No. 1038160

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHENIE Y. LOCK,

Appellant/Cross-Respondent

v.

AMERICAN FAMILY INSURANCE COMPANY,

Respondent/Cross-Appellant.

AMERICAN FAMILY'S ANSWER AND CONTINGENT CROSS-PETITION

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I. INTRODUCTION

Petitioner Lock's request for discretionary review should be denied because this case does not meet any of the four (4) requirements for review under RAP 13.4(b).[1] [2] LOCK II is not in conflict with any prior decision of the Supreme Court or the prior, binding published Court of Appeals ("COA") opinion – *i.e.*, LOCK I.[3] Likewise, this case, which involves the

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[1] *See* **Ex. 1** (*Lock v. Am. Family Ins. Co.*, No. 85844-1-I (WASH. CT. APP., Dec. 23, 2024) (hereafter, "LOCK II").).

[2] *See generally* RAP 13.4(b):

> *Considerations Governing Acceptance of Review.* A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

[3] *Lock v. Am. Family Ins. Co.*, 12 Wn. App. 2d 905, 460 P.3d 683 (2020) (hereafter, "LOCK I").

application of well-established Washington law, presents no significant question of law under the Washington State Constitution or any issue of substantial public interest requiring determination by the Supreme Court.[4]

Moreover, this Court previously considered substantially these same arguments when it denied Petitioner's 2022 Interlocutory Appeal and Petitioner's subsequent 2023 Request for Direct Review.[5] As such, this Court should deny review.

American Family further respectfully requests that this Court award attorney fees and expenses under RAP 18.1, RAP 18.7, and RAP 18.9 because the pending petition has no legal or factual basis, and Petitioner is well aware that she advances her petition without the same.

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[4] *See supra*., fn.3; *see also* RAP 13.4(b)(3) & (4).

[5] *See* **Ex. 4** (Ruling Denying Direct Discretionary Review, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., April 20, 2022)); **Ex. 5** (Certificate of Finality, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., May 23, 2022)), and **Ex. 6** (Order Terminating Review/Transferring to Court of Appeals, *Lock v. Am. Family Ins. Co.*, No. 101865-7 (WASH., October 3, 2023)).

II. IDENTITY OF RESPONDENT/CROSS-PETITIONER

American Family Insurance Company ("American Family") is the Respondent/Cross-Petitioner in this case. American Family opposes the Petition for Review ("Pet.").

If this Court grants Lock's petition, it should also accept review of the issues alternatively raised by American Family during the underlying appeal which Division I did not consider because it affirmed the 2022 trial on remand.[6]

III. RESTATEMENT OF ISSUES RAISED BY PETITIONER.

A. No Basis for Review Under RAP 13.4(b)(1).

The Court of Appeals properly found that the trial court did not err in denying Petitioner's request for a *Henderson*

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[6] LOCK II, *slip op.* at n.15. *See also* CP 367- 461 (American Family's Notice of Cross-Appeal), **Ex. 7** (American Family's Answering Brief and Opening Cross-Appeal Brief, *Lock v. Am. Family Ins. Co.*, No. 85844-1 (WASH. CT. APP., April 22, 2024) at 48-69; and **Ex. 8** (American Family's Reply Brief, *Lock v. Am. Family Ins. Co.*, No. 85844-1 (WASH. CT. APP., June 21, 2024)) at 10-25.

hearing because Petitioner failed to establish the requisite *prima facie case* of implicit bias.[7]

B. No Basis for Review Under RAP 13.4(b)(2).

In its affirmation of LOCK I as the operative law of the case, the Court of Appeals in LOCK II noted Petitioner's failure to petition the state Supreme Court for review of LOCK I, thus rendering LOCK I the law of the case.[8, 9] Nevertheless, and

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[7] *See* LOCK II, *slip op*. at 17. *See also Henderson v. Thompson,* 200 WASH. 2d 417, 439-40, 518 P.3d 1011 (2022) (discussing the burden at a *CR 59* evidentiary hearing upon prima facie showing of racial bias) and *Simbulan v. Nw. Hosp. & Med. Ctr.*, 32 WASH. APP. 2d 164, 183-88, 555 P.3d 455 (2024)(contrasting facts to party's flagrant appeals in Henderson and appeals in the criminal context).

[8] *See* RAP 12.2 (*Disposition on Review*), RAP 12.5 (*Mandate*) and RAP 12.7 (*Finality of Decision*).

[9] *See* LOCK II, *slip op.* at 22 (*emphasis added*) (referencing, LOCK I at 919):

> […] We disagree with Lock's assertion and her reliance on the first trial court's findings as a factual basis to support her new attorney fees request. First, after each of Lock's attorney fees requests, which were made before two different judges, the trial court reviewed and considered the motions, as well as American Family's responses and Lock's replies. Second, because the first

despite being previously addressed by all levels of this state's judiciary including by the trial Court on remand, the Supreme Court on interlocutory appeal, and the LOCK II Court of Appeals, Petitioner remains unthwarted and continues her frivolous attempts to appeal what she failed to appeal in 2020.

C. No Basis Under RAP 13.4(b)(3).

As noted by the Court of Appeals, Petitioner offered no proof to support her conclusory statements that her fundamental due process rights were violated by American Family, the trial court, or LOCK I.

D. No Basis Under RAP 13.4(b)(4).

The Court of Appeals properly distinguished between American Family's corporate counsel's alleged direct contact conduct from the postlitigation conduct of trial counsel, as

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> trial court vacated its prior order granting attorney fees based on its further understanding of the procedural record, ***such factual findings simply do not exist***.

repeatedly upheld by other prior Washington courts in this matter.[10]

IV. RESTATEMENT OF CASE

The facts of this case are accurately set out in Division I's opinion in LOCK I and LOCK II.[11]

A. LOCK I sets forth the Undisputed Facts and Operative Law.

This case arises from a minor 2013 motor vehicle accident wherein Petitioner was rearended by an uninsured driver. Petitioner originally filed suit against American Family under an Uninsured Motorist ("UM") claim in March 2015. [12] Petitioner

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[10] "Procedural bad faith is unrelated to the merits of the case and refers to 'vexatious conduct during the course of litigation.'" LOCK II, *slip op.* at 20 (referencing, *Hedger v. Groeschell*, 199 Wn. App. 8, 14, 397 P.3d 154 (2017) (quoting, *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131 (1999)). *See also* LOCK II, *slip op.* at n.13.

[11] *See* LOCK II, *slip op.* at n.2, "[b]ecause the underlying facts are not at issue in this appeal, we cite to this court's previous opinion in this matter to provide factual context."

[12] CP 1-5.

subsequently amended her complaint in to add a bad faith claim and extracontractual claims under the Insurance Fair Conduct Act ("IFCA") and the Consumer Protect Act ("CPA") in November 2015. [13] While this case was proceeding to a July 2017 trial (hereafter "First Trial"), American Family inadvertently mailed a check for $4,153.75, along with a corresponding cover letter, directly to Petitioner rather than to her counsel on 3/30/17. [14]

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[13] CP 8-19.

[14] The check was for court-ordered sanctions.

Following the conclusion of the first jury trial, the parties filed cross-appeals; Petitioner did **not** subsequently challenge or seek review of the LOCK I opinion under RAP 13.4(a).[15,16]

In LOCK I, the Court of Appeals upheld the post-verdict JNOV dismissing Petitioner's bad faith and extracontractual claim verdicts on post-verdict motions, finding that Petitioner failed to introduce any evidence of damage proximately caused by the alleged bad-faith actions. This effectively extinguished the bad faith damage award of $413,575. Thus, leaving only the $21,000 UM verdict intact.[17, 18]

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[15] *See* **Ex. 4** at 3; see also **Ex. 3** (Ruling Denying Emergency Motion for Stay, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., Jan. 13, 2022)) at 3.

Lock also sought direct review when she filed her 2017 appeal, but the Supreme Court transferred her appeal to the Court of Appeals pursuant to RAP 4.2. *See* **Ex. 9** (Order Terminating Review/Transferring to Court of Appeals, *Lock v. Am. Family Ins. Co.*, No. 95508-5 (WASH., Nov. 28, 2018)).

[16] *See* A-14 to A-39.

[17] LOCK I at 924-931; *see also,* **Ex. 3** at 7 and **Ex. 4** at 6.

Following the first appeal, Division I, "with one exception, affirmed the trial court's dismissal of the extracontractual claims following trial that included a $413,575 verdict on Lock's common law insurance bad faith claim. This court [Division I] remanded for trial on a claim for common law insurance bad faith based on American Family's corporate counsel's alleged conduct of directly contacting Lock pretrial." [19] LOCK I also remanded for offset of the UIM award by PIP benefits paid.

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[18] The first trial court improperly denied American Family's post-verdict motion to reduce the $21,000 UIM verdict by the PIP offset; a ruling in favor of Petitioner. Thus, on 1/17/18, a $21,000 UIM judgment in favor of Petitioner was entered. American Family satisfied the UIM Judgment on 1/25/18. Thereafter, the Court of Appeals correctly remanded that issue for application of the available PIP offsets in accordance with Washington authority. *See* LOCK II, *slip op.* at n.1 and LOCK II, *slip op.* at n.4.

[19] *See* LOCK II, *slip op.* at 1-2 (internal citations omitted)

In affirming LOCK I, the LOCK II Court of Appeals held that LOCK I unequivocally vacated the attorney fee award.[20] The Court of Appeals went on to find:

> Lock reads out of context this court's statement that "[w]e ... reverse the trial court's JNOV dismissing Lock's insurance bad faith claim'…Lock…ignores this court's [Division I's] holding that postlitigation bad faith conduct is rarely admissible because it lacks probative value and has a high risk of prejudice." In her first appeal to this court, Lock argued that the trial court erred in excluding evidence of American Family's litigation conduct that occurred after she filed her UIM lawsuit. This court explicitly held, "[t]he trial court did not abuse its discretion in excluding the postlitigation conduct of trial counsel, including evidence of bad faith in the filing of untimely motions for summary judgment and removing the case to federal court." As to any substantive insurance bad faith claim, read in context, this court's reversal of the JNOV dismissing Lock's

[20] *See* LOCK II, *slip op.* at pg. 6 (referencing, LOCK I at 925, n.4). Therein, Division I expressly noted that, "[n]either party sought review of this court's decision." *Id*.

