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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

FEB -1 AM 11:30
NO. 64003-8

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

RYAN E. MILLER, individually,
Respondent,

v.

PATRICK J. KENNY, individually
Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,
Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR SKAGIT COUNTY
HONORABLE MICHAEL E. RICKERT

CORRECTED BRIEF OF RESPONDENTS MILLER AND KENNY

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I. INTRODUCTION

Despite clear evidence that its insured was liable and significantly underinsured for damages arising from a car accident, Safeco, for over two and one-half years, refused to offer its limits, forcing its insured to consent to entry of judgment, coupled with an assignment and covenant not to execute. Safeco stipulated that its insured's settlement was reasonable, and in moving to dismiss the bad faith claim brought by its insured's assignee, did not contest its bad faith, challenging only his standing to sue and alleging that the insured improperly reserved to himself certain elements of his damages.

The trial court properly denied Safeco's challenge based on the terms of the assignment. Safeco, as a stranger to the assignment, lacks standing to allege that the parties improperly "split the damages" in their agreement. The terms of the assignment and the parties' conduct establish that Safeco's insured, Patrick Kenny, fully and completely assigned all of his claims against Safeco to the injured party, Ryan Miller. CR 17 expressly precludes dismissal based on an assignee's standing, especially where, as here, Safeco is fully protected against multiple claims because both Miller and Kenny are parties to the action and Kenny fully ratified Miller's claims. Safeco,

which litigated the bad faith claim for over three years before raising its assignment defense, has waived its challenge to Miller's standing. Any one of these reasons justify dismissing review as improvidently granted or affirming the trial court's denial of summary judgment.

Safeco's substantive argument, should the court address it, is meritless. Safeco made no attempt to rebut the presumption that its bad faith conduct damaged Kenny, its insured, who, as Safeco concedes, suffered both economic and non-economic harm. Further, a reasonable covenant judgment entered against its insured is, in and of itself, sufficient harm to support a claim for bad faith against Safeco. This court should hold that Safeco is liable for the amount of Kenny's settlement as a matter of law if Miller prevails in establishing Safeco's bad faith at trial.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

The insurer's delay, its mishandling of claims and its refusal to settle caused its insured to enter into a covenant judgment in excess of his policy limits, to incur personal attorney fees, as well as other non-economic harm. The insured assigned the right to bring any and all claims against his insurer, including an action for bad faith, along

with all damages arising from the covenant judgment, to the injured plaintiff in settlement of the lawsuit.

1. Is the insurer entitled to dismissal based on its unilateral interpretation that the insured's reservation of the right to recover personal damages in the assignment precludes, as a matter of law, the harm or prejudice necessary to support a cause of action for bad faith, where both parties to the assignment are before the court, both agree that the assignment gave the assignee all of the insured's claims, and the insured has ratified his assignee's right to sue and agrees to be bound by the resulting judgment? (Arg. § B.1-4)

2. Did the insurer waive its right to assert the assignee's lack of standing by waiting more than three years, during which it litigated this bad faith claim, before raising the standing defense, and then refused to amend its answer to assert the assignee's lack of standing after being ordered to do so by the trial court? (Arg. § B.5)

3. Where the trial court failed to certify that review of the issue of the assignee's standing to sue for bad faith will expedite termination of the litigation, should review be dismissed as improvidently granted? (Arg. § B.6)

4. Did the trial court correctly refuse to dismiss the bad faith claim brought by the insured's assignee based upon the insurer's

contention that the insured's reservation in the assignment of the right to recover personal damages "rebutted the presumption of harm" and therefore barred the bad faith claim as a matter of law? (Arg. § C)

III. RESTATEMENT OF THE CASE

A. **Safeco's Mishandling Of Its Insureds' Claims Is an Unchallenged Verity On Appeal.**

This case involves Safeco's liability for its mishandling of the various insurance claims stemming from an August 2000 rear-end automobile accident. Because Safeco did not challenge plaintiff's allegations of misconduct in its cursory, five page motion for summary judgment, they are verities on review of the trial court's denial of Safeco's motion. (CP 166-71). See *Torres v. Salty Sea Days, Inc.*, 36 Wn. App. 668, 670, 676 P.2d 512, *rev. denied*, 101 Wn.2d 1008 (1984) (accepting "plaintiff's allegations as verities. The question is whether these allegations, if proved, would entitle Torres to relief.")

Safeco's attempt to justify its handling of its insureds' claims in its opening brief disregards this standard of review, but it is also wholly unsupported by the summary judgment record. Safeco's self-serving version of the facts must be disregarded by this court because none of the evidence it cites was before the trial court when it denied Safeco's motion for partial summary judgment. RAP 9.12 ("On review

of an order . . . denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.")¹

As established in plaintiff's response to Safeco's summary judgment motion, and confirmed through additional discovery, Safeco knew Mr. Kenny was liable and significantly underinsured, yet spent two and a half years deliberately evading its legal duties to its insureds solely in order to protect its own financial interests.

In August 2000, Patrick Kenny was driving a Safeco-insured vehicle with three friends when he rear-ended another vehicle at freeway speeds without evasion or excuse. The passengers were hospitalized with head injuries and multiple fractures. Safeco investigated the claims and quickly determined that Mr. Kenny was an insured driver and was 100% at fault. Safeco also determined that the damages to the passengers (Miller, Bethard and Peterson)

¹ Safeco cites CP 437-441 for the facts stated on page 4 of its brief. However, those citations are to a narrative interrogatory answer, attached to a 2005 memorandum in opposition to a motion to compel. (CP 351-458) That pleading was not presented to the trial court on summary judgment, is not listed in its summary judgment order, and, in any event, is inadmissible to support Safeco's defense. See ER 801. (CP 166-93 (motion for summary judgment); 302-15 (reply); 316-18 (order))

exceeded all liability limits, that Kenny faced an excess exposure, and that all of the passengers consequently had underinsured (UIM) claims. (CP 237, 239-240)

Inexplicably, Safeco assigned the same adjusters and supervisors to handle the passenger's first party UIM claims, as well as their third party liability claims adverse to Mr. Kenny.² (CP 239) They evaluated the commingled liability and damage information for all the claimants, determining within months that the claims exceeded all liability and UIM limits. Safeco used the evaluations to set its reserves, or the "most probable outcome" of what it expected to pay, at the full liability limits of \$1.5 million.³ (CP 239) It also set a

² Months after the lawsuit was filed, Safeco eventually separated the adjusters while keeping all claims commingled and assigned to the same supervisors. (CP 274-75) See *Ellwein v. Hartford Acc. and Indem. Co.*, 142 Wn.2d 766, 782, 15 P.3d 640 (2001) (in finding bad faith as a matter of law, court held that commingling of liability and UIM files was "particularly troubling".)

