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**I. SUMMARY OF REPLY ARGUMENT**

Mutual of Enumclaw does not dispute the following facts: (1) the settlement judgment between MOE's insured (Paulson Construction) and the Martinellis established clear liability of the insured for a fixed amount of damages; (2) Paulson Construction assigned all of its contract rights and bad faith claims to the Martinellis as part of the settlement; (3) MOE *admitted* that "some" of those damages come within its coverage; (4) MOE had ample opportunity to investigate and adjust the Martinelli's third-party claim, and; (5) the Martinellis made demand on MOE to pay the undisputed amounts due under the policy, but MOE paid *nothing*. Martinelli Br., pp. 45-48. These facts establish MOE's violation of WAC 284-30-330(6).

As the prevailing party in the trial court, the Martinellis may argue any basis urged in the trial court upon which this Court may affirm the trial court judgment. This Court thus properly considers whether MOE violated WAC 284-30-330(6) as an additional ground on which to affirm.

MOE mistakenly asserts that the Martinellis cannot enforce MOE's duty of good faith, yet Washington law clearly recognizes that the insured's *assignee* can indeed enforce the insurer's duty of good faith to its

insured. The Martinellis furthermore *agree* that if MOE had paid *something*, then MOE's payment would have required the Martinellis to come forward with evidence that MOE's claim investigation and payment were unreasonable; however, those are not the facts. Instead, MOE paid nothing, despite the fact that WAC 284-30-330(6) required it to unconditionally tender the reasonable amount of undisputed, covered damages.

The parties also agree that the insured's remedies for an insurer's bad faith in handling a third-party claim include a presumption of harm and estoppel to deny coverage. The parties further *agree* that a single violation of the claims handling subsections to WAC 284-30-330 represent *per se* bad faith. The Martinellis specifically and properly briefed MOE's violation of WAC 284-30-330(6) in their Opening Brief, as an alternative basis for affirming the trial court's determination that MOE had acted in bad faith. The Martinellis' Opening Brief also specifically briefed Washington remedies for an insurer's bad faith, including the presumption of harm and estoppel to deny coverage. Under these circumstances, the Martinellis had no reason to reiterate those arguments for a second time in their cross-appeal contained in the same Brief.

## II. ARGUMENT

### A. THE COURT HAS JURISDICTION TO REVIEW WHETHER MUTUAL OF ENUMCLAW VIOLATED WAC 284-30-330(6).

Mutual of Enumclaw mistakenly asserts (MOE Reply Br., pp. 36-38) that this Court may not consider whether MOE violated WAC 284-30-330(6), even if that violation provides an alternative ground on which to affirm the trial court judgment.

The Martinelli's Brief explained (pp. 17, 45) that Mutual of Enumclaw's violation of WAC 284-30-330(6) provides an additional basis upon which this Court can *affirm* the trial court judgment. As the party prevailing in the trial court, the Martinellis are "entitled to argue any grounds in support of the superior court's order that are supported by the record" without even filing a notice of cross-appeal. *McGowan v. State*, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002). The Martinellis seek no *additional* relief by way of their cross-appeal; they only seek affirmance of the trial court judgment. The Martinellis thus properly argue MOE's violation of WAC 284-30-330(6) as an alternative basis for affirmance of the trial court judgment.

Nevertheless and out of an abundance of caution, the Martinellis did indeed file a notice of cross-review on this issue, consistent with RAP

2.4(a)(“The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent”). The Martinellis also properly assigned error to and briefed this issue in their opening brief. Martinelli Brief, pp. 4, 45-48.

Thus, whether construed as an alternative basis for affirming the trial court judgment, or properly raised pursuant to RAP 2.4(a), this Court unquestionably has jurisdiction to decide whether MOE violated WAC 284-30-330(6) and, if so, what remedy should follow that violation.

MOE’s argument to the contrary (MOE Reply Br., pp. 36-38) is in error.

**B. NO DISPUTE OF FACT EXISTS CONCERNING MOE’S VIOLATION OF WAC 284-30-330(6).**

Relying on the trial court’s Letter Opinion, MOE says that “it is unquestioned that there are material issues of fact regarding whether MOE has failed to pay the Martinellis a sum which is undisputably insured under the insurance contract.” MOE Reply Br., p. 38. Compare, Martinelli Br., p. 47.

