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No. 47494-8-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION TWO

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant / Cross-Respondent,

vs.

MYONG SUK DAY,

Respondent / Cross-Appellant.

APPELLANT / CROSS-RESPONDENT'S REPLY AND RESPONSE

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TABLE OF CONTENTS

Page

I. Enumclaw's Reply. ---------- 1

1. Day's "restatement" of the "facts" is riddled with inaccurate statements which require correction. ---------- 1

2. Summary of reply. ---------- 4

3. Neither the covenant nor the lack of an assignment of rights is relevant to this appeal. -------- 8

a. Day is protected by the fact that her liability has been entirely discharged, not by a covenant.---------- 9

i. A release from all future liability is much more and much different than a covenant not to execute.---------- 12

ii. This distinction was enforced in Werlinger. ---------- 12

iii. There is no stronger release known to law than a satisfaction and dismissal with prejudice. ---------- 13

iv. Satisfaction of a judgment is an unconditional release of a judgment debtor from liability. ---------- 14

b. The "issue" of Day's failure to assign her claim against MOE to Smith and Lee is not an issue; it is another straw argument. ---------- 16

4. In order to be entitled to coverage by estoppel, an insured must establish that a bad faith act caused the insured's liability to the third party. ---------- 17

a. There should be no presumption in this unusual case because the reservation of rights had no connection to Day's potential liability to Smith and Lee. ---------- 19

b. Without a presumption, Day did not establish any relationship between the claimed bad faith and her liability to Smith and Lee. This was a strategic, purposeful choice on her part. --------- 24

i. The jury's findings do not establish a causal link between bad faith and Day's liability to her victims. ---------- 28

ii. The court made no factual finding regarding a causal link between bad faith and Day's liability to her victims, other than to stating its opinion that it "may well be" that there was **not** one. ---------- 30

5. The trial court erred in entering the void judgments against Day. ---------- 30

a. MOE's challenge to the entry of the judgments against Day is timely. ---------- 31

b. Substantively, the trial court erred in entering the judgments against Day. ---------- 31

6. The trial court's failure to give the proposed instructions at issue is reversible error. ---------- 34

a. Enumclaw was entitled to the proposed jury instructions. ---------- 34

b. Enumclaw did not waive its claim to instructional error. ---------- 38

7. The trial court error in applying an IFCA multiplier to emotional distress damages. ---------- 40

a. The undifferentiated verdict did not waive the issue of whether the IFCA multiplier should apply to emotional distress damages. ---- 40

b. Failure to raise this issue below does not preclude review. ---------- 41

c. Under IFCA, "actual damages" does not included emotional distress. ---------- 42

II. Response to Day's Cross Appeal. ---------- 44

1. The Court should not consider Day's argument regarding denial of her motion for summary judgment. ---------- 44

a. Day did not appeal the denial of her motion for partial summary judgment regarding harm. -- 44

b. Day is not permitted to appeal the denial of her motion for summary judgment where she acquiesced to the court treating it as a motion in limine (which the court **granted**) and subsequently abandoned those claims at trial. ----45

2. The Court should affirm the dismissal of Day's reformation claim. ---------- 46

a. Day invited the "error" of which she now complains. ---------- 47

b. Substantively, Day is incorrect about reformation. ---------- 48

TABLE OF AUTHORITIES

Citation Page

Associated Petroleum Products, Inc., v Nw. Cascade, Inc. 149 Wn. App. 429, 203 P.3d 1077 (2009) ---------- 48,49

Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004) ---------- 35

Barton v. State, Dep't of Transp., 178 Wn.2d 193, 308 P.3d 597 (2013) ---------- 15

Bennett V. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) ---------- 42

Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 49 P.3d 887 (2002) ---------- 10, 11, 19, 20, 33

Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756287 P.3d 551 (2012) ---------- 27, 28

Burke v. Hill, 190 Wn. App. 897, 361 P.3d 195, 204 (2015) ------- 45

Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am., 189 Wash. 329, 65 P.2d 689, 693 (1937) ---------- 37

Coventry Associates v. Am. States Ins. Co., 136 Wn.2d 269, 961 P.2d 933 (1998) ---------- 19, 20, 21

Cole V. Harveyland, LLC, 163 Wn. App. 199, 258 P.3d 70 76-77 (2011) ------- 42

Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 63 P.3d 125 (2003) ---------- 38, 48

Duncan v. Judge.
43 Wn.2d 836, 264 P.2d 865 (1953) ---------- 13

First Nat. Bank v. Fowler.
51 Wash. 638, 99 P. 1034, (1909) ---------- 31

Gomez v. Sauerwein.
172 Wn. App. 370, 289 P.3d 755 (2012) ---------- 45

Harbor Lands LP v. City of Blaine.
146 Wn. App. 589, 191 P.3d 1282, 285 (2008) ---- 31

In re Tortorelli.
149 Wn.2d 82, 66 P.3d 606, (2003) ---------- 47

Jeffrey v. Weintraub.
32 Wn. App. 536, 648 P.2d 914 (1982) ---------- 31

Johnson v. Rothstein.
52 Wn. App. 303, 759 P.2d 471, (1988) ---------- 46

Ledcor Indus. (USA). Inc. v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 206 P.3d 1255 (2009)- 26, 27

Maynard Inv. Co. v. McCann.
77 Wn.2d 616, 465 P.2d 657, (1970) ---------- 26, 27

Miller v. Kenny.
180 Wn. App. 722, 325 P.3d 278 (2014) ---------- 42

Moratti ex rel. Tarutis v. Farmers Ins. Co. of WA. 162 Wn. App. 495, 254 P.3d 939 (2011) ------ 10, 11, 22

Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007) --- 19, 21

Polygon Nw. Co. v. Am. Nat. Fire Ins. Co.,
143 Wn. App. 753, 189 P.3d 777 (2008),
cf. *Goehle v. Fred Hutchinson Cancer Research Ctr.*,
100 Wn. App. 609, 1 P.3d 579 (2000) ---------- 40

Pulcino v. Fed Express Corp.,
141 Wn.2d 629, 9 P.3d 787 (2000) ---------- 42

Safeco Ins. Co. of Am. v. Butler,
118 Wn.2d 383, 823 P.2d 499 (1992) ---------- *Passim*

Segura v. Cabrera,
184 Wn.2d 587, 362 P.3d 1278 (2015) --------- 42, 43

St. Paul Fire & Marine Ins. v. Onvia, Inc.,
165 Wn. 2d 122, 196 P.3d 664 (2008) ---------- 17, 19, 20, 21, 22

Tank v. State Farm Fire & Cas. Co.,
105 Wn.2d 381, 715 P.2d 1133 (1986) --------- 38

Washburn v. City of Fed. Way,
178 Wn.2d 732, 310 P.3d 1275, 1283 (2013)-- 39

Werlinger v. Clarendon Nat. Ins. Co.,
129 Wn. App. 804, 808, 120 P.3d 593 (2005) - 12, 13, 26, 27

Woo v. Fireman's Fund Ins. Co.,
161 Wn.2d 43, 164 P.3d 454 (2007) ---------- 23

Foreign Authority

Berkshire Hathaway Homestate Ins. Co. v SQI Inc,
2015 WL 5555012 (Sept. 21, W.D. Wash.) --- 19, 49

Jones v Reliable Sec. Incorporation, Inc.,
29 Kan.App 2d 617 (2001) ---------- 37

Osberg v. Foot Locker, Inc.,
2015 WL 5786523 (S.D.N.Y. Oct. 5, 2015) ---- 49

Selcke v. New England Ins. Co.,
2 F.3d 790, (7th Cir. 1993) ---------- 32

Schreib v. Am. Family Mut. Ins. Co.,
2015 WL 5175708 (W.D. Wash. 2015) ------- 41, 44

Schwartz v. California Claim. Serv.,
52 Cal. App. 2d 47, 125 P.2d 883 (1942) ------ 14

Other Citations

33 C.J.S. Executions § 236 ---------- 15

47 Am.Jur.2d Judgments § 804 (2006) ---------- 13, 14

Black's Law Dictionary (10th ed. 2014) --------- 32, 33

RAP 5.3(a)(3) ---------- 45

RAP 10.3(g) ---------- 40

RCW 6.27.060 ---------- 15

RCW 6.17.100 ---------- 15

RCW 48.18.230 ---------- 36, 38

RCW 48.18.190 ---------- 37

RCW 48.30.010 ---------- 43

RCW 48.30.015 ---------- 44

RCW 59.18.050 ---------- 43

I. Enumclaw's Reply

1. Day's "restatement" of the "facts" is riddled with inaccurate statements which require correction.

a. The finding of bad faith is not "undisputed." Response 1. It is hotly disputed, as is the erroneous measure of harm of coverage by estoppel.