³ Safeco uses its evaluations in two ways – to set reserves and to determine injury claim value. As established by its internal documents and the admissions of its managing agents, Safeco's reserves are based on all the same factors it uses to value injury claims for purposes of liability or UIM settlements. (CP 834, 837-38, 846-55) Thus, a claim reserve amount is the "most probable outcome" for what Safeco expects to pay in the future, and is necessarily the same as the value of that claim. *Id.*

\$100,000 reserve on Cassie Peterson's UIM claim, which it represented was the full amount of her UIM limits.⁴ (CP 239, 296)

As explained below, over the next two and one-half years, Safeco re-evaluated these claims 20 more times, each time reconfirming its conclusion that Kenny was liable, significantly underinsured and that UIM benefits were owed. (CP 239-45, 604-09) Yet each time, Safeco refused to offer those limits to settle any of the claims.

Safeco's automobile liability limit for Kenny was \$500,000, with an additional umbrella policy on top. Although the named policyholders (the Petersons) had no objection to disclosure of their total policy limits, Safeco implied that it wanted to hide that information, and asked the Petersons themselves not to disclose it. (CP 562, 571-73)

⁴ Her limits were actually \$500,000, an amount approximating Safeco's internal evaluation of her actual damages. (CP 741, 768-70) Safeco's misrepresentation of those limits was not discovered until after this bad faith litigation commenced. (See CP 585-86, 602)

The claimants needed to know the full liability limits in order to pursue their respective UIM claims.⁵ Safeco rejected their requests to learn the amount of the liability limits. By the end of the first year following the accident, all grew frustrated and eventually hired counsel.

Counsel for Bethards and Millers made repeated requests to Safeco during the fall of 2001 for disclosure of the limits. (CP 261-62, 264, 267-69) Safeco knew that continued refusal to disclose limits would force a lawsuit against its insured. Its internal file notes confirm that it was *not* in its insureds' best interests to refuse to disclose the limits.⁶ (CP 268-69, 271-72) Even though Safeco had by this point re-evaluated the claims as exceeding all liability and UIM limits ten different times, it concealed the fact that Kenny was underinsured. (CP 241-44, 728-29) Contrary to the express wishes and interests of its insureds, Safeco continued to withhold limits information while misrepresenting that the undisclosed limits would be "sufficient." (CP

⁵ The UIM insured carries burden of proving the amount of the liability limits before obtaining underinsured benefits. ***Dixie Ins. Co. v. Mello***, 75 Wn.App 328, 335, 877 P.2d 740 (1994), *rev. denied*, 125 Wn.2d 1025 (1995).

⁶ See ***Smith v. Safeco Ins. Co.***, 112 Wn.App 645, 50 P.3d 277 (2002), *rev'd on other grnds* 150 Wn.2d 478, 78 P.3d 1274 (2003) (bad faith can be predicated upon an insurer's refusal to disclose liability limits).

267) Safeco's conduct forced Patrick Kenny to be sued in December 2001, when Ryan Miller filed this action in Skagit County Superior Court. (CP 1-3, CP 265)

Later discovery in the bad faith case revealed that in January 2001, Safeco implemented a new bonus or incentive program to turn around its claims department. During the time Safeco was rejecting the requests to disclose its liability limits, Safeco claims personnel were being financially rewarded for meeting arbitrary claims payment goals and saving "lost economic opportunities" by reducing or delaying injury and property payments.⁷ By May 2002, Safeco paid its claims employees their first turnaround bonus. (CP 877) The performance bonus and incentive programs continued throughout the life of these claims. (CP 876)

In response to discovery in the underlying personal injury action, Safeco was forced to disclose that the umbrella policy provided Kenny with an additional million dollars coverage. After Miller provided his UIM insurer, Farmers Insurance, with this information, it determined that Kenny was still significantly

⁷ For example, bonuses could be earned for reducing injury payments by 5%, by complying with average payment goals of \$7,335 for injury claims under \$50,000, and only paying on average \$9,625 for claims over \$50,000, including damages for brain injuries, lost limbs, and broken backs. (CP 872-77, 883, 890)

underinsured, it timely evaluated his claim and paid Miller his full UIM benefits in July 2002. Safeco was informed of Farmers' evaluation. (CP 703-05) Safeco also received separate demands from each of the claimants. Safeco even received a demand from its own insurance defense counsel to tender all Safeco's limits in an attempt to settle the case. (CP 279, 280) Safeco refused all requests.

In August 2002 – two years from the accident – Safeco had reevaluated the claims 14 times. (CP 241-45) Each time Safeco's internal evaluation confirmed its previous evaluations and those of Farmers Insurance that Kenny was significantly underinsured, exposed to excess judgments and that it owed UIM benefits to its insured passengers Cassie Peterson and Ashley Bethard. Safeco internally used its evaluation to re-reserve all liability and UIM limits. Externally, however, Safeco refused to tender those limits to settle. It refused to pay any UIM benefits it determined were owed (despite Farmers paying Miller his UIM benefits). It also refused to mediate. (CP 706, 710)

Contrary to Safeco's recent claims, at the time it was rejecting the demands from the claimants and its own insurance defense counsel to tender limits to settle, Safeco claimed the damages might

not exceed the limits so it was not willing to tender or mediate. As Safeco's claims file and testimony of its managing agents confirmed, the decision not to settle or mediate by August 2002 was solely Safeco's, based upon its own financial decisions, and had nothing to do with the demands from any of the claimants. (CP 279, 706)

Over the next eight months, Safeco refused to settle or mediate. Safeco offered a number of excuses for its continued delay, including that Kenny might not ultimately be proven to be under-insured, that it needed formal medical examinations of the claimants, and that Kenny might have a seatbelt defense to liability under Canadian law. Yet Safeco never hired the experts it knew would be required to support a seatbelt defense, never hired any damage experts, and eventually dropped its excuse of needing independent medical exams. (CP 279, 706, 710)

B. Safeco's Abandonment of Kenny Left Him No Alternative But To Consent To A Judgment Under The Terms of A Settlement In Which He Assigned To Miller All Of His Claims Against Safeco.

