

Jun 20, 2016, 8:45 am

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Supreme Court No. 92425-2
Spokane Co. Superior Court Cause No. 15-2-00436-5

SUPREME COURT OF THE STATE OF WASHINGTON

ANASTASIA FORTSON-KEMMERER, an individual,

Petitioner-Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent-Defendant.

PETITIONER'S REPLY BRIEF

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Comm 6-20-16

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Plaintiff-Petitioner Anastasia Fortson-Kemmerer (Fortson) submits this reply to the brief submitted by Defendant-Respondent Allstate Insurance Company (Allstate):

I. REPLY

A. Allstate does not dispute the material facts relating to the underlying UIM action and this action for the common law tort of insurance bad faith and violations of the Insurance Fair Conduct Act.

In particular, Allstate does not dispute the following:

- Fortson was injured in an automobile collision caused by an uninsured motorist, and made a claim with Allstate for UIM benefits. Allstate Br., at 5.
- Allstate repeatedly offered \$9,978 to settle Fortson's UIM claim. CP 5 & 13; Allstate Br., at 6.
- Allstate had not completed its investigation of Fortson's claim when it made the offers. CP 5 & 13.
- Fortson filed an action to obtain the full UIM benefits to which she was entitled under her policy with Allstate. The action did not include any extra-contractual claims. CP 66 & 165-97; Allstate Br., at 6-7.
- After Fortson filed the UIM action, Allstate suspended its investigation of her claim. CP 6.
- Fortson received an award of \$43,017 in damages plus \$1,134.11 in costs in mandatory arbitration. CP 6, 14 & 41-43; Allstate Br., at 7.
- After the arbitration award, Allstate offered to settle the UIM claim for \$25,000. CP 6 & 14.

- Fortson declined to accept less than the arbitration award, and the award was eventually reduced to judgment and paid. CP 6.
- Fortson filed a second action against Allstate for the tort of insurance bad faith and violations of Washington's Insurance Fair Conduct Act (IFCA), RCW 48.30.015. CP 3-9; Allstate Br., at 7-8.
- The bad faith/IFCA complaint alleged that Allstate failed to conduct a reasonable investigation of Fortson's claim, and that its low settlement offers were unreasonable, constituted a constructive denial of her claim, and compelled her to initiate litigation and prosecute her UIM claim to judgment in order to obtain the full benefits due under her policy. CP 7-8.
- Allstate obtained dismissal of the second action on grounds of res judicata, relying on two federal court decisions issued after litigation of Fortson's UIM action was completed. CP 49-56 & 262-67; Allstate Br., at 9-11.

B. Allstate does not dispute its prior statements regarding the relationship between UIM and extra-contractual claims.

Allstate does not dispute the fact that it made the following statements to obtain bifurcation of UIM and extra-contractual claims, nor does it dispute that the following statements are accurate:

- A UIM claim focuses on the amount of benefits due under the policy, and involves the same issues, evidence and discovery as a tort claim for damages as a result of an automobile accident, with the insurer stepping into the shoes of the underinsured driver. CP 99, 110-11, 125-26, 130-32 & 160-61.

- Extra-contractual claims focus on the insurer's conduct in the claims handling process, and involve different issues, evidence and discovery than a UIM claim. CP 99, 110-11, 118, 125-26, 130-32 & 160-61.
- Extra-contractual claims are "dependent upon resolution" of an underlying UIM claim, and are "premature" until after the underlying UIM claim has been completely resolved. CP 100, 107 & 117. It is "literally impossible to narrow issues, determine relevancy, and triability of issues, and even to determine whether there is any question of fact as to any extra-contractual claim." CP 100 (lines 4-6).
- In some cases, resolution of the underlying UIM claim may "eliminate the need for" or "moot" extra-contractual claims. CP 99-100, 103 & 119.

Although it argues these statements do not give rise to judicial estoppel, Allstate does not deny them or attempt to reconcile them with the statements made in support of its res judicata defense in this case.