b. Enumclaw most certainly does challenge the jury's verdict (Response at 3) – the trial court wrongly allowed Day to present an unnaturally truncated version of the actual facts (which did not include how the case against Day was resolved), allowed Day's expert to give incorrect and uncorrected legal opinions, misstating the elements and burden of proof for Day's reformation claim.

c. Day did not tell Huh she wanted the same liability coverage Kim had. Response at 4. It is undisputed that Day made changes to the coverage Kim had. FF p. 3. The only finding was a failure of clear and convincing evidence that Day and Huh agreed she would have coverage for liquor liability. *Id.*

d. Enumclaw was not obligated to "step in" and provide coverage, even if Day had told Huh she wanted liquor liability coverage six years prior. Response at 4. This is pure statement of law, and it is incorrect. Enumclaw is bound by terms *of the policy it wrote*, unless that policy had been reformed by clear, cogent and convincing evidence of mutual

mistake. Day continues to argue that the fact that Huh had "binding authority" means that some legal theory, provable by a preponderance, other than policy reformation is applicable to the facts of this case. Day has never cited a ***single case*** to support her theory, much less that the insurer must give the insured a *presumption* that the policy is something other than written. In fact, Washington law is exactly the opposite. Here, the policy was not reformed, never had liquor liability coverage, and did not provide coverage for this loss.

e. "Huh told Day she had insurance that covered the lawsuit, and said she should contact Enumclaw." Response at 5. Huh's testimony was the opposite. (RP 12/2/14, p. 104-106) Aside from noting that both sides suffered credibility issues (FF), the trial court did not resolve the issue.

f. If the fact that Day's policy did not contain liquor liability coverage was "unbeknownst" to her, it was because she failed to read her policy during the six years of renewals prior to the claim. Response at 5.

g. Day claims, "Enumclaw did not ask Day if she had asked its agent Huh to include liquor liability coverage and did not inform Day that Huh had authority to bind Enumclaw." Response 6. This is emblematic of why the failure to properly instruct the jury was so critical in this case. Day is arguing to this Court that the "real coverage issue" is whether she asked Huh to include liquor liability coverage and what authority Huh had to

bind Enumclaw. This is an issue of how ***binders*** are effective, and ***binders*** expire the moment the insured receives the actual policy. Day was allowed to present expert testimony that Enumclaw should have informed her about Huh's binding authority, which is absolutely irrelevant to anything related to this lawsuit. The only thing relevant is whether Enumclaw had an obligation to "inform" Day about *her* claim for reformation, and then perform the investigation of *her* claim for her (it does not).

h. Day states, "On October 14, 2009, weeks after Day had retained her own lawyer at her own expense, MOE finally accepted..." Response at 8. Enumclaw responded immediately to the tender (CP 382), and appointed her an attorney 26 days after first notice, 20 days after she first saw Hester. CP 382, 412. During that period, Hester did 2.8 hours of work (CP 412), all of which and more Enumclaw paid for (RP 11/13/14, p. 43).

i. Enumclaw *did* give Day notice that it might file a declaratory action. Response at 9. The reservation of rights letter, sent 26 days after notice of the claim, told her that Enumclaw may file a lawsuit to determine coverage. CP 144. And there is no requirement that an insurer must exceed the civil rules requirements for notice in litigation with its insured.

j. Day complains that it was appointed defense counsel, not insurance counsel, that signed the dismissal stipulation of Smith and Lee's claims. Response at 13. Day hints that her *coverage counsel* would have

prevented Smith and Lee's claims against their client from being dismissed with prejudice. Anytime a lawyer claims it is in his client's best interest to have the court enter a multimillion dollar judgment against her rather than having the claims dismissed with prejudice, judicial alarm bells should be ringing at full volume.

2. *Summary of the Reply*

No matter how many times the Respondent claims this is just another case where the insurer in bad faith failed to defend or indemnify its insured and should therefore be assessed damages measured by the stipulated covenant judgment, this case is nothing of the kind. No matter how the Respondent twists the facts and legal burdens, both in the Response and in front of the jury, the dispositive facts are undisputed.

First, Enumclaw in good faith fully and satisfactorily satisfied its duty to defend the insured. That fact is undisputed and unchallenged by the Respondent. Second, Enumclaw in good faith satisfactorily protected the insured through participating in the settlement of all claims against her, ultimately achieving a full and final release with no contribution from her whatsoever. Every bit of Day's liability to the people she so badly injured has been forever and irrevocably discharged. She is not "protected" by a covenant – the "debt" misleadingly reflected in the judgments was paid before they were even entered, and there is *nothing left to execute*. She is

demanding that the damage *to her*, allegedly caused by her insurance company, be measured by how badly *she* injured two other human beings[1]. Her sense of justice requires that she be awarded more than ***$10 million***, while not one cent of that money will go to pay the already satisfied "judgments" she claims harmed her, nor will any of it benefit *her* victims. The only result of the Court adopting Ms. Day's arguments would be that she personally would be $10 million richer than she was before her carelessness dramatically changed the course of two lives. There has never been a case in any jurisdiction where the court followed a course even remotely like that laid out by the Respondent in this case.

Nor has there ever been a case where an insured argued ferociously to reignite a multimillion dollar liability case against herself that had been settled and dismissed with prejudice, only to *demand* the court enter astronomical judgments against herself so that she could claim an insurer injured her. And there can be no doubt of Day's absolute dedication to achieving that warped result. A year and a half after the claims against her had been dismissed, Day's attorney arrived at oral argument for a Motion for Summary Judgment in this *coverage* case, and demanded that the

[1] Her claim that Enumclaw "got off cheap" (Response at 34) by fully funding her legal defense and paying $125,000 on a claim wholly outside of coverage is particularly distasteful in light of the fact that she was fully released by Smith and Lee with *no* personal contribution, for one-tenth the amount she agreed she actually owed them (a combined $725,000 on a $7.9 million reasonable settlement amount (CP 756)), and wants to put the difference, millions of dollars, in her own pocket.

Court enter these multi-million dollar judgments against his client. CP 646. As Day's attorney made clear, if Judge Arend refused to enter these judgments, "I will hold Lee and Smith's ***feet to the fire*** and have them take the lead to conduct a reasonableness hearing and get judgments entered in that way before the trial in this bad faith case." CP 646. Judge Arend (correctly) refused to enter the defunct "judgments."

So Day's attorney did hold their "feet to the fire" to make them demand the court enter judgments against his client. Daryl Graves, attorney for Smith and Lee, his feet to the fire, explained at oral argument that he *felt threatened that Day would sue his clients* if he failed to assist her in entering judgments against herself. RP 3/7/14, p. 12. Over Enumclaw's objection, the "judgments" were entered, but there was nothing that could be done to satisfy them since the victims in the underlying action had long since signed full and final releases eliminating their claims against the insured[2].

It is these very judgments she claims Enumclaw *proximately caused* her to suffer because of *its* bad faith. And this proximate cause is the next issue Enumclaw will address. This case is different from

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[2] Day's claim that Enumclaw's agreement that the settlement was reasonable was a concession that it would be an appropriate covenant judgment is revisionist history. As *her attorney* explained to Enumclaw: "Any reasonableness hearing the plaintiffs bring will be adverse to Michael Huh and his insurer, ***not MOE.***" CP 270 (Note that this citation was incorrect in Enumclaw's opening brief; Enumclaw regrets the error.)

decisions where the measure of presumed damages for bad faith conduct is the stipulated amount that the insured owes the victims, because the alleged bad faith here could not have proximately caused Day's liability. On the contrary, where the insurer has satisfied its duty to defend and protected the insured, the measure of damages *according to Washington law* is limited to actual damages, not fictitious exposures long satisfied with no payment from the insured.

While the enormous damages awarded by the trial court and the absence of any liability on the part of Day may be the most attention-grabbing aspects of this case, the bad faith finding itself was built on a series of errors at the trial court. These errant rulings allowed Day's expert to provide fallacious testimony about the law, opining that written insurance contracts can be broadened beyond the written policy so long as the agent has "binding authority" and it seems more likely than not that the insured wanted additional coverage. *See Appendix C to Brief of Appellant.* Enumclaw was then stymied in its attempt to cure this expert's misstatements by the court's failure to instruct the jury on the actual standards and burdens related to reformation.

Finally, after addressing these errors, Enumclaw will discuss the court's trebling under IFCA the "emotional" damages awarded to the insured, treating these emotional damages as "actual damages." The

judgment should be overturned and a new trial ordered.