By May 2003, approximately a month before trial on Miller's claims against him, Safeco had essentially abandoned its insured's defense by failing to retain any experts or procure any medical evidence in defense of his case. Kenny was left facing an almost

certain excess verdict – one that was reflected in Safeco’s evaluations and reserves since August 2000. Kenny had no choice but to hire personal counsel at his own expense to negotiate a global settlement with all claimants. After initially threatening to pull coverage, Safeco eventually consented to the settlement, and finally paid Cassie Peterson a portion of her UIM benefits. (CP 285-86, 299)

The settlement required payment of Kenny’s liability limits and entry of reasonable covenant judgments approved by the court. (CP 18-19) It also required Kenny to assign to plaintiffs “all rights, privileges, claims and causes of action that he may have against his insurers or affiliated companies” including but not limited to all of his “privileges, and claims or causes of action arising out the insurance contract.” (CP 19) Finally, it required Kenny’s continued cooperation, and his pursuit of any non-assignable claims, all at the expense of losing any protection or covenants not to execute. (CP 19-20) As reimbursement, Kenny retained an interest in the recovery of certain damages on the assigned causes of action, including his personal attorney fees. (CP 19)

C. Safeco Intervened In The Action And Stipulated To Reasonableness The Covenant Judgment.

Safeco intervened in the action to participate in determining the amount of the reasonable stipulated judgments, acknowledging that Miller as assignee would be seeking to recover from Safeco the excess amount of the final judgment over judgment proceeds, thus giving Safeco “as much at stake in the outcome of the reasonableness hearing as . . . the plaintiff.” (CP 4-9) It then stipulated to reasonable covenant judgments for all of the passengers under the *Glover/Howard* factors. (CP 29-30) It agreed to treat the judgments as entered, waived its rights to contest these judgments, and presented an order to the trial court confirming the agreement. (CP 29-30)

D. Miller Amended His Complaint To Assert Kenny’s Claims Against Safeco. Safeco Litigated The Bad Faith Case For Three and One-Half Years Before Raising Its Assignment Defense.

In June 2005, Miller amended his complaint in his action against Kenny to assert as Kenny’s assignee causes of action against intervenor Safeco for negligence, bad faith, CPA violations, breach of contract, breach of fiduciary duty and breach of regulatory/statutory

violations. (CP 10-30)⁸ Kenny remained a named party in the action. In accordance with the broad language of the assignment, Miller's complaint requested "an award of all economic, non-economic, compensatory and exemplary damages" resulting from Safeco's misconduct. (CP 13, 133) Safeco's initial answer (later stricken) did not challenge the nature or scope of the assignments, or Miller's right or capacity to recover all of Kenny's damages. (CP 459-74, 475-76)

In early 2008, more than two and a half years after Miller asserted his assigned claims, Safeco moved to dismiss the CPA claim, arguing that public policy prohibited its assignment. The trial court denied the motion. (CP 614-24, 625-28) Safeco then filed two unauthorized answers to Miller's complaint. Both asserted the non-assignability of a CPA claim as an affirmative defense, but neither challenged the assignment on the basis of its "split" or "partial" nature. (CP 154, 632)

In May 2008, the trial court struck Safeco's untimely answers, sanctioned Safeco \$1,500 for filing them without permission, and dismissed with prejudice all of its affirmative defenses except "failure

⁸ Miller filed a second amended complaint in April 2006 to clarify his assignment from Peterson. (CP 129-150)

to state a claim.” (CP 644-45) In response to contention interrogatories, Safeco explained that this remaining defense was based solely on its position that (1) payment of the Peterson limits satisfied all of Safeco’s obligations, and (2) breach of regulatory/statutory duties was not a cognizable claim under Washington law. (CP 295) The assignment itself was not mentioned.

In July 2008, Safeco obtained leave to file a proper amended answer, representing that its answer would only admit or deny the allegations in plaintiff’s April 2006 amended complaint, would contain nothing “new or surprising,” and would not “assert new affirmative defenses.” (CP 649, 674-75) While asserting cross-claims for declaratory relief, Safeco’s amended answer still asserted no challenge to Miller’s right as assignee to recover bad faith damages under the assignment. (CP 224-238)

E. The Trial Court Denied Safeco’s Motion For Summary Judgment, And Certified That Interlocutory Review Of Its Order Would Advance The Resolution Of Only One Of The Causes Of Action.

Safeco first challenged Miller’s standing as a bad faith assignee in December 2008, when it filed the summary judgment motion under review. (CP 166-93) Miller objected due to Safeco’s failure to timely plead this defense. (CP 202-06) When the trial court

denied its motion, Safeco orally requested certification and leave to amend to assert an affirmative defense to Miller's recovery because "when this is on appeal, the [waiver] argument will be renewed." (RP 41) The trial court directed Safeco to file motions for certification and to amend under CR 15. (RP 41-42) Safeco moved to certify but never moved to amend its answer.⁹ In response to Safeco's certification motion, Kenny filed a declaration formally ratifying all of the claims Miller was asserting by assignment, including the claim for recovery of Kenny's non-economic harms, and also declared his willingness to pursue those claims in his own name if Miller was not the proper party to do so. (CP 334-35)

In denying summary judgment, the trial court acknowledged the merits of plaintiff's waiver argument, but rested its decision on the "heartbeat of the motion which is the harm issue." (RP 43-44) It stated that this issue presented a "close case," but that the lawsuit as a whole was "alive and breathing" and should continue. (RP 41, 46) Its subsequent order granting certification expressly recognized that review "will materially advance the ultimate termination of [only] *one* of the causes of action." (emphasis added) (CP 346-47) The

⁹ Although Kenny remains both a named and interested party, Safeco has never timely served him with any of the underlying motions or pleadings relevant to its appeal.

Commissioner granted discretionary review despite recognizing that review would not terminate the proceedings below on the remaining causes of action, all of which involved the same evidence and witnesses. (6/3/09 Ruling Accepting Review)

IV. ARGUMENT

A. Summary of Argument.

An insurer may not evade *any* liability for the tort of bad faith if its misconduct caused harm to its insured. Safeco's argument that an insured's assignee cannot sue for bad faith if the insured reserves to himself his "personal damages" is unsupported by any authority or legitimate public policy, and if adopted would undermine the assignability of bad faith claims, a vehicle for settling grievous personal injury actions that the courts of this state have consistently approved for over half a century.

This Court need not address Safeco's argument on the merits to affirm the trial court's denial of summary judgment because Safeco lacks standing to challenge the assignment between Miller and Kenny. Safeco misreads the plain terms of the assignment in which Miller completely and irrevocably received all of Kenny's rights to assert Kenny's claims for bad faith. Even a partial assignment is valid and enforceable.

Moreover, Safeco's argument that Miller, its insured's assignee, lacks standing to assert its insured's harm because the parties improperly "split the harm" in their assignment must be rejected under CR 17, which by its terms, precludes dismissal if an obligor is protected against multiple lawsuits by the joinder or ratification of all interested parties. This rule applies with particular force where, as here, both assignee and assignor are parties to the lawsuit and Kenny has expressly ratified Miller's claims. Even if Safeco could otherwise complain about Miller's standing, Safeco's three year delay in challenging Miller's right to recover constitutes a waiver of its defense as a matter of law.

