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SUPREME COURT OF THE STATE OF WASHINGTON

ANASTASIA FORTSON-KEMMERER,
Petitioner,

v.

ALLSTATE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellant Anastasia Fortson-Kemmerer (“Fortson”) was involved in an auto accident with an uninsured driver. Three years after the accident, Fortson demanded that Allstate, her uninsured motorist carrier, pay her \$75,000 in underinsured motorist (“UIM”) benefits for alleged injuries she incurred in the accident. In the same demand letter, Fortson’s counsel threatened to sue Allstate for breach of contract and violation of the Insurance Fair Conduct Act if Allstate rejected Fortson’s UIM demand. Allstate did reject the demand, offering Fortson \$9,978.00 to settle her UIM claim. Shortly thereafter, Fortson sued Allstate for breach of contract for failing to pay the UIM benefits she demanded. Despite her threat, Fortson did not assert any claims for violations of the Insurance Fair Conduct Act in her lawsuit. The lawsuit resulted in a judgment in favor of Fortson which Allstate satisfied.

Nearly three years after the judgment was satisfied, Fortson sued Allstate a second time for damages based on Allstate’s previous failure to pay UIM benefits. This time, Fortson alleged Allstate violated the Insurance Fair Conduct Act (“IFCA”) and the Consumer Protection Act (“CPA”), and acted in bad faith when it failed to pay the UIM benefits she demanded and for failing to properly investigate her UIM claim. Allstate moved for summary judgment dismissal of Fortson’s suit arguing that res

judicata applied to bar Fortson's second lawsuit because both lawsuits were based on the same event: Allstate's alleged failure to pay Fortson the UIM benefits she believed she was entitled to recover. The trial court agreed and dismissed Fortson's lawsuit.

Filing two lawsuits based on the same event—claim splitting—is precluded by the doctrine of res judicata. Res judicata bars a subsequent lawsuit when the two suits are identical in four respects: (1) parties, (2) causes of action or claims, (3) subject matter, and (4) the quality of persons for or against whom the claim is made.

Fortson's appeal is predominantly based on the assertion that arguments Allstate made in unrelated cases show that Fortson's two lawsuits do not have identity of causes of actions or subject matter; alternatively, Fortson argues that based on Allstate's arguments in those unrelated cases, Allstate should be judicially estopped from asserting res judicata to bar Fortson's second lawsuit. However, while Fortson quotes extensively from briefing Allstate filed in those unrelated cases, Fortson fails to disclose that the arguments she quotes were *not* made in the context of evaluating whether res judicata applies to bar a second lawsuit, instead, the arguments were all made in the context of a *motion to bifurcate* where the insureds had *properly* asserted all their claims arising out of their demand for UIM benefits in one lawsuit. Further, Allstate does *not* argue

in its motions to bifurcate that UIM breach of contract claims and bad faith/IFCA claims are so separate and distinct that they should be asserted in two consecutive lawsuits, as Fortson would like this Court to believe. Nor has Allstate argued that UIM breach of contract and UIM bad faith/IFCA claims do not arise out of the same transactional nucleus of facts. Instead, in those unrelated cases, Allstate sought to bifurcate the trials of the UIM breach of contract claims and the UIM bad faith/IFCA claims, and to stay discovery on the bad faith claims until the UIM claims have been resolved, to avoid prejudice to Allstate should discovery and trial on the claims proceed at the same time. Indeed, the purpose behind bifurcated trials and the factors to consider when evaluating whether claims should be bifurcated for purposes of trial, have no relationship to the purpose behind and the test for application of res judicata. Consequently, Allstate's position on motions to bifurcate in cases where the insured properly alleged both UIM breach of contract and UIM bad faith/IFCA claims against Allstate in one lawsuit has absolutely no relevance to the application of res judicata in this case. The trial court properly rejected Fortson's arguments, and dismissed her lawsuit as a matter of law. The trial court's orders should be affirmed.

II. STATEMENT OF ISSUES

A. Does the doctrine of res judicata bar an insured from filing a second lawsuit against its insurer alleging bad faith and violations of the IFCA and the CPA based on the insurer's failure to pay underinsured motorist benefits, when the insured previously sued and got a judgment against the insurer for breach of contract for failing to pay those same underinsured motorist benefits? (Petitioner's Assignment of Error 1).

B. Did the trial court properly exercise its discretion when it determined that judicial estoppel did not apply to preclude Allstate from arguing that res judicata barred Fortson's second lawsuit when Fortson (1) failed to establish that Allstate's arguments, made in other, unrelated lawsuits in which the plaintiffs had properly alleged both contractual (UIM) and extra-contractual (bad faith/IFCA) claims against Allstate together in one lawsuit and Allstate had moved for bifurcated trials, are clearly inconsistent with Allstate's position that Fortson's later and separately asserted claims for bad faith/IFCA are barred by the doctrine of res judicata in this case, and (2) failed to establish any of the factors required for application of judicial estoppel? (Petitioner's Assignment of Error 1).

C. Did the trial court properly exercise its discretion when it denied Fortson's motion to continue the summary judgment to conduct discovery when Fortson (1) failed to establish a good reason for her delay

in obtaining the evidence she sought; (2) failed to state what evidence would be established through the discovery she sought; and (3) failed to establish that the desired evidence would raise a genuine issue of material fact with respect to the legal issue of res judicata? (Petitioner's Assignment of Error 2).

III. STATEMENT OF THE CASE

On December 21, 2006, appellant, Anastasia Fortson-Kemmerer ("Fortson") was injured in an auto accident with an unknown driver who fled the scene.¹ Fortson was insured at the time of the accident under Allstate Insurance Company ("Allstate") auto policy, No. 064031937, the policy included underinsured motorist ("UIM") coverage.²

Almost three years after the accident, by letter dated October 30, 2009, Ms. Fortson demanded that Allstate pay \$75,000 in UIM benefits to her under her Allstate policy for injuries and damages she allegedly incurred in the accident.³ In the same letter, Ms. Fortson's counsel specifically discussed the IFCA, and after quoting several sections of the Act, told Allstate that its failure to pay the demand would expose it to liability for violations of the IFCA.⁴ Fortson's counsel also told Allstate that if it did

¹ CP 4; 24;

² *Id.*

³ CP 5; 31-34.

⁴ CP 33-34.

not pay the \$75,000 demanded, suit would be filed “for the full benefits” of the Allstate policy, “and the remedies and penalties provided for in the Insurance Fair Conduct Act.”⁵ Upon receipt of the letter, Allstate investigated the loss and based upon the information provided to it, offered to settle Ms. Fortson’s UIM claim for \$9,978.00.⁶ Fortson rejected the offer.

On May 18, 2011, Ms. Fortson filed a lawsuit against Allstate in Spokane County Superior Court, *Fortson-Kemmerer v. Allstate Ins. Co.*, No. 11-2-02099-6 (“*Fortson I*”) to recover UIM benefits, alleging that Allstate had breached its insurance contract by failing to pay the amount of UIM benefits she believed she was owed.⁷ Although Fortson had warned of her intent to pursue an IFCA claim if forced to sue Allstate to recover the UIM benefits she demanded, the lawsuit did not assert any extra contractual claims (i.e., bad faith or IFCA claims) against Allstate. The lawsuit alleged, in pertinent part, the facts of the accident; that it was presumed that the at fault driver did not have any liability insurance; and that Fortson suffered personal injuries, property damage and other consequential damages as a result of the accident, including medical expenses, economic damages, physical pain, emotional suffering and general damages.⁸ The complaint

⁵ *Id.*

⁶ CP 5.

⁷ CP 36-40.