3. Neither the covenant nor the lack of an assignment of rights is relevant to this appeal

In support of her strenuous argument that the "judgments" she provoked against herself caused her more than $10 million of harm, Day raises two straw arguments that she predictably has no trouble defeating. First, that covenant judgments are "real" harm to the insured (as though Enumclaw were arguing otherwise), even though the covenant prevents execution of that judgment against the insured's personal assets. Second, that the fact that she did not assign her rights (as an insured typically would in a covenant judgment scenario) is immaterial as to the value and nature of those rights. She is benignly correct that a covenant judgment is still "harm," and that the assignment does not matter, *but neither is at issue.* She focuses on them to obscure the fact that she seeks to break new legal ground by entirely divorcing a policy holder's damages from the amount the policy holder owes the injured party. Throughout the annuals of reported caselaw nationwide, there is no other instance of an insured with the audacity to claim for her own benefit damages she caused to others. Day brushes this aside, as a factor that has not previously been a part of the damages analysis in bad faith cases. But that does not mean it is unimportant; it simply means no insured has previously advanced such an

extreme argument to an appellate court. Below, Enumclaw will address both of Day's straw arguments, and in doing so, reiterate what Enumclaw's *actual* arguments are regarding harm to the insured, and the effect of not assigning her bad faith claim.

a. Day is protected by the fact that her liability has been entirely discharged, not by a covenant.

The covenant feature in the settlement agreement between Day and her victims is not relevant to the present case, where the liability has been subsequently discharged by settlement and payment. In order to understand why, it is helpful to consider the usual characteristics of a covenant judgment and compare them to the Day's present scenario. The typical covenant judgment results in the insured having an adverse judgment entered against it, but its personal assets are safe. The covenant has no impact on the validity of the judgment, but it creates a shield around the insured, limiting execution to the rights against the insurer.

Washington courts have refused to accept this "no harm" argument because it would lay waste the intentions of the settling parties, and would leave the tort victim with a "pig in a poke;" an unintended and undeniably unpalatable result, nothing like what happened here. The simple solution is to honor the intentions of the settling parties, and treat the judgment as what it is: a real debt, due and owing, while not giving the insurer the

benefit of the asset shield the insured negotiated for itself. This is exactly what our courts have done. *Besel v. Viking Ins. Co. of Wisconsin.* 146 Wn. 2d 730, 736, 49 P.3d 887, 890 (2002). This is established caselaw, and while Enumclaw obviously does not challenge it, it has *nothing to do* with a liability that has been compromised, settled, paid and released, immediately after the covenant agreement. Covenant judgments are simply a mechanism to allow an injured party to pursue the insurance asset while taking the insured out of the equation. They are not, and never have been, an opportunity for the insured to become rich while taking the *victim* out of the equation.

Day paints Enumclaw as simply another insurer trying again to use the covenant to argue "no harm" to the insured, and avoid paying. *Response at 31-34.* Day cites *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 254 P.3d 939 (2011). There, the insurer made an unsuccessful argument Day claims was "identical to that here," that a "live judgment" is necessary to prove harm. *Response at 34.* The argument in *Moratti*, however, was most certainly *not* "identical to that here," and was only a rehash of what was rejected in *Safeco Ins. Co of Am. v. Butler*, 118 Wn. 2d 383, 823 P.2d 499 (1992), and *Besel*, 146 Wn. 2d 730. In those cases, and again in *Moratti*, the insured agreed to a stipulated judgment, then exchanged a covenant not to execute for an

assignment. Aside from the covenant, the judgment was fully enforceable, and the insured remained liable. *Moratti* adds nothing new to issue of whether a covenant prevents harm to an insured (it does not), and certainly did not shed any light on whether there is a relevant difference between an insured that is protected only by a covenant, versus an insured whose liability has been entirely extinguished by voluntary agreement with the tort victim through payment. Enumclaw's real argument is that the covenant is irrelevant, and extinguishment of Day's liability by payment to the victims is what matters. While this is a distinction not recognized by Day, it is recognized by courts, and it is crucial in this case.

i. A release from all future liability is much more and much different than a covenant not to execute.

An important aspect of judicial reasoning that covenants do not eliminate harm is the extent to which courts go to distinguish a protective covenant from a *release* that *extinguishes* all liability against the insured.

> Washington courts have properly recognized that a covenant not to execute coupled with an assignment and settlement agreement ***is not a release*** permitting the insurer to escape its obligation. A covenant not to execute coupled with an assignment and settlement agreement ***does not release a tortfeasor from liability***; it is simply "an agreement to seek recovery only from a specific asset-the proceeds of the insurance policy and the rights owed by the insurer to the insured." *Butler*, 118 Wn.2d at 399, 823 P.2d 499.
>
> *Besel v. Viking*, 146 Wn. 2d at 736-37 (emphasis added, citations omitted).

These cases demonstrate the well-recognized distinction between an insured protected by a covenant, whose harm is not negated by the covenant, and an insured who is entirely released from all liability, who does not suffer harm. Indeed, whether the tortfeasor has been released from all liability is *the* feature of the settlement agreement that matters *most* to courts.

ii. This distinction was enforced in Werlinger.

This issue was the core of the *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005) decision, where the insured settled by stipulating to a $5 million judgment and exchanging a covenant for an assignment. The insured had previously filed for bankruptcy protection, but the bankruptcy court permitted the lawsuit to go forward, subject to the insured's $25,000 limits. The assignee sued the insurer, seeking to establish bad faith and collect the $5 million.

Although there was a covenant protecting the insured's personal assets (just as there was in the case at bar), the Court paid it no attention. Instead, the Court ruled, "The Warners suffered no harm as a result of Clarendon's actions. They were shielded from personal liability by their Chapter 7 bankruptcy status." *Id at* 809. The Werlingers argued that they should be entitled to a *Butler* presumption of harm, just as Day argues

here. The Court agreed that a presumption could be appropriate if there were bad faith, but held that the absolute shield from personal liability rebutted that presumption as a matter of law.

iii. There is no stronger release known to law than a satisfaction and dismissal with prejudice.

This case is analogous to *Werlinger* in the respect that the insured's freedom from liability on the stipulated judgment negated the harm element of a bad faith claim. However, it is important to note that here there is no legal boom, like bankruptcy, being dropped on an injured party. Day's discharge from liability was the result of a compromised resolution of Lee and Smith's claims, made by them while fully advised by sophisticated lawyers. Lee and Smith made an informed decision to take money in exchange for fully and forever releasing Day, subject only to resolution of the claim against Huh, which followed shortly thereafter. And satisfaction is the strongest form of release known to the law.

iv Satisfaction of a judgment is an unconditional release of a judgment debtor from liability.

The satisfaction of a judgment is an action "extinguishing the liability" of the tortfeasor. *Duncan v. Judge*, 43 Wn.2d 836, 839, 264 P.2d 865, 866 (1953) "A satisfaction of judgment is the ***discharge of an obligation*** under a judgment by payment of the amount due." 47 Am.Jur.2d Judgments § 804 (2006) (emphasis added).

Here, the settlement agreement between Day and her victims was clear that once the assigned claims against Huh had been resolved, the stipulated judgment was fully satisfied, regardless of whether less than the face amount of the judgment had been recovered from Mr. Huh.

> ***As soon as the assigned claims have concluded (whether by settlement, final judgment, or exhaustion of all appeals and the time for further action has expired), Day may enter a full satisfaction of Judgment signed by Plaintiffs in favor of Day***, which full satisfaction shall be signed by Plaintiffs when this settlement is executed. ***The full satisfaction is to be entered regardless of the amount of any judgment awarded or settlement accepted and regardless of whether the result is less than the judgment agreed in this settlement.***
>
> CP 305.

The claims against Mr. Huh *were* resolved by settlement long before Day "held Smith and Lee's feet to the fire" to make them enter the judgments against herself, so before the trial court judge finished signing the judgments, the debt they represented had been fully and irrevocably extinguished. Any obligations they facially appear to create have been discharged. 47 Am.Jur.2d Judgments § 804 (2006).[6]

Unlike a covenant not to execute, a satisfaction of judgment *does* release a tortfeasor from liability, it *does* represent total freedom from liability and it *is* an outright cancellation of the entire obligation. "The lien of an execution is absolutely extinguished by a full satisfaction of the

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[6] It should be noted that "[t]he satisfaction of judgments for less than their face value is of everyday occurrence . . ." *Schwartz v. California Claim Serv.*, 52 Cal. App. 2d 47, 55, 125 P 2d 883, 888 (1942).

judgment . . . such as by payment or tender of payment." *33 C.J.S. Executions § 236*[7]

Day and her victims intended their settlement to be conditioned *only* on resolution of the Huh claims, and once resolved, they intended that the contemplated judgments against Day would legally vanish.[8] Day's contention that she does not have a full release from Smith and Lee is absurd. *Response at 32.* The final release occurred, by the terms of the settlement agreement, the moment the claim against Huh was resolved. Day then launches into an exegesis of her claim that Enumclaw cannot "take advantage" of the fact no judgments were entered (until Day caused them to be entered against herself), claiming that Enumclaw "ignores" the fact that judgments were, in fact, entered[9]. *Response at 33.* However, the immutable fact remains, regardless of how we arrived at this point, that every potential liability of Day to Smith and Lee has been settled, paid, and extinguished.