Safeco conceded for purposes of its motion for summary judgment that its insured Kenny suffered harm as a result of Safeco's bad faith. This concession alone is dispositive. Under Washington law, a covenant judgment is itself sufficient harm to support an action for bad faith. If this court does not dismiss review as improvidently granted, it should affirm and hold that Safeco is liable for the full amount of the reasonable covenant judgment should a jury find that it acted in bad faith.

B. Safeco Cannot Challenge Miller's Right To Sue Under An Assignment That Gives Miller All Of Kenny's Claims Against Safeco.

1. Safeco Lacks Standing To Challenge The Assignment.

Kenny's reservation of the right to recoup damages once Miller recovered them on his behalf in the assigned claims is an issue between Miller and Kenny and is of no moment to Safeco. Safeco lacks standing to challenge the terms or the validity of the assignment between Kenny and Miller. See *Old Nat. Bank of Washington v. Arneson*, 54 Wn. App. 717, 722, 776 P.2d 145, rev. denied, 113 Wn.2d 1019 (1989) (stranger to assignment lacks standing to challenge it); *Barker v. Danner*, 903 S.W.2d 950, 955-56 (Mo. App. 1995) (obligor lacks standing to claim assignment lacks consideration, that assignment was fraudulently made or incomplete).

Thus, this court need not even interpret the terms of the assignment in order to affirm the trial court. But if it does, it should hold that the trial court properly rejected Safeco's challenge to Miller's standing because the assignment gave Miller Kenny's right to sue and protected Safeco against any prejudice arising from multiple suits.

2. **Miller Received And Asserted All of Kenny's Rights Against Safeco.**

Kenny's assignment was complete and irrevocable and included his claim for bad faith as authorized by RCW 4.08.080 and Washington law. See ***Carlile v. Harbour Homes, Inc.***, 147 Wn. App. 193, 208, 194 P.3d 280 (2008) ("An assignee steps into the shoes of the assignor"), *rev. granted in part*, 166 Wn.2d 1015 (2009). Kenny's assignment gave Miller "all rights, privileges, claims and causes of action that he may have against his insurers . . ." (CP 19) Safeco's argument that Kenny's assignment was "incomplete" focuses entirely on the subsequent "reservation" clause in the agreement, in which Kenny reserved to himself only the right to claim an interest in the *proceeds* of any damage award for non-economic losses caused by Safeco. (CP 19) The trial court properly gave effect to both clauses of the agreement by interpreting it to give Miller a complete assignment of the claim, with a reservation in Kenny of the right to recover certain proceeds of the claim. See ***Nishikawa v. U.S. Eagle High, LLC***, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007) (court should harmonize clauses that seem to conflict with goal of interpreting the agreement "in a manner that gives effect to all the contract's provisions"), *rev. denied*, 163 Wn.2d 1020 (2008).

Miller's post-assignment conduct confirms this interpretation of the agreement. See *Berg v. Hudesman*, 115 Wn.2d 657, 677-78, 801 P.2d 222 (1990) (subsequent conduct of contracting parties relevant to discern parties' intent). Safeco contends that Miller's second amended complaint abandoned any claims "on behalf of Kenny," (Pet. Br. at 24), but Miller asserted claims against Safeco based exclusively on his assignment in both his first amended complaint, and in his second amended complaint (which added the assigned claims from Peterson). (CP 129: identifying Miller as "assignee;" CP 131: alleging Safeco's conduct resulted in "injuries and damages to assignor Patrick Kenny").¹⁰

Kenny's conduct following execution of the assignment also confirms that the purpose of the agreement is, as Kenny stated in opposing certification, to "assign and transfer to Ryan all rights and control of any cause of action" he had against Safeco, including any cause of action that might give rise to damages personal to him. (CP

¹⁰ The only operative change in the Second Amended Complaint is its addition of Peterson's assigned claims based on Safeco's UIM policy. Compare CP 10-14 (First Amended Complaint) with CP 129-34 (Second Amended Complaint).

334)¹¹ Kenny's counsel's threat to sue Safeco for personal damages "that are exacerbated" by Safeco's *post-assignment* misconduct (CP 92-93), relied upon by Safeco in violation of RAP 9.12, provides objective evidence that Kenny had already assigned to Miller the right to sue for Safeco's *pre-assignment* breaches of its duty of good faith.

3. A Partial Assignment Is Nonetheless Valid.

Safeco's flawed interpretation of the agreement to create a partial assignment, in which Kenny allegedly kept for himself a portion of his claim, in any event, fails to provide any basis for dismissal. A partial assignment of a chose in action is no less enforceable than an assignment of the entire claim. See *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange*, 4 Wn. App. 49, 51, 480 P.2d 226 (1971).

The only possible concern raised by a partial assignment is that the defendant may face multiple lawsuits arising from the same transaction. *Hardware Dealers*, 4 Wn. App. at 51. However, "[i]f the

¹¹ As Safeco notes (Pet. Br. at 18), Kenny's declaration was interposed to oppose certification on the ground that Kenny had fully ratified Miller's right to bring all of Kenny's claims under CR 17. Safeco's contention that the declaration was interposed to "cure" an invalid assignment, to reform or rescind the assignment, or to provide an improper "subjective" interpretation of the parties' agreement is without merit. (Pet. Br. at 18-21)

debtor is protected in his payment to the assignee, it can be no concern of his that the assignee must account to the assignor for a part or the whole amount so collected.” ***Leavenworth State Bank v. Wenatchee Valley Fruit Exchange***, 118 Wash. 366, 373, 204 Pac. 8 (1922). See ***Purdy v. Pacific Automobile Ins. Co.***, 157 Cal.App.3d 59, 203 Cal.Rptr. 524, 536 (1984) (upholding partial assignment of economic harm arising from insurer’s bad faith while insured retained claims for emotional distress where insured “filed a joint suit with his trustee”).

Here, Safeco cannot possibly face multiple suits because Kenny and Miller are both parties to this action and will be equally bound by any judgment under principles of res judicata. (Arg. § C, *infra*) As the California Court of Appeals held in ***Purdy***, deciding whether a bad faith case may proceed based on whether the assignment “contained a few magical words exalts form over substance.” 203 Cal. Rptr. at 536.