> extracontractual bad faith claims related to remand for a new trial on Lock's common law insurance bad faith claim "*based on American Family's direct contact during litigation*" and no other insurance bad faith claim."[21]

Petitioner further agreed with the Court of Appeals upon inquiry:

> JUDGE COLBURN: I want to clarify the distinction between a substantive claim for insurance bad faith versus bad faith litigation tactics. Those are two different things.
>
> MS. SARGENT: Absolutely.[22]

1. Numerous courts affirmed LOCK I on remand; those rulings were further affirmed by this Court and in LOCK II.

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[21] LOCK II, *slip op.* at 12-13 (*emphasis in original*) (internal citations omitted).

[22] *See* **Ex. 2** (Appeal Hearing Transcript, *Lock v. Am. Family Ins. Co.*, No. 85844-1-I, (WASH. CT. APP., Nov. 5, 2024) at 8:15-19.

It is significant to note that a member of the Division 1 Court of Appeals, Judge Hazelrigg, considered and ruled on both LOCK I and LOCK II. In LOCK II, the Court of Appeals expressly affirmed:

- "We refer to the sending of the check and cover letter as American Family's "direct contact."[23]

- "Lock asserts this court reversed the JNOV on the jury's bad faith verdict of $413,575 'without limitation' and ordered a new trial on all evidence of American Family's bad faith. Lock argues she should now, out of fairness, recover the original bad faith verdict of $413,575 in addition to her $40,000 verdict on remand. *Because her interpretation is contrary to a fair and plain reading of* Lock*, we deny her request*."[24]

- "Notably, even if it could be interpreted that this court's vacating the trial court's order of denying attorney fees also vacated the first trial court's ruling vacating its own previous order *awarding* attorney

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[23] *See* LOCK II, *slip op.* at 4 (referencing LOCK I at 913, 923-24).

[24] LOCK II, *slip op.* at 11-12 (*emphasis added*) (referencing, LOCK I, 12 Wn. App. 2d at 926, 932).

fees, this court also vacated any order awarding attorney fees."[25]

- The Court of Appeals further addressed and found Petitioner's position to be unsupported by the record, "American Family engaged in bad faith litigation tactics and this court's failure to sanction American Family for its conduct sends a clear message to insurers that 'improper removals to federal court, cheap trial tactics, flat out lies, lying, manipulating the court to delay resolution, avoiding depositions, refusing to disclose witnesses, and otherwise litigating abusively is condoned by the judicial system.' Lock *does not identify specific conduct with cites to the record*. At the end of her argument, she [Petitioner] includes a *string citation to the record untethered to any facts*."[26]

LOCK II was, of course, not the first court to affirm the holdings in LOCK I:

> On remand, *two* different superior court judges *denied Lock's motion for attorney fees* based on American Family's bad faith litigation, *and* the

[25] LOCK II, *slip op* at n.12 (*emphasis in original*) (referencing, LOCK I at 925 n.4).

[26] LOCK II, *slip op.* at 21 (internal citation added) (*emphasis added*).

> *trial court rejected Lock's argument that she could retry all her previously dismissed bad faith insurance claims*."[27]

Moreover, during the 2022 Interlocutory Proceedings, this Court twice-affirmed LOCK I's scope as to remand, noting Petitioner's "misinterpretation" of LOCK I:

> Ms. Lock's argument turns on a *misinterpretation* of the Court of Appeals decision, which has been final for nearly two years. Of particular importance, the Court of Appeals affirmed the superior court's JNOV order, which dismissed Ms. Lock's bad faith claims as a matter of law. That post-verdict order *extinguished the jury's award of $413,575*. The Court of Appeals

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[27] *See* LOCK II, *slip op.* at 2 (*emphasis added)*; *see also* **Ex. 4** at 7-8, "The superior court clarified that issue when it entered the order granting American Family's motion for partial summary judgment, *which Ms. Lock did not oppose and for which she does not seek review*. Ms. Lock's motion for entry of partial summary judgment was essentially an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review. It was therefore not surprising that the superior court denied Ms. Lock's motion to enter partial judgment on the original, but no longer valid, jury verdict, and denied reconsideration.

> reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation, meaning the check and cover letter mailed to her by American Family's corporate counsel [ ]. The superior court clarified that issue when it entered the order granting American Family's motion for partial summary judgment, *which Ms. Lock did not oppose and for which she does not seek review*. Ms. Lock's motion for entry of partial summary judgment was essentially an *ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review*. It was therefore not surprising that the superior court denied Ms. Lock's motion to enter partial judgment on the original, but no longer valid, jury verdict, and denied reconsideration of that decision. Here, Ms. Lock spends much of her time relitigating these issues that are not properly before this court."[28,29]

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[28] **Ex. 4** at 6-7 (internal citation omitted) (*emphasis in original*) (*emphasis added*).

[29] *See also* **Ex. 3** at 7-8, "Ms. Lock's argument for a stay relies on a misinterpretation of the Court of Appeals decision, which is now final. A careful review of that decision indicates the Court of Appeals reversed the superior court's JNOV only with respect

2. In LOCK II, the Court of Appeals made clear that Petitioner's reading of LOCK I was unfounded.

LOCK II is certainly not the first time Petitioner's "misinterpretation" of LOCK I and the record on remand was addressed. In fact, Division I's express "clarification" of LOCK I was yet another admonishment of Petitioner's unreasonable conduct, following a line of prior admonishments. *See Lynn v. Labor Ready, Inc*., 136 WASH. APP. 295, 314, 151 P.3d 201

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to Ms. Lock's claim of bad faith based on American Family's direct contact with her pending trial.[]. The court otherwise affirmed the superior court's JNOV order, which had the practical effect of extinguishing the jury's award of $413,575. The Court of Appeals thus reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation, meaning the check and cover letter mailed to her by American Family's corporate counsel. []. The superior court merely clarified that issue when it entered the order granting American Family's motion for partial summary judgment, which Ms. *Lock did not oppose and for which she does not seek review*. The *superior court's order denying Ms. Lock's motion for partial judgment is consistent with the Court of Appeals decision* and the order granting American Family's motion for partial summary judgment." *Id.* (internal citations omitted) (*emphasis added*).

(2006) (directing the court commissioner to determine reasonable attorney fees as a sanction under WASH. R. APP. P. 18.9(a) for making substantive misrepresentations to the court in a published decision). Despite the record evidencing numerous instances wherein Petitioner was admonished for her misrepresentations, Petitioner's conduct remains unchecked.[30]

B. The Court of Appeals Correctly Held that Substantial Evidence Undermines Petitioner's Claims of Judicial Bias.

Throughout this matter's procedural history, Petitioner has always had a full opportunity to be heard and file pleadings but systematically failed to properly exercise those rights. Petitioner's litigation decisions cannot be the basis of claimed institutional bias.

For example, Petitioner did not oppose American Family's first summary judgment on the scope of the single issue remaining for retrial, to wit: Lock's common law insurance bad

[30] *See* **Ex. 2** at 19 :8-15.

faith based upon American Family's direct contact with Lock post-litigation (*i.e.*, 3/30/17 check and letter).[31] Despite Petitioner's failure to properly challenge and object to American Family's motion, Lock nevertheless subsequently claimed it was not the proper scope.[32]

In fact, and contrary to Petitioner's express misrepresentations to the judiciary, including during oral arguments at the Court of Appeals for LOCK II, many of the 2022 Trial Court's decisions and rulings were in favor of Lock and against American Family, just like the Trial Court's numerous rulings in favor of Lock and against American Family during the litigation on remand.[33]

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[31] *See* CP 198-217; *see also* CP 5153: 17-23, 5154:6-11, and CP 5155:1-21.

[32] *See e.g.,* CP 773: 24-26; *but cf.,* CP 198-217 at 198:16-21 and 203:10-18.

[33] *See* **Ex. 2** at 19:1-7; *see also* CP 367-372 at ¶¶1, 2, 4-8 & 11; CP 104-106. This list is not exhaustive.

Not only is the record devoid of evidence supporting Lock's claims of systemic, institutional, and judicial bias, but it is also replete with numerous, concrete examples evidencing Lock's improper gamesmanship during remand. For example, Lock played games with discovery, refusing to appear for her video deposition despite having notice for more than 300 days.[34] In fact, this Court previously found that Petitioner's counsel engaged in bad faith litigation conduct.[35]

In LOCK II, Division I states in unequivocal terms, "[w]e hold that Lock's bald accusations are insufficient to defeat the presumption of an impartial judiciary."[36] In so holding, the

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[34] *See* CP 7034-7038; *see also* fn. 34, *infra*.

[35] *See e.g.*, **Ex. 3** at 8 "[f] urthermore, American Family has established that Ms. Lock consistently refused to sit for a videotaped deposition, even when ordered to do so by the superior court. In apparent response to Ms. Lock's delay tactics, American Family filed the motions she now seeks to stay. American Family's contention that the so-called emergency is one of Ms. Lock's own making is well-taken." *But cf.*, **Ex. 4** at 8, n.3.

[36] *See* LOCK II, *slip op.* at 19.

Court of Appeals found:

> Lock's briefing mentions uncited judicial rulings on remand that, based on Lock's statement of the case, could apply to rulings issued by multiple judges. Lock vaguely describes the rulings and fails to offer evidence of any of the judicial officers' biases against her. See RAP 10.3(a)(6). The mere labeling of a ruling as biased is not evidence of systemic or implicit bias at work in the perversion of a specific legal determination. If courts did not require more, they would open the door to bald accusations of bias halting the wheels of justice simply because the system is served by human decisionmakers."[37]

In contrast to *Henderson,* Lock has not presented any evidence of improper remarks, cross-examination, or conduct by American Family's counsel during trial, nor has Lock offered evidence of any improper remarks or conduct of the trial court on remand.