C. The parties agree regarding the elements of res judicata, but Allstate incorrectly applies the elements to this case.

The parties agree regarding the elements of res judicata: (1) identical *persons*, (2) identical *quality* of the persons for or against whom the claim is made, (3) identical *subject matter*, and (4) identical *causes of action*. See Fortson Br., at 23-24; Allstate Br., at 14. Allstate does not dispute that every element must be satisfied, and a lack of identity in any single element is sufficient to preclude

application of res judicata. See *Fortson Br.*, at 23-24 (citing *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn. 2d 853, 866, 93 P.3d 108 (2004)).¹

The parties agree that the underlying UIM action and this action involve identical persons. See *Fortson Br.*, at 24; *Allstate Br.*, at 17-18. However, they disagree regarding the remaining elements of res judicata.

¹ In the superior court *Allstate* argued that it is not necessary to satisfy all four elements of res judicata. See *Fortson Br.*, at 24 n.12 (quoting CP 50, lines 6-8). However, *Allstate* has not made this argument in its response brief, and appears to have abandoned it on appeal. See *Diel v. Beekman*, 1 Wn. App. 874, 876, 465 P.2d 212 (1970) (stating “[p]laintiffs advanced this argument to the trial court but failed to argue it in their brief. It is therefore regarded as abandoned”), rev. denied, 81 Wn. 2d 1007 (1972). The federal district court decisions on which *Allstate* relies are wrong when they state that it is not necessary to satisfy all four elements of res judicata under Washington law. See *Zweber v. State Farm Ins. Co.*, 39 F. Supp. 3d 1161, 1166 (W.D. Wash. 2014) (quoting *Smith v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 1499265, at *4 (W.D. Wash., Apr. 11, 2013)); *Smith*, 2013 WL 1499265, at *4 (quoting *Feminist Women’s Health Center v. Codispoti*, 63 F.3d 863, 867 (9th Cir. 1995)). The authority to which this statement can be traced is addressing the four sub-elements of a single element of res judicata (identity of cause of action), not the four elements of res judicata. See *Codispoti*, 63 F.3d at 867 (citing Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 816 (1985)). In any event, the federal district court decisions do not trump *Hisle*, which stated that it is necessary to satisfy all four elements of res judicata and found the absence of a single element to be dispositive in rejecting application of the defense. See 151 Wn. 2d at 866.

1. Allstate effectively eliminates the element of res judicata requiring identical *quality* of persons by conflating it with identity of *persons*, and further ignores authority defining *quality* as analogous to *capacity* and holding that an insurer acts in a different capacity in defending a UIM claim than in other first-party insurance contexts.

Allstate equates identity of *quality* of persons with an identity of *persons*, stating: “[b]ecause the parties are identical in both [Fortson’s underlying UIM claim] and [her subsequent bad faith claim], the quality of persons is also identical.” Allstate Br., at 36 (brackets added). This approach effectively eliminates the distinction between identity of *quality* of persons and identity of *persons*, even though they are separate elements of res judicata.

In advocating this approach, Allstate ignores authority stating the *quality* of persons is analogous to *capacity*. See Fortson Br., at 30 (citing *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn. App. 222, 231, 308 P.3d 681 (2013); Trautman, *supra*, at 821). Allstate also ignores authority distinguishing the capacity of an insurer defending a UIM claim as compared to other first-party insurance contexts. See Fortson Br., at 30 (citing *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn. 2d 766, 781-82, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 486, 78 P.3d 1274

(2003)).² In keeping with this authority, the Court should hold that the *quality* of persons is not identical in UIM and extra-contractual claims. Since this essential element of Allstate's res judicata defense is missing, the underlying UIM action should not bar Fortson's bad faith/IFCA action.