4. CR 17 Precludes Dismissal On The Basis Of Miller’s Standing To Assert Kenny’s Claims Under The Assignment.

CR 17 expressly precludes dismissal of Miller’s bad faith claim based on Miller’s standing as Kenny’s assignee. Where, as here, a defendant argues that the named plaintiff lacks capacity to sue as

assignee, CR 17, by its terms, requires ratification, joinder or substitution, but prohibits dismissal. Safeco's discourse on whether an assignee must possess under the terms of his assignment all the "personal damages" suffered by the insured in order to sue for bad faith is, in the end, an entirely academic exercise because, whether Safeco is right or wrong, Kenny is already joined as a party and has fully ratified Miller's standing to sue and pursue all of his damages. (CP 335)

"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until reasonable time has been allowed after objection for ratification or commencement of the action by, or joinder or substitution of, the real party in interest." CR 17(a). While Safeco now disavows its argument below, in the trial court it correctly characterized its challenge to Miller's standing as an issue of real party in interest. (CP 307)¹² Under the real party in interest rule, however, Kenny's joinder

¹² In response to Miller's argument that Safeco had waived its challenge to Miller's standing, Safeco asserted that Miller "has confused capacity to sue with the problem of real party in interest. The problem here is not that Mr. Miller lacks the capacity to sue, but that he does not own the claim that he is asserting, or stated differently, *that he is not the real party in interest.*" (CP 307) (emphasis added).

or ratification "shall have the same effect as if the action had been commenced in the name of the real party in interest." CR 17(a).

Safeco's contention that the statute of limitations requires the dismissal of Miller's bad faith claim because Kenny's ratification comes "too late" is particularly meritless. CR 17 is designed to foreclose such technical challenges to standing based on the timing or the scope of assignments. See **Eastlake Const. Co. v. Hess**, 33 Wn. App. 378, 380-81, 655 P.2d 1160 (1982), *remanded on other grounds*, 102 Wn.2d 30, 686 P.2d 465 (1984). For instance, in **Kommavongsa v. Haskell**, 149 Wn.2d 288, 317-18, 67 P.3d 1068 (2003), the Supreme Court held that an assignment of a legal malpractice claim was void against public policy, but even after judgment and appeal remanded to authorize substitution of the assignor as the real party in interest. See also **Miller v. Campbell**, 164 Wn.2d 529, 538, 192 P.3d 352 (2008) (authorizing substitution of bankruptcy trustee after trial; "substitution changes only the representative capacity of the parties, not the nature of the claims against which the Estate must defend."); **Rinke v. Johns-Manville Corp.**, 47 Wn. App. 222, 226-28, 734 P.2d 533 (real party in interest may be added at any time, even after trial), *rev. denied*, 108 Wn.2d 1026 (1987).

Safeco's argument against "splitting" an assignment or "divid[ing]" a claim, (Pet. Br. at 24), invokes the danger of multiple lawsuits – the danger that CR 17(a)'s requirement of joinder or ratification is designed to avoid. Here, principles of res judicata fully protect Safeco from such concerns because, even if Kenny "retains the harm," as Safeco argues, both Miller and Kenny are currently parties to this action and both will be bound by any resulting judgment under principles of res judicata. "If they are . . . joined, they are bound." *Restatement (2nd) Judgments* § 55, comment c (both assignor and assignee are bound by judgment if they are joined in an action against the obligor). Here, Kenny *is* joined, and as he affirmed in his declaration, he will be bound. (CP 335 ("I approve and ratify [Miller's] actions . . . I understand I will be bound by any verdict . . .")) See ***Cain v. State Farm Mut. Auto. Ins. Co.***, 47 Cal.App.3d 783, 121 Cal.Rptr. 200, 208 (1975) ("Because, in this case, the partial assignor and the partial assignee are joined as parties plaintiff in the same lawsuit, the judgment is binding upon both plaintiffs, and appellant is protected from future litigation arising out of the same facts under the doctrine of res judicata.")

Safeco cannot possibly establish any basis for dismissal of the bad faith claims against it regardless whether the real party in interest

is assignor, assignee, or both of them together. CR 17 is intended "to expedite litigation by not permitting technical or narrow constructions to interfere with the merits of legitimate controversies." **Beal for Martinez v. City of Seattle**, 134 Wn.2d 769, 778, 954 P.2d 237 (1998). The rule is designed "to allow the court to reach the merits as opposed to disposition on technical niceties." **Hess**, 33 Wn. App. at 381, *citing Fox v. Sackman*, 22 Wn. App. 707, 709, 591 P.2d 855 (1979). Safeco's technical argument that neither Kenny nor Miller is a real party in interest because "Kenny owns the harm [and] Miller owns the covenant judgment" is meritless.

5. Safeco Waived Its Challenge To Miller's Standing By Waiting Three Years Before Raising The Issue.

Safeco never pleaded a defense to Miller's right to recover damages under the assigned claims, and waited for more than three years, extensively litigating other issues, before challenging Miller's standing in its fourth summary judgment motion. Safeco argues that the trial court held that Safeco had not waived the issue, but in fact, the trial court declined to deny the motion on the basis of waiver because it denied Safeco's motion for summary judgment on the merits, and did not need to reach the issue. (RP 43 ("I'm not [denying the motion] on the waiver issue. . . . I'm doing it on the . . . harm

issue.”)¹³ Safeco’s failure to timely raise the issue of Miller’s standing provides an independent ground to affirm the trial court’s refusal to dismiss. See **Marriage of Rideout**, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (court may affirm on any basis supported by record).

A defendant must timely challenge an assignee’s right to recover, either as a matter of lack of capacity under CR 9, or as a theory of avoidance under CR 8(c). See **Walter Implement, Inc. v. Focht**, 42 Wn. App. 104, 107, 709 P.2d 1215 (1985) (noting that federal courts have treated a real party in interest objection as an affirmative defense under Fed.R.Civ.P. 8(c) or 9(a), “deemed waived by delay”; but rejecting challenge to validity of assignment on the merits), *aff’d in part, rev’d on other grounds*, 107 Wn.2d 553, 730 P.2d 1340 (1987).¹⁴ Under Civil Rule 9(a), “[w]hen a party desires to raise an issue as to . . . the capacity of any party to sue or be sued or

¹³ Safeco recognized that the trial court reserved the issue when it acknowledged that the “[waiver] argument will be renewed” on appeal. (RP 41)