Day's argument invites a peculiar philosophical inquiry as to whether she was "harmed" by the fact there was a brief period in which

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[7] Neither a writ of execution nor a writ of garnishment could even theoretically issue in this case. In Washington, a judgment creditor must certify by affidavit that there is some amount owing on the judgment (RCW 6.27.060, RCW 6.17.100).

[8] Whether a settlement agreement is intended to release a defendant must be determined by the intentions of the settling parties. *Barton v. State, Dep't of Transp.*, 178 Wn.2d 193, 211, 308 P.3d 597, 607 (2013) Here there can be no question that Smith and Lee intended to fully release Day once the Huh claims were settled.

[9] It is passing strange that Day claims Enumclaw has "ignored" the fact that judgments were entered against Day.

Smith and Lee *could have* entered the covenant judgments against her - between when she signed the settlement agreement and when Smith and Lee settled with Huh. All of that took place in a window between June and October, 2011. Academics aside, our legal system does not measure tort damages by what *might have* but *did not* happen to a plaintiff.[10]

As of the time of the 2014 trial of this case, the judgments Day caused to be entered against herself had been fully satisfied for three years, the settlement on which they were based long since funded, and Day's liability voluntarily discharged by Smith and Lee. That conclusively negates the element of any harm, let alone $10 million of harm, with respect to those "judgments." A covenant not to execute is not the same as a satisfied liability, and Day's argument to the contrary is a straw. The Court should reverse the trial court's entry of judgment against Enumclaw that was based on the manufactured, illusory "liability" to Smith and Lee.

b. The "issue" of Day's failure to assign her claim against MOE to Smith and Lee is not an issue; it is another straw argument.

Day's second straw argument that she attempts to foist onto Enumclaw is that ". . . Day could not pursue her own bad faith claim against her own insurer MOE because the plaintiffs accepted an

[10] Of course, emotional distress damages related to the process are an entirely different question – as is well recognized. *Miller v. Kenny*, 180 Wn. App. 772, 802, 325 P.3d 278, 294 (2014). This analysis applies only to "harm" measured by the judgment.

assignment of her claim against her broker, rather than against Enumclaw." *Response at 35* Enumclaw *does not* contend that Day's failure to assign her rights is material, but it *does* contend that Day's rights against Enumclaw related to her liability to Smith and Lee are determined by her *actual* liability to Smith and Lee, regardless of who owns those rights. The fact the insured demands a right to put the money in her own pocket absent a concomitant liability to her victims is crucially important; but the reason that it is important is the absence of her liability, not the retention of her own cause of action.

4. In order to be entitled to coverage by estoppel, an insured must establish that a bad faith act caused the insured's liability to the third party

There are two ways an insured can establish proximate cause in a third party liability bad faith claim. It can benefit from a presumption of causation that the insurer fails to factually rebut[11], or it can prove causation of its alleged damages "in the usual way" (by factually establising the insurer's bad faith conduct proximately caused an undesirable consequence).[12] But where the insurer offers evidence of no proximate causation between the acts complained of and the insured's liability to a third party, the finder of fact must, somewhere along the line,

[11] *Safeco Ins. Co. of Am v Butler*, 118 Wn. 2d 383.
[12] *St. Paul Fire & Marine Ins Co. v Onvia, Inc*, 165 Wn. 2d 122, 196 P.3d 664 (2008).

make a determination of whether the insurer's proof preponderates. Here, Enumclaw presented just that kind of evidence (and offered to present more), but instead of letting the jury weigh it, or weighing it itself, the trial court treated it as though it did not exist, explicitly overriding the causation issue entirely, and entered judgment for $10 million of "harm" Enumclaw did not cause.

Enumclaw's affirmative evidence that any harm Day suffered did *not* include her extinguished liability to Smith and Lee comprised following facts:

1. Day has no kind of further liability to Smith and Lee.

2. Day forced the entry of the "judgments" against herself, agreeing to re-open a case against herself that had been settled, paid, dismissed with prejudice, and would never have been re-opened over her objection.

3. A declaration and offer of proof that if permitted, Linda Johnston would have testified that before Enumclaw decided to compromise its coverage position and contribute $125,000 to Day's settlement, she had all of the information Day claims should have answered the coverage question: Johnston had attended the depositions of all the people Day claims should have been interviewed. She would have testified that Enumclaw's indemnity decision, which came months later, was the same as it would have been if Enumclaw had had that same information earlier. (CP 1915).

Day argues that Johnston's declaration is self-serving speculation that things might have come out differently if Enumclaw had conducted a good faith coverage investigation. *Response at 29.* However, this was *not*

a "nothing would have changed" declaration. It was testimony that Enumclaw *did* have all of the information Day alleged a full investigation would have revealed, *prior* to the *actual* decision about indemnification coverage – ie, prior to Day's settlement with Smith and Lee. Johnston's declaration is affirmative evidence that even if there had been an improper delay in the coverage investigation, it was immaterial to the liability outcome for Day[13]. And an insurer is absolutely entitled to consider the fact that there is no coverage for a claim when deciding how much to offer in settlement. *Berkshire Hathaway Homestate Ins. Co. v. SQI Inc.*, 2015 WL 5555012 (Sept. 21, 2015, W.D. Wash.).

a. There should be no presumption in this unusual case because the reservation of rights had no connection to Day's potential liability to Smith and Lee.

Since the Supreme Court announced in *Butler* and *Besel* that the remedy for each and every instance of bad faith is a presumption of coverage by estoppel, that same Court has systematically retreated from that broad overgeneralization. *Coventry Associates v. Am. States Ins Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998), *Onvia*, 165 Wn.2d 122, *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn. 2d 903, 169 P.3d 1 (2007). The insured in *Coventry* argued that *all* instances of bad faith should result in coverage by estoppel. The Supreme Court answered that

[13] It bears noting that the *court*, having heard all of Day's strongest evidence, came to the same conclusion as Ms. Johnston did: Day's reformation claim was not meritorious

Butler did not *really* mean that *all* bad faith should result in estoppel, because only third party liability cases implicate the policy considerations that lead to the *Butler* remedy. *Coventry*, 136 Wn.2d 269. Following that logic, the insured in the third-party case of *Onvia* cited *Butler*, *Besel* and *Coventry* to argue that *all* bad faith *in third party liability cases* should result in coverage by estoppel. *Onvia*, 165 Wn.2d 122. Again, the Supreme Court retreated from its dicta, ruling that *not* all bad faith, even in third party liability cases, should result in a presumption, because especially where there was no duty to defend, the policy considerations of *Butler* and *Besel* did not apply. *Id.* Now, in this case, the insured once again relies on *Butler* and *Besel* to argue that *any time* there is bad faith in a reservation of rights setting, the remedy is automatically the presumption of coverage by estoppel. Once again, the insured in this case jettisons the *principles* of *Butler* and *Besel* in favor of the discredited "all presumption, all estoppel, all the time" dogma.

The Supreme Court in *Coventry* expounded on the core reason why that estoppel can be appropriate in reservation of rights cases. As noted by Day herself, it is "because the insurer *contributes to the insured's loss* by failing to fulfill its obligation in some way." *Coventry*, 136 Wn.2d at 284 *(emphasis added)*. *Response at 24* What *Coventry* is addressing is the situation where an insurer manipulates its insured's defense to serve its

own interests in denying coverage. In that case, the insurer has put its thumb on the scale of the insured's potential liability to the tort victim, and no amount of evidence will show what the outcome would have been, had the insured been provided a pure defense. Where the nature of insurer's actions does not even have the *potential* to impact the insured's loss (liability to a third party), *Coventry* and *Onvia* hold that there is no presumption of coverage by estoppel.

Day's contention that *Butler* necessitates the presumption any time there is some element of bad faith in the same claim where the insurer defends under a reservation of rights was rejected in *Dan Paulson*, 161 Wn. 2d 903. In that case, the Supreme Court explained that *Butler* does not go that far, and does not extend to the situation where the alleged bad faith is not "intrinsically associated with [the] underlying defense":

> Finally, we emphasize that while we are not retreating from *Butler*, ***neither are we extending it***. The presumption of harm has previously been applied ***where the insurer's bad faith was associated with its underlying defense of the insured***. That ***limitation*** is unchanged by our decision today.
>
> *Id. at* 924 (Emphasis added)

This is an unequivocal recognition that *Butler* is not as broad as Day contends. This is precisely the case to which *Paulson* refused to extend *Butler*. Enumclaw fully and satisfactorily discharged its duty to defend Day, and the bad faith she alleges was confined to coverage duties.

These claimed coverage duties involved investigating reformation facts about what happened six years earlier between Day and her agent, that were entirely isolated from the facts relevant to any defense against the Smith and Lee claims – exactly the opposite of bad faith that is "intrinsically associated with the underlying defense" of the insured.[14] This is the same distinction the Court later applied in *Onvia*, and that the Court should apply in the case at bar.