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[37] LOCK II at 18-19 (referencing, *Berhe*, 193 Wn.2d at 663 (acknowledging everyone lives with unconscious biases).

V. ARGUMENT WHY REVIEW SHOULD BE DENIED.

Petitioner seeks review under RAP 13.4(b)(1), RAP 13.4(b)(2), RAP 13.4(b)(3), and RAP 13.4(b)(4).[38] Petitioner's arguments are not only meritless but mandate sanctions.

A. LOCK II is Consistent with Washington Precedent Including LOCK I and *Henderson*.

Despite her conclusory statements, Petitioner was afforded a full and fair trial on her UIM and all bad faith claims during the 2017 jury trial, other than the check. In fact, the 2017 jury found that American Family did not unreasonably deny a claim or benefits to Petitioner Lock.[39] Ultimately, with the exception of the sanctions check, all Petitioner's Lock's bad faith claims were found to be wanting by the jury and/or were dismissed by the trial court. [40]

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[38] Lock's PET., at 13-16.

[39] CP 7991.

[40] "Except for the trial court's error in considering potential damages resulting from the specific bad faith act of direct

Petitioner Lock "did not subsequently challenge or seek review of LOCK I."[41] Thus, LOCK I is the undisputed law of the case. [42]

To that end, RAP 12.2, "[u]pon issuance of the mandate of the appellate court…the decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action to any court."[43]

B. *Henderson* is inapplicable.

Petitioner's next argument turns on whether Division I properly applied the *Henderson* analysis. In LOCK II, the Court of Appeals agreed that Petitioner failed to present any evidence

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contact, this court otherwise rejected Lock's argument that she proved evidence of damages proximately caused by American Family's bad faith conduct." *See,* LOCK II at 12 and n.11.

[41] *See* CP 5581-5582; *see also* RAP 12.2, RAP 12.5, and RAP 12.7.

[42] *Id.*

[43] *See Lodis v Corbis Holdings, Inc*., 192 Wn. App. 30, 336 P. 3D 11246, 2015 WASH. APP. LEXIS 3073 (WASH. CT. APP. 2015).

consistent with *Henderson* to warrant an evidentiary hearing. Thus, while affirming the *Henderson* test, the Court of Appeals factually distinguished this matter. To that end, Petitioner has no facts (nor has she ever offered any facts) to support a *Henderson* hearing, nor does Petitioner offer this Court any evidence of implicit bias, either from counsel or from the record. Petitioner has not, because she cannot, present any evidence of improper remarks, cross-examination, or conduct by American Family's counsel during trial.

Moreover, the Court of Appeals directly addressed Petitioner's reliance on *Henderson*, and its post-verdict form of relief:

> JUDGE HAZELRIGG: […] But the focus of the *Henderson* determination had to do with appeals to ***implicit bias in the jury***, right?
>
> MS. SARGENT: Right.
>
> JUDGE HAZELRIGG: Arguments of counsel and ***injection*** of racial animus or racial bias ***into the deliberative process of the jury***.

> MS. SARGENT: Yes.
>
> JUDGE HAZELRIGG: And so I'm talking about the procedural distinction and how we would apply that to pretrial rulings by a judge.
>
> MS. SARGENT: I think this court would have to go into a brave new world, Your Honor, and acknowledge that what happened in this case was based on systemic an institutional bias. Counsel said that Lock had ample opportunity, and some rulings were in her favor. That is patently incorrect. ***On remand, Lock won one motion, and that was to amend the Complaint.*** Every other motion, bar none, was ruled against on Lock. And even the trial court who ultimately ruled on this case or tried the case [].[44]

Of course, Petitioner misstated this matter's procedural history on remand, which the Court of Appeals addressed both

[44] *See* **Ex. 2** at 18 and 19:1-7.

briefly at oral arguments and more fully in LOCK II.[45] [46]

1. Petitioner's Arguments Re: Judicial Bias Were Previously Adjudicated by This Court.

First, there are no *Henderson* issues. An evidentiary *Henderson* hearing is a post-verdict relief request.[47] It is undisputed that Petitioner never made a *Henderson* request post-the 2022 trial verdict. Significantly, while Petitioner invoked *Henderson* in her request for relief on the second appeal, Petitioner also expressly stated she did not want a new trial or

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[45] *See* **Ex. 2** at 19:8-15, and LOCK II.

[46] *See generally* **Ex. 10** (American Family's Rebuttal Chart Re: Locks's 47 Examples Of "Unfair and Biased Decisions."), and LOCK II, *slip op.* at 11.

[47] *See Henderson*, 200 Wn.2d at 439 (holding that a determination of whether racism could have affected the verdict requires a review of the totality of the circumstances of the trial); *see also,* LOCK II, *slip op.* at 15, "a reviewing court may only consider the evidence and argument that was before the trial court at the time of the hearing on the *motion for a new trial*." Id., (referencing *Simbulan v. Nw. Hosp. & Med. Ctr.*, No. 85114-4-I, *slip op.* at 13 (WASH. CT. APP. August 26, 2024) (*emphasis in original*).

even a *Henderson* hearing.[48] Instead, Petitioner requested the Court of Appeals to award punitive damages in excess of $10 million dollars, a remedy clearly not within the purview of the appellate court.[49]

Moreover, if Petitioner truly believed that her allegations of ongoing, systemic bias had any merit (*e.g.*, allegations of judicial bias against two trial court judges – Judges Andrus and Schubert), she had every opportunity to raise them either prior to or during her first appeal in 2018. Petitioner also could have filed a judicial complaint with the Washington's Commission on Judicial Conduct.[50] Petitioner did none of those things. Petitioner also failed to raise any such issues post Division I's

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[48] *See* LOCK II, *slip op.* at 16-17.

[49] *See* **Ex. 8** at 66-68.

[50] CJC, Canon 2.

first opinion in 2020. Once again, she did not. Petitioner's allegations were thus estopped.

Nevertheless, Petitioner still raised those issues, along with new allegations of judicial bias (*e.g.*, additional allegations against Judge Schubert on remand as well as against additional members of Washington's judiciary – Judge Oishi, Judge Diaz, Judge Thorp, and Judge McKee) to this Court during her interlocutory appeal in 2022 and again during her 2023 request for direct review.[51] Thus, our Supreme Court previously considered substantially similar arguments when it denied both the 2022 motion for discretionary review and the subsequent 2024 request for direct review.[52]

C. The Court of Appeals Proper Consideration and Application of Washington Precedent, Including LOCK I and *Henderson*, Does Not Warrant Supreme Court Review Under RAP 13.4(b)(3).

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[51] *See* **Ex. 3-5** and **Ex. 6**.

[52] *See* **Ex. 3**, **Ex. 4**, **Ex. 5**, and **Ex. 6**.

Petitioner offers the following conclusory statement, which is entirely unsupported by fact or law:

> Review should be accepted because the decisions of the Court of Appeals affirming the trial court's limitation of Lock' s new trial to evidence not presented at the first trial; affirming the trial court's denial of an evidentiary hearing on the claim of racial bias; and affirming the trial court's refusal to address Lock's motion for the fees deny Lock her fundamental right to due process under the Washington Constitution. Wash. Const. art. I §. 3. R.A.P. 13.4(b)(3).

First, the LOCK II Court of Appeals upheld and affirmed LOCK I's express limitations of the trial court on remand. Again, these findings are unequivocal given (1) Petitioner failed to challenge Division I's first opinion, subsequently published and thus the binding law of the case, and (2) a member of the Division I Court of Appeals, Judge Hazelrigg was involved in Arguments and the ruling in

LOCK I and LOCK II. In short, Judge Hazelrigg knew what LOCK I meant because she was part of the ruling.

Moreover, LOCK II properly considered and applied other relevant and applicable authority raised by the parties. To that end, in considering *Van Noy* as raised by Petitioner, the Court of Appeals addressed Petitioner's reliance on *Van Noy* expressly holding *Van Noy* is inapposite to the instant matter.[53]

Here, there can be no doubt that Petitioner is well aware there is no "significant question of law under the

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[53] LOCK II, *slip op.* at 23, finding: "However, *Van Noy* is inapposite. *Van Noy* involved insureds' lawsuit against automobile insurer to recover for breach of contract, breach of fiduciary duty, bad faith claims handling, and violation of the CPA, arising after the insurer disallowed PIP benefits. *Van Noy* thus did not involve an attorney fees award as a sanction for bad faith litigation conduct. Comparatively, all the CPA and IFCA claims were dismissed in the instant case. As this court held in *Lock*, postlitigation conduct of the insurer's counsel is not the basis for insurance bad faith liability. And procedural bad faith is unrelated to the merits of the case." (internal citations omitted).

Constitution of the State of Washington" warranting this Court's review.

D. American Family is Entitled to Sanctions Under RAP 18.1, RAP 18.7, and RAP 18.9.

This Court may deny a petition for review and order the petitioner to pay attorney fees and expenses for a frivolous petition pursuant to RAP 18.1, 18.7, and 18.9. An award of sanctions is an extraordinary action and should not be done lightly. However, in this case, sanctions are warranted.[54]

RAP 18.9(a) provides the appellate court with authority to impose terms or compensatory damages to be paid to the party

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[54] In determining whether an appeal is frivolous, the courts have been guided since at least 1980 by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See *Streater v. White*, 26 WASH. APP. 430, 435, 613 P.2d 187 (1980)).

harmed by a frivolous appeal. An appeal is frivolous where there are no debatable issues on which reasonable minds might differ, and is devoid of merit, so there is no reasonable possibility of reversal. Additionally, RCW 4.84.185 provides a statutory basis to award attorney fees to a prevailing party for opposing a frivolous action.