In support of its attempt to equate identity of *quality* of persons with identity of *persons*, Allstate cites *Pederson v. Potter*, 103 Wn. App. 62, 73, 11 P.3d 833 (2000), *rev. denied*, 143 Wn. 2d 1006 (2001). *See* Allstate Br., at 36. The *Pederson* opinion states:

res judicata requires identity in the quality of persons for or against whom the claim is made. Because the parties are identical, the quality of the persons is also identical. *See Rains v. State*, 100 Wash.2d 660, 664, 674 P.2d 165 (1983).

103 Wn. App. at 73 (citation in original). While this quotation appears to support Allstate's argument by conflating identity of *quality* of persons with identity of *persons*, *Pederson* does not purport to eliminate *quality* as an independent element of res judicata, nor does it foreclose the analogy between *quality* and *capacity* in *Berschauer*, *supra*.

² *See also Cedell v. Farmers Ins. Co.*, 176 Wn. 2d 686, 697, 295 P.3d 239 (2013) (stating "[t]he UIM insurer steps into the shoes of the tortfeasor and may defend as the tortfeasor would defend"); *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn. 2d 303, 308, 88 P.3d 395 (2004) (stating "[f]or purposes of UIM coverage, the insurance carrier is said to stand in the shoes of the tortfeasor, and payments made by the UIM carrier are treated as if they were made by the tortfeasor").

The authority on which *Pederson* relies does not support elimination of *quality* as an independent element of res judicata. In *Rains*, the Court held that the quality of persons is based on substance rather than form, so that nominally different parties can be considered qualitatively identical under appropriate circumstances for purposes of applying res judicata. See 100 Wn. 2d at 664. *Rains* did not hold that an identity of *persons* necessarily establishes the identity of *quality* of persons. See *id.* Under the substantive principle applied in *Rains*, even identical parties would have to be considered qualitatively different when they are acting in different capacities, as in this case.

The quoted language from *Pederson* should be viewed in light of the facts. The case involved parties to a business transaction whose capacity remained the same in two separate actions.³ Under these facts, there was no reason for the court to distinguish the identity of *quality* of persons from the identity of *persons*. Because the court did not need to make a distinction between these elements

³ The Potters sold a business and leased certain property to the Pedersons. See 103 Wn. App. at 65-67. When the Pedersons defaulted on their obligations under the sale and lease agreements, the parties entered into a settlement agreement that included a confession of judgment in favor of the Potters in case of further default. See *id.* When the Pedersons defaulted again, the Potters filed the confession of judgment. See *id.* After determining that the confession of judgment was a final judgment on the merits, the court held that it barred a subsequent action by the Pedersons. See *id.* at 72-73.

of res judicata, *Pederson* should not be construed as eliminating *quality* as an independent element.⁴

2. Allstate attempts to portray Fortson's bad faith/IFCA action as having the same subject matter as the underlying UIM action based solely upon an argumentative characterization that is contrary to its prior statements and course of conduct as well as the applicable law.

Allstate contends that UIM and extra-contractual claims involve identical subject matter based on a characterization of both claims as involving, at some level, the failure to pay UIM benefits, relying on the federal district court decision in *Zweber*. See *Allstate Br.*, at 34 (arguing “identity of subject matter” is present because “[i]n both lawsuits, Fortson’s principle assertion is that Allstate improperly determined the amount of UIM damages she was entitled to recover”). In adopting this characterization, Allstate does not attempt to justify the level of generality it employs for determining identity of subject matter. Allstate could just as easily contend that UIM and extra-contractual claims have identical subject matter because they both involve insurance.

Allstate’s characterization of the subject matter of UIM and extra-contractual claims in this case is at odds with its prior

⁴ Other cases cited by Allstate seem to treat identity of *quality* of persons separately from identity of *persons*, although this element was not disputed by the parties. See *Allstate Br.*, at 36 (citing *Zweber*, 39 F. Supp. 3d at 1168; *Smith*, 2013 WL 1499265, at *4; *Codispoti*, 63 F. 3d at 867).

statements. In its statements, Allstate notes that UIM claims focus on the amount of benefits due under the policy, which correspond to the damages caused by the fault of an underinsured motorist, while extra-contractual claims focus on the insurer's conduct in the claims handling process. *See* CP 99, 110-11, 118, 125-26, 130-32 & 160-61. Whether or not these statements give rise to judicial estoppel, they undercut Allstate's characterization of the subject matter of UIM and extra-contractual claims here.