Day also argues that Enumclaw ignores *Moratti*, 162 Wn. App. 495, on the issue of the presumption. She claims that case rejected the insurer's argument that a "failure to investigate" claim was governed by *Onvia*, rendering the presumption of estoppel unavailable. Indeed, the Court in *Moratti* did reject the application of *Onvia* to the facts of that case, and did apply the presumption. But *Moratti* was a "duty to settle" case, where the insurer's bad faith was a gross miscalculation of the insured's potential for liability that led it expressly reject *any* settlement negotiations by the tort victim. *Id. Moratti* had nothing to do with whether a slow investigation of an issue unrelated to the insured's potential liability should result in a *Butler* presumption under *Onvia*. Here, Day strategically elected to abandon any failure to settle claim, and put on a case restricted to emotional harm she alleged Enumclaw caused by not

[14] The jury was prevented from hearing that the coverage duties were discharged by Enumclaw paying on a claim for which there was no coverage, and Day being released.

investigating her reformation claims quickly enough. In her Response, Day does not challenge that she waived her claim for failure to settle, but she inserts a few barbs in the brief that should be mentioned. For example, she contends the jury found that Enumclaw had "breached its core good faith duties to . . . ***indemnify***. . ." *Response at 25 (emphasis added).* The jury found no such thing, and could not have, since Day expressly kept that claim from it. Further, she states, "An insurer's failure to fully investigate and keep its insured informed of 'all developments' relevant to coverage implicates . . . ***the duty to settle the underlying claim and, ultimately, to indemnify the insured*** from an arguably covered claim."[15] *Response at 22. (emphasis added).* But *not* in this case; Day's withdrawal of her claim related to settlement or indemnity ends that question. The Court should reject Day's invitation to re-vivify her abandoned claim.

Day's Response failed identify even a single theoretical way in which the allegedly defective investigation of her reformation claim could have impacted her defense to the Smith and Lee claims. But equally importantly, Day has disclaimed any complaints about the defense and abandoned any claims about indemnification. RP 12-20-14. p. 63. The *only*

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[15] There is no duty to indemnify just because a claim is "arguably covered." Day confuses that standard with the duty to defend. An insurer is entitled to an actual determination of whether a loss is covered by the policy with respect to indemnification. *Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 53, 164 P.3d 454 (2007).*

consequence to Day of Enumclaw providing a defense is that she was capably and aggressively defended. That fact, standing alone, should not *enhance* her ability to claim the extreme remedy of a presumption of coverage by estoppel.

b. Without a presumption, Day did not establish any relationship between the claimed bad faith and her liability to Smith and Lee. This was a strategic, purposeful choice on her part

i. The jury's findings do not establish a causal link between bad faith and Day's liability to her victims.

The jury was instructed to award damages it found were proximately caused by the alleged bad faith. CP 1755. Its $300,000 award reflects the only causation it found, and it was based *exclusively* on Day's emotional distress related to the investigation of her indemnity claim. That causation has nothing to do with whether any action of Enumclaw caused her liability to Smith and Lee.

In her Response, Day conflates the jury's determination that Enumclaw's inadequate investigation proximately caused her $300,000 worth of emotional distress with a *conclusive determination* that Enumclaw's conduct proximately caused her $10 million (now exhausted) liability. *Response at 37-38* This is a sort of "bursting bubble" theory of bad faith, where all the insured has to do is prove some degree of emotional harm, and the bubble bursts: the insurer is conclusively

presumed to have proximately caused entry of the tort judgment against the insured. To be clear, ***no case*** has ***ever*** applied any such rule, and Day's link between her emotional distress and her $10 million (exhausted) liability to Smith and Lee is absolutely groundless. Even if this Court rules that a presumption of harm *did* arise, there is no connection between emotional distress and the resolution of her victims' claims.

Miller v. Kenny, 180 Wn. App. 772, does not support Day's argument to the contrary. *Miller* is not a case where the insured attempted to bootstrap a finding of causation of "personal damages" (such as emotional distress) into a conclusive determination that the insurer also caused the insured's liability to the third party. *Id* Rather, the jury determined as a factual matter that Safeco had failed to settle in bad faith, and Safeco made *no reported effort* to rebut the presumption that its actions proximately caused harm in the amount of the covenant judgment. Safeco's argument was that if the insured elected to use the covenant judgment as the measure of its harm, it could not *also* present evidence that the insurer's bad faith caused other "personal damages" including emotional distress. *Id.* The trial court allowed all of those claims to go to the jury, which awarded the $4.15 million value of the covenant judgment, and an additional $7.75 million for emotional distress. *Id.* The Court of Appeals rejected Safeco's "election" argument, and held that the value of

the reasonable covenant judgment was "floor, not the ceiling" of the insured's damages. That is to say, if the insured could prove "personal damages," those could be awarded on top of coverage by estoppel. *Id.*

While it is easy to see why the "floor, not the ceiling" language is appealing to Day, *Miller* actually stands for exactly the opposite proposition of what she cites it for. *Miller* does not address, and does not purport to decide, the circumstances under which a presumption of harm arises nor how it can be rebutted[16]. It certainly does not overrule cases like *Ledcor Indus (USA), Inc v Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255 (2009), and *Werlinger*, 129 Wn. App. 804, both cases where a presumption of harm was rebutted. Thus, when *Miller* speaks of the value of the covenant judgment as the "floor," it presupposes a factual setting where the presumption arose and was not rebutted, and there was ***actual liability outstanding***. The true holding of *Miller* is that the insured's entitlement to a judgment for the value of the covenant judgment is determined *independently* from the insured's entitlement to "personal damages." As that Court stated, "A covenant judgment. . . is the presumed measure of damage ***only*** for the insured's liability to third parties[17]. The damages personal to the insured are determined by a finder of fact."

[16] The Court noted it was limiting its analysis as the insurer suggested. "Safeco expressly states that the issue of presumed harm 'is not before the Court here. Rather, this case involves what damages are encompassed by a covenant judgment settlement '" *Id. at 799.*
[17] Again, in the context where the insurer could not rebut that presumption.

Miller, 180 Wn. App. at 802 (emphasis added). Day's argument that where a jury decides that bad faith was the proximate cause of "personal damages," the insurer is conclusively presumed to have proximately caused the insured's liability to a third party finds no support in *Miller*

Here, where the insurer can prove that the covenant judgment does ***not*** measure the insured's liability to a third party (as in *Werlinger*), and offers uncontested evidence that the maligned investigation was entirely and thoroughly complete before the settlement decision was made, there is no basis to ignore those facts just because the insured established "personal damages" of emotional distress. The jury did not "establish" that Enumclaw proximately caused Day any liability to Smith and Lee: it was prevented from hearing whether Day even had any liability.

Day also argues that this issue is immaterial, because Enumclaw would not have been allowed to make its rebuttal arguments in any event. She cites *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 782, 287 P.3d 551 (2012) for the proposition that "[t]his presumption may be rebutted only by a showing of fraud or collusion," and noting that fraud and collusion are not at issue in this case, concludes that the harm *cannot* be rebutted. This "holding," ***had it not appeared in the <u>dissent</u> of Bird***, would have directly contradicted *Bulter* and reversed both *Werlinger* and *Ledcor*, both cases where the insurer successfully rebutted a presumption

of harm without a hint of fraud or collusion.[18] And *Butler* was explicit: "[T]he insurer ***can*** rebut the presumption by showing by a preponderance of the evidence its acts did not harm or prejudice the insured." *Butler*, 118 Wn. 2d at 392 (emphasis added).

Given that Day limited her presentation to the jury to strictly "personal damages," it is wrong to assert the jury conclusively determined anything about proximate causation of her liability to Smith and Lee. If that issue had been presented to the jury, Enumclaw would have been entitled to present rebuttal evidence. Using that verdict to establish a fact that Enumclaw was not permitted to rebut was reversible error.

*ii. The court made no factual finding regarding a causal link between bad faith and Day's liability to her victims, other than stating its opinion that it "may well be" that there was **not** one.*

Before the trial began, Day moved *in limine* to exclude all evidence regarding the lead up to, and the facts surrounding, Day's settlement with Lee and Smith. At that time, Enumclaw objected to carving out just part of the claims handling process because Enumclaw should be allowed to present all of its defenses to whatever harm she

[18] The issue in *Bird* was whether the insurer was entitled to a jury trial to determine whether the settlement, already determined to have been reasonable by the court, was an accurate measure of the insured's damages. The discussion was limited, in both the majority and dissenting opinions, to rebutting the dollar value of the harm. *Id.* Of course, Enumclaw acknowledges that proof of fraud or collusion is *sufficient* (but not the exclusive method) to rebut the presumption.

might claim. RP 11/13/14, pp. 72-84, 11/17/14 5-8. Over Enumclaw's objection, the trial court allowed Day to present this truncated version of the claims handling process to the jury, but the judge noted, "It does seem well-established that the presumptive measure of damages, ***which can be rebutted posttrial***, is the amount of the settlement." RP 11/17/14 p. 8 (emphasis added). While Enumclaw disagreed about the scope of what the jury would consider, the trial court's pre-trial pronouncement did recognize that even if the jury determined bad faith and a presumption of harm arose, ***posttrial*** Enumclaw could rebut that presumption.