RCW 4.84.185 provides a statutory basis to award attorney fees to a prevailing party for opposing a frivolous action. RAP 18.9(a) provides the appellate court with authority to impose terms or compensatory damages to be paid to the party harmed by a frivolous appeal. An appeal is frivolous where there are no debatable issues on which reasonable minds might differ, and is devoid of merit, so there is no reasonable possibility of reversal.

Here, it is clear, not only by a plain reading of the appellate rules, LOCK I, and LOCK II, that the pending petition has no legal or factual basis. Incredulously, even after Division I's LOCK II express clarification of LOCK I and Petitioner's

admission that the record is absent of evidence that counsel made biased arguments before the 2022 jury on remand, Petitioner continues to spurn the authority of our Washington State Courts. American Family should not continue to bear the expense of these tactics. Sanctions against Petitioner Lock are thus warranted and should be awarded in favor of American Family.

VI. CONTINGENT CROSS-PETITION FOR REVIEW

For the reasons noted *supra*., this Court should deny review. But if this Court accepts review, then in the interests of justice, it should also accept American Family's issues raised in its briefing including its Opening Cross-Appeal Brief.[55]

Specifically, American Family petitions this Court under RAP 13.4(b)(2) to contingently accept American Family's cross-petition to summarily consider the following issue:

> Whether the Trial Court erred when it found bad faith as a matter of law. American Family from presenting evidence of "mistake" re: American

[55] *See* **Ex. 7**.

> Family's direct contact during litigation by sending her the subject check and letter.[56]

Pursuant to RAP 13.4(b)(2), the 2022 trial judge's finding of bad faith as a matter of law was in error because it conflicts with LOCK I.

Because American Family has a potential cross-petition, American Family further reserves in this regard.

VII. CONCLUSION

This Court should deny Lock's Petition for Review and American Family should be awarded its fees and costs as sanctions for a frivolous appeal.

RESPECTFULLY SUBMITTED this **8th** day of **April**, **2025**.

WATHEN | LEID | HALL | RIDER, P.C.

s/ Kimberly Larsen Rider
Rory W. Leid, III, WSBA #25075
Kimberly Larsen Rider, WSBA#42737
Attorneys for Respondent/Cross-Appellant American Family Ins. Co.

[56] *See* **Ex. 7** at 48-69 and **Ex. 8** at 10-25.

CERTIFICATION PURSUANT TO RAP 18.17

I certify that this document contains **3,663** words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits), in compliance with RAP 18.17.

Dated this 8th day of April 2025.

s/ Kimberly Larsen Rider
Kimberly Larsen Rider, WSBA #42737

RESPONDENT'S APPENDIX

1	Slip Opinion, *Lock v. Am. Family Ins. Co.*, No. 85844-1-I, (WASH. CT. APP., Dec. 23, 2024).
2	Appeal Hearing Transcript, *Lock v. Am. Family Ins. Co.*, No. 85844-1-I, (WASH. CT. APP., Nov. 5, 2024).
3	Ruling Denying Emergency Motion for Stay, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., Jan. 13, 2022)
4	Ruling Denying Direct Discretionary Review, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., April 20, 2022)
5	Certificate of Finality, *Lock v. Am. Family Ins. Co.*, No. 100476-1 (WASH., May 23, 2022)
6	Order Terminating Review/Transferring to Court of Appeals, *Lock v. Am. Family Ins. Co.*, No. 101865-7 (WASH., October 3, 2023)
7	American Family's Answering Brief and Opening Cross-Appeal Brief, *Lock v. Am. Family Ins. Co.*, No. 85844-1 (WASH. CT. APP., April 22, 2024)

8	American Family's Reply Brief, *Lock v. Am. Family Ins. Co.*, No. 85844-1 (WASH. CT. APP., June 21, 2024)
9	Order Terminating Review/Transferring to Court of Appeals, *Lock v. Am. Family Ins. Co.*, No. 95508-5 (WASH., Nov. 28, 2018)
10	American Family's Rebuttal Chart Re: Locks's 47 Examples Of "Unfair and Biased Decisions," *Lock v. Am. Family Ins. Co.*, No. 85844-1 (WASH. CT. APP., April 22, 2024)

CERTIFICATE OF SERVICE

I, Taryn Tomassetti, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that on April 8, 2025, I caused to be filed and served: **REPLY BRIEF OF CROSS-APPELLANT AMERICAN FAMILY** as indicated below:

COPY to Attorneys for Plaintiff: Vonda M. Sargent, WSBA #24552 Carol Farr, WSBA #27470 Vonda M. Sargent PS 119 1st Ave S. STE 500 Seattle, WA 98104 Tel: (206) 638-4970 sisterlaw@me.com carolfarr@gmail.com sargentlaw9@gmail.com	**Via E-Mail**

I declare under penalty of perjury under the laws of the

State of Washington that the foregoing is true and correct.

DATED this 8th day of April 2025, at Seattle, Washington.

s/ Taryn Tomassetti
Taryn Tomassetti, Legal Assistant
ttomassetti@wlhr.legal

Exhibit 1

FILED
12/23/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEPHENIE Y. LOCK, an individual,

Appellant,

v.

AMERICAN FAMILY INSURANCE COMPANY, a Foreign Corporation, doing business in Washington,

Respondent.

No. 85844-1-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — This appeal follows a trial on remand in what is now a nearly decade-long intensely litigated contest originally stemming from a motor vehicle collision in 2013. Lock sued American Family Insurance Company for uninsured motorist (UIM) benefits as well as extracontractual claims under the Washington Consumer Protection Act (CPA), the Insurance Fair Conduct Act (IFCA), and common law insurance bad faith. Lock v. Am. Fam. Ins. Co., 12 Wn. App. 2d 905, 909, 460 P.3d 683 (2020). In the first appeal, this court, with one exception, affirmed the trial court's dismissal of the extracontractual claims following trial that included a $413,575 verdict on Lock's common law insurance bad faith claim. Id. at 925-26. This court remanded for trial on a claim for common law insurance bad faith based on American Family's corporate

counsel's conduct of directly contacting Lock pretrial.[1] Id. at 924-25. In doing so, this court did not address Lock's claim that the trial court erred in vacating its attorney fee award for bad faith litigation tactics and instead vacated the trial court's order awarding or denying attorney fees and instructed that any claims for fees should be addressed on remand. Id. at 925 n.4. Neither party petitioned our state Supreme Court for review of this court's decision.

On remand, two different superior court judges denied Lock's motion for attorney fees based on American Family's bad faith litigation, and the trial court rejected Lock's argument that she could retry all her previously dismissed bad faith insurance claims. A jury awarded Lock $40,000 on her common law insurance bad faith claim. Lock appeals contending (1) the trial court erroneously limited the scope of the trial on remand, (2) the trial court wrongly denied her an evidentiary hearing on racial bias, (3) judicial bias violated her right to due process, and (4) the trial court erroneously denied her bad-faith-litigation award of attorney fees. American Family asks this court to affirm and only alternatively cross-appeals.

We affirm.

FACTS

In 2013 Lock was rear-ended by an uninsured driver and diagnosed with neck and back pain. Id. at 909.[2] At the time of the collision, Lock's American Family auto insurance policy included personal injury protection (PIP) and UIM benefits. Id. at 910.

[1] This court also remanded for the trial court to offset the jury's $21,000 UIM award by the amount American Family had paid under Lock's PIP policy for her medical bills prior to trial. Lock, 12 Wn. App. 2d at 928, 930, 932.

[2] Because the underlying facts are not at issue in this appeal, we cite to this court's previous opinion in this matter to provide factual context.

After the collision, American Family paid all of Lock's submitted medical bills. Id. at 910-11, 914. American Family later notified Lock it would not pay for any further medical treatment after an independent medical exam determined she did not require any additional diagnostic testing or treatment. Id. at 910-11. Lock filed a UIM claim against American Family in March 2015. Id. at 911. In November Lock amended her complaint to also include extracontractual claims under the CPA, chapter 19.86 RCW; the IFCA, RCW 48.30.015; and common law insurance bad faith. Id.

After Lock amended her complaint, American Family twice unsuccessfully tried to remove the case to federal court. Id. at 911-12. After the first remand back to state court, a King County Superior Court Judge denied American Family's motion for a summary judgment hearing on shortened time and denied American Family's request for a pretrial summary judgment hearing. Id. American Family then again tried to remove the case to federal court and filed the same summary judgment motion. Id. at 912. After determining that American Family relied on its own estimate of general damages as the basis for removal, a United States District Court Judge sanctioned American Family and remanded the case back to state court. Id. The district court judge found that American Family "flat-out lied to the Court" about the amount in controversy and used "cheap trial tactics" by removing the case in an attempt to obtain summary judgment. Id. The district court judge sanctioned American Family by awarding Lock attorney fees in the amount of $4,153.75. Id. Once back in state court the second time, the superior court judge set trial for May 2017 and again denied American Family's request to calendar its motion for summary judgment "due to its bad faith litigation tactics." Id.

In March 2017 American Family's corporate counsel mailed the $4,153.75 sanction check with a cover letter on American Family "Claims Legal Division" letterhead directly to Lock's home. Id. at 913, 916-17. The cover letter was captioned with the case name and King County Superior Court case number and stated the payment "represents full and final settlement of all claims in the above-captioned matter." Id. at 913. We refer to the sending of the check and cover letter as American Family's "direct contact." See id. at 913, 923-24.

The first trial court denied Lock's request for a jury instruction that American Family's direct contact was evidence of bad faith conduct, and concluded there were no damages caused by the direct contact. Id. at 915. The jury found that American Family had not committed an IFCA violation. Id. at 916. The jury awarded Lock a $21,000 verdict on her UIM claim, $8,500 on her CPA claim, and $413,575 on her bad faith claim. Id. Lock moved for attorney fees based on American Family being found as having "acted in bad faith" by a unanimous jury, the federal district court judge, and the superior court judge who denied American Family's request to calendar a motion for summary judgment. The first trial court initially granted attorney fees and directed Lock to submit a fee declaration segregating the fees incurred due to American Family's bad faith litigation conduct.[3] Id. at 919.