⁸ CP 37-39.

further alleged that Fortson had purchased her Allstate policy, which policy included underinsured motorist coverage; that Fortson was entitled to benefits under the UIM coverage of the policy, that Fortson had a contractual right to receive UIM benefits from Allstate and a contractual right to be adequately compensated for her damages, but that Allstate refused to agree to adequately compensate Fortson and/or to accept her claim for UIM benefits.⁹

Fortson's lawsuit was resolved through mandatory arbitration on January 12, 2012¹⁰ and a judgment was entered in her favor on February 29, 2012.¹¹ Allstate paid the judgment and a satisfaction of judgment was entered on April 17, 2012.¹²

On February 6, 2015, almost four years after filing *Fortson I* and nearly three years after the satisfaction of judgment was filed in that case, Ms. Fortson sued Allstate a second time in Spokane County Superior Court, *Forston-Kemmerer v. Allstate Ins. Co.*, No. 15-200436-5 ("*Fortson II*").¹³ The complaint in *Fortson II* alleged substantially the same facts as were alleged in *Fortson I*. Just as in *Fortson I*, the complaint in *Fortson II* alleged

⁹ *Id.*

¹⁰ CP 6; 41-43.

¹¹ CP 41-43.

¹² CP 44-45.

¹³ CP 3-9.

that Fortson was involved in an auto accident with an unknown, at-fault driver who fled the scene; that it was presumed the at-fault driver did not have liability insurance, that Fortson incurred damages as a result of the accident, including “severe medical damages, diminished enjoyment of life, and injury to her credit rating;” that Fortson had purchased an automobile policy from Allstate which policy provided UIM benefits and Fortson was entitled to benefits under the UIM provisions of the Allstate policy; that Fortson demanded that Allstate pay \$75,000 in UIM benefits for injuries allegedly incurred in the accident in December 2009 (before filing *Fortson I*); that Allstate rejected the demand offering \$9,978.00 to settle the UIM claim; that Fortson was entitled to full compensation for her injuries under the UIM provisions of the Allstate policy and despite Fortson’s request for UIM payment, Allstate refused to tender proper payment; that Allstate failed to pay Fortson her adequate UIM compensation, and Allstate’s low offer to settle her UIM claim represented a constructive denial of her UIM claim.¹⁴ *Fortson II* thus alleges claims for bad faith and violations of IFCA and the CPA for Allstate’s alleged refusal to pay the amount of UIM benefits to which Fortson believed she was entitled, and for allegedly failing to conduct a reasonable investigation of Fortson’s UIM claim.¹⁵

¹⁴ CP 3-8.

¹⁵ CP 7-9

Allstate answered the complaint, asserting res judicata as an affirmative defense¹⁶ and subsequently filed a Motion for Summary Judgment for an Order dismissing Fortson's claims, with prejudice, as barred by the doctrine of res judicata.¹⁷ In its motion, Allstate relied on well-established Washington case law outlining the requirements and analysis for application of res judicata.¹⁸ And, while no Washington state appellate court has faced the identical issue as presented in this case – namely, whether res judicata bars an insured from asserting a second lawsuit alleging bad faith and IFCA violations based on the insurer's failure to pay UIM benefits, when the insured had previously sued the insurer for breach of contract for failing to pay UIM benefits – Allstate relied on two federal district courts, applying Washington law, that addressed this precise issue.¹⁹ *Zweber v. State Farm Ins. Co.*, 39 F. Supp. 3d 1161 (W.D. Wash. 2014); *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 12-1505, 2013 WL 1499265 (W.D. Wash. Apr. 11, 2013). Both courts held that res judicata barred the plaintiffs' subsequent lawsuits as a matter of law.

¹⁶ CP 17.

¹⁷ CP 20-45; 46-60. Allstate also moved for an Order dismissing Fortson's claims as barred by the applicable statute of limitations. CP 56-58. The court found a question of fact existed as to that issue and denied Allstate's request. That issue is not before this Court.

¹⁸ CP 49-56.

¹⁹ *Id.*

In *Zweber* and *Smith*, the insureds' first lawsuits against their insurers arose out of the insurers' refusal to offer the amount of UIM compensation the insureds believed they were entitled to; ultimately, judgments were entered and satisfied. Both insureds later filed second actions asserting claims for bad faith and violations of IFCA and the CPA, claiming the insurers failed to properly evaluate and/or settle their UIM claims. The courts in *Zweber* and *Smith* applied well-established Washington case law to find that the doctrine of res judicata applied to bar the insureds' second lawsuits against the UIM insurers.

In response to Allstate's Motion for Summary Judgment, Fortson argued that Allstate had not established the elements for res judicata and/or alternatively, Allstate should be estopped from relying on res judicata to bar her second lawsuit.²⁰

The trial court, the Honorable Patrick Monasmith, agreed with Allstate finding it "inescapable" that res judicata applied to bar *Fortson II*.²¹ The court explained that the decisions in both *Zweber* and *Smith* "were very clear on their face [with] very similar facts patterns" to the present case.²² While acknowledging that federal district court decisions are not binding,

²⁰ CP 213-222.

²¹ RP 42:21-22.

²² RP 41:20-22.

Judge Monasmith found the *Zweber* decision to be “very, very persuasive,”²³ particularly because the essential facts of *Zweber* were virtually identical to the facts in this case.²⁴ The court entered an Order granting Allstate’s Motion for Summary Judgment dismissing Fortson’s lawsuit, with prejudice.²⁵

Fortson had also sought a continuance of Allstate’s Motion for Summary Judgment, claiming she needed to depose corporate representatives at Allstate and propound written discovery to dispute the application of res judicata and to obtain evidence to show that Allstate should be estopped from arguing that res judicata applied to bar *Fortson II*.²⁶ Allstate opposed the motion to continue, arguing that Fortson had not satisfied the requirements of Civil Rule 56(f) to obtain a continuance of the summary judgment motion because she had failed to demonstrate good cause for the delay, and the evidence she claimed she needed was irrelevant and would not raise a material issue of fact to preclude summary judgment.²⁷ The trial court agreed with Allstate and denied Fortson’s motion for continuance.²⁸

²³ RP 42:11-14.

²⁴ *Id.*

²⁵ CP 264-267.

²⁶ CP 201-208.

²⁷ CP 225-232.

²⁸ RP 44:14-21; CP 262-263.

Fortson subsequently filed a Notice of Appeal to this Court seeking Direct Review.²⁹

IV. ARGUMENT

A. Standards of Review.

The standard of review on appeal from an order granting a motion for summary judgment is de novo. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). The standard of review for the legal question of whether res judicata bars an action is also de novo. *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211, 214 (2007), citing *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005).³⁰ However, a trial court's decision finding that judicial estoppel does not apply is reviewed for abuse of discretion. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 952, 205 P.3d 111 (2009). Likewise, a trial court's order denying a CR 56(f) motion to continue a summary judgment motion is reviewed for abuse of discretion. *Briggs v. Nova Servs.*, 135 Wn. App. 955, 961, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009).

²⁹ CP 268-73.

³⁰ Fortson's vague assertions that res judicata may involve factual issues for the trial court have no basis in the law; the cases she relies on for this assertion simply do not support it. *See*, Petitioner's Opening brief, at 22, fn. 11. The court in *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *rev. denied*, 168 Wn.2d 1068 (2010), clearly holds that application of res judicata is a question of law for the court to decide.

B. The Trial Court’s Order On Summary Judgment Should Be Affirmed Because Res Judicata Bars A Second Action Against The Insurer For Alleged Bad Faith, IFCA and CPA Violations For Failing To Pay UIM Benefits, When The Insured Previously Filed A Lawsuit Against the Insurer For Failing To Pay UIM Benefits.