In addition, Allstate's characterization of the subject matter of UIM and extra-contractual claims is at odds with its course of conduct. It is undisputed that Allstate has a practice of hiring separate counsel to defend UIM and extra-contractual claims and seeking to bifurcate these claims when they are brought in the same action. CP 62 & 75-77. This conduct further undercuts Allstate's characterization of the subject matter of UIM and extra-contractual claims.⁵

⁵ Fortson filed a motion to continue summary judgment proceedings under CR 56(f) to obtain specified discovery regarding Allstate's business practice of separately handling of UIM and extra-contractual claims. *See* Fortson Br., at 19-20. Business practices are relevant to whether actions should be deemed identical for purposes of applying res judicata. *See id.* at 36-37 (collecting Washington cases and secondary authorities). Fortson had not already obtained this discovery because Allstate previously represented that its summary judgment motion would be limited in scope. *See id.* at 20 n.9. In its response to Fortson's CR 56(f) argument on appeal, Allstate does not acknowledge the specific discovery requested or the authority establishing the relevance of the discovery. *See* Allstate Br., at 48-49. The present state of the record is sufficient to reverse summary

Most importantly, Allstate's characterization of the subject matter of UIM and extra-contractual claims is contrary to this Court's precedent defining the identical subject matter element of res judicata. "[T]he same subject matter is not necessarily implicated in cases involving the same facts," and an action premised on an obligation established in an earlier action is deemed to involve different subject matter. *Hisle*, 151 Wn. 2d at 865-66; see also *Fortson Br.*, at 28-29 (discussing *Hisle*). Allstate appears to acknowledge this rule, but attempts to avoid it by simply repeating its characterization of the relationship between UIM and extra-contractual claims. See *Allstate Br.*, at 35-36 (also discussing *Hisle*).

Fortson's bad faith/IFCA action is necessarily premised upon the obligation to pay UIM benefits established in the underlying action because, among other things, she alleges that Allstate violated the Insurance Commissioner regulation that prohibits "[c]ompelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than *the amounts ultimately recovered in such actions or proceedings.*" WAC 284-

judgment in favor of Allstate on res judicata, but it is not sufficient to grant summary judgment without the benefit of the discovery requested by Fortson. If the Court is not inclined to hold that res judicata is inapplicable, it should remand for discovery.

30-330(7) (brackets & emphasis added). A violation of this regulation constitutes evidence of bad faith and a violation of IFCA. *See* RCW 48.30.015(5)(a); WPI 320.06. Because the bad faith/IFCA action is premised upon “the amounts ultimately recovered” in the UIM action, it does not involve the same subject matter as the underlying UIM action. The inability to satisfy this element of res judicata is an independently sufficient basis to reject Allstate’s res judicata defense.

3. Allstate agrees regarding the sub-elements for determining whether there is an identity of cause of action, but misapplies them to the facts of this case.

The parties agree that four factors or sub-elements are considered in evaluating whether causes of action are identical: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *See* Fortson Br., at 24; Allstate Br., at 18. The parties also agree that these factors provide a framework for analysis rather than a mechanistic test. *See* Fortson Br., at 25;

Allstate Br., at 18. However, the parties disagree regarding application of this framework.

a. Because Fortson’s bad faith/IFCA action takes the result of the underlying UIM action as a given, no rights established in the underlying UIM action will be impaired.

Allstate contends that the rights established by Fortson’s prior UIM judgment would be impaired by this action on grounds that it satisfied the UIM judgment and “reopening the litigation would impair that satisfaction and potentially expose Allstate to additional liability.” Allstate Br., at 19. This reasoning is unsupported by authority, and is flawed on several levels.