However, no dispute exists concerning the *material*<sup>1</sup> (and very simple) facts critical to MOE’s violation of WAC 284-30-330(6). **MOE**

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<sup>1</sup>A “material” fact is one upon which the outcome of the litigation depends, in whole or in part. *Hash by Hash v. Children’s Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988), quoting, *Barrie v. Hosts of America*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

**thus quibbles** (MOE Reply Br., pp. 41-43) **about the precise *amount*** that MOE should have paid to comply with WAC 284-30-330(6), but does *not* respond to the three simple, *material* facts: (1) MOE admits that *some* of the Martinelli's damages are covered; (2) the judgment established clear liability, and; (3) MOE thereafter paid nothing, despite the Martinelli's request and ample opportunity for it to identify insured damages. See, Martinelli Brief, pp. 13-14, 46-48. No dispute exists concerning these facts *material* to MOE's violation of WAC 284-30-330(6) and the Martinellis need show no other facts to establish MOE's violation.

MOE merely argues that it can *indefinitely* ignore WAC 284-30-330(6), without consequences. However, to allow an insurer to pay *none* of the undisputed, covered damages while it litigates coverage as to *some* of the damages eviscerates WAC 284-30-330(6) and serves to encourage insurers to delay the adjusting process and payment of undisputed claims. This is precisely what RCW 48.01.030 and related WAC 284-30-330 are intended to prevent. This statute and accompanying regulations are completely consistent with MOE's quasi fiduciary duty to its insured. Accordingly, no genuine issue of *material* fact exists concerning whether MOE violated WAC 284-30-330(6).

**C. THE MARTINELLIS PROPERLY ASSERT THE RIGHTS OF PAULSON CONSTRUCTION AGAINST MOE UNDER WAC 284-30-330(6).**

The parties *agree* that MOE's insured, Paulson Construction, assigned *all* of its contract rights and bad faith claims against MOE to Mr. and Mrs. Martinelli. CP 189-210; MOE Reply Br., p. 13; Martinelli Brief, p. 13. Nevertheless, relying on *Nigel v. Harrell*, 82 Wn. App. 782, 919 P.2d 630 (1996), MOE argues that the Martinellis have no "cognizable" cause of action for MOE's violation of WAC 284-30-330(6). MOE Reply Br., pp. 40-41. MOE is mistaken. Washington law unmistakably allows the *assignee of an insured* to enforce the insurer's duties to the insured.

For example, in *Smith v. Safeco Ins. Co.*, 112 Wn. App. 645, 50 P.3d 277 (2002), *rev'd on other grounds*, 150 Wn.2d 478, 78 P.3d 1274 (2003), the Court of Appeals cited *Nigel* and agreed that the third-party plaintiff could *not* assert her own cause of action against the insurer and affirmed dismissal of that part of the complaint. *Smith*, 112 Wn.2d at 650 ("Thus, Smith has no claim against Safeco in her own right").

Nevertheless, the Court of Appeals thereafter recognized, discussed and decided (albeit incorrectly) the merits of Smith's claim, *as assignee of the insured*, that the insurer breached its duty of good faith when it refused to inform the third-party claimant of the insured's policy limits in a clear

liability situation. *Id.*, 112 Wn.2d at 650-55. Accord, e.g., *McGreevy Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 32-36, 904 P.2d 731 (1995) (assignee enforcing insured's contract right to recover damages); *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 204, 743 P.2d 1244 (1987).

The Martinellis, *as assignees of the insured*, thus state a proper claim for relief against Mutual of Enumclaw for breach of MOE's duties under WAC 284-30-330(6). MOE's argument to the contrary is in error.