1. The Doctrine of Res Judicata.

“Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.” *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009), *rev. denied*, 168 Wn.2d 1028(2010). ““The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.”” *Id.* at 899, quoting *Marino Prop. Co. v. Port Comm’rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982), quoting *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). The doctrine prohibits “the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.” *Karlberg v. Otten*, 167 Wn. App. 522, 535, 280 P.3d 1123 (2012) (emphasis added), quoting *Ensley*, 152 Wn. App. at 899. “[I]f an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing an action for the residue of the claim.”” *Karlberg*, 167 Wn. App. at 535, citing *Landry v. Luscher*, 95 Wn. App. 779, 782, 976 P.2d 1274, *rev.*

denied, 139 Wn.2d 1006. “[A]ll issues which might have been raised and determined are precluded.” *Feminist Women’s Health Ctr. v. Codispoti*, 63 F.3d 863, 868 (9th Cir. 1995) (applying Washington law) quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987); *accord, Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

In other words, res judicata applies “...to every point which properly belonged to the subject of [the prior] litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 442, 423 P.2d 624 (1967), quoting *Sayward v. Thayer*, 9 Wash. 22, 36 P. 137 (1894). Res judicata is “the rule, not the exception.” *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004).

Dismissal on the basis of res judicata is appropriate to preclude a second lawsuit when a prior judgment has a concurrence of identity with the second lawsuit in four respects: (1) persons and parties; (2) causes of action or claims; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made.³¹ *Ensley*, 152 Wn. App. at 902; *Schoeman*

³¹ The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit. *Ensley*, 152 Wn. App. at 899. That threshold requirement was met in this case by the judgment entered in Fortson’s favor in *Fortson I* on February 29, 2012. Fortson does not dispute this issue.

v. N.Y. Life. Ins. Co., 106 Wn.2d 855, 858-59, 726 P.2d 1 (1986) (collecting cases); *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

The present case is a clear example of the claim splitting that res judicata was designed to prevent. There is a concurrence of identity in all four respects between Fortson's first lawsuit for breach of contract for Allstate's failure to pay the amount of UIM benefits Fortson demanded, and her second lawsuit for bad faith and IFCA violations for Allstate's alleged failure to pay the correct amount of UIM benefits and properly investigate Fortson's UIM claim. Fortson's bad faith and IFCA claims *could have and should have been litigated* in her first lawsuit. Likewise, Fortson's argument that res judicata does not apply because she is asserting new legal theories (tort and statutory claims as opposed to the contract claim for UIM benefits) has repeatedly been rejected by Washington courts.

The federal district courts in *Zweber*, 39 F. Supp. 3d 1161 and *Smith*, 2013 WL 1499265, reached the same conclusion as the trial court in this case, based on virtually identical facts. While not controlling on this Court, the courts' well-reasoned and thorough analysis in *Zweber* and *Smith*, discussed in detail below, apply to the facts of this case. Allstate requests the Court affirm the trial court's decision that *Fortson II* is barred by the doctrine of res judicata.

2. Fortson's Breach of Contract Claim for UIM Benefits and Her Claims For Bad Faith And Violation Of IFCA Share Identity of Persons and Parties, Causes of Action, Subject Matter, and Quality of Persons For or Against Whom the Claim is Made.

In *Zweber*, the insured was seriously injured in an auto accident with an underinsured motorist. 39 F. Supp. 3d at 1163. After recovering from the at fault driver, the insured demanded the \$250,000 limits of his State Farm policy UIM coverage. *Id.* at 1164. State Farm offered to pay \$100,000 to settle the insured's UIM claim. In early 2010, the insured sued State Farm to compel judicial resolution of his UIM claim. During the discovery phase of the litigation, the insured again demanded the full \$250,000 UIM limits. State Farm rejected his demand and the case was eventually resolved at trial. The jury awarded the insured \$1.3 million in damages. *Id.* State Farm paid its policy limits and a satisfaction of judgment was entered. *Id.*

Likewise, in *Smith*, the insured's first lawsuit against her insurer arose out of the insurer's refusal to offer the insured a "...reasonable, fair or equitable amount under the underinsured policy." 2013 WL 1499265, at *1. The jury entered a verdict in the insured's favor and the resulting judgment was satisfied. *Id.* at *2.

Subsequently, the insureds in *Zweber* and *Smith* both filed a second lawsuit against their insurers, alleging claims for breach of contract, bad

faith and violations of the CPA and IFCA. Both insureds claimed their insurers failed to pay UIM benefits in the amount they were entitled to recover and failed to conduct reasonable investigations. *Zweber*, 39 F. Supp. 3d at 1164; *Smith*, 2013 WL 1499265, at *2. The insurers moved to dismiss the second lawsuits as barred by the doctrine of res judicata.

In both cases, the courts undertook an extensive analysis of Washington law on the doctrine of res judicata, including the principles and purpose behind the doctrine, and evaluated whether there was identity between the prior judgment and the subsequent action with respect to (1) persons and parties; (2) causes of action; (3) subject matter; and (4) quality of persons for or against whom the claim is made. *Zweber*, 39 F. Supp. 3d at 1165-1169; *Smith*, 2013 WL 1499265, at *4-5. Both courts found all four factors present and held that res judicata barred the subsequent lawsuits, as a matter of law. *Zweber*, 39 F. Supp. 3d at 1169; *Smith*, 2013 WL 1499265, at *7. The analysis in *Zweber* and *Smith* equally applies to the facts of this case.

a. *Fortson I* and *Fortson II* Share An Identity of Parties.

The courts in both *Zweber* and *Smith* easily concluded that because the parties were the same in both actions, that the first factor (identical persons and parties) was met. *Zweber*, 39 F. Supp. 3d at 1168, citing

Karlberg, 167 Wn. App. at 537; *Smith*, 2013 WL 1499265, at *4. Likewise, in the present case, Fortson concedes that there is an identity of parties between *Fortson I* and *Fortson II*. Thus, this factor is clearly met.

b. *Fortson I* and *Fortson II* Share An Identity of Causes of Actions or Claims.

This Court explained over thirty years ago that identity of causes of actions “cannot be determined precisely by mechanistic application of a simple test.” *Rains*, 100 Wn.2d at 663-64. Instead, four flexible set of factors are considered when evaluating whether there is an identity of causes of action or claims:

(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 664; *Energy Northwest v. Hartje*, 148 Wn. App. 454, 464, 199 P.3d 1043 (2009). Notably, these factors are simply analytical tools and not all four factors need be present to bar a second lawsuit. *Ensley*, 152 Wn. App. at 903 citing *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995). The fourth factor—that the two suits arise out of the same transactional nucleus of acts—is considered to be the most important. *Déjà Vu-Everett-Federal Way, Inc., v. City of Federal Way*, 96 Wn. App. 255, 262, 979 P.2d 464 (1999) citing *Costantini v. Trans World Airlines*, 681

F.2d 1199, 1202 (9th Cir. 1982); *Sewer Alert Comm. v. Pierce Cty.*, 791

F.2d 796, 798-99 (9th Cir. 1986) (applying Washington law).

(i) Allstate's rights or interests established in the prior judgment will be impaired.

As to the first factor (whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action), the court in *Zweber* found that because State Farm had satisfied the judgment in the first action, re-opening the dispute between the parties would impair that satisfaction and expose State Farm to additional liability. *Zweber*, 39 F. Supp. 3d at 1168. This finding applies equally to the present case: Allstate satisfied the judgment in *Fortson I*, reopening the litigation would impair that satisfaction and potentially expose Allstate to additional liability. Thus, factor one has been met in this case.

(ii) Substantially the same evidence as presented in *Fortson I* will be presented in *Fortson II*.