Posttrial, Enumclaw argued that if the court were to apply a presumption of harm, Enumclaw should be allowed to present live testimony rebutting that presumption. CP 1866. While the court recognized that ***nothing*** about what the jury actually determined would establish proximate causation of the "harm" related to the judgments,[19] it refused to consider whether Enumclaw had actually caused that harm as a factual issue:

> MR. BRENT BEECHER: . . . What I am suggesting is that this would have happened regardless of whether Enumclaw had investigated at the earlier stages of the claim. And we can

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[19] THE COURT: What they found is bad faith, and they found emotional damages of $300,000.

MR. BRENT BEECHER But there's nothing about that in and of itself that implicates an estoppel remedy.

THE COURT: No. Estoppel wouldn't be imposed by the jury, anyway That's a matter of law RP 2/9/15 p. 79

> prove it.
>
> THE COURT: Well, that may well be true. But I'm not sure it makes any difference.
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> RP 2/9/15 p. 90.

> MR. BRENT BEECHER: Is the Court deciding as a matter of law that Enumclaw cannot rebut the presumption?
>
> . . .
>
> THE COURT: I don't think that there is a presumption to rebut in this case. The legal principle of coverage by estoppel then takes us to the judgment that's already been determined to be reasonable and imposes it as a measure of damages in the bad faith action. That's what the Court's decision is.
>
> RP 2/9/15/ p. 87.

In neither its judgment (CP 2164), nor is colloquy related to estoppel (RP 2/9/15 p. 81-91) did the trial court find that there was any causal relationship between the jury's decision and the "harm" Day claims to have suffered by entry of judgments, presumptive or not, rebutted or not. Because neither the jury nor the judge made any factual finding about causation there was no basis for estoppel. This Court should reverse.

5. The trial court erred in entering the void judgments against Day.

a MOE's challenge to the entry of the judgments against Day is timely.

In a footnote, Day contends that MOE "did not challenge (or timely appeal) either the vacation of the dismissal or the judgment subsequently entered." *Response at 33, fn 6* If her contention is that the judgments she entered against herself were "final judgments" immediately

subject to appeal, she is mistaken. They were entered after the Smith and Lee lawsuit was consolidated with this lawsuit (CP 2190, CP 602), and were thus not final judgments under CR 54(b) because they did not resolve all claims between all parties:

> An order of consolidation effectively discontinues the separate actions and creates a single new and distinct action; the fact that separate judgments are entered does not overcome the effect of the consolidation.
>
> *Jeffery v. Weintraub*, 32 Wn. App. 536, 547, 648 P.2d 914, 921 (1982)

Where multiple judgments are rendered after consolidation, the appellant has a right to treat them as a single action, and file a single notice of appeal. *First Nat. Bank v. Fowler*, 51 Wash. 638, 640, 99 P. 1034, 1035-36 (1909). The judgments against Day were timely appealed at the conclusion of the consolidated action. And the notion that MOE "did not challenge" the entry of these judgments is incomprehensible. CP 786.

b. Substantively, the trial court erred in entering the judgments against Day.

The trial court erred by entering the Smith and Lee judgments against Day, because the prior satisfaction rendered the claims moot before judgments were entered. Because of the settlement, the *payment* pursuant to the settlement terms, and agreed *satisfaction*, the court could no longer offer Smith and Lee any effective relief, and therefore *their claims against Day* were moot. *Harbor Lands LP v. City of Blaine*, 146

Wn. App. 589, 595, 191 P.3d 1282, 1285 (2008) (*a case is moot where the court can no longer provide effective relief*). Because the Smith and Lee claims were "moot when the superior court entered judgment, th[ose] judgment[s] must be vacated." *Id.* While a conditional settlement does not moot a case, once payment has been made and the conditions satisfied, the settlement moots the claims of the parties. *Selcke v. New England Ins. Co.*, 2 F.3d 790, 791-92 (7th Cir. 1993).

The reason that Day desperately wanted these multimillion dollar judgments entered against herself is the same reason the court should not have entered them. Having something called a "judgment" "against" her lends judicial imprimatur to the idea that Day actually owed Smith and Lee something, and that Enumclaw should be forced to discharge her liability. But every important aspect of the "judgments" that were entered is ***false***. Smith and Lee are not "judgment creditors." CP 2195, 2191. A judgment creditor is "A person having a legal right to enforce execution of a judgment for a specific sum of money." Black's Law Dictionary (10th ed. 2014). Having settled and received payment from Huh, Smith and Lee formally agreed that any such judgment was fully satisfied. When a judgment is satisfied, "the lien of such judgment shall be discharged." RCW 4.56.100.

Similarly, Day is not a "judgment debtor": "A person against

whom a money judgment has been entered but not yet satisfied." Black's Law Dictionary (10th ed. 2014). While Day may coyly claim that she has *chosen* not to file the full satisfaction she has in her possession, that is an issue of the public record, not her liability on the "judgments." Smith and Lee are not entitled to seek money, and Day is not obligated to pay any.

Finally, the judgments recited that Day had liability to Smith in the amount of $4.6 million (CP 2195) and Lee in the amount of $5.5 million (CP 2191). That was false at the time the trial court signed them. The trial court put an official seal of judicial approval on an objectively false narrative, and converted a fabricated story of Day's "debt" into official public record. It is beneath the dignity of our system to allow such fiction.

It is important to distinguish the judgments here from the covenant judgments in *Butler*, 118 Wn. 2d 383, *Besel*, 146 Wn. 2d 730, and their progeny. In those cases, the Court has been careful to explain that the covenant judgment against the insured is an authentic judgment, but that the covenant restricts the tort victim to execution on a single asset of the insured: the insured's rights against the insurer. In those cases, and in fact in every reported covenant judgment case, the payment ultimately issued is to the victim of the insured's conduct, not to the insured after the claims against it are long gone. Thus the mootness argument Enumclaw makes here is inapplicable to the covenant judgments in those cases. In those

cases, the tort victim really is a judgment creditor; the insured really is a judgment debtor, and the amount recited on the face of the judgment really is the amount for which the insured is liable. The *Butler* line of cases does nothing to lessen the force of Enumclaw's argument that where an insured's liability has been settled, paid, and satisfied, no "judgment" should be entered because the case has been mooted.

It is easy to understand why Day wanted the trial court to enter something that made it look like she had liability to Smith and Lee. The cases that discuss binding an insurer to the value of the "covenant judgment" all presume, and quite naturally so, that the value of such a covenant judgment represents the amount in which the insured is indebted. By obtaining a "judgment" against herself, Day co-opts the powerful verbal imagery of "coverage by estoppel" and "covenant judgments." But the fact that Day was able to cajole Smith, Lee and the trial court to enter meaningless judgments against herself changes nothing about what harm she actually suffered. Judgments are amongst the most solemn tokens of judicial expression. They should not be treated as linguistic gimmicks to invoke caselaw which is otherwise inapplicable.

6. The trial court's failure to give the proposed instructions at issue is reversible error

a. Enumclaw was entitled to the proposed jury instructions

The instructions Enumclaw proposed are legally well-supported; two are verbatim Washington statutory law (with citations), one is quoted language from a Supreme Court case, and the last is foreign authority. There was sufficient evidence supporting Enumclaw's theory on these instructions, so failure to give them was reversible error. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386, 389 (2004).

It was insufficient to instruct the jury that Enumclaw had a duty to refrain from actions that were unreasonable frivolous or unfounded, and had a duty to investigate. To judge the adequacy of the investigation, the jury ought to have been told the law that governed Day's reformation claim. Not doing so would be like instructing a jury in a car accident case that the drivers had a duty to use due care, but refusing to instruct the jury on the legal rules establishing who had the right of way at the intersection. The instructions in the case at bar did not inform the jury of the law that was applicable to the handling of this claim, as it was being handled.

The trial court judge recognized, during the trial, that this was a pivotal issue. During the testimony of Day's claims-handling expert Smith, the judge was pondering the extent to which the expert should be allowed to testify about the law. The judge noted, "But ***how you decide*** whether or not you have an obligation to provide coverage, to provide indemnity coverage, ***is very much what the case is all about.***" RP

11/24/14, p. 97 (emphasis added). And then the judge allowed Smith's testimony, over Enumclaw's objection, that how you decide is by asking whether the agent had "binding authority" and whether the agent "made an error." *RP 11/24/14 p. 136.* Smith concluded, "[W]hen . . .you apply the standards that we've discussed, I think you can reach a conclusion that this should have been a covered claim." *Id. (See Appendix C to Appellant's Brief for surrounding relevant testimony).* Mr. Smith also testified that Enumclaw should have conceded the coverage question by resolving any doubts *in favor of providing coverage* ***regardless of whether Day had a meritorious reformation claim.*** RP 11/24/14 p.146-147. That is absolutely not the law, and the Court should have so instructed the jury. Enumclaw had a right to use such instruction in its closing argument to show that Smith was wrong about the issue facing Enumclaw, *and* whether Enumclaw was required to resolve doubts in her favor.