[3] The trial court's initial order granting attorney fees states:
To obtain an award of those fees and costs, plaintiff shall submit a fee declaration that segregates those fees incurred due to American Family's bad faith. Examples of such fees include: (1) fees incurred to reschedule American Family's 30(b)(6) deposition; (2) fees incurred [to] attend and repeatedly prepare for any deposition that American Family failed to attend despite not having a protective order in place; (3) fees incurred to oppose American Family's improper efforts to get a hearing on summary judgment after [a superior court judge] ruled she would not hear it; and (4) fees incurred to address American Family's improper removals to federal court.

The trial court also granted American Family's motion for JNOV and dismissed Lock's CPA and bad faith extracontractual claims.[4] Id. at 916, 918. Relevant to this appeal, the trial court held in part that Lock's failure to prove evidence of damages proximately caused by any bad faith action by American Family invalidated the jury's common law insurance bad faith verdict as a matter of law. Id. at 918.

American Family also moved for reconsideration of the trial court's attorney fee award. Id. at 919. The first trial court granted the motion and vacated his prior order awarding attorney fees. Id. The court reasoned that American Family provided additional procedural background in its motion for reconsideration causing the court to more fully consider the record, and that Lock failed to segregate her requested fees as ordered.[5]

On appeal, this court held that "[p]ostlitigation conduct of the insurer's counsel is not the basis for liability for insurance bad faith." Id. at 923. This court affirmed the trial court's dismissal of the extracontractual claims except in respect to Lock's common law insurance bad faith claim. Id. at 925, 928, 931-32. This court held that "the trial court erred in excluding evidence of damages that might have resulted from American Family's direct contact with Lock." Id. at 926. The trial court therefore "abuse[d] its discretion by excluding evidence of damages related to American Family's action directly sending the $4,153.75 check to Lock." Id. at 923. Thus, this court held that "[t]he trial court's conclusion in its JNOV that there was no evidence of damages to support Lock's claim of bad faith insurance coverage was erroneous." Id. at 926. This court

[4] Only the $21,000 UIM verdict remained. Lock, 12 Wn. App. 2d at 918.

[5] The order states Lock "did not segregate any of the hundreds of thousands of dollars in attorney's fees she initially sought."

"remand[ed] for retrial of Lock's claim for common law insurance bad faith based on American Family's conduct directly contacting Lock pretrial." Id. at 925. Later, at the end in the concluding paragraphs of its opinion, this court wrote:

> We reverse the trial court's order excluding evidence of American Family's direct contact with Lock during litigation and any resulting damages supporting her insurance bad faith claim. We also reverse the trial court's JNOV dismissing Lock's insurance bad faith claim.

Id. at 932. As to attorney fees, this court noted:

> Lock also argued that the trial court erred in vacating its order granting her attorney fees for American Family's bad faith litigation tactics. Because we are remanding for trial on Lock's claim of bad faith, we also vacate the trial court's order awarding or denying attorney fees. Any claims for fees should be addressed on remand.

Id. at 925, n.4. Neither party sought review of this court's decision.

On remand, much litigation ensued. We discuss only what is relevant for this appeal. Lock filed a CR 16 motion in April 2021, prior to the second trial, requesting a pretrial conference in part to discuss "whether implicit bias has [sic] recognized by our [state] Supreme Court in its June 4, 2020 letter has played any role in the proceedings before reassignment."[6] It is undisputed that Lock is Asian and her counsel is Black. American Family filed a response in opposition to Lock's CR 16 motion and moved to strike Lock's counsel's attached declaration. Another King County Superior Court judge denied Lock's CR 16 motion and American Family's motion to strike.

In July 2021 Lock moved for sanctions and attorney fees for American Family's bad faith litigation conduct. Lock asserted this court "remanded this matter for the

[6] In the letter addressed to our state's judiciary and legal community, our state supreme court recognized "[t]he devaluation and degradation of black lives is not a recent event" but "is a persistent and systemic injustice that predates this nation's founding." The court called on the legal community to "recognize the harms that are caused when meritorious claims go unaddressed."

imposition of sanctions and attorney fees due to American Family's bad faith litigation conduct." American Family opposed the motion and argued Lock was attempting to relitigate the entire case. The superior court, after reviewing and considering the pleadings, denied the motion in its entirety on the merits.

In August 2021 American Family filed a motion for partial summary judgment requesting the trial court "order that Lock's only viable cause of action for retrial is for common law bad faith, based upon American Family's direct contact with Lock post-litigation." American Family requested the court to confirm that Lock was estopped from relitigating her CPA, IFCA, and Olympic Steamship[7] claims. Lock declined to respond to the motion she described as a "billing attempt" by the defense that is nothing more than asking the trial court to affirm this court's ruling in Lock. The trial court granted American Family's motion and clarified that "the sole issue to be decided at trial" on remand was Lock's common law insurance bad faith claim "as it related to the check and letter sent directly" to Lock. Lock filed a motion for partial judgment entry for the first trial's jury verdict of $413,575 plus interest, which the trial court denied in October. The trial court also denied Lock's motion for reconsideration in November. Lock petitioned the Washington Supreme Court for discretionary review of the October and November orders. Lock also requested an emergency stay.

In January 2022 the Supreme Court commissioner denied Lock's emergency stay request and in April also denied her motion for discretionary review. In May the Supreme Court issued a certificate of finality and remanded to superior court for further

[7] Lock had requested attorney fees and costs under Olympic Steamship v. Centennial Ins., 117 Wn.2d 37, 811 P.2d 673 (1991) in her November 2015 amended complaint. Attorney fees are a recoverable damage in a bad faith claim for insurance coverage denial under Olympic Steamship. Id. at 52-53.

proceedings. The Supreme Court commissioner stated that Lock's argument for the stay and discretionary review "relies on a misinterpretation" of this court's decision in Lock. Echoing the emergency stay ruling, the commissioner stated in the discretionary review denial:

> Of particular importance, the Court of Appeals affirmed the superior court's JNOV order, which dismissed Ms. Lock's bad faith claims as a matter of law. That post-verdict order extinguished the jury's award of $413,575. The Court of Appeals reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation, meaning the check and cover letter mailed to her by American Family's corporate counsel.

The trial on remand occurred in December. In the days leading up to the trial, the trial court considered motions between the parties to strike, for contempt, and for sanctions concurrently with the parties' motions in limine.[8] The substance of these motions and the parties' motions in limine largely centered around the ongoing dispute about what could and could not be litigated at trial. In fact, the trial court explained that the primary motion in limine "is what the parameters of this trial will be" and that the court's decision "on that front will inform a number of both parties' other motions in limine." When the court listed the motions before it and asked the parties if there were any other documents the court did not list but should be reviewed, Lock's counsel stated:

> So I just want to put on the record that ... the history of this case is such that I think it would be necessary for the Court ... to have a ... CR 16 hearing so we can truly understand what's occurred in this case and why we're even having an argument about the scope of the case as (inaudible).

[8] American Family filed a motion to strike, for contempt, and for sanctions. Lock filed a response requesting the court to deny the motion and to impose sanctions against American Family. American Family filed a reply in support of its motion to strike, for contempt, and for sanctions. Lock then filed a motion to strike American Family's motion to strike, for contempt, and for sanctions.

Lock then argued the trial should not be limited to bad faith specific to American Family's single direct contact act. On rebuttal, Lock's counsel argued:

> To look at the Henderson case[9] particularly and listen to the argument, you can hear the justices asking whether it would be fruitless for me to continue to oppose these orders that are clearly not going in my favor. And, yes, it would be fruitless for me to do so. The fact that I used every avenue available to me and to my client to get the Court back on track with this case, I did that. And this fiction that the race issue has been adjudicated is simply false. It has not been addressed.
>
> ...
>
> And if you take the time to look at the motions practiced and look at the orders that have been entered in this case, it is clear, it is absolutely clear that Lock has made a prima facie case that an objective observer who was aware of an explicit bias that it could be found in this case, and that is what has been argued with the CR 16 request for the motion, which American Family ferociously fought against.

In its ruling on the second trial's scope, the trial court read on the record from this court's prior decision as well as from the Supreme Court commissioner's ruling. The trial court ruled that "this trial is for the jury to determine what, if any, damages were causally related by" American Family's direct contact.

The trial court also acknowledged that Lock "raise[d] an extremely valid issue of racial bias." The court continued:

> I'm saying extremely valid not because I thoroughly assessed the conduct of judicial officers' orders issued in this case but because I recognized that every single individual, including every single judicial officer, has inherent biases, and these inherent biases do play a role in certain decisions that we make.
>
> I also recognize the frustrations that I think very well may be valid on the part of the plaintiff regarding orders that have consistently gone against the plaintiff in light of a considerable amount of evidence in which one would expect otherwise. However, the reason why I don't think that a proactive effort on my part to hold an evidentiary hearing to determine whether implicit biases did play a role in one or more of the decisions issued by judicial officers after remand before today on this case is

[9] Henderson v. Thompson, 200 Wn.2d 417, 421, 518 P.3d 1011 (2022).

> because even if I set aside the orders determining the parameters of the issue before the trial of fact ... I still would go to the Court of Appeals ... specificity in their opinion and the Supreme Court's clarification of the issue ... [and] I would arrive at the same conclusion ....

The court then went through each of the parties' motions in limine.[10] Ultimately, the jury decided for Lock and awarded a verdict of $40,000. Lock does not challenge this $40,000 verdict on appeal.

After trial, in January 2023, Lock moved "for the bad faith attorney fees awarded in 2017 after Lock's first trial." In her motion, she asserts this court agreed with Lock and vacated the first trial court's reconsideration of his prior order granting her bad faith attorney fees in 2017. Lock specifically requested all of her bills and costs from 2015 to 2017 and "sanctions for the conduct of American Family post remand where it faced no sanctions for its continued abusive litigation tactics and its continued use of the court system to prolong the litigation." In response, American Family requested the court sanction Lock for procedural and professional conduct rules violations. The second trial court denied Lock's motion for attorney fees, costs, and sanctions. In the same order, the court denied American Family's motion for sanctions.