As to the second factor, substantially the same evidence that was presented in *Fortson I* will be presented in *Fortson II*. The court in *Smith* found that the same evidence introduced in the UIM breach of contract suit would also be introduced in the bad faith/IFCA lawsuit, explaining that both lawsuits alleged that Ms. Smith was involved in an auto accident caused by the negligence of another person and that Ms. Smith was damaged in an amount beyond that which her insurer offered to pay. *Smith*, 2013 WL

1499265, at *5. Thus, to prove her bad faith claims in the second lawsuit, Ms. Smith would be required to present evidence to establish that the tortfeasor was negligent in causing the accident, that Ms. Smith was injured, and the value of her injuries because that evidence was relevant to demonstrate that the insurer's decision not to pay UIM proceeds was unreasonable and in bad faith. *Id.* Thus, the same evidence presented in the first lawsuit would again be presented in the second lawsuit.

The same holds true in this case. Fortson alleged in both suits that she was involved in an auto accident with an uninsured driver who fled the scene, that she incurred damages as a result of the accident, and that Allstate refused to adequately compensate her for her injuries as it was contractually liable to do. To prove her bad faith/IFCA claims in this lawsuit, Fortson will be required to present evidence to establish that the tortfeasor was negligent in causing the accident, that Fortson was injured, and the value of her injuries because that evidence is relevant to demonstrate that Allstate's decision not to pay UIM proceeds was unreasonable and in bad faith. Thus, the same evidence presented in *Fortson I* will be presented in *Fortson II*.

Further, the fact that bad faith/IFCA claims require new and different evidence, evidence that was not presented in the first lawsuit for UIM damages, does not change this result. *Zweber*, 39 F. Supp. 3d at 1168-1169. The court in *Zweber* explained that while the insured's bad faith

lawsuit would introduce new evidence regarding State Farm's conduct during the handling of the UIM claim, the evidence in the UIM lawsuit and the bad faith lawsuit would, nonetheless, significantly overlap because the insured would still be required to present evidence to establish the value of his UIM claim and each parties' assessment of that value in the second lawsuit. *Id.*

The same is true in this case. While some new evidence would be introduced in *Fortson II* regarding Allstate's alleged conduct while investigating and evaluating the UIM claim, there remains an overlap of evidence insofar as Fortson will be required to introduce evidence regarding the facts of the accident, the tortfeasor's negligence in causing the accident, and the value of Fortson's injuries, in this lawsuit, as a basis to support her bad faith and IFCA claims handling violations. Therefore, just as in *Smith* and *Zweber*, substantially the same evidence presented in *Fortson I* will be presented in *Fortson II*.

Furthermore, contrary to Fortson's repeated assertions, Allstate's arguments in its procedural motions to bifurcate the trial of the bad faith/IFCA issues from the trial of UIM damages issues, when those claims were all *properly* asserted in one lawsuit – that bifurcation is appropriate because the evidence for the bad faith issues is separate and distinct from the evidence for purposes of the UIM issues – is *not* inapposite to its

assertion here that the same evidence as presented in *Fortson I* would be presented in *Fortson II*. Notably, 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.³² See, *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 487, 54 Cal. Rptr. 2d 888 (1996) (“[i]ssues adjudicated in earlier phases of a bifurcated trial are binding in later phases of that trial and need not be relitigated”). Hence, the evidence surrounding the facts of the accident and the value of the insured's injuries is *not* relitigated in the second phase of the trial. The second phase, the bad faith/IFCA phase of the bifurcated trial, addresses only the “separate and distinct” claims handling issues and evidence that is not presented in the UIM breach of contract trial phase. But here, if Fortson was allowed to proceed with this lawsuit, the trial would not

³² “Bifurcated trials’ are trials in which only some of the issues of the case will be resolved at one trial, with the rest left for a further trial or other proceedings.” 75 Am. Jur. 2d *Trial* § 58, Westlaw (database updated Feb. 2016). On the other hand, severing claims divides a lawsuit into two or more separate and independent causes, with the severed claims becoming entirely distinct actions to be tried, with judgment independently entered. *Id.*; 9A Charles Alan Wright et al., *Federal Practice and Procedure* § 2388, Westlaw (3d ed. database updated Apr. 2016).

be the second phase of a bifurcated trial since Fortson did *not* assert all of her claims against Allstate in the same lawsuit, and the jury will not already have heard and decided the issues with respect to the value of Fortson's injuries. Rather, just as in *Smith* and *Zweber*, the same evidence Fortson presented in *Fortson I* would still have to be presented in *Fortson II*, conclusively establishing that substantially the same evidence as presented in *Fortson I* will be presented in *Fortson II*.

(iii) *Fortson I* and *Fortson II* involve infringement of the same right.

As to the third factor, *Fortson I* and *Fortson II* involve infringement of the same right. The court in *Zweber* found this factor was present because the allegations in the insured's two lawsuits directly involved the insured's claim for UIM benefits and therefore, the insured's "rights alleged to be infringed in each action were identical." *Zweber*, 39 F. Supp. 3d at 1169. The court explained that the first lawsuit was filed for judicial resolution of the insured's claim for UIM benefits after State Farm refused to pay the \$250,000 UIM demand. *Id.* at 1164. The second lawsuit also involved the insured's claim for UIM benefits because State Farm had allegedly refused to pay the amount of UIM benefits the insured believed he was entitled to recover, had failed to conduct a reasonable investigation of his UIM claim, had offered unreasonable settlement amounts, violated various insurance

regulations, and acted in bad faith, all in connection with the insured's UIM claim. *Id.* This was the case, "even though one [lawsuit] focuses on claims handling and the other on claim evaluation. [The insured] does not have a right to fair claims handling that is independent of his right to payment for a claim. Thus, this factor strongly supports [the insurer's] position." *Id.* at 1169. In short, State Farm's alleged infringement on the insured's right to UIM benefits formed the basis for both lawsuits, satisfying factor three. *Id.*

Similarly, in *Smith*, the infringement of the insured's right to UIM compensation formed the basis for both lawsuits because the insured "[sought] redress for the same wrong: State Farm's refusal to provide her with the full limits of her UIM policy." *Smith*, 2013 WL 1499265, at *5.

Likewise, in this case, both lawsuits involve Fortson's claim that Allstate infringed on her right to UIM benefits. The first suit was filed to recover UIM compensation Fortson claimed Allstate refused to pay. The second lawsuit also involves Fortson's UIM claim because she alleges Allstate refused to adequately compensate her and failed to reasonably investigate her UIM claim. Thus, as in *Zweber* and *Smith*, *Fortson I* and *Fortson II* involve infringement of the same right – the right to adequate UIM compensation.

(iv) *Fortson I* and *Fortson II* arise out of the same transactional nucleus of facts.

Fortson's UIM bad faith and IFCA claims arises out of the same transactional nucleus of facts as her UIM breach of contract claim. According to Washington courts, "the scope of a 'transaction' should be 'determined pragmatically,' essentially by examining the relevant facts and circumstances." *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 628-29, 72 P.3d 788 (2003), quoting Restatement (Second) of Judgments § 24 (Am. Law Inst. 1982) ("Restatement"). Consequently, when evaluating whether two suits arise out of the same transactional nucleus of fact, the relevant "transaction" is far broader than the specific legal theories asserted in the lawsuits because a plaintiff is "not allowed to recast his claim under a different theory and sue again." *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 40, 914 P.2d 737 (1996), quoting *Shoemaker*, 109 Wn.2d at 507.