In fact, statutory law provides that whatever authority an agent has to issue an oral binder expires, at the latest, 90 days from its effective date. RCW 48.18.230, Proposed Ins. No. 1, CP 1715. Mr. Smith testified, incorrectly, "I think all they had to recognize was they had an agent with binding authority." RP 11-24-14, p. 139-140. Smith testified that an oral agreement in conflict with the insurance policy was valid even though not in writing and made a part of the policy, simply because of "agent error."

Id That is not the law. RCW 48.18.190. *Proposed Ins. No. 2 (CP 1716).* Smith testified that the issue *was not* "reformation," and that the insured gets the benefit of any factual doubts. The actual standard was annunciated in *Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am.*, 189 Wash. 329, 339.65 P.2d 689,693 (1937), proposed as instruction no. 13 (CP 1731):

> If the true agreement was expressed in the oral contract or in the binder, and either varies from the written policy, ***the only remedy is reformation*** of the written contract to make it conform to the true intent of the parties.

Allowing Smith to testify as to the incorrect legal standards that established *what* Enumclaw was supposed to be investigating would be like letting him testify that an insurer has to cover any loss that happens on a Tuesday, regardless of what the policy says, and that the insurer's failure to investigate the day of the occurrence is bad faith. The insurer should be entitled to argue under proper instructions what the law *actually is*.

Finally, Enumclaw proposed the following instruction: "An insurer has a duty to investigate whether the claims against its insured are covered by the policy as actually written by the insurer. However, an insurer has no duty to investigate an insured's claim that the policy should mean something other than the policy that was written by the insurer." CP 1719. Day incorrectly contends that this instruction (which cited *Jones v. Reliable Sec Incorporation, Inc.*, 29 Kan.App.2d 617 (2001)) is contrary

to *Tank* (Response at 39). Neither *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) nor any other case in Washington has ever held that an insurer has an obligation to investigate more than coverage under the actual policy issued. Washington has a strong statutory framework that is formulated to allow all parties to rely on the contents of insurance policies, as they are written. RCW 48.18.190, RCW 48.18.230. The burden of proving reformation *is on the insured*, by clear, cogent and convincing evidence of mutual mistake. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654,669, 63 P.3d 125 (2003). Nowhere on the list of items a Washington insurer is required to investigate in the context of a liability claim is "is the policy the written contract of insurance, or is it something else?" Imposing a burden on insurers to investigate reformation claims any time the insured "remembers" that its agent said there "should be coverage" would be an unprecedented obligation, beyond the contemplation of *Tank* or any other case, and directly contradicts statutorily enacted policy of demanding reliance on policies as written. This instruction is a correct statement of the law, and it was error for the court to refuse to give it.

b. Enumclaw did not waive its claim to instructional error.

Day claims that Enumclaw waived the right to challenge instructional error because it allegedly failed to object to the refusal to

give them. This contention is meritless. There are pages of argument about each of these instructions in the record, and rulings from the court refusing to give them:

- Proposed Instruction No. 1 (CP 1715): RP 12-3-14 p. 49-54.
- Proposed Instruction No. 2 (CP 1716): RP 12-3-14 p. 54-58.
- Proposed Instruction No. 5 (CP 1719) RP 12-3-14 p. 61-62
- Proposed Instruction No. 13 (CP 1731) RP 12-3-14 p. 13-19.

The trial court made it clear that it was ruling on the instructions on the basis of this argument, and would *not* revisit the issues: "We're going to go through these instructions, and I'm going to rule on them. And then we're going to keep going because I am not going to get bogged down in postruling discussions." RP 12-3-14, p. 22. There is no rule or case that a party must re-object to the court's failure to give an instruction that has been fully argued and ruled upon. In fact, just the opposite:

> CR 51(f) requires a party objecting to a jury instruction to "state distinctly the matter to which he objects and the grounds of his objection." This objection allows the trial court to remedy error before instructing the jury, avoiding the need for a retrial. The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection. So long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review.
>
> *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 746-47, 310 P.3d 1275, 1283 (2013)

Here, Enumclaw fully apprised the trial judge of the nature and substance of its objection to the court's failure to give the proposed

instructions. The error was preserved.

Although Enumclaw described the instructions the court failed to give in its Issues, Day also contends that failure to number the instructions in that section was technical errata of Enumclaw's opening brief. RAP 10.3(g). However, Enumclaw did clearly assign error to the court's failure to give instructions, and its brief explicitly identified (by number and cite) which instructions it contends ought to have been given, quoting them in the content of the brief. Presuming this constitutes errata, "A minor technical violation of RAP 10.3(g) will not bar appellate review where the nature of the challenge is perfectly clear and the challenged ruling is set forth and fully discussed in the appellate brief." *Polygon Nw. Co. v. Am. Nat. Fire Ins. Co.*, 143 Wn. App. 753, 774, 189 P.3d 777, 788 (2008), *cf. Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000).

6. *The trial court erred in applying an IFCA multiplier to emotional distress damages.*

   a *The undifferentiated verdict did not waive the issue of whether the IFCA multiplier should apply to emotional distress damages.*

Day argues that Enumclaw is precluded from challenging the IFCA multiplier on emotional distress because it agreed to a verdict form that did not differentiate IFCA liability versus bad faith liability. A single interrogatory was appropriate for the two causes of action because both

turned on Day's alleged violation of the WAC regulations. But the proper legal characterization of damages the jury found was expressly reserved to the court. During argument regarding the verdict form, the court recited the stipulation that allowed a single interrogatory to be used:

> THE COURT: So then the agreement is that if there were bad faith damages, emotional distress damages, ***that would be up to the Court to determine whether it related to IFCA or just generally bad faith and the degree to which, if at all, there should be a multiple on those damages***. Meaning that the proximate cause, if they find there was proximate cause, would apply equally to both of the claims, the regulatory breach as well as the tort bad faith. Okay?
>
> RP 12/3/14 p. 80.

Nothing about the use of an undifferentiated verdict form allowed the jury to decide the purely legal issue of whether emotional distress damages are "actual harm" under the IFCA.

b. Failure to raise this issue below does not preclude review.

Day correctly notes that the issue of emotional distress damages as "actual harm" under the IFCA was not squarely presented to the trial court. As she also notes, the only case that even obliquely addresses this issue is *Schreib v. Am. Family Mut. Ins. Co.*, 2015 WL 5175708 (W.D. Wash. 2015), decided in September 2015. Judgment against Enumclaw was entered five months earlier. The ban on appellate consideration of issues not raised at the trial court is discretionary, and does not apply at all

where the issue raised affects the right to maintain the action, particularly where the rights of the parties depend upon the applicability of a statute that the court is "duty bound to know does not govern the case." *Maynard Inv Co. v. McCann*, 77 Wn.2d 616, 621-22, 465 P.2d 657, 660-61 (1970), *see also Cole v. Harveyland, LLC*, 163 Wn. App. 199, 209-11, 258 P.3d 70, 76-77 (2011), *Pulcino v. Fed Express Corp.*, 141 Wn.2d 629, 649, 9 P.3d 787, 798 (2000), *Bennett v. Hardy*, 113 Wn.2d 912, 917-19, 784 P.2d 1258, 1260 (1990). Here, because the IFCA does not apply to emotional distress, Day had no cause of action under the statute.

c Under IFCA, "actual damages" does not include emotional distress.