In June 2023 the trial court entered a satisfaction of judgment. Lock filed a notice of direct appeal to the Washington Supreme Court. American Family filed notice of cross appeal. The Supreme Court transferred the appeal to this court.

[10] It appears American Family, based on the trial court's motion in limine rulings, was satisfied to "push to the side" its contempt motion until after trial.

DISCUSSION

Motion to Strike

In her reply brief, Lock requests this court to strike portions of American Family's opening brief based on its "overlength" and "improper use of appendices." Lock asserts violations of the Rules of Appellate Procedure (RAP), including that American Family's appendix includes materials not contained in the record without this court's permission and that certain appendices are irrelevant. See RAP 10.3(a)(8). We deny Lock's motion to strike for two reasons.

First, this court granted American Family's motion to submit an overlong brief. Second, "a motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider." Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012); see RAP 1.2(a). This court will not sift through the record or briefs "with a stamp or scissors to prevent the judges who are hearing the case from seeing material deemed irrelevant or prejudicial." Engstrom, 166 Wn. App. at 909 n.2. This court did not rely on American Family's appendices to resolve this appeal.

Scope of Trial

Lock contends the trial court erroneously modified this court's mandate when it limited the trial on remand to the sole issue of American Family's direct contact. Lock asserts this court reversed the JNOV on the jury's bad faith verdict of $413,575 "without limitation" and ordered a new trial on all evidence of American Family's bad faith. Lock argues she should now, out of fairness, recover the original bad faith verdict of $413,575 in addition to her $40,000 verdict on remand. Because her interpretation is

contrary to a fair and plain reading of Lock, we deny her request. See, e.g., 12 Wn. App. 2d at 926, 932.

In Lock, the issues on appeal were the trial court's exclusion of evidence related to American Family's litigation conduct and the court's JNOV dismissing Lock's extracontractual CPA and bad faith claims as a matter of law. 12 Wn. App. 2d at 918-19. This court affirmed the trial court's dismissal of the CPA claim and the court's evidentiary rulings related to Lock's unsuccessful IFCA claim. Id. at 923-25, 928, 931-32.

In respect to the trial court's dismissal of Lock's common law insurance bad faith claim, this court held the trial court abused its discretion only by excluding evidence of damages resulting from American Family's direct contact, which led to the trial court erroneously concluding in its JNOV there was no evidence of damages to support the jury's common law insurance bad faith verdict. Id. at 917-18, 924-26. Except for the trial court's error in considering potential damages resulting from the specific bad faith act of direct contact, this court otherwise rejected Lock's argument that she proved evidence of damages proximately caused by American Family's bad faith conduct.[11] Id. at 925-26.

Lock reads out of context this court's statement that "[w]e ... reverse the trial court's JNOV dismissing Lock's insurance bad faith claim" near the end of this court's opinion. Id. at 932. Lock reads this as allowing a new trial on all of Lock's common law insurance bad faith claims, but ignores this court's holding that postlitigation bad faith

[11] This court analyzed and rejected Lock's other arguments that:
> the jury (1) knew American Family cut off her benefits, (2) knew that American Family failed to investigate fairly by not providing Dr. Chong with all of her medical records and not consulting with her treating physician, [and] (3) knew that she had to hire an expert whose bill was in excess of $18,000.

Lock, 12 Wn. App. 2d at 925-26.

conduct is rarely admissible because it lacks probative value and has a high risk of prejudice. Id. at 921. In her first appeal to this court, Lock argued that the trial court erred in excluding evidence of American Family's litigation conduct that occurred after she filed her UIM lawsuit. Id. at 919. This court explicitly held, "The trial court did not abuse its discretion in excluding the postlitigation conduct of trial counsel, including evidence of bad faith in the filing of untimely motions for summary judgment and removing the case to federal court." Id. at 923. As to any substantive insurance bad faith claim, read in context, this court's reversal of the JNOV dismissing Lock's extracontractual bad faith claims related to remand for a new trial on Lock's common law insurance bad faith claim "based on American Family's direct contact during litigation" and no other insurance bad faith claim. Id. at 932 (emphasis added); see id. at 923, 925, 931.

The trial court did not err in restricting the trial on remand to American Family's conduct of having direct contact with Lock by mailing her the sanction check and cover letter.

Evidentiary Hearing for Racial Bias

Lock contends she was wrongly denied an evidentiary hearing after raising the issue of racial bias to the trial court. Specifically, Lock argues the trial court erred when it denied Lock's CR 16 motion requesting a pretrial hearing to discuss "whether implicit bias has [sic] recognized by our Supreme Court" had an effect in the proceedings. Lock argues the trial court also erred when it declined to conduct an evidentiary hearing after Lock raised the issue of racial bias during motion in limine arguments before her trial on remand.

American Family asserts that Lock waived her claim of systemic and institutional bias and request for a hearing specific to racial bias because she failed to request such a hearing post-verdict. American Family also contends that Lock failed to establish a prima facie case where an objective observer could conclude that racial bias was a factor in the jury's verdict.

Due process requires a fair trial. Tatham v. Rogers, 170 Wn. App. 76, 90, 283 P.3d 583 (2012). "Under Washington law, the right to a jury trial includes the right to an unbiased and unprejudiced jury." State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). Appeals to racial or ethnic bias in the justice system cannot be permitted. See State v. Zamora, 199 Wn.2d 698, 723, 512 P.3d 512 (2022); State v. Horntvedt, 29 Wn. App. 2d 589, 599, 539 P.3d 869 (2023). Civil or criminal, "a verdict affected by racism violates fundamental concepts of fairness and equal justice under law." Henderson, 200 Wn.2d at 421. In State v. Jackson, this court held the trial court erred when it ruled on Jackson's motion for a new trial without conducting an evidentiary hearing pursuant to his prima facie showing of racial bias. 75 Wn. App. at 544. This court also noted that "[t]he fact that Jackson did not agree to an evidentiary hearing below does not constitute a waiver of his right to argue that he was denied the right to due process." Id. at 544 n.4. We disagree with American Family's assertion that a party is necessarily barred from raising a claim of racial bias if the party did not request an evidentiary hearing below. See id. But we do agree with American Family that Lock failed to establish a prima facie showing of racial bias.

To advance her argument, Lock correctly asserts, as recognized by our state Supreme Court in Henderson, 200 Wn.2d at 421, that, "[w]hether explicit or implicit,

purposeful or unconscious, racial bias has no place in a system of justice." The Henderson court acknowledged if racial bias is a factor in a judge or jury's decision, the decision necessarily does not achieve substantial justice and must be reversed. Id. at 421-22. The court addressed the issue of whether the plaintiff was entitled to an evidentiary hearing after she moved for a new trial arguing that defense counsel's appeals to racial bias affected the jury verdict. Id. at 422. The court held if a party presents a prima facie showing that racial bias affected the verdict, the party is entitled to an evidentiary hearing. Id. at 438. The court explained:

> In ruling on a motion for a new civil trial, "[t]he ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict."

Id. at 422 (alteration in original) (quoting State v. Berhe, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019)); see also Henderson, 200 Wn.2d at 435 (discussing burden of proof at evidentiary hearing).

A determination of whether racism could have affected the verdict requires a review of the totality of circumstances of the trial. Henderson, 200 Wn.2d at 439. A reviewing court "may only consider the evidence and argument that was before the trial court at the time of the hearing on the motion for a new trial." Simbulan v. Nw. Hosp. & Med. Ctr., No. 85114-4-I, slip op. at 13 (Wash. Ct. App. Aug. 26, 2024), https://www.courts.wa.gov/opinions/pdf/851144.pdf (emphasis added). In Henderson, the court held that defense counsel's trial references to Henderson as combative and the defense's arguments that Henderson was solely motivated by financial gain and was exaggerating her injuries evoked stereotypes that portrayed Henderson as an

angry Black woman and as "untrustworthy, lazy, deceptive, and greedy." 200 Wn.2d at 436-37. As this court recently clarified, we review a trial court's decision under the Henderson test de novo. Simbulan, slip op. at 11.

Without a verdict to challenge at the time of Lock's request for a hearing, Lock necessarily could not establish a prima facie case under Henderson. Lock asks this court to broaden the reach of the Henderson framework to apply to inherently biased pretrial judicial rulings in addition to a party's conduct during trial. The Henderson facts were specific to a party's objective appeals to a factfinder's racial bias and such appeals' objective effect on the outcome of the trial, whether by jury or bench trial verdict. Henderson, 200 Wn.2d at 439-40 (discussing the burden at a CR 59 evidentiary hearing upon prima facie showing of racial bias); see also Simbulan, slip op. at 23-24 (contrasting facts to party's flagrant appeals in Henderson and appeals in the criminal context). Lock conceded at oral argument that the application of Henderson to pretrial judicial bias would be "a brave new world," and proposed that a pretrial evidentiary hearing on judicial racial bias require a neutral arbiter, such as a special master.

However, even if this court were to extend Henderson to require an evidentiary hearing to examine judicial rulings possibly tainted by a judge's own racial bias, Lock fails to make a prima facie showing under the Henderson standard. In her CR 16 motion and motion in limine arguments, Lock only offered conclusory arguments. She claimed that the trial court's rulings were racially biased, degrading, and one-sided, but failed to offer evidence of how a judge's purported bias was objectively activated to impact any specific ruling. See Henderson, 200 Wn.2d at 436-38 (describing how defense counsel's allusions to racial stereotypes implicitly invited jurors to make decisions on

improper grounds rooted in prejudice or racial biases). Courts must "focus on the effect of racially biased comments or actions, not the intent of the actor, when evaluating whether a verdict has been affected by racism." Id. at 434. A basic disagreement with the factfinder's decision is not sufficient to meet the test. See Simbulan, slip op. at 24 (stating the unacceptable risk of the misapplication of the Henderson standard to tempt parties "to proactively introduce evidence of their own ethnicity or primary language to ensure another chance at litigation in the event of an unfavorable verdict").