As explained by the court *Sound Built Homes*, a claim includes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." 118 Wn. App. at 628-29, quoting Restatement § 24. Indeed, as noted in Restatement § 24 cmt. c, there may be a single transaction even though there are "different harms, substantive theories,

measures or kinds of relief. . . . That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.” Furthermore,

The present trend is to see *claim* [in the context of *res judicata*] in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. *The transaction is the basis of the litigative unit or entity which may not be split.*

Sound Built Homes, 118 Wn. App. at 629 (emphasis added), quoting Restatement § 24 cmt. a. These principles have been applied by Washington courts for decades. *Sound Built Homes*, 118 Wn. App. at 631 (collecting cases).³³

For example, in *Schoeman*, the Court held that a claim for life insurance proceeds precluded a later claim for negligent issuance of same policy, explaining that if “there has been an opportunity to litigate on the matter in a former action, the party-plaintiff should not be permitted to relitigate that issue.” 106 Wn.2d at 859. In *Currier v. Perry*, 181 Wash. 565, 44 P.2d 184 (1935), the first lawsuit was for an injunction compelling

³³ See also, Restatement § 25 (plaintiff’s claim is extinguished “even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action.”).

delivery of title to corporate stock; the second lawsuit was for damages based on conversion of same stock. The Court held the second action was barred because “...res judicata applies ... not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” *Id.* at 569 quoting *Sayward*, 9 Wash. at 36.

Consistent with these principles, the courts in *Zweber* and *Smith* rejected the notion that the insureds’ second lawsuits for bad faith/IFCA violations in the handling of the UIM claim did not arise out of the same transactional nucleus of facts simply because they alleged new and different legal theories than those alleged in the UIM breach of contract lawsuit. *Zweber*, 39 F. Supp. 3d at 1167; *Smith*, 2013 WL 1499265, at *4. The court in *Smith* noted that “*res judicata* does not merely prohibit a party from raising identical legal theories; rather parties may not raise new legal theories based upon the same transactional nucleus of facts that could have been raised in the original action.” *Smith*, 2013 WL 1499265, at *5, citing *Sound Built Homes*, 118 Wn. App. 617, and Restatement § 24 cmt. c. Thus, the court in *Smith* held that the insured’s lawsuits arose from the same transactional nucleus of facts because whether by a breach of contract claim

as alleged in the first lawsuit or a breach of contract claim coupled with bad faith and statutory claims, the insured “sought redress for the same wrong: State Farm’s refusal to provide [the insured] with the full limits of her UIM policy.” *Smith*, 2013 WL 1499265, at *5.

Likewise, the court in *Zweber* explained that “[r]es judicata is not so narrow that it precludes relitigation only of identical claims . . . [r]ather, it precludes litigation of all causes of action that ‘properly belonged to the subject of the litigation, and [that] the parties, exercising reasonable diligence, might have brought forward at the time.’” *Zweber*, 39 F. Supp. 3d at 1167 (internal citations omitted). In holding that the transactional nucleus of facts was the same in both lawsuits filed by the insured, the court in *Zweber* explained:

In both cases the claims are, at a fundamental level, based on State Farm’s refusal to pay Mr. Zweber the policy limits on his claim. In the first action, Mr. Zweber claimed that he was entitled to more benefits than State Farm was offering him. In the second action, Mr. Zweber claims that State Farm violated its various duties by refusing to acknowledge that he was entitled to more benefits than State Farm was offering him. In both cases, the basic behavior being complained of is the same: refusal to pay benefits in the requested amount. Accordingly, the transactional nucleus of facts is the same in both cases.

Id. at 1169.

Similarly, the majority of courts in other jurisdictions also routinely bar subsequent bad faith lawsuits where the bad faith action is based on the

same failure to pay UIM benefits that was the subject of a prior UIM breach of contract lawsuit under the doctrine of res judicata, finding that the lawsuits arise from the same transactional nucleus of facts. *Porn v. Nat'l Grange Mut. Ins. Co.*, 93 F.3d 31, 34 (1st Cir. 1996) (applying “transactional approach” and barring subsequent bad faith claims that should have been raised in prior UIM case); *Rawe v. Lib. Mut. Fire Ins. Co.*, 462 F.3d 521, 528–29 (6th Cir. 2006) (the mere assertion of alternative bad faith theories and remedies in the second lawsuit does not preclude application of res judicata because the bad faith claims could have and should have been asserted in first lawsuit for UIM benefits); *Powell v. Infinity Ins. Co.*, 282 Conn. 594, 922 A.2d 1073 (2007) (applying transactional test to hold that judgment in action for UIM contract benefits bars subsequent bad faith and unfair insurance practices lawsuit); *Salazar v. State Farm Mut. Auto. Ins. Co.*, 148 P.3d 278, 280 (Colo. App. 2006) (when applying the transactional test, the identity of cause of action or claim is determined by looking at “the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies” and hence, second action for bad faith and Unfair Claims Practices Act was barred by res judicata); *Stafford v. Jewelers Mut. Ins. Co.*, No. 12-50, 2013 WL 796272, at *13 (S.D. Ohio Mar. 4, 2013) (“[A] majority of the courts that have considered whether the facts underlying a breach of insurance contract claim and a bad-faith claim

are sufficiently related for purposes of res judicata have concluded that both claims arise out of an insurer's refusal to pay the insured the proceeds of the policy.”);³⁴ *Duhaime v. Am. Reserve Life Ins. Co.*, 200 Conn. 360, 511 A.2d 333 (1986) (insurance unfair trade practices lawsuit barred by res judicata where the insured was merely asserting a new statutory theory to obtain an additional remedy).

In the present case, *Fortson II* likewise arises out of the same transactional nucleus of facts as those that were presented or should have been presented in *Fortson I*. Both 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. In *Fortson I*, she claimed she was injured in an auto accident with an uninsured driver and was entitled to benefits under the UIM provisions of the Allstate policy, but Allstate refused to adequately compensate her and/or refused to accept her claim for UIM benefits.³⁵ In *Fortson II*, she claims that she was injured in an auto accident with an uninsured driver and was entitled to benefits under the UIM provisions of the Allstate policy, but that Allstate in bad faith and in violation of the IFCA rejected and refused to tender proper payment of UIM

³⁴ Each of these cases was cited by the court in *Smith*, 2013 WL 1499265, at *6.

³⁵ CP 37-39.

benefits.³⁶ While Fortson asserts new theories of bad faith and IFCA violations in *Fortson II*, res judicata is based on what the plaintiff “could have” litigated if she had pled her claims at the appropriate time in the first action. Just as in *Zweber* and *Smith*, and the cases cited above, Fortson is seeking to recast her current claims under legal theories she failed to timely plead in *Fortson I*. These claims could have and should have been litigated in Fortson’s first lawsuit.

Fortson’s attempt to cast an extremely narrow meaning to the “transactional nucleus of facts,” arguing that *Fortson I* only involved the motor vehicle collision, while *Fortson II* involves only Allstate’s conduct, also fails. See, *Zweber*, 39 F. Supp. 3d at 1167; *Smith*, 2013 WL 1499265, at *4; *Porn*, 93 F.3d at 35 (insured’s characterization of the first lawsuit as arising only out of the auto accident and the second lawsuit as arising only out of the handling of the claim was artificially narrow). As previously explained, review of the complaints in both *Fortson I* and *Fortson II* demonstrates that the two suits rest on similar fact patterns: both allege Fortson was injured in an auto accident, that she was entitled to benefits under the UIM provisions of the Allstate policy, but that Allstate refused to agree to adequately compensate her. The basic behavior being complained

³⁶ CP 4-5, 7.

of in both lawsuits is the same: refusal to pay benefits in the amount demanded.

