billing to USAA, CP 295, establishes that USAA knew Woodley had a receivable. This lawsuit was filed on January 10, 2011, less than six years after USAA was invoiced

and the account receivable created. Thus, the six-year statute of limitations for an account receivable contained in RCW 4.16.040 controls.

That statute provides in relevant part:

The following actions shall be commenced within six years:

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

RCW 4.16.040(2).⁵

In 1989, the Legislature amended RCW 4.16.040, the six-year statute of limitations, and added a new category for accounts receivable incurred in the ordinary course of business. Laws of 1989, ch. 38 § 1. No written contract is necessary and the six-year limitation provision is applicable to attorney fees. Our Supreme Court so held in *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007). In that case, attorney Tingey sued his clients for non-payment of legal fees incurred on an hourly basis. There was no written fee contract. *Id.* at 655. The attorney brought suit after three years. The Court held that an account receivable means “amounts due a business on account from customers who have

⁵ Laws of 2007, ch. 124 § 1, eff. July 22, 2007, which amended RCW 4.16.040(2) to include the language above quoted, also provided in another section of the same chapter that: “This act applies to all causes of action on accounts receivable, whether commenced before or after the effective date of this section.” Laws of 2007, ch. 124 § 2.

bought merchandise or received services.” *Id.* at 659-60. The Court held that attorney fees which were invoiced satisfy this meaning of an account receivable and are governed by the six-year statute of limitations. In reaching that result, the Court noted that as long as the business or profession carried the receivable on its books, the six-year limitation applied. It noted the Legislature’s intent to broaden the circumstances under which business debts were subject to a six-year statute of limitations. *Id.* at 662.

After *Tingey* was decided, the Legislature amended RCW 4.16.040 to define an account receivable. When *Tingey* was decided, the statutory provision contained no definition and stated, “The following actions shall be commenced within six years: . . . (2) An action upon an account receivable incurred in the ordinary course of business.” *See* former RCW 4.16.040 (1989). Five months after the *Tingey* decision, the Legislature amended the statute to define an account receivable as “any obligation for payment incurred in the ordinary course of claimant’s business or profession, whether arising from one or more transactions and whether or not earned by performance.” Laws of 2007, ch. 124 § 1, effective July 22, 2007.

By using the words *any obligation for payment*, the Legislature abolished any need for direct contract privity. As long as an account

receivable is created on *any* basis, the six-year limitation applies. This would include an unjust enrichment claim since USAA received the benefit of Woodley's work for which it has not paid. That work resulted in USAA not having to pay thousands of dollars on the Carvers' claims against its insureds.

Here, there is no dispute that USAA was invoiced, Woodley has treated this as an account receivable from USAA, USAA received the benefit of his services, and less than six years elapsed before suit commenced. Accordingly, the six-year provision of RCW 4.16.040(2) controls and this case is not time barred. The trial court erred in granting summary judgment to USAA, who argued that a three-year statute of limitation applied.

(3) This Is An Action Upon a Written Contract By a Third Party Beneficiary After USAA Breached Its Duty to Defend

An insurance contract is imbued with the public interest. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). An insurance company has three basic duties: to defend, to settle, and to indemnify. *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 504, 254 P.3d 939 (2011), *review denied*, 173 Wn.2d 1022 (2012) (petition for certiorari filed (June 4, 2012)). These duties stem from an insurer's enhanced duty of good faith as a fiduciary in its

relationship with an insured. *Tank*, 105 Wn.2d at 385. Accordingly, an insurer “must deal fairly with an insured, giving equal consideration *in all matters* to the insured’s interests.” *Id.* at 386.

This enhanced duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions, *see id.* at 386 (collecting cases); and it has been codified in statute and administrative code as well. RCW 48.01.030 provides:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance.

See also, Tank, 105 Wn.2d at 386. This overriding requirement to act honestly and with equity in all insurance matters has resulted in requirements by the Insurance Commissioner which govern insurers’ practices. One such provision is contained in WAC 284-30-330(2), which identifies unfair or deceptive acts by insurers applicable to the settlement of claims as including: “Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.”