In her briefing, Lock asks this court to consider the totality of circumstances of the trial to conclude that American Family's misrepresentations affected the trial court's rulings favoring American Family "over Asian Lock and her Black attorney," but she again fails to explain how such conduct was racially framed or how it perpetuated racial stereotypes to objectively activate the trial court's alleged systemic and institutional racial bias against her. Nor does Lock present any argument as to how the institutional racial bias impacted the jury's verdict in her favor. We cannot say systemic and institutional bias is at work in a trial court's ruling or in a verdict merely because the party and/or their attorney is a person of color and the ruling was unfavorable or the verdict ostensibly insufficient. See id. Indeed, not all express recognitions of race carry the danger of appealing to potential racial bias. Zamora, 199 Wn.2d at 715.

Because Lock has not established a prima facie case of racial bias, it follows that the trial court did not err in denying her requests for an evidentiary hearing. That does not mean that Lock is without an avenue to assert a claim of judicial bias, which we address next.

Judicial Bias

Aside from asking this court to extend Henderson, Lock contends multiple trial court's rulings were unfair and biased toward American Family in violation of the appearance of fairness doctrine. Because Lock offers insufficient briefing to support her argument, we reject her claim.

The appearance of fairness doctrine applies to judicial and quasi-judicial decisionmakers. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999). Lock correctly asserts the doctrine requires a judge to be impartial and also appear to be impartial. Id. "[T]rial before an unbiased judge is an essential element of due process." In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). However, "[t]here is a presumption that a trial judge properly discharged his/her official duties without bias or prejudice." Id. A party asserting judicial bias "must provide specific facts establishing bias" to overcome the presumption, such as evidence on the record of the judge having a personal interest in the outcome or the judge's personal prejudice against the party. Id. at 692-93; see also Tatham, 170 Wn. App. at 90-91 (providing examples of evidence of judicial bias requiring recusal under due process). Mere speculation of judicial bias is insufficient. Tatham, 170 Wn. App. at 96. "Judicial rulings alone almost never constitute a valid showing of bias." Davis, 152 Wn.2d at 692.

Lock's briefing mentions uncited judicial rulings on remand that, based on Lock's statement of the case, could apply to rulings issued by multiple judges. Lock vaguely describes the rulings and fails to offer evidence of any of the judicial officers' biases against her. See RAP 10.3(a)(6). The mere labeling of a ruling as biased is not evidence of systemic or implicit bias at work in the perversion of a specific legal

determination. If courts did not require more, they would open the door to bald accusations of bias halting the wheels of justice simply because the system is served by human decisionmakers. See Berhe, 193 Wn.2d at 663 (acknowledging everyone lives with unconscious biases).

We hold that Lock's bald accusations are insufficient to defeat the presumption of an impartial judiciary.

Attorney Fees

Lock next contends the trial court should have granted her attorney fees for American Family's bad faith litigation conduct that she was initially granted by the first trial judge in 2017. Lock argues because a court may award attorney fees for bad faith litigation conduct and American Family acted in bad faith contrary to its fiduciary duty to Lock as its insured, "[t]he only fair and just remedy would be to award Lock the 2017 attorney fees and costs as filed in 2017 with interest from that date." We decline Lock's request.

In Lock's first appeal, this court declined to address Lock's challenge to the first trial court's order vacating it's previous order granting her attorney fees for American Family's bad faith litigation tactics. Lock, 12 Wn. App. 2d at 925 n.4. Because the case was remanded for trial on Lock's common law insurance bad faith claim, this court instead vacated the trial court's order awarding or denying attorney fees, and noted any fees should be addressed on remand. Id. On remand, Lock moved for and was twice denied attorney fees as sanctions, and other requests not at issue in this appeal, for American Family's bad faith litigation conduct.

A prevailing party does not recover attorney fees absent a contract, statute, or recognized ground of equity. Rorvig v. Douglas, 123 Wn.2d 854, 861, 873 P.2d 492 (1994); see Berryman v. Metcalf, 177 Wn. App. 644, 656, 312 P.3d 745 (2013). A "trial court has the inherent authority to sanction a party for 'bad faith,'" Including procedural bad faith. Hedger v. Groeschell, 199 Wn. App. 8, 13-14, 397 P.3d 154 (2017). "Procedural bad faith is unrelated to the merits of the case and refers to 'vexatious conduct during the course of litigation.'" Id. at 14 (quoting Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131 (1999)). Bad faith litigation can provide an equitable basis for attorney fees, such as conduct that delays or disrupts litigation. Rogerson Hiller Corp., 96 Wn. App. at 927-28; State v. S.H., 102 Wn. App. 468, 475, 8 P.3d 1058 (2000).

This court reviews a trial court's decision to deny attorney fees under an abuse of discretion standard. Pierce v. Bill & Melinda Gates Found., 15 Wn. App. 2d 419, 447, 475 P.3d 1011 (2020). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. Roats v. Blakely Island Maint. Comm'n, Inc., 169 Wn. App. 263, 284, 279 P.3d 943 (2012). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices. Id. This court's scope of review is generally bound by the trial court's factual findings and will not attempt to make factual findings based on an incomplete record in which the appealing party did not properly brief or argue the elements of a claim. Dalton M, LLC v. N. Cascade Tr. Servs., Inc., 2 Wn.3d 36, 53, 534 P.3d 339 (2023); see RAP 2.5(a), 10.3(a)(6). A trial court must make a finding of bad faith to assign sanctions. Hedger, 199 Wn. App. at 14. "A finding of 'inappropriate and improper' conduct 'is

tantamount to a finding of bad faith.'" Andren v. Dake, 14 Wn. App. 2d 296, 321, 472 P.3d 1013 (2020) (quoting S.H., 102 Wn. App. at 475)).

Lock argues that American Family engaged in bad faith litigation tactics and this court's failure to sanction American Family for its conduct sends a clear message to insurers that "improper removals to federal court, cheap trial tactics, flat out lies, lying, manipulating the court to delay resolution, avoiding depositions, refusing to disclose witnesses, and otherwise litigating abusively is condoned by the judicial system." Lock does not identify specific conduct with cites to the record. At the end of her argument, she includes a string citation to the record untethered to any facts.

"It is an appellant's responsibility to provide 'argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.'" Romero v. Dep't of Soc. & Health Services, 30 Wn. App. 2d 323, 544 P.3d 1083 (2024) (quoting RAP 10.3(a)(6)). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996); see Nelson v. Duvall, 197 Wn. App. 441, 460, 387 P.3d 1158 (2017). This case involves more than 9,500 pages in the record and, by Lock's count, more than a thousand pleadings between the parties. We decline to fish in the record to construct an argument for bad-faith-litigation sanctions on Lock's behalf. See State v. Cox, 109 Wn. App. 937, 943, 38 P.3d 371 (2002).

In her brief's introduction, Lock seems to identify the district court judge's ruling stating that American Family "flat-out lied to the Court" about the amount in controversy and used "cheap trial tactics" by removing the case to obtain summary judgment as a legal determination of bad faith litigation that mandates attorney fees. But the district

court judge indeed imposed a sanction and awarded attorney fees. Lock, 12 Wn. App. 2d at 912. Lock cites to no authority to support her indirect suggestion that a trial court's denial of additional sanctions for the same conduct is an abuse of discretion. Where a party fails to cite to relevant authority, we generally presume that the party found none. State Constr., Inc. v. City of Sammamish, 11 Wn. App. 2d 892, 906, 457 P.3d 1194 (2020) (citing Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wn. App. 344, 353, 71 P.3d 233 (2003)).

Overall, Lock fails to demonstrate how the denials of her two motions on remand were manifestly unreasonable, exercised on untenable grounds, or untenable. Rather, Lock makes a conclusory argument that the trial court "gave no credence to the prior findings of [American Family's] bad faith litigation tactics" and repeatedly cites to the first trial court's initial findings of American Family's bad faith litigation tactics. We disagree with Lock's assertion and her reliance on the first trial court's findings as a factual basis to support her new attorney fees request. First, after each of Lock's attorney fees requests, which were made before two different judges, the trial court reviewed and considered the motions, as well as American Family's responses and Lock's replies. Second, because the first trial court vacated its prior order granting attorney fees based on its further understanding of the procedural record, such factual findings simply do not exist.[12] See Lock, 12 Wn. App. 2d at 919.

Lock argues that American Family's bad faith litigation tactics violated its fiduciary duty and it should be sanctioned for its unfair treatment of Lock as its insured.

[12] Notably, even if it could be interpreted that this court's vacating the trial court's order of denying attorney fees also vacated the first trial court's ruling vacating its own previous order awarding attorney fees, this court also vacated any order awarding attorney fees. Lock, 12 Wn. App. 2d at 925 n.4.

Lock cites Van Noy v. State Farm Mutual Automobile Insurance for the principle that an insurer must deal fairly with its insured, "'giving equal consideration in all matters to the insured's interests as well as its own.'" 142 Wn.2d 784, 793, 16 P.3d 574 (2001) (quoting Van Noy v. State Farm Mut. Auto. Ins. Co., 98 Wn. App. 487, 492, 983 P.2d 1129 (1999)). However, Van Noy is inapposite. Van Noy involved insureds' lawsuit against automobile insurer to recover for breach of contract, breach of fiduciary duty, bad faith claims handling, and violation of the CPA, arising after the insurer disallowed PIP benefits. Id. at 787-89. Van Noy thus did not involve an attorney fees award as a sanction for bad faith litigation conduct. Comparatively, all the CPA and IFCA claims were dismissed in the instant case. As this court held in Lock, postlitigation conduct of the insurer's counsel is not the basis for insurance bad faith liability.[13] 12 Wn. App. 2d at 919. And procedural bad faith is unrelated to the merits of the case. Hedger, 199 Wn. App. at 14.