Finally, Fortson's argument that she is not seeking to relitigate the amount of damages awarded on her UIM claim in *Fortson II*, but instead is seeking "to recover additional damages caused by Allstate forcing her to pursue litigation to recover her UIM benefits,"³⁷ actually highlights the fact that the two lawsuits arise out of the same transactional nucleus of facts. The value of Fortson's UIM damages is an issue that would have to be relitigated in *Fortson II* as part of Fortson's claim that Allstate acted in bad faith and violated IFCA by offering a lower UIM amount than Fortson was entitled to recover and/or to establish that Allstate conducted an unreasonable investigation of her damages. Consequently, Fortson's right of recovery in the second lawsuit would rest on the same facts Fortson relied on in the first lawsuit, giving rise to the application of res judicata. *Karlberg*, 167 Wn. App. at 537. (where the court in the second lawsuit relied on findings and conclusions from the first lawsuit, plaintiff's "right of recovery rested on the same state of facts" and hence, judgment in plaintiff's second lawsuit was barred by res judicata).

³⁷ Petitioner's Opening Brief at 25.

In short, based upon the facts alleged in *Fortson I* and *Fortson II*, both lawsuits arise out of the same transactional nucleus of facts, thereby establishing that the lawsuits share an identity of causes of actions or claims. So this factor too supports application of res judicata to bar *Fortson II*.

c. *Fortson I* and *Fortson II* Share An Identity of Subject Matter.

Res judicata also applies because *Fortson I* and *Fortson II* share an identity of subject matter. The court in *Zweber* noted that “[t]he ‘same subject matter’ inquiry is somewhat vague, and that Washington courts have ‘seldom had occasion to discuss the requirement and its implications.’” 39 F. Supp. 3d at 1168, quoting 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35:25 (2d ed. 2009). However, courts have found identity of subject matter when, although claims in two lawsuits were stated differently, the basis of both lawsuits was the plaintiff’s alleged deprivation of a right and tortious harm resulting from false allegations, allegations (*Kuhlman*, 78 Wn. App. at 124); the subject of both lawsuits was the alleged deprivation of constitutional rights (*Rains*, 100 Wn.2d at 663); and, the subject of both lawsuits were rights allegedly governed by a community property agreement (*Norris v. Norris*, 95 Wn.2d 124, 622 P.2d 816 (1980)). On the other hand, the “subject matter” was determined not to be the same when the subject matter of the first lawsuit was a 2007 deed of trust and the

second lawsuit involved the foreclosure of a 2009 deed of trust (*Schroeder v. Excelsior Mgmt. Grp., L.L.C.*, 177 Wn.2d 94, 297 P.3d 677 (2013)); when the first action sought to invalidate a collective bargaining agreement and the second action assumed the validity of the agreement but sought legal guidance as to how the agreement was to be applied (*Hisle*, 151 Wn.2d 853); and when two separate actions were filed to quiet title in property, but the property in each action was a separate and distinct piece of property (*St. Luke's Evangelical Lutheran Church of Country Homes v. Hales*, 13 Wn. App. 483, 487, 534 P.2d 1379 (1975), *rev. denied*, 86 Wn.2d 1003 (1975)).

The court in *Zweber* easily concluded that the subject matter in the insured's two UIM related lawsuits was the same. According to the court, "both actions involve, primarily, State Farm's failure to pay Mr. Zweber's claim in the amount he felt he deserved. In both actions, Mr. Zweber's principal assertion is that State Farm improperly determined the amount of damages due under his policy." *Zweber*, 39 F. Supp. 3d at 1168. "[B]oth actions seek the same remedy for substantially the same harm, giving them identity of subject matter." *Id.* The court in *Smith* also easily concluded that the subject matter in the insured's two UIM suits in that case were the same because both suits involved the insurer's failure to pay the insured's demand for UIM benefits. 2013 WL 1499265, at *4.

Likewise here, identity of subject matter is also met. *Fortson I* and *Fortson II* arise from the insured's claim for UIM benefits and Allstate's alleged failure to settle her claim or pay her the amount of UIM benefits she believed were owed to her. *See, Rains*, 100 Wn.2d at 663 (identity of subject matter in both lawsuits was the alleged deprivation of constitutional rights); *Kuhlman*, 78 Wn. App. at 124 (although claims in two lawsuits were stated differently, both lawsuits involved the same subject matter because the basis of the claims was the plaintiff's alleged deprivation of a right and tortious harm resulting from false allegations). In both lawsuits, Fortson's principle assertion is that Allstate improperly determined the amount of UIM damages she was entitled to recover and improperly failed to pay her the compensation she felt was due to her. She now claims a lack of good faith on Allstate's part, but it still turns on the same event: Allstate's alleged refusal to pay adequate compensation. There has never been a dispute as to Allstate's obligation to pay UIM damages, the dispute has only centered on the amount of compensation it was required to pay. In short, the two suits clearly involve an identity of subject matter.

Fortson's reliance on *Hisle* to argue that there is no identity of subject matter misses the mark. In *Hisle*, the first lawsuit was filed in an attempt to invalidate a collective bargaining agreement, while the subsequent action properly assumed the validity of that agreement but

sought legal guidance regarding how to apply the agreement. *Hisle*, 151 Wn.2d at 866. There is no such difference in this case. In the present case, there has never been a dispute as to Allstate's obligation to pay UIM damages, the dispute has only centered on the value of damages it was required to pay. Further, Fortson's principal assertion in both actions is that Allstate improperly determined the amount of UIM benefits due under her insurance policy. The facts and decision in *Hisle* have no application here. *Fortson I* and *Fortson II* share an identity of subject matter.

d. *Fortson I* and *Fortson II* Share An Identity of Quality of Persons For Or Against Whom The Claim Is Made.

Establishing that two lawsuits share an identity of persons, "simply requires a determination of which parties in the second suit are bound by the judgment in the first suit." *Ensley*, 152 Wn. App. at 905. Here, both Fortson and Allstate are bound by the judgment in *Fortson I*, and therefore, since only Fortson and Allstate are the parties in *Fortson II*, the two suits share an identity of the quality of persons. Because the parties are identical in both *Fortson I* and *Fortson II*, the quality of the persons is also identical. *Accord, Pederson v. Potter*, 103 Wn. App. 62, 73, 11 P.3d 833 (2000) (parties in two suits were identical satisfying requirement that the quality of person be the same); *Zweber*, 39 F. Supp. 3d at 1168; *Smith*, 2013 WL 1499265, at *4 (same); *Feminist Women's Health Ctr.*, 63 F.3d at 867

(applying Washington law) (same). Fortson's assertion that the quality of persons is different finds no support in the law

Here, all four factors used to determine whether res judicata bars a subsequent lawsuit have clearly been met and the Court should affirm the summary judgment dismissal of Fortson's second lawsuit against Allstate as a matter of law.

3. Fortson's Argument That Bad Faith And IFCA Claims Do Not Accrue Until After Resolution Of The UIM Claim Fails Because The Argument Was Not Raised Below And It Has No Support In Washington Law.

Fortson argues for the first time on appeal, and without citation to any relevant authority, that some bad faith and IFCA claims may not be ripe and may not accrue until the conclusion of litigation on the underlying UIM claim. Her argument fails for numerous reasons. First, Fortson failed to present this argument to the trial court, and therefore, it should not be considered on appeal. *Wilson v. Steinbach*, 98 Wn.2d 434, 440, 656 P.2d 1030 (1982) (legal theories and arguments not raised in a timely fashion before the trial court may not be considered for the first time on appeal), *superseded by statute on other grounds as stated in, Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009); RAP 2.5(a).