First, this bad faith/IFCA action does not “reopen” the UIM action. On the contrary, the bad faith action takes the result of the UIM action as a given. Fortson does not seek to relitigate the amount of contractual damages awarded under her UIM policy. Instead, to the extent it is relevant to her extra-contractual claims, she seeks to give it collateral estoppel effect in this proceeding.⁶

Second, the prospect of liability in this bad faith/IFCA action does not “impair” the satisfaction of the judgment entered in the UIM action. The judgment remains satisfied. *See* RCW 4.56.100

⁶ *Cf. Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 572, 320 P.2d 311 (1958) (holding “judgment fixing the tort liability of the [insured] defendant in the main action is not *res judicata* of the indemnity liability of the insurance company,” although “the doctrine of collateral estoppel applies in a proper case”).

(regarding satisfaction of judgments). Allstate is essentially claiming that the amount of its contractual liability established in the UIM action should somehow act as a cap on its extra-contractual liability in this action, but there is no basis for this claim.⁷

Third, the prospect of liability in this action does not impose “additional liability” on Allstate in the sense of increasing the amount of its contractual obligation established in the UIM action. Liability is additional only in the sense that bad faith and IFCA claims redress different wrongs and provide different remedies. The cause of action is not identical because no rights established in the UIM action will be impaired in this bad faith/IFCA action.

b. Allstate acknowledges that Fortson’s bad faith/IFCA action involves different evidence in its response brief, a fact confirmed by Allstate’s prior statements.

Allstate acknowledges that “some new evidence would be introduced in the [this bad faith/IFCA action] regarding Allstate’s alleged conduct while investigating and evaluating the UIM claim.” Allstate Br., at 21 (brackets added). This understates, but is nonetheless confirmed by, Allstate’s prior statements regarding the

⁷To the extent of any overlap in damages, Fortson would be subject to the rule against double recoveries. *See Rekhter v. State Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 121, 323 P.3d 1036 (2014) (stating “Washington courts have consistently implemented rules designed to prevent double recoveries”).

extent to which the evidence in UIM and extra-contractual actions differs. *See* CP 111 (line 8, “completely different ... evidence”); CP 125 (lines 12-14, “evidence necessary to support a bad faith claim is ‘very different from that necessary to support a claim for UIM benefits’”); CP 132 (lines 9 & 12, “evidence for each claim is distinct” and “requires substantially different witnesses and evidence”); CP 160 (line 18, “completely different discovery and evidence”).

Allstate claims there will be an overlap of “evidence regarding the facts of the accident, the tortfeasor’s negligence in causing the accident, and the value of Fortson’s injuries.” *Id.* However, to the extent of overlap, the facts established in the underlying UIM action will have collateral estoppel effect, and such evidence will not have to be re-introduced in this matter.⁸ There is minimal overlapping evidence and the cause of action is not identical.

⁸ Allstate discussion regarding bifurcation of UIM and extra-contractual claims seems to acknowledge that the result of the UIM claim is binding on extra-contractual claims. *See* Allstate Br., at 22 (stating “when Allstate moves to bifurcate, it requests that the UIM breach of contract issues be resolved first, before the bad faith/IFCA issues are resolved. Consequently, *the jury’s UIM damage verdict is binding for purposes of the subsequent bad faith/IFCA phase of the trial; the verdict is the measure of UIM damages in the second phase of the trial, for purposes of evaluating whether Allstate acted reasonably in its evaluation and investigation of the insured’s UIM claim*”; emphasis added).

c. Allstate’s argument that UIM and extra-contractual actions involve infringement of the same right is based on the same unwarranted characterization regarding the relationship between such claims that it uses to establish identity of subject matter.

To support its claim that UIM and extra-contractual claims involve infringement of the same right, Allstate invokes the same characterization of the relationship between these claims that it uses to establish identity of subject matter jurisdiction. *Compare* Allstate Br., at 24 (arguing infringement of the same right is present because “both lawsuits involve Fortson’s claim that Allstate infringed on her right to UIM benefits”), *with id.* at 34 (arguing identity of subject matter is present because “[i]n both lawsuits, Fortson’s principle assertion is that Allstate improperly determined the amount of UIM damages she was entitled to recover”). As noted above, this characterization is contrary to Allstate’s prior statements and course of conduct.