**D. WASHINGTON'S INSURANCE REGULATIONS ESTABLISH THE STANDARDS FROM WHICH TO DETERMINE WHETHER MOE ACTED "REASONABLY" WHEN IT PAID NOTHING AFTER ITS INSURED'S LIABILITY BECAME FIXED AND MOE ADMITTED COVERAGE FOR SOME OF THOSE AMOUNTS.**

Mutual of Enumclaw also argues (MOE Reply Br., pp. 39-43) that its violation of WAC 284-30-330(6), standing alone, does not represent bad faith unless the insured has "clearly established what liability, if any, MOE has for the settlement entered into by Paulson and the Martinellis." *Id.*, p. 41. As it has in both of its briefs in this Court, Mutual of Enumclaw ignores its *admission* that *some* of the damages included in the liability judgment against its insured do indeed fall within its coverage. The Martinellis thus agree that *if* MOE had paid *something*, then the Martinellis would have been required to come forward with evidence as to

whether such an amount unconditionally tendered was indeed “reasonable.” See, *McDill v. Utica Mut. Ins. Co.*, 475 So.2d 1085, 1092 (La. 1985)(“In this case, had Utica tendered some reasonable amount of the general damages, they would not have been arbitrary and capricious and the penalty provision would not apply”); see further, *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 336, 2 P.3d 1029 (2000)(in determining whether the insurer’s settlement strategy violated WAC 284-30-330(7), Court held that “based on the *large disparity* between State Farm’s offers and the ultimate result, a jury could not find that State Farm forced Anderson into arbitration by making unreasonably low offers.” [Emphasis added]). See further, *Martinelli Br.*, p. 46. But those are not the facts present here, *because MOE did not pay any amount*. Instead, MOE paid *nothing*.

MOE nevertheless argues that “pre-litigation settlement offers do not *determine* what in fact was the sum actually owed to the claimant.” MOE Reply Br., p. 42 (emphasis added). The Martinellis agree. However, *Voland v. Farmers Ins. Co. of Arizona*, 189 Ariz. 448, 943 P.2d 808 (1997), cited by MOE (MOE Reply Br., p. 42), is inapposite to the facts and law presented here. More specifically, in *Voland*, “plaintiff never demanded the carriers to pay her undisputed special damages before

arbitration” and “any obligation the carriers had to gratuitously pay plaintiff UM benefits in advance for her special damages was, as a matter of law, ‘fairly debatable.’” *Young v. Allstate Ins. Co.*, 296 F. Supp.2d 1111, 1117 (D. Ariz. 2003), quoting *Daly v. Royal Ins. Co. of Am.*, 2002 WL 17678887 \*11-12 (D. Ariz. 2002). Here, the Martinellis *did* ask MOE to pay the undisputed amounts *and* MOE itself admits that “some” of the judgment amount against its insured is indeed covered under its policy. Moreover, outside the specific context of Arizona UIM claims, an Arizona insurer’s failure to pay the “undisputed portion of the claim promptly” does indeed constitute bad faith. See, *Voland, supra*, 943 P.2d at 812, quoting, *Borland v. Safeco Ins. Co.*, 147 Ariz. 195, 200, 709 P.2d 552, 557 (App. 1985); *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 597, 734 P.2d 76, 82 (1987). Indeed, *Voland* distinguished *itself* because *Borland* and *Filasky* did not involve a UIM claim. *Voland, supra*, 943 P.2d at 812 (“a personal injury claim is unique and generally not divisible or susceptible to relatively precise evaluation or calculation”).

Washington established specific insurance claims handling regulations that require insurers, including MOE, to promptly investigate and adjust claims. When, as here, a third party claim becomes liquidated against the insured, the insurer acknowledges that at least some of the

claim falls within coverage, demand is made upon the insurer to pay the undisputed amounts of the claim, and the insurer has had ample opportunity to investigate and adjust the claim, the insurer cannot stonewall the claim and pay *nothing*. If it does engage in such stonewalling, then its insured (and the assignee of its insured) have every right to recover for the insurer's bad faith.<sup>2</sup>

In essence, MOE seeks to shift to the insured MOE's responsibility to adjust claims in a timely fashion, contrary to what WAC 284-30-330(3), (4), (6), (7), (12) and WAC 284-30-370 require. An insurer violates its duty of good faith when, as here, its insured's liability has been fixed, the insurer has acknowledged coverage for some of the amounts included in the judgment; *but then pays nothing* despite the fact that it has had ample opportunity to investigate the claim.