Second, an argument unsupported by citation to legal authority need not be considered on appeal unless meritorious on its face. *Somer v.*

Woodhouse, 28 Wn. App. 262, 270, 623 P.2d 1164 (1981). Fortson fails to cite to a single Washington case to support her assertion that a verdict amount is required before some bad faith and IFCA claims accrue. Nor is there any apparent merit to her argument. Indeed, the same argument was easily rejected by the court in *Smith*, 2013 WL 1499265, at * 9.

Third, an action for bad faith handling of insurance claims sounds in tort (*Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992)), and a tort personal injury claim accrues at the time the act or omission occurs. *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348, 349 (1988). Thus, Fortson's bad faith and IFCA claims did not accrue at the time the arbitrator determined the value of Fortson's UIM claim, instead, they accrued when Allstate extended its allegedly unreasonable settlement offer, *before* Fortson filed her first lawsuit.

Fourth, Fortson's reliance on the discovery rule – a defense to the application of the statute of limitations – is wholly misplaced. Under the discovery rule, “[i]n certain torts . . . a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action.” *In re Estates of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992), quoting *White v. Johns-Manville Corp.*, 103 Wn. 2d 344, 348, 693 P.2d 687 (1985). Fortson cites no legal authority to suggest the

discovery rule applies to the bad faith claims she asserts in this lawsuit.³⁸ The authorities she relies on, *Winburn v. Moore*, 142 Wn.2d 206, 18 P.3d 576 (2001), and *Webb v. Neuroeducation, Inc.*, 121 Wn. App. 336, 345, 88 P.3d 417 (2004), involved a statutory discovery rule set forth in RCW 4.16.350 applicable to medical malpractice cases. That statute has no application here.

Further, *before* Fortson filed her first lawsuit, she clearly was aware of all the essential elements of her bad faith/IFCA claims as she threatened to sue Allstate for alleged violations of IFCA if Allstate refused to pay her UIM policy limits demand. This conclusively establishes that Fortson *knew* of the essential elements of her bad faith and IFCA claims before filing *Fortson I*, and therefore, even if the discovery rule was an option for insureds seeking to avoid res judicata, which it is not, the rule would not apply to the facts of this case.

Finally, even assuming a verdict amount on the UIM breach of contract claim is necessary before a claimed violation of WAC 284-30-

³⁸ “Washington courts have extended the application of the discovery rule to a variety of tort actions including: professional malpractice actions, product liability actions, the failure to comply with mandatory self-reporting environmental law, and libel suits against ex-employer.” *Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997), as amended on denial of reconsideration (1997) (internal citations omitted).

330(7)³⁹ accrues, which it is not, the breach of contract and bad faith/IFCA claims should nonetheless be brought together in the first action because bifurcating the bad faith/IFCA claims from the breach of contract claim, and resolving the breach of contract claim first would have resolved any and all issues of ripeness. *Smith*, 2013 WL 1499265 at *10.

[T]he facts of the case make clear that Plaintiff could have and should have raised her bad faith claims in the underlying action and the parties could, if necessary, have sought to bifurcate the case. Accordingly, the Court declines to accept Plaintiff's ripeness arguments.

Id.

4. The Trial Court Properly Determined That Judicial Estoppel Does Not Apply To The Facts of This Case.

A trial court's decision that judicial estoppel does not apply is reviewed for abuse of discretion. *Ashmore*, 165 Wn.2d at 952. In this case, the trial court did not abuse its discretion when it determined that judicial estoppel does not apply to the facts of this case.

“Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.” *Ashmore*, 165 Wn.2d at 951, citing *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). “The purpose of judicial

³⁹ “Compelling 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.”

estoppel is to bar as evidence statements and declarations by a party which would be contrary to sworn testimony the party has given in the same or prior judicial proceedings.” *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974).

Three core factors are initially reviewed to determine whether judicial estoppel applies in any given case: “whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party’s position, and whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Ashmore*, 165 Wn. 2d at 951-52. Notably, these factors are not an “exhaustive formula” and, therefore, “[a]dditional considerations” may guide a court’s decision.” *Arkison*, 160 Wn.2d at 539, quoting *N.H. v. Me.*, 532 U.S. 742, 751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001), citing *Markley v. Markley*, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948). The Court in *Markley* cited the following six factors that may also be relevant when determining whether or not judicial estoppel applies:

- (1) The inconsistent position first asserted must have been successfully maintained;
- (2) a judgment must have been entered;
- (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; [and] (6) it must appear unjust to one party to permit the other to change.

Id. at 614-15 (quotation omitted).

Without citation to any legal authority from any jurisdiction, in an attempt to avoid the inescapable application of res judicata in this case, Fortson argues that Allstate's motions seeking to bifurcate and stay discovery and trial of UIM bad faith/IFCA claims from the UIM claims in cases where the insureds have *properly* asserted all of the claims together in one lawsuit, somehow renders Allstate judicially estopped from arguing that res judicata applies in this completely different case. Fortson's argument fails.

First and foremost, Allstate's position advanced in this case—that Fortson's claims for UIM related bad faith/IFCA are barred by the doctrine of res judicata because they were not joined in her 2011 lawsuit—is not clearly inconsistent or incompatible with Allstate's request for *bifurcated trials* in actions where plaintiffs have *properly* asserted both the UIM and related bad faith/IFCA claims against Allstate in *one* lawsuit. In those cases, Allstate is *not* arguing that UIM breach of contract claims and bad faith/IFCA claims are so separate and distinct that they should be asserted in two consecutive lawsuits, as Fortson would like this Court to believe. Instead, Allstate seeks to bifurcate the UIM breach of contract and bad

faith/IFCA issues into two trials, and to stay discovery on the bad faith claims until the UIM claims have been resolved, to avoid prejudice to Allstate should discovery and trial on the claims proceed at the same time.⁴⁰ In bifurcated trials, the first phase establishes the amount of UIM benefits the insured is entitled to recover, and the second phase establishes whether or not Allstate acted reasonably when it investigated and valued the UIM claim. Because the jury verdict establishing the UIM damages value is binding on the parties for the second trial phase, evidence as to the facts of the accident and the value of the injuries is not relitigated in the second phase of the bifurcated trial; hence, the bifurcated trials involve separate and distinct issues and evidence.

This is analogous to cases where the Washington courts bifurcate liability from damages in a personal injury lawsuit, they do so because the evidence is separate and distinct. For example, in *Brown v. General Motors Corp.*, 67 Wn.2d 278, 283, 407 P.2d 461 (1965), the plaintiff alleged that a steering defect in her vehicle caused it to veer off the road resulting in her injuries. This Court affirmed the trial court's decision to bifurcate and try the liability issue first, with damages to be tried only if the plaintiff

⁴⁰ Prejudice can result from the discovery of Allstate's UIM work product claims file before the UIM claim has been resolved, (CP112) and from the introduction at trial of Allstate's claims handlers evaluations of the UIM claim when the jury is evaluating the value of the UIM breach of contract damages (CP115), to name just a few.

prevailed on liability. In upholding the order bifurcating the trials, this

Court stated:

[I]n this case, the issues of liability and damages were singularly separable and distinct, and the possibility of a substantial saving in trial time, expense and convenience to the court and to the respective parties was clearly discernable [sic] and that prejudice to the plaintiffs, beyond the chance of a compromise verdict, was not and has not been shown.

Id. By finding that the issue of liability and damages were “singularly separable and distinct,” *for purposes of bifurcating trial on those issues*, this Court certainly was not suggesting that the issues of liability and damages were so separate and distinct that they should have been asserted in two separate, consecutive lawsuits. *Id.* The same holds true in this case. Allstate’s argument in support of *bifurcated trials* in actions where plaintiffs have properly alleged both UIM and bad faith/IFCA claims against Allstate in one lawsuit is *not* “clearly inconsistent” or incompatible with Allstate’s arguments in this case that Fortson’s claims for bad faith/IFCA are barred by the doctrine of res judicata because they were not joined in her 2011 lawsuit.