Our courts have read some statutory provisions for "actual damages" to include emotional distress, and others, under *identical* language, not to; "'actual damages' has a 'chameleon-like quality' because 'the precise meaning of the term 'changes with the specific statute in which it is found.'" *Segura v. Cabrera*, 184 Wn.2d 587, 595, 362 P.3d 1278, 1282 (2015) (citations omitted). The factor that differentiates statutes that embrace emotional distress from those that do not is whether the statute provides protection against injury to the person, versus a different remedy. For example, statutes that encompass personal harm

include the Fair Credit Reporting Act[20], and the Washington Law Against Discrimination[21]. "Both the FCRA and WLAD guard against harm to the person [akin to defamation]." *Id at* 594. However, where the statute has no similar purpose, "actual damages" does not include emotional distress. *Id.* For example, where a landlord *intentionally* rents a condemned unit, the tenant is entitled to "up to treble the actual damages sustained as a result of the violation." RCW 59.18.050. The Supreme Court ruled that the purpose of this statute was to cover the actual costs of tenant relocation, not protect against damaged emotions. *Segura v. Cabrera*, 184 Wn.2d 587. The Court noted that the Consumer Protection Act, which provides for up to treble "actual damages" protects "business or property," not personal injuries, and therefore did not include emotional distress. *Id.*

With respect to the IFCA, the statute makes clear that its purpose is to prevent the unreasonable denial of "a claim for coverage or payment of benefits to any first party claimant." RCW 48.30.010. The trebling provision states, "The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated [an enumerated WAC provision], increase the total award

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[20] "[W]hose purpose is "to protect an individual from inaccurate or arbitrary information about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment" *Id*

[21] "The purpose of WLAD is to protect the "public welfare, health, and peace of the people" because "discrimination threatens [their] rights and proper privileges." *Id*

of damages to an amount not to exceed three times the actual damages." RCW 48.30.015. This language focuses entirely on ensuring that the claimant has received the benefits to which it was entitled *under the policy*. Notably, the statute recognizes that there are *other* legal remedies outside of the statute: "(6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law." *Id* One of these "other remedies" for insurer bad faith is emotional distress damages. *Miller*, 180 Wn. App. at 802. *Schreib* did not "erroneously" conclude that there could be no recovery of emotional distress damages for insurer bad faith; *Shreib* confirmed that there *can be* – they are just not "actual damages" under the IFCA. The court erred by using the IFCA to treble emotional damages, and this Court should reverse that determination. This argument is moot if the Court orders a new trial.

II. Response to Day's Cross Appeal

1. The Court should not consider Day's argument regarding denial of her motion for summary judgment.

a. Day did not appeal the denial of her motion for partial summary judgment regarding harm.

In neither Day's Notice of Cross-Appeal nor her Amended Notice of Cross-Appeal is there even a whisper of her claim to challenge this alleged denial of her motion for partial summary judgment. That alone

prevents review of this issue under RAP 5.3(a)(3). *Gomez v. Sauerwein*, 172 Wn. App. 370, 376-77, 289 P.3d 755, 758 (2012). *Burke v. Hill*, 190 Wn. App. 897, 917, 361 P.3d 195, 204 (2015). The only exception to this rule is where the order complained of "prejudicially affects" the order that *was* properly designated. *Id.* Here, Day's summary judgment on the issue of harm is unrelated to her complaint that the court ruled against her reformation claim. The alleged denial of her motion for partial summary judgment is not properly before this Court.

b. Day is not permitted to appeal the denial of her motion for summary judgment where she acquiesced to the court treating it as a motion in limine (which the court ***granted****) and subsequently abandoned those claims at trial*

Day contends that the trial court "denied" her motion for partial summary judgment establishing harm. That never occurred[22]. Day did bring such a motion, but the court deferred ruling on it, reserving the issue. CP 1238-1239. When the issue was revisited during argument on motions *in limine*, the court decided it was an evidentiary issue, *granted* it, and titled it "Order Granting Motion in Limine Regarding Harm" (the Order was apparently not filed). RP 11/17/14 p. 5. Day acquiesced in this approach. *Id.* She then elected not to put any evidence of what the claim could have been settled for before the jury. She chose not to assert that she

[22] The Order she cites as a "denial" of her motion (CP 314) was actually a denial of a motion for partial summary judgment brought by Enumclaw months earlier

had "lost control of the defense" (an absurd claim devoid of evidence). Similarly, she decided not to present evidence of any attorney fees or costs she allegedly incurred because of Enumclaw's actions. She is requesting this Court to order judgment on claims that she freely abandoned when these issues were tried. "[A] denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." *Johnson v. Rothstein*, 52 Wn. App. 303, 303-05, 759 P.2d 471, 472-73 (1988). Not only did Day *win* her motion, she voluntarily abandoned these claims by not presenting them at trial. The Court should not revisit them.

2. *The Court should affirm the dismissal of Day's reformation claim.*

Day asks this Court to depart from established law on reformation, and rule that alleged misconduct of the insurer six years after the formation of the insurance contract, as part of the investigation of a claim, relieves her of the obligation to prove mutual mistake by clear and convincing evidence. The Court should not consider this argument because Day actively endorsed and invited the trial court to apply the mutual mistake standard, thus inviting precisely the alleged error of which she now complains. Ultimately, she is substantively incorrect that unilateral mistake is sufficient to support a claim for reformation where the alleged misconduct takes place six years after formation.

a. Day invited the "error" of which she now complains.

The "invited error" doctrine holds that where a party sets up an error at the trial court, it is barred from complaining about that error on appeal. *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, 611-12 (2003). Here, the claim for reformation was asserted by Day, and she was entitled to argue and attempt to prove it how she saw fit. She unequivocally argued to the trial court that the law required her to prove that both Day *and Huh* had experienced a mutual mistake, and that she had to prove it by clear, cogent and convincing evidence. Here is what she told the trial court:

> MR. KILPATRICK: They don't dispute the law that when there is a mistake it can be corrected or it should be corrected –
>
> THE COURT: It has to be a mutual mistake.
>
> MR. KILPATRICK: ***A mutual mistake, absolutely, absolutely.***
>
> ...
>
> THE COURT: The dispute is that Mr. Huh says she didn't ask and she declined it. And Ms. Day stated that she wanted the same thing that Mr. Kim had, and that included liquor liability. So on the face of it there isn't a mutual mistake.
>
> MR. KILPATRICK: ***Yes, that's right.***
>
> RP 2/9/15, p.4

Similarly, Day acknowledged and endorsed the clear, cogent and convincing standard in her briefing:

> As long as the surrounding circumstances and credible testimony show ***cogently and convincingly*** that a different agreement was reached than the insurance policy carried out,

> and the evidence is ***clear*** what the terms of the insurance were to be, reformation is required.
>
> CP 1827.

Having invited the trial court to apply these standards, she should not be allowed to complain about the result on appeal.

b. Substantively, Day is incorrect about reformation.

Even if Day had not invited and waived her claimed error, the Court should not radically depart from the well-established law on reformation. The rule is clear:

> A party may seek reformation of a contract if (1) the parties made a mutual mistake or (2) one of them made a mistake and the other engaged in inequitable conduct. However, *reformation is justified only if the parties' intentions were identical at the time of the transaction. The party seeking reformation must prove the facts supporting it by clear, cogent and convincing evidence.*
>
> *Denaxas*, 148 Wn.2d at 669 (citations omitted, emphasis added)

Despite her previous embrace of the "mutual mistake" position, Day's new argument is that if an insured can prove "inequitable conduct" *six years* after formation of the contract, then the insured should only have to show a unilateral mistake as of the time of formation. Not only was there *no* evidence that Enumclaw fraudulently concealed anything from Day (at worst, a failure to investigate), but the cases she cites lend her no support. For example, in *Associated Petroleum Products, Inc. v. Nw.*

Cascade, Inc., 149 Wn. App. 429, 437-38, 203 P.3d 1077 (2009), the Court applied the "unilateral mistake" rule to the "account stated" principle. The court noted that a stated account becomes a new contract, then determined that there was a question of fact about whether there had been inequitable conduct *at the time* that new contract was formed. The Court was careful to point out that the "term 'mistake' refers to the party's *beliefs* ***at the time the contract is made***. . ." *Associated Petroleum Products, Inc. v Nw. Cascade, Inc.*, 149 Wn. App. 429, 437, 203 P.3d 1077 (2009) (emphasis added). *See also Berkshire Hathaway Homestate Ins. Co. v. SQI Inc.*, 2015 WL 5555012 (Sept. 21, 2015, W.D. Wash.) *(Inequitable conduct only relevant "during the formation of their contracts.")*

Day also cites *Osberg v Foot Locker, Inc.* 2015 WL 5786523 (S.D.N.Y. Oct 5, 2015) for the proposition that her unilateral mistake should be sufficient. This ERISA case from the federal court in New York adds nothing to the analysis. This is but another case holding that where there is a unilateral mistake, the party urging reformation must prove inequitable conduct at the time of formation (in that case, a plan conversion). There, Footlocker as plan fiduciary, knew that its summary materials misrepresented the terms of the plan, and the class was reasonably mistaken in its belief that the plan conformed to the summary.

Reformation was appropriate based on that unilateral mistake combined with fraudulent misrepresentations of the other side at the time the contract was formed.

Here there was no evidence, and Day does not suggest even an inference, that there was any fraud or inequitable conduct by Huh at the time the policy issued. The Court should reject her invitation to jettison the basic elements of reformation, and affirm the judgment of the trial court dismissing her claim for reformation.

Respectfully submitted,

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MUTUAL OF ENUMCLAW INSURANCE COMPANY, Appellant / Cross-Respondent, v. MYONG SUK DAY, dba STOP IN GROCERY, Respondent / Cross-Appellant.	NO. 47494-8-II DECLARATION OF SERVICE

Brent Beecher, declares under penalty of perjury, that on the date noted below he caused a copy of the Reply / Cross-Response Brief of Appellant to be delivered to the Court and parties listed below, by placing a copy of it in the U.S. Mail:

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