In making its characterization, Allstate does not address differences in the rights involved in UIM and extra-contractual claims, which were pointed out in Fortson’s opening brief. These rights have a different source: UIM claims are contractual, while extra-contractual claims are grounded in the common law and statute. *See* Fortson Br., at 26. They redress different wrongs:

breach of contract versus improper claims handling. *See id.* They are independent of each other: while breach of contract and improper claims handling may occur in the same case, breach of contract is neither necessary nor sufficient to establish bad faith or a violation of IFCA. *See id.* Because different rights are involved, the cause of action is not identical.

d. Allstate’s argument that UIM and extra-contractual actions involve the same transactional nucleus of facts is based on the same unwarranted characterization regarding the relationship between such claims that it uses to establish identity of subject matter and infringement of the same right.

To support its contention that UIM and extra-contractual claims involve the “same transactional nucleus of facts,” Allstate again invokes the same characterization of the relationship between these claims that it uses to establish “identity of subject matter” and “infringement of the same right.” *Compare* Allstate Br., at 30 (arguing same transactional nucleus of facts is present because “[b]oth [claims] are, at a fundamental level, based on Allstate’s alleged refusal to pay Fortson the amount of UIM benefits she believed she was entitled to recover”), *with id.* at 24 (arguing infringement of the same right is present because “both lawsuits involve Fortson’s claim that Allstate infringed on her right to UIM

benefits”), *and id.* at 34 (arguing identity of subject matter is present because “[i]n both lawsuits, Fortson’s principle assertion is that Allstate improperly determined the amount of UIM damages she was entitled to recover”). As noted above, this characterization is contrary to Allstate’s prior statements and course of conduct. It is no more appropriate to establish same transactional nucleus of facts than it is to establish the other elements of *res judicata*. The transactional nucleus of fact in a UIM claim, which focuses the damages caused by the fault of an underinsured motorist, differs from extra-contractual claims, which focus on the insurer’s conduct in the claims handling process. Because of the difference, the cause of action is not identical.

4. In the final analysis, Allstate has not satisfied its burden to prove that Fortson’s bad faith/IFCA action could and should have been brought at the same time as the underlying UIM action.

The parties agree that *res judicata* is limited to claims that could and should have been litigated in a prior action. *See Allstate Br.*, at 13, 27 & 31; *Fortson Br.*, at 32-34. However, Allstate has never repudiated the substance of its prior statements that extra-contractual claims are “dependent upon resolution” of an underlying UIM claim, and are “premature” until after the

underlying UIM claim has been completely resolved. CP 100, 107 & 117.

Allstate has never explained how extra-contractual claims based on “[c]ompelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings,”⁹ can be considered ripe unless and until the amounts are recovered in the underlying proceeding.¹⁰

Lastly, Allstate has never addressed the consequences of forcing insureds like Fortson to bring extra-contractual claims at the same time as contractual claims (subject to bifurcation motions), even if the extra-contractual claims prove to be unnecessary or unwarranted after resolution of the contractual claims. As pointed out in Fortson’s opening brief, the Court has rejected a sue-first-and-ask-questions later approach in the medical negligence context. *See* Fortson Br., at 34. Aside from arguing that

⁹ WAC 284-30-330(7) (brackets added); *see also* RCW 48.30.015(5)(a) incorporating this regulation as a violation of IFCA); WPI 320.06 (indicating a violation of this regulation is evidence of bad faith).