¹⁴ See **Federal Deposit Ins. Corp. v. Main Hurdman**, 655 F.Supp. 259, 263 (E.D.Cal.1987) (“defendant’s assertion that the claim is nonassignable falls within the parameters of Fed.R.Civ.P. 9(a)”); **Smith v. Sellar**, 371 P.2d 809, 811 (Ak. 1962) (defendant obligated to comply with Rule 9(a) in challenging right to recover as assignee); 6A Wright & Miller, *Fed. Prac. & Proc. Civ. 2d* § 1554 (3rd Ed.) (challenge to real party in interest should be treated “as something in the nature of an affirmative defense under Rule 8(c),” but that “regardless of what vehicle is used for presenting the objection, it should be done with reasonable promptness,” or it will be “waived by delay.”)

the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Failure to timely raise a plaintiff's lack of capacity results in waiver. See **Dearborn Lumber Co. v. Upton Enterprises, Inc.**, 34 Wn. App. 490, 493, 662 P.2d 76 (1983) ("Since Upton did not challenge the plaintiff's capacity until after his answer, this assignment of error is deemed waived."); **Trust Fund Services v. Glasscar, Inc.**, 19 Wn. App. 736, 745, 577 P.2d 980 (1978) (assignee's lack of capacity "should have been presented to the trial court at the outset of the litigation"); **Hardware Dealers**, 4 Wn. App. at 51 ("Since they could waive the defense if they wish, we hold that they did so . . ."). See also, **King v. Snohomish County**, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) (purpose of common law waiver doctrine is "to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.").

Miller first asserted the assigned claims against Safeco in 2005. (CP 10-30) In its answer, Safeco admitted to the assignments from Kenny. (CP 461) When Safeco disputed the scope of Peterson's assignment, Miller obtained leave to amend the complaint

to specifically plead the assignment from Peterson, but maintained his claims based on the Kenny assignment. (CP 129-32, 914-15) Safeco did not respond to this second amended complaint within the ten days ordered by the trial court.

Safeco waited another two years before bringing a motion for summary judgment limited to challenging the assignment of Kenny's CPA claims. (CP 614-15, 625-28) After the trial court denied its motion, without notice or leave of court, Safeco unilaterally filed two unauthorized answers asserting non-assignability of the CPA claim as an affirmative defense. (CP 154, 632) Safeco still did not assert any defense or otherwise challenge the nature or scope of the assignment from Kenny. In May 2008, the trial court struck Safeco's untimely and improper answers, and all of its affirmative defenses. (CP 644-45) It also sanctioned Safeco \$1,500 for filing answers without leave of court and attempting to assert new or dismissed defenses. (CP 644-45)

When in July 2008, Safeco finally sought leave to amend, it represented to the court that it would not assert any new defenses in its amended answer. (CP 649) It did not raise its partial assignment defense until it noted its summary judgment motion for January 2009.

(CP 166-71, 224-28) Although the trial court did not address Safeco's waiver of this defense on the merits, Safeco's failure to timely raise the defense constitutes a waiver as a matter of law and an alternative basis for affirming the trial court's denial of its motion for partial summary judgment.

6. This Court Improvidently Granted Review Because Safeco's Challenge To Miller's Standing Will Not Affect The Outcome Of This Lawsuit.

This court should without further delay summarily dismiss this interlocutory appeal from the denial of summary judgment and remand for trial, without setting this case for oral argument. Review was improvidently granted because Safeco's arguments will not affect the outcome of this litigation, which will ultimately hinge on whether the jury finds Safeco liable for bad faith. Indeed, the trial court did not certify that immediate appellate review will "materially advance the termination of the litigation," RAP 2.3(b)(4), only that immediate review would "materially advance the ultimate termination of *one* of the causes of action." (CP 346-47) (emphasis added)¹⁵ This is the same as no certification at all.

¹⁵ Safeco misrepresents the terms of the trial court's certification order in its Brief of Petitioner at 9.

Even if this court accepts Safeco's interpretation of the assignment, the result will be a remand for trial because Kenny is joined as a party and has ratified Miller's claims, because Safeco waived its challenge to the assignment, and because Safeco's motion does not affect the remaining claims at issue in this case, including Miller's assigned CPA claims, which require only a demonstration of "injury to business or property." Peterson's assigned claims remain to be tried. This court should summarily dismiss review as improvidently granted without further delay and remand for a trial on the merits of Safeco's bad faith, which may render moot any of the issues raised on interlocutory review.

C. Safeco Cannot Rebut The Presumption That Its Bad Faith Harmed Its Insured.

1. Safeco Concedes That It Is Liable For Its Insured's Reasonable Settlement If Its Bad Faith Caused Harm To Its Insured.

Ryan Miller, as Kenny's assignee, has standing to assert Kenny's claims for bad faith. For purposes of Safeco's summary judgment motion, it was undisputed that Safeco's misconduct caused its insured Patrick Kenny to suffer a judgment that Safeco stipulated was reasonable and not the result of fraud or collusion. Safeco's

concessions regarding the facts and the law are dispositive of its challenge to the trial court's refusal to dismiss Miller's assigned claim of bad faith. While Safeco alleges "a split of authority" among other jurisdictions (Resp. Br. at 10-11), there is no question of the law in this state.

As Safeco concedes, Washington has adopted the "judgment rule," – the insured's confession of judgment "itself constitutes damage and harm sufficient to permit recovery . . ." (Pet. Br. at 11-12) See **Safeco Ins. Co. of America v. Butler**, 118 Wn.2d 383, 399, 823 P.2d 499 (1992) (covenant judgment "constitutes real harm" even though "the agreement insulates the insured from liability"), *quoting* **Wolfberg v. Providence Mut. Cas. Co.**, 98 Ill. App. 2d 190, 240 N.E.2d 176, 180 (1968)) See also **Carter v. Pioneer Mut. Cas. Co.**, 423 N.E.2d 188, 190 (Ohio 1981) ("entry of judgment in excess alone is sufficient damage to sustain a recovery from an insurer for its breach of duty to act in good faith in defending the insured's case."). This has been the law in Washington for over a half-century. See **Evans v. Continental Cas. Co.**, 40 Wn.2d 614, 628-30, 245 P.2d 470 (1952).

In this review of denial of summary judgment based solely on the issue of Miller's standing as assignee, Safeco cannot and does

not argue that its mishandling of the claims against its insured and its delay in settling those claims satisfied its obligation of good faith. Safeco also concedes that its insured may assign his claim for bad faith to an injured plaintiff in settlement of the underlying litigation, (Pet. Br. at 12),¹⁶ that it is bound by its insured's settlement of the underlying action, that this settlement was reasonable and not the result of fraud or collusion.¹⁷ In fact, Safeco stipulated to the settlement's reasonableness. (CP 28-30)

Safeco also concedes that in an action for bad faith, the insurer bears the burden of establishing that its actions "did not did not harm or prejudice the insured." (Pet. at 14, *quoting Butler*, 118 Wn.2d at 394) Finally, and most importantly, Safeco does not (and cannot on this record) argue that its insured Kenny did not suffer "harm" as a result of Safeco's conduct, either in the form of the covenant judgment entered against him, the personal attorney fees he was

¹⁶ See *Butler*, 118 Wn.2d at 399-400 (assignee acquires *all of* insured's rights at time of assignment); *Bench v. State Automobile and Casualty Underwriters, Inc.*, 67 Wn.2d 999, 408 P.2d 899 (1965) (criticizing contention that bad faith claim not assignable as "untenable").