**E. THE MARTINELLIS PROPERLY BRIEFED  
PRESUMPTION OF HARM AND ESTOPPEL IN THEIR  
OPENING BRIEF.**

Mutual of Enumclaw inaccurately argues (MOE Reply Br., pp. 43-

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<sup>2</sup> MOE also asserts that "the Martinellis failed to establish how Paulson had been damaged as a result of the failure of MOE to pay after the settlement was reached." MOE Reply Br., p. 43. MOE has the issue backwards. Under *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992), there exists a *presumption of harm*. Thus, the burden was on MOE, not the Martinellis, to show that Paulson was *not* harmed by MOE's violation of WAC 284-30-330(6). MOE has never done that, or even tried to do that. Moreover, the judgment remains in effect against Paulson without satisfaction or credit for MOE's payment of undisputed amounts covered by its policy. See, Martinelli Br., pp. 26-32.

44) that “the Martinellis do not argue or offer citation to authority for this extraordinary proposition...” that “infer[s] a violation of a WAC provision, after settlement by the tort claimant and the insured can be a basis to invoke coverage by estoppel.” That is simply not true. See, Martinelli Br., pp. 45-48. First, MOE itself acknowledges that “the insured may establish the first element [of a CPA claim, *i.e.*, an unfair or deceptive act or practice in trade or commerce that impacts the public interest] **by showing a violation of any subsection of WAC 284-30-330**” and “[t]he violation of a WAC 284-30-330 subsection establishes a breach of duty [for purposes of a “non-CPA claim”].” MOE Br., p. 40 (emphasis added), *quoting, American Manufacturers Mut. Ins. Co. v. Osbourne*, 104 Wn. App. 686, 696-8, 17 P.3d 1229 (2003); *Industrial Indemnity v. Kallevig*, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990) and *Anderson, supra*, 101 Wn. App. at 333. The Martinellis *agree* that, by showing a single violation of a subsection of WAC 284-30-330, they have established MOE’s bad faith. MOE thus mistakenly relies upon *Hayden v. Mut. of Enumclaw*, 141 Wn.2d 55, 1 P.3d 1167 (2000), which did *not* involve violation of a subsection of WAC 284-30-330 *and which specifically did not involve bad faith. Id.*, 141 Wn.2d at 63 (“Hayden Farms, however, failed to allege either prejudice or bad faith, and, thus,

neither of these forms of estoppel apply”). In contrast, the Martinellis specifically rely upon MOE’s violation of WAC 284-30-330, which represents *per se* bad faith—as the authorities quoted in MOE’s own Reply Brief establish.

The Martinelli’s opening brief thus clearly and unambiguously asserted that MOE’s violation of WAC 284-30-330(6) and the related regulations governing prompt claims handling practices, represents *bad faith*. Martinelli Br., pp. 45-48. The specific and expressly stated purpose of the Martinellis’ argument on this issue was to provide this Court with an alternative basis on which to affirm the trial court judgment based upon bad faith. Martinelli Br., pp. 17, 45. The Martinellis also thoroughly briefed the appropriate remedies for insurer bad faith, pursuant to *Butler*, *Besel* and *Vanport Homes*. Martinelli Br., pp. 26-32. Indeed, MOE agrees “[t]he Martinellis are correct that, if the insurance company engages in bad faith regarding the handling of the defense of the underlying tort claim, it is presumed that the insured was harmed, and that coverage by estoppel may be invoked.” MOE Reply, p. 16. The Martinellis thus had no reason for the Martinellis to reiterate that argument again later in their brief.

### III. CONCLUSION

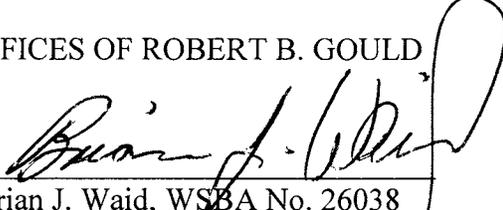
Mr. and Mrs. Martinelli reiterate their request that the Court affirm the judgment of the trial court in their favor and against Mutual of Enumclaw, reverse the trial court's decision that an insurer may indefinitely delay tender of undisputed, covered property damage claims, and award Mr. and Mrs. Martinelli their reasonable attorney fees on appeal.

DATED this 23<sup>rd</sup> day of September, 2005.

Respectfully submitted,

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