¹⁰ Allstate incorrectly claims that this argument was never made in the superior court. *See* Allstate Br., at 37. Although the word “ripe” was never used, the argument that extra-contractual claims are premature before resolution of the underlying UIM action was made in the superior court, based on Allstate’s own statements. *See, e.g.*, CP 210 (lines 15-18); CP 219 (lines 8-13).

this case involves insurance rather than medical negligence, Allstate has never provided any reasons for adopting such an approach here. *See* Allstate Br., at 38-40. The Court should conclude that res judicata is inapplicable.

E. Allstate improperly attempts to avoid judicial estoppel by arguing that its inconsistent statements were made in a different procedural context—bifurcation versus res judicata—rather than addressing the inconsistency of the statements, and interjects equitable estoppel principles into its analysis of judicial estoppel.

The parties agree regarding what Allstate describes as the “core” elements of judicial estoppel: (1) whether a party’s later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of the inconsistent position would create a perception that either the first or second court was misled; and (3) whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See* Allstate Br., at 41; Fortson Br., at 35. Allstate argues that none of these elements are satisfied because its inconsistent statements were made in connection with bifurcation motions rather than res judicata motions. *See* Allstate Br., at 42-45.

However, application of judicial estoppel does not hinge upon the procedural posture in which inconsistent statements were made, but rather upon the inconsistency of the statements. Allstate

has never attempted to reconcile the directly contradictory statements it previously made about the relationship between UIM and extra-contractual claims in previous cases with the statements made in this case. The fact that the requirements for bifurcation and res judicata differ does not render Allstate's statements consistent.

Beyond the core elements of judicial estoppel, Allstate looks to *Markley v. Markley*, 31 Wn. 2d 605, 614-15, 198 P.2d 486 (1948), where the Court quoted the an extended passage from a legal encyclopedia:

A number of limitations upon, or qualifications of, the rule against assuming inconsistent positions in judicial proceedings have been laid down. *Thus, the following have been enumerated as essentials to the establishment of an estoppel under the rule that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change. The courts are not altogether agreed, however, as to the application of some of these limitations.* Clearly, to give rise to an estoppel, the positions must be not merely different, but so inconsistent that one necessarily excludes the other. There is considerable authority for the rule that estoppel against such a change of position is dependent upon success in maintaining the original claim, but there is also authority to the contrary, especially in cases where the action of the party amounts to

an election of rights as distinguished from an election of remedies. Likewise, the rule that a judgment must have been rendered is generally held not to apply in cases where the right set up in a subsequent suit, as distinguished from the mere remedy, is inconsistent with that set up in the former suit. Similarly, although it is well settled in most jurisdictions that the rule that the taking of a position in one judicial proceeding precludes the taking of an inconsistent position in a subsequent one does not apply ordinarily to suits in which the issues and the parties are not the same, there are some jurisdictions in which the rule is extended under some circumstances even to cases of this kind. Moreover, although the raising of an estoppel against assuming inconsistent positions in judicial proceedings is often made to depend in some degree upon whether the other party has been misled and induced to change his position, there is also authority that these elements are not so important in this connection as they are in ordinary equitable estoppel.’

(Quoting former 19 Am. Jur. 709, *Estoppel* § 73; emphasis added.)

In *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007), the Court cited *Markley* for the proposition that the core elements of judicial estoppel are not an “exhaustive formula,” and the six factors listed in *Markley* highlighted above “may likewise be relevant when applying judicial estoppel.” The *Markley* factors have been criticized as interjecting equitable estoppel principles into judicial estoppel. See *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 908, 28 P.3d 832 (2001). While the *Markley* factors may support application of judicial estoppel per *Arkison*, neither *Markley* nor *Arkison* requires them to be satisfied in order to apply judicial

estoppel, and the fact that they are not present here should pose no impediment to applying the doctrine.

II. CONCLUSION

The Court should conclude that the doctrine of judicial estoppel is inapplicable, reverse the superior court, vacate the summary judgment order in favor of Allstate, and remand this case for trial.

Respectfully submitted this 19th day of June, 2016.

s/George M. Ahrend
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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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Signed on June 19, 2016 at Moses Lake, Washington.

s/George M. Ahrend

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