¹⁷ See *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 739-40, 49 P.3d 887 (2002). (insurer that commits bad faith is bound by amount of settlement determined reasonable in underlying action so long as it is "notified of the reasonableness hearing and afforded ample opportunity to respond."); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764-65, 58 P.3d 276 (2002)

forced to incur, or the other "intangible harm" including injury to credit, uncertainty and distress, and damage to reputation. Instead, Safeco seeks immunity from the consequences of its bad faith by parsing the terms of the assignment between Miller and Kenny, arguing that Kenny's assignment of harm is ineffective because it is "incomplete." (Pet. at 14)

In light of Safeco's concessions, this court must reject Safeco's argument that it rebutted the presumption of harm in the instant case. First, Safeco conceded that its insured Patrick Kenny was "harmed" by entry of a reasonable covenant judgment, so its arguments about the scope of the assignment are irrelevant. Second, Safeco's argument that entry of a covenant judgment is itself insufficient harm to support a claim for bad faith is directly contrary to Washington law.

2. Safeco Failed To Rebut The Presumption That *Its Insured* Suffered Harm.

In order to avoid liability for bad faith, Safeco had the burden of establishing that *its insured* suffered no harm. But Safeco makes no such argument and indeed, conceded in its motion for summary judgment Kenny's "emotional distress, attorneys fees, damages to . . . credit or reputation, and other noneconomic damages" occasioned by Safeco's inexcusable refusal to accept responsibility under its

insurance contract. (CP 168) Instead, Safeco argues that *its insured's assignee* Ryan Miller did not receive in his assignment that harm because Patrick Kenny reserved the right to recover for himself the "personal harm" indisputably caused by Safeco's bad faith. Safeco's failure to rebut the presumption that its bad faith harmed *its insured* is dispositive of its argument challenging the trial court's denial of its motion for partial summary judgment.

Safeco's concession renders its convoluted attempt to parse the assignment from Kenney to Miller irrelevant. Safeco concedes that Miller received from Kenny an assignment of all of Kenny's *claims* for bad faith, but argues that Kenny "reserved to himself" the right to recover all "*personal damages*" arising from Safeco's bad faith. (Pet. Br. at 5, 14) But that reservation is of no consequence in resolving the critical issue – whether Safeco rebutted the presumption that its bad faith harmed *its insured*.

Kenny's alleged reservation of the right to assert on his own behalf claims for his "personal damages" reinforces the presumption that Safeco's bad faith caused "harm." While Kenny's counsel's post-assignment letter (CP 92-93), cited by Safeco (Pet. Br. at 7, 15) was not before the trial court on summary judgment, see RAP 9.12,

Kenny's threat to "pursue claims for damages personal to him that are exacerbated" by Safeco's post-assignment misconduct (CP 92) only provides further proof of the fact that Safeco's bad faith caused *its insured* the very type of intangible harm that satisfies this element of the cause of action under Washington law. ***Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.***, 161 Wn.2d 903, 922-23, ¶ 38, 169 P.3d 1 (2007) ("MOE's bad faith conduct interfered in DPCI's final hearing preparation, interjected insurance coverage issues into the arbitration, and created uncertainty").

Even if the assignment in this case reserved *all* the damages to Kenny – an argument that Safeco does not and cannot make under the plain language of the assignment – Safeco does not contend that it rebutted the presumption that *Kenny* suffered harm. Because Safeco did not rebut the presumption that it harmed its insured, it is liable for the amount of the reasonable covenant judgment if the jury finds that it acted in bad faith. Miller, as Kenny's assignee, may recover on that assigned claim.

3. A Covenant Judgment Entered Against An Otherwise Solvent Insured Constitutes Sufficient Harm, In And Of Itself, To Support A Claim For Bad Faith.

Safeco's contention that Miller cannot recover on his assigned claims for Safeco's bad faith absent a full assignment of every element of Kenny's "personal damages" falters for an additional reason – the covenant judgment alone constitutes sufficient harm to sustain a bad faith claim.

The history of the "judgment rule" in Washington – discussed extensively by Safeco (Pet. Br. at 11-14) – illustrates why recovery of emotional distress or other "personal damages," such as those at issue in the reservation clause of the assignment here, have never been required as an element of an action for bad faith. While a claim for bad faith "sounds in tort," it is "grounded upon the insurer's bad faith in failing to perform a contractual obligation." ***Evans v. Continental Cas. Co.***, 40 Wn.2d 614, 630, 245 P.2d 470 (1952). "The general rule regarding damages for an insured's breach of contract is that the insured must be put in as good a position as he or she would have been had the contract not been breached." ***Kirk v. Mt. Airy Ins. Co.***, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998). Traditionally, the recoverable damages from an insurer's breach of the

duty of good faith include. . .” (1) the amount of expenses, including reasonable attorney fees, the insured incurred in defending the underlying action, and (2) the amount of the judgment entered against the insured in the underlying action.” **Greer v. Northwestern Nat. Ins. Co.**, 109 Wn.2d 191, 202, 743 P.2d 1244 (1987).

Emotional distress damages were thus not recoverable at all under a claim for bad faith, until the Court firmly grounded the claim in tort principles in **Butler** and **Besel**. Washington courts now allow the recovery of other tort damages in a bad faith action, including such “personal damages” as emotional distress that are not recoverable under a breach of contract theory or under the Consumer Protection Act. See **Anderson v. State Farm Mut. Ins. Co.**, 101 Wn. App 323, 33, 2 P.3d 1029 (2000) (“because bad faith is a tort, a plaintiff is not limited to economic damages” but may recover for emotional distress), *rev. denied*, 142 Wn.2d 1017 (2001).

This expansion of remedies to include such “personal harms,” however, by no means supports Safeco’s argument that proof of damages beyond entry of a covenant judgment is a necessary element of an action for bad faith. Washington courts have never held that an insured need prove *any* compensable harm beyond the entry of an adverse judgment to recover for bad faith. The **Butler**

Court imposed upon the insurer the burden of proving that it has not harmed its insured for two reasons: (1) as a "disincentive" against an insurer tempted to act in bad faith, and (2) because the consequences of an insurer's bad faith are so difficult to prove or quantify:

[S]hifting of the burden [to the insurer] ameliorates the difficulty insureds have in showing that a particular act [by the insurer] resulted in prejudice. It also recognizes the fact that loss of control of the case is in itself prejudicial to the insured.