Lock did not meet her burden of establishing the trial court abused its discretion in denying her requests for attorney fees.

American Family's Attorney Fees Request

American Family requests attorney fees and costs under RAP 18.1. American Family specifically argues because Lock's appeal was frivolous, it is entitled to attorney fees under RCW 4.84.185 and RAP 18.9(a). Lock's appeal was not frivolous. "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that

[13] The Lock court expressly distinguished the direct contact conduct by American Family's corporate counsel from the postlitigation conduct of trial counsel. Lock, 12 Wn. App. 2d at 924.

it is so devoid of merit that there is no possibility of reversal." Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). As we have previously acknowledged, this court in Lock expressly reversed orders granting or denying attorney fees and indicated that a party's request for fees should be addressed on remand. 12 Wn. App. 2d at 925 n.4. Lock did just that. An appeal is not frivolous merely because the appellant's arguments are rejected. Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). We deny American Family's motion for attorney fees.[14]

We affirm.[15]

Colum, J.

WE CONCUR:

Chung, J.

Hazelrigg, ACJ

[14] Lock also requests this court to sanction American Family for its purported bad faith litigation tactics on remand. We decline to do so. This court will not find an act of bad faith litigation in the first instance. See Dalton M, LLC, 2 Wn.3d at 53.

[15] Because we affirm, we need not address American Family's alternative arguments raised in its cross-appeal.

Exhibit 2

Lock v. American Family Insurance Co.

Appeal Hearing Excerpt

November 5, 2024

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No. 85844-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION I

STEPHENIE Y. LOCK,

Appellant/Cross-Respondent,

v.

AMERICAN FAMILY INSURANCE COMPANY,

Respondent/Cross-Appellant.

ORAL ARGUMENT BEFORE THE COURT OF APPEALS, DIVISION I

November 5, 2024

Panel: Linda Colburn, Janet Chung, Cecily Hazelrigg

TRANSCRIBED BY: Marjorie Jackson, CET

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I N D E X O F P R O C E E D I N G S

PAGE

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November 5, 2024

JUDGE COLBURN: Counsel, are you ready to proceed?

MS. SARGENT: May it please the Court, my name is Vonda Sargent. I'm here with co-counsel, Carol Farr. And, Counsel.

Your Honor, we're here before the Court --

JUDGE COLBURN: Would you like to reserve rebuttal?

MS. SARGENT: Yes, Your Honor. I'd like to reserve three minutes for rebuttal. Thank you.

Your Honor, we're here before the Court After an arduous and very long process for what should have been a very simple motor vehicle collision. We were before the trial court on a remand where this court ordered a new trial on Stephenie Lock's insurance bad faith claim. Stephenie Lock's due process rights were violated because of the deliberate malfeasance of American Family.

American Family argued that instead of Stephenie Lock having a right to retry her case with evidence that had been erroneously excluded from the trial that, in fact, the new trial was just the erroneously excluded evidence. I'd like to point out, Your Honor, that

American Family failed to respond to any of the issues raised by Stephenie Lock and, therefore, they should be verities on appeal.

American Family failed to acknowledge that it argued that this court expressly affirmed the JNOV dismissing Lock's insurance bad faith claim.

JUDGE COLBURN: So let's talk about that, since I know that much of your appeal is centered around the interpretation of basically the first appeal and opinion issued by this court. So I understand the line that you're focusing on is we -- I'll quote it. "We also reverse the trial court's JNOV dismissing Lock's insurance bad faith claim."

Correct?

MS. SARGENT: That's correct.

JUDGE COLBURN: And I understand that you're saying, hey, they reversed it so, therefore, we are free to basically readdress all our bad faith claims. But in context, isn't it related exactly how the opinion stated, is that they're remanding for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation? So in context, isn't it, in fact, interpreted that that is the only issue that's for trial on remand?

MS. SARGENT: No, Your Honor. If you read it in

context of "evidence of American Family's direct contact with Lock and any resulting damages" should have been admissible to support her bad faith claim. Stephenie Lock did not bring her bad faith claim based on the check and the release. The check and release came ten days -- maybe three days before the trial, so it was not possible for us to have litigated on that being the bad faith. So that was not her bad faith claim.

So reading this in context of what that case was about, it is in support of Lock's bad faith claim.

JUDGE COLBURN: Well -- or isn't it the danger is that the Court erred in allowing you to remand on any issue at all versus suggesting that, hey, that wasn't an issue we raised, but the fact that this court in the opinion said you can have a trial on this based on the record of what we see, versus what you want to do is interpret it as saying, hey, so it means that we can go ahead and try all those other bad faith claims that we originally tried in the first trial.

What I'm saying is, isn't the dangers of what you're arguing is that you shouldn't have been able to have a new trial?

MS. SARGENT: Well, Your Honor, looking at the opinion below, the first Lock opinion, no, that's not what that opinion stated. That opinion, in Lock's

estimation, is very clear that the JNOV dismissing Lock's insurance bad faith claim was erroneous and reversed. Stephenie Lock's bad faith claim was not situated on the issuance of a release and a check on the eve of trial. There was a slew and a list of other evidence that was presented. And, in fact, the evidence of the release and the check was not even permitted to be allowed until American Family opened the door. So that was not Lock's insurance bad faith claim.

Additionally, Your Honor, her due process rights were violated in that, despite the Court remanding for a new trial, American Family argued veraciously that it should have been remanded to determine whether there was a cognizable claim. Well, there's nowhere in the opinion that says that the trial court is to determine whether there is a cognizable claim.

That is an example of the bad faith litigation tactics that were recognized in the 2017 ruling from Judge Schubert, that you can't have a trial on litigation conduct, bad faith litigation conduct, but that's the conduct that should be sanctioned.

They continued with that conduct repeatedly and throughout the course of this trial, resulting in a trial where Lock got a trial where she got to say: They sent a check. And then American Family got to argue,

because in arguing what bad faith was after the Court refused to allow us to have an expert, we cited to the statute. It's deceit. Said that it was deceitful -- or "dishonest" is the word I used.

Then American Family got to argue that it was a mistake and an error, an administrative error. They argued that the case should be dismissed because one instance of bad faith does not make a bad faith claim.

And so that goes back to your initial question, Your Honor, is whether or not this was remanded on one issue of bad faith. One issue of bad faith does not give rise to a bad faith insurance claim. It was a series of conduct by American Family that gave rise to --

JUDGE COLBURN: I want to clarify the distinction between a substantive claim for insurance bad faith versus bad faith litigation tactics. Those are two different things.

MS. SARGENT: Absolutely.

JUDGE COLBURN: All right. So I understand -- I understand and I hear your argument regarding you believe that, based on this court's previous opinion, you should have been able to litigate all your bad faith claims as you did previously.

Correct?

MS. SARGENT: That's correct.

JUDGE COLBURN: All right. And as far as you arguing conduct that American Family did, that's why I want to make sure I'm understanding overlap versus non-overlap of bad faith litigation tactics versus bad faith substantive insurance claim.

MS. SARGENT: Okay. So the bad faith litigation tactics is why Lock was unable to try her case that was remanded. So that's that separate part.

The bad -- the substantive part of the bad faith claim that the Court would --

JUDGE COLBURN: You would agree, though, that if this court agreed with American Family as far as the interpretation of this court's previous opinion, then that would dispose of any issue regarding bad faith litigation regarding the interpretation of what could be litigated on remand? Yes?

MS. SARGENT: No, I would not agree with that, Your Honor, and this is why. As part of their bad faith litigation tactics, they argued that the case was remanded to determine whether there was a cognizable claim. Then they argued that the case was remanded to determine whether summary judgment should be issued because one instance of bad faith does not give rise to an insurance bad faith claim.

So, no, Your Honor, I would not agree with that.

JUDGE COLBURN: Counsel?

MS. RIDER: Good morning, Counsel, Your Honors. May it please the Court, my name is Kimberly Larsen Rider, and I'm one of the attorneys for American Family Insurance Company.

On appeal, American Family is requesting this court affirm the 2022 jury verdict and deny all other relief requested by Ms. Lock on appeal. If, in fact, this court does affirm the 2022 jury verdict and the post-verdict findings, American Family waives its cross-appeal issues and the Court need not consider those.

There are no factual or legal basis for the appeal issues raised by Ms. Lock here today. Ms. Lock's appeal is predicated on two main theories. First, that the Henderson case is applicable to this matter. And the second, that Ms. Lock was denied her opportunity to re-argue all American Family's alleged acts of bad faith conduct during the 2022 trial on remand.

First, there are no Henderson issues on appeal.

JUDGE COLBURN: Let's start out with the main issue regarding what they were allowed to try on remand. Counsel is arguing the line in the first Lock opinion that says, "We also reverse the trial court's JNOV

dismissing Lock's insurance bad faith claim." And interpreting that as, hey, this court reversed the JNOV so, therefore, they're allowed to go ahead and retry the bad faith claims.

So let's just have your response to that.

MS. RIDER: Surely. The jury improperly found bad faith in the 2017 trial. And as the Court is aware, that finding was overturned by the JNOV. Now, the JNOV dismissed the CPA and the bad faith claims, and Ms. Lock was able to argue and be heard on all issues of bad faith except for the sanctions check. This is why the Court in Lock 1 solely remanded on one issue. And I quote from that opinion. "We remand for retrial of Lock's claim for common law insurance bad faith based on American Family's conduct directly contacting Lock pre-trial."

So again, Ms. Lock did have a full and fair opportunity to litigate all the bad faith claims during the first trial. Those were all dealt with but for the sanctions check, and that is what was the substance matter of the trial on remand. And Ms. Lock had a full --

JUDGE COLBURN: What about her argument that the first trial had nothing to do with the direct contact of the sanctions check because it just occurred, what, a

couple of -- ten days before trial? So therefore, the only thing that could have been remanded was her ability to, in fact, prove damages related to the bad faith claim.

MS. RIDER: Well, ultimately, Ms. Lock is saying that all this bad faith conduct should have been relitigated. Again