Here, the Hanochs’ USAA policy contained a duty to defend. CP 389. There were no issues of coverage. The accident occurred on

September 11, 2002. By September 26, USAA was aware Woodley was protecting the Hanochs' interests. Hanoch testified she hired Woodley “to protect [her].” CP 275. By October 2002, USAA was aware that the Carvers had retained counsel. USAA had concluded the Carvers were “innocent” and had sustained damages. CP 153, 156. USAA was aware that the driver for Western Ports was going to submit the matter to his lawyer. CP 153. Reynolds and USAA’s legal unit had determined that a lawsuit would be forthcoming unless Western Ports decided to “step forward.” CP 157. By January 2003, USAA definitively knew that Western Ports and its carrier were not going to “step forward” and a lawsuit would be filed against their insured. CP 241. Yet, USAA did not provide the Hanochs with counsel, instead, relying *on Woodley* to protect USAA’s interests for months.⁶

In the meantime, Woodley hired a noted accident reconstruction expert, John Hunter, who actually did inspect Hanoch’s vehicle and opined that Western Ports’ driver caused the accident. His testimony was instrumental in the arbitrator’s determination that Hanoch was not liable

⁶ USAA also did not take action to preserve the evidence of Hanoch’s car. After consulting one accident reconstruction expert, John O’Callaghan, who declined to see the vehicle, never wrote a report, and said he could not determine who caused the accident, USAA failed to further pursue securing a helpful expert.

for the accident, thereby saving USAA thousands of dollars that it would otherwise have had to pay on behalf of its insured.⁷

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

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

Tara Hanoch's decision to employ Woodley was a reasonable response to the situation in which she found herself. Washington law is clear that when an insurer breaches its duty to defend an insured, the

⁷ Not only did USAA decline to pay for Woodley's services in obtaining this crucial witness and testimony, the insurer also tried to foist storage costs for the vehicle onto Woodley or make him buy the wrecked Hanoch vehicle if he still needed it.

insured is entitled to take whatever steps necessary to protect its interests because “when an insurer has refused to defend its insured, it is in no position to argue that the steps the insured took to protect [it]self should inure to the insurer’s benefit. *Greer v. Northwestern Nat. Ins. Co.*, 109 Wn.2d 191, 204, 743 P.2d 1244 (1987).⁸ See also, *Besel v. Viking Ins. Co.*

⁸ The supplementary payments part A of the Hanochs’ USAA policy as to liability states in pertinent part:

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

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

CP 390. Here, Woodley did more than simply “baby sit” the file on the Hanochs’ behalf. USAA benefitted from his services in defeating liability on the Hanochs’ part. Washington law has expressly indicated that an insurer does not get a “free ride” with respect to services offered by counsel for an insured. In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), *impliedly limited in part as recognized in Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012), our Supreme Court held that an insurer was obliged to reimburse an insured for fees incurred by the insured in pursuing its subrogation interest from a tortfeasor as part of the insured’s broader efforts against that tortfeasor because such an action benefitted the insurer. As the *Mahler* court explained,

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

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

Moreover, an insured is entitled to reimbursement of all fees incurred prior to the tender of the case to the insurer. *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 142-43, 149, 29 P.3d 777 (2001), *review denied*, 146 Wn.2d 1005 (2002). See also, *National Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 779-80, 256 P.3d 439 (2011), *review*

of *Wisconsin*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002); *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 397, 823 P.2d 499 (1992) (rejecting insurer argument that insured could not enter into covenant judgment with claimant to avoid exposure).

USAA's breach of its duty to defend occurred even in the absence of a demand from the claimant. *Moratti*, 162 Wn. App. at 495. In that case, Emily Moratti sustained extensive burn injuries in 2002 as a result of a fire at a rental house owned by William Lipscomb and insured by Farmers. *Id.* at 499. Moratti hired a lawyer who made repeated attempts to find out policy limits from Farmers and other information. The attorney informed Farmers that Moratti's medical bills were now \$793,000 and again requested other information. *Id.* at 499-500. Farmers refused to provide the information and denied liability. Moratti's lawyer asked the Farmer's adjuster if he should send the settlement package information in

denied, 173 Wn.2d 1006 (2012) (unless insurer can show substantial and actual prejudice resulting from insured's alleged late tender, insurer is liable for pre-tender defense costs). Similarly, insureds are entitled to reimbursement where they hire counsel to represent them after the insurer denied them a defense. In *Prudential Prop. and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 124, 724 P.2d 418 (1986), the court held the insurer had a duty to reimburse the insureds where the defense costs on covered and uncovered claims were not susceptible to proration. *See also, Public Util. Dist. No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 810, 881 P.2d 1020 (1994) (covered and noncovered claims and damages cannot be allocated where both arise from the same factual core). Accordingly, where USAA benefitted from Woodley's efforts on behalf of Hanoch, USAA must pay its fair share of the costs incurred. *See Mahler*, 135 Wn.2d at 425 n.17; *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 654, 272 P.3d 802 (2012) (*Mahler's* equitable sharing rule derives from principles of equity, not contract language). This applies to Woodley's efforts on Hanoch's behalf before any lawsuit was actually filed. *See Griffin*, 108 Wn. App. at 142-43, 149 (insured entitled to reimbursement of pre-tender fees).