Second, judicial estoppel is not appropriate here because the second factor for its application has likewise not been met – namely, accepting Allstate’s position that res judicata applies to the facts of this case would not create any “perception” that any court was “misled” by Allstate’s

position when it moves to bifurcate trials. Allstate has never asserted in its motions to bifurcate that bad faith/IFCA claims should not be brought in the same lawsuit as the UIM breach of contract claim, nor has Allstate argued that the claims do not arise out of the same transactional nucleus of facts.

Turning to the third factor, Fortson has failed to establish how Allstate would derive a “unfair advantage” by application of the doctrine of res judicata in this case nor has she shown that an “unfair” detriment would be imposed on her if judicial estoppel was applied. The simple truth is that Allstate’s position on motions to bifurcate in cases where the insured has properly alleged both UIM and bad faith/IFCA claims against Allstate in one lawsuit has absolutely no relevance to the application of res judicata in this case. Fortson has not, nor can she, demonstrate any unfair detriment to her from Allstate’s position in unrelated motions in unrelated cases.

Turning to the remaining factors set forth in *Markey*, consideration of these factors leads to the same conclusion: judicial estoppel is not appropriate in this case. First, Allstate’s motions to bifurcate are not always successful (*Markey* factor no. 1). See, e.g., *Krett v. Allstate Ins. Co.*, No. 13-131, 2013 WL 5406222 (W.D. Wash. Sept. 26, 2013); *Dees v. Allstate Ins. Co.*, No. 12-483, 2013 WL 3877708 (W.D. Wash. Sept. 6, 2012); *Tavokoli v. Allstate Prop. & Cas. Ins. Co.*, No. 11-1584, 2012 WL 1903666 (W.D. Wash. May 25, 2012) (collecting cases); *Light v. Allstate Ins. Co.*,

182 F.R.D. 210 (S.D. W. Va. 1998). Second, a motion to bifurcate does not end in a judgment as required for judicial estoppel, it merely ends in an order either granting or denying the motion (*Markey* factor no.2). See, *Raymond v. Ingram*, 47 Wn. App. 781, 785, 737 P.2d 314 (1987), superseded by statute on other grounds as stated in, *C.J.C. v. Corp. of Catholic Bishops of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (refusing to apply the doctrine of judicial estoppel because the party's alleged inconsistent position was taken in reference to the court's denial of a motion for summary judgment, which the court reasoned was not a final judgment).

Third, the parties and questions in the motions to bifurcate are not the same as presented in this case: the question for purposes of a motion to bifurcate is whether bifurcation will avoid prejudice and promote judicial economy as required under Civil Rule 42, while *res judicata* raises the question of whether claims and issues filed in a second lawsuit were litigated, or could have been litigated, in the prior action. *Karlberg*, 167 Wn. App. at 535 (*Markey* factor no. 4). In addition, Fortson has not come forward with any evidence to establish that she was misled by Allstate's request for bifurcation in the foreign actions and changed her position in reliance (*Markey* factor no. 5). In fact, there is no evidence that Fortson knew of those motions when filing her 2011 lawsuit.

In the end, it is abundantly clear that Fortson has failed to satisfy the requirements for imposing judicial estoppel in this case. That Allstate seeks *bifurcated trials* in actions where plaintiffs have properly alleged both UIM and bad faith/IFCA claims against Allstate in one lawsuit is neither inconsistent nor incompatible with Allstate's position here that Fortson's claims for bad faith/IFCA are barred by the doctrine of res judicata because they were not joined in her 2011 lawsuit. Fortson has failed to establish the presence of any factors for application of judicial estoppel. The trial court did not abuse its discretion when it ruled that the doctrine did not apply.

C. The Trial Court's Order Denying Fortson's Motion For Continuance Of The Summary Judgment Motion Should Be Affirmed Because Fortson Failed To Provide Any Analysis Or Argument In Her Appellate Brief To Establish That The Trial Court Abused Its Discretion In Denying Her Motion.

A trial court's order denying a CR 56(f) motion to continue a summary judgment motion is also reviewed for abuse of discretion. *Briggs*, 135 Wn. App. at 961. Civil Rule 56(f) allows a court, in its discretion, to continue a motion for summary judgment when the party opposing the motion for summary judgment "cannot present by affidavit facts essential to justify the party's opposition" to permit depositions or discovery. CR 56(f).⁴¹ A trial court does not abuse its discretion when it denies a motion

⁴¹CR 56(f) states in pertinent part: "When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may ... order

to continue under any of the following circumstances: “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Local 1001*, 77 Wn. App. 33, 49, 888 P.2d 1196 (1995) quoting *Tellevik v. Real Prop.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992). On appeal, Fortson does not address *any* of these factors, much less establish that she has met all three.

Vague and generalized statements as to what evidence is being sought and how it will preclude summary judgment does not support a motion for CR 56(f) continuance. *See, Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003), *rev. denied*, 150 Wn.2d 1021 (2003). Fortson does not state what evidence would be established through the additional discovery or how the desired evidence will raise a genuine issue of material fact. While she argues that “the parties’ ‘business understanding or usage’ is relevant to whether actions should be deemed the same for purposes of applying res judicata,” she does not provide any explanation as to the meaning of the phrase ‘business understanding or

a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

usage,' she does not provide citation to any legal authority to explain what is meant by the phrase or how the phrase is to be applied, she does not provide any analysis to explain how this phrase applies to the facts of the present case, and she does not explain how discovery of Allstate's "business understanding or usage" will create a genuine issue of material fact on the application of res judicata to this lawsuit, which is a question of law for the court to decide. Fortson's vague and generalized statements are insufficient to warrant a continuance.

Finally, while *Fortson* summarily argues that "[t]he court has a 'duty' to give the party opposing summary judgment 'a reasonable opportunity to complete the record before ruling on the case,'"⁴² citing *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902-03 and n.5, 973 P.2d 1103, *rev. denied*, 139 Wn.2d 1003 (1999), she fails to recognize that the moving party must *first* "show reasons why the party cannot present facts justifying its opposition," *and* must satisfy each of the requirements set forth above. *Mannington*, 94 Wn. App at 902. Fortson has failed to satisfy her burden. In short, Fortson failed below and on appeal, to identify the evidence she believed she would have obtained in discovery, and to

⁴² Petitioner's Opening Brief at 37.

establish how that evidence would raise a material issue of fact on the legal issue of res judicata. Accordingly, the trial court's order should be affirmed.

V. CONCLUSION

For the foregoing reasons, Allstate respectfully requests the Court affirm the trial court's rulings below and its Order on Summary Judgment dismissing *Fortson II*, as a matter of law and with prejudice.

RESPECTFULLY SUBMITTED this 20 day of April, 2016.

KELLER ROHRBACK L.L.P.

By 

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CERTIFICATE OF SERVICE

I, Keeley Engle, declare under penalty of perjury under the laws of the State of Washington that at all times hereinafter mentioned, I am a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date below, and pursuant to the service agreement in this case, I caused a copy of the foregoing document to be served on the individuals identified below via Email and First Class U.S. mail, postage prepaid:

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SIGNED this 20th day of April, 2016, at Seattle, Washington.



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Subject: RE: Fortson-Kemmerer v. Allstate - Supreme Court Cause No. 92425-2

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Subject: Fortson-Kemmerer v. Allstate - Supreme Court Cause No. 92425-2

Good afternoon Mr. Carpenter,

Allstate Insurance Company respectfully submits the attached Respondent's Brief for filing and entry with the Court. Per the parties service agreement, Counsel for the Petitioner is being served simultaneously by copy of this email.

Regards,

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