Dan Paulson Const., 161 Wn.2d at 920-921, ¶ 37, quoting **Butler**, 118 Wn.2d at 392.

Safeco's argument that the only compensable harm that can be presumed in this case is the personal, non-economic harm to Kenny's credit and reputation, and the personal attorneys fees he incurred, turns the **Butler** Court's secondary explanation of the policy underlying the rule into the rule itself. Safeco's argument misconstrues the **Butler** Court's explanatory dicta that intangible "personal harm" to credit and reputation may be presumed from entry of a covenant judgment:

Second, even though the agreement insulates the insured from liability, it still "constitutes a real harm because of the *potential* effect on the insured's credit rating ... [and] damage to reputation and loss of business opportunities[.]"

118 Wn.2d at 399, quoting *Barr v. General Acc. Group Ins. Co. of North America*, 360 Pa.Super. 334, 342, 520 A.2d 485, 489, appeal denied, 517 Pa. 602, 536 A.2d 1327 (1987) (emphasis added).

Because the consequences of bad faith are both economic and non-economic, tangible and intangible, quantifiable and unquantifiable, the *Butler* Court thus held that these *potential* harms, were enough to justify the insurer's liability for the amount of a reasonable covenant judgment if the insurer acted in bad faith. *Dan Paulson Const.*, 161 Wn.2d at 920, ¶ 34, quoting *Butler*, 118 Wn. 2d at 394 ("Ultimately, 'if the insured prevails on the bad faith claim, the insurer is estopped from denying coverage.'"). The *Dan Paulson* Court specifically rejected an insurer's argument that it may rebut the presumption merely by showing that its insured failed to suffer any tangible damage to its credit or reputation that would not have occurred anyway. *Dan Paulson Const.*, 161 Wn.2d at 923, ¶ 39 & n.19. Similarly, here, Safeco's attempt to "rebut the presumption of harm" by showing that Miller, as assignee, has no right to assert any claim for these "intangible harms" that Safeco caused its insured to suffer eliminates the presumption and "the judgment rule" entirely.

Moreover, allowing the covenant judgment itself to establish the requisite harm does not, as Safeco argues, render this

presumption "irrebuttable." (Pet. Br. at 15) An insurer can rebut the presumption, for instance, by establishing that the insured can not, as a matter of law, suffer any consequences from an adverse judgment. See **Werlinger v. Clarendon Nat. Ins. Co.**, 129 Wn. App. 804, 120 P.3d 593 (2005) (insured entered into a covenant judgment after it filed for bankruptcy because of unrelated debts; bankruptcy fully protected the insured from suffering consequences as a result of the insurer's bad faith; because settlement was unreasonable insurer rebutted the presumption of harm, and the insured was required to prove its damages "the ordinary way."), *rev. denied*, 157 Wn.2d 1004 (2006) (Pet. Br. at 16-17).

An insurer has also been allowed to rebut the presumption of harm by establishing that it remedied its initial refusal to defend by paying the insured's defense counsel, who "aggressively defended" the insured's interests without objection, and then indemnifying its insured for all covered claims. See **Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Co.**, 150 Wn. App. 1, 11, ¶ 23, 206 P.3d 1255 (2009) (Pet. Br. at 17). The insurer may also rebut the presumption if it can show that the insured's settlement was not reasonable. See **MacLean Townhomes, LLC v. Charter Oak Fire Insurance Co.**, 2008 WL 4691051 (W.D. Wash. 2009) (distinguishing

Werlinger as a case in which covenant judgment was determined to be unreasonable because of insured's pre-existing bankruptcy filing, and holding that the damages for bad faith breach of the duty to settle is the settlement amount approved in a reasonableness hearing in which insurer participated). Finally, and of the most significance to this case in which the issue of Safeco's bad faith remains unresolved, "insurers can avoid this result [and the presumption entirely] . . . by acting in good faith." *Besel*, 146 Wn.2d at 739-40.

Here, however, Safeco makes no argument that its insured was insulated from the consequences of an adverse judgment, that it acted quickly to remedy the consequences of its bad faith, or that the settlement was unreasonable. Because Safeco stipulated that the settlement was a reasonable one, in the event Miller is able to establish Safeco's bad faith at trial, Safeco will be liable for the full amount of the covenant judgment, regardless whether Miller establishes additional damages. *Besel*, 146 Wn.2d at 739.

If this court chooses to address the merits of Safeco's argument, it should hold as a matter of law that Kenny, and Miller as his assignee, suffered sufficient harm to assert a bad faith claim against Safeco. This court should remand for trial limited to the issue of Safeco's bad faith, and hold that Safeco is liable for the covenant

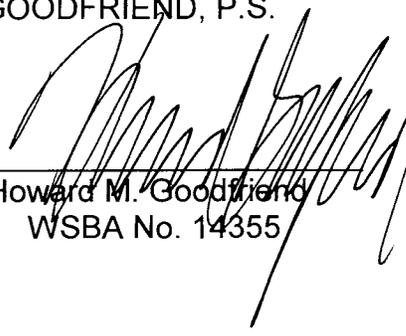
judgment against its insured as a matter of law, if the jury determines that Safeco acted in bad faith. See, *Impecoven v. Dept. of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (summary judgment may be granted to non-moving party where issue involves purely legal issue).

V. CONCLUSION

The court should affirm the denial of summary judgment or dismiss review as improvidently granted. In the event it addresses Safeco's argument on the merits it should hold that Safeco will be liable for the full amount of its insured's settlement if Miller prevails in establishing Safeco's bad faith at trial.

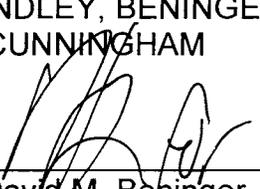
Dated this 29th day of January, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
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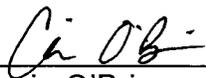
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 29, 2010, I arranged for service of the foregoing Corrected Brief of Respondents Miller and Kenny, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Timothy James Parker Michael King Emilia Sweeney Carney Badley Spellman 701 Fifth Avenue, Suite 3600 Seattle WA 98104-7010	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
David M. Beninger Deborah Martin Luvera, Barnett, Brindley, Beninger & Cunningham 701 Fifth Avenue, Suite 6700 Seattle WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 29th day of January, 2010.



Carrie O'Brien