hopes that it would “change [her] mind” about liability. *Id.* at 500. The adjuster said not to bother. The adjuster did not inform Lipscomb that Moratti’s attorney was attempting to settle.

In 2003, Moratti filed suit against Lipscomb and Farmers provided a defense. *Id.* at 500. It then offered its policy limits. However, this was not acceptable to Moratti. Lipscomb then entered into a covenant judgment where he paid \$600,000 of his own funds, stipulated to a judgment of \$17 million with a covenant not to execute and assigned his claims against Farmers to Moratti. Moratti then sued Farmers for bad faith. *Id.* at 500-01.

In defending, Farmers asserted that no actual suit was filed nor settlement offered prior to suit, contending that it did not breach its obligations. It further argued that it did defend and offered policy limits when an actual suit was filed. This Court rejected Farmers’ arguments and held the “duty to settle is intricately and intimately bound up with the duty to defend and to indemnify.” *Id.* at 504. The Court stated:

We can give no credence to Farmers’ assertion that it did not have to respond until 2004 because no settlement offer or demand was made or suit filed until then.

Id. at 504. It found Farmers had a duty to make a good faith effort to settle as soon as it was reasonably likely that the insured may be liable. In

doing so, it equated the duty to settle with the duty to defend and found the duty to defend “must be prompt and timely.” *Id.* at 503.

In light of these insurer duties summarized in *Moratti*, USAA had a duty to defend as soon as it was reasonably likely that a lawsuit would be filed which was certainly as early as January 2003, and clearly so when informed in April by Woodley that a lawsuit was forthcoming. USAA failed to provide counsel and breached its duty to defend the Hanochs. As in *Moratti*, USAA cannot rely on the fact that it provided a defense when an actual lawsuit was filed.

Woodley was a third party beneficiary of that agreement and is entitled to recoup his defense fees from USAA under that written contract. He and his role were known to the Hanochs and USAA. When an insurer breaches its duty to defend, a lawyer for the insured that performs the defense services is an intended third party beneficiary of the contract.

Creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract. *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 886, 719 P.2d 120 (1986). A court must determine if a party is the intended beneficiary of a contract. *Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010). Construction of a contract determines the legal consequences that follow

from the terms of the contract. *Id.* at 697 n.6 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990)). To the extent the reviewing court is required to interpret contract provisions, it applies the de novo review standard. *Id.* at 697. While interpretation of a contractual provision is often an issue of fact, construction is always a question of law. *Id.*

A third party beneficiary contract exists when the contracting parties intend to create one. *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 196, 49 P.3d 912 (2002). The test of intent is not whether the parties desired to confer a benefit upon the third person or advance his interests but is an objective one: whether performance under the contract would necessarily and directly benefit the third party. *Kim*, 156 Wn. App. at 699; *Donald B. Murphy*, 112 Wn. App. at 196. *See also*, *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 255-56, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010) (test for intent is an objective one—whether performance under the contract would necessarily and directly benefit that party).⁹ Here, the insurance

⁹ Our Supreme Court has explained the “intent” necessary to create a third party beneficiary contract as follows:

“If the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person ... The ‘intent’ which is a prerequisite of the beneficiary’s right to sue is ‘not a desire or purpose to confer a particular benefit upon him,’ nor a desire to

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

It has been expressly held that a third party beneficiary of a written contract who has a right to sue on the contract is governed by the six-year statute of limitations.¹⁰ *Lybecker v. United Pacific Ins. Co.*, 67 Wn.2d 11, 18, 406 P.2d 945 (1965). Regarding a duty to defend under an insurance contract, the statute of limitations does not begin to run until there is a final judgment in the underlying lawsuit. *Bush v. Safeco*, 23 Wn. App.

advance his interests, but an intent that the promisor shall assume a direct obligation to him.... So long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity. In short, the motive, purpose, or desire of the parties is a quite different thing from their intention.”

Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc., 105 Wn.2d 878, 885-87, 719 P.2d 120 (1986) (quoting *Vikingstad v. Baggott*, 46 Wn.2d 494, 496-97, 282 P.2d 824 (1955)).

¹⁰ RCW 4.16.040(1) provides:

The following actions shall be commenced within six years:

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

327, 329, 596 P.2d 1357 (1979); *Castle & Cooke, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 512, 711 P.2d 1108, *review denied*, 105 Wn.2d 1021 (1986). Here, the underlying final judgment was entered on January 25, 2005. Woodley's lawsuit was commenced less than six years from that date.

In sum, the six-year statute of limitations applies to Woodley's suit on an account receivable and as a third party beneficiary of the insurance contract. Woodley's suit against USAA for fees is timely. Moreover, USAA is obligated as a matter of law to pay for Woodley's pre-tender service that benefitted USAA. For these reasons, the trial court erred in granting USAA's motion for summary judgment and denying Woodley's motion for summary judgment.

(4) Woodley Is Entitled to Recover His Attorney Fees In This Action And On Appeal

Woodley requests his reasonable attorney fees, including on appeal, under RAP 18.1 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Under *Olympic Steamship*, "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." 117 Wn.2d at 54. An insured cannot claim attorney fees where the dispute is over the extent of the insured's damages or factual questions of

liability. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 899, 16 P.3d 617 (2001). RAP 18.1 provides a party may recover attorney fees on appeal if such fees are otherwise allowed by law and if the requirements of RAP 18.1 are met.

In this action, Woodley is effectively enforcing USAA's obligations under its insurance contract. When USAA did not properly provide a defense under its insurance contract, David and Tara Hanoch sought out Mr. Woodley to defend them and Woodley's defense services should be paid under *Olympia Steamship*. Under *Olympic Steamship*, Woodley is entitled to recover his fees in this action and on appeal. There, our Supreme Court held that the duty to defend was a contract right and its breach allowed for the recovery of attorney fees, stating: "We also extend the right of an insured to recoup attorney fees that it incurs because an insurer refuses to defend." *Olympic Steamship*, 117 Wn.2d at 52. The case also holds that an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of the insurance contract "regardless of whether the insurer's duty to defend is at issue." *Id.*

Woodley is entitled as a third party beneficiary to assert the rights of his clients, the Hanochs. Moreover, if USAA is not compelled to pay its pro rata share of legal expenses, the insureds would not receive the full

benefit of their coverage. Thus, this case is more akin to a dispute over the vindication of policy provisions to which the insured is entitled (for which fees may be awarded) than a dispute over the amount of coverage (for which fees are not available). *See Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012). Further, this case involves a legal question concerning interpretation of the insurance policy, not a factual question focusing on the size of a covered loss. *Id.* at 659-60. This too supports an award of *Olympic Steamship* fees. *Id.*

E. CONCLUSION

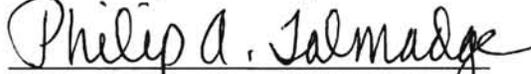
USAA saved thousands of dollars due to the defense work of Gordon Woodley. Having received this benefit, it refused to pay Woodley's outstanding account receivable for the services he provided on behalf of USAA's insured. Alternatively, Gordon Woodley was a third party beneficiary of the contract between USAA and the Hanochs. In either event, the action is governed by a six-year statute of limitations. Woodley sought in this action to be paid for his defense work, which benefitted USAA.

The trial court here erred in denying Woodley's summary judgment motion and in granting USAA's summary judgment motion on the applicable limitation period for Woodley's claim. This Court should reverse the trial court's order and remand, directing the trial court to enter

an order granting Woodley's summary judgment motion and awarding him attorney fees under *Olympic Steamship*. Costs on appeal, including reasonable attorney fees, should be awarded to Woodley.

DATED this 25th day of June, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Brief of Appellant in Court of Appeals Cause No. 68342-0-1 to the following parties:

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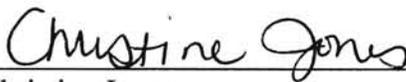
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Original filed by Messenger on June 25 with:

Court of Appeals, Division I
Clerk's Office

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

Dated June 25, 2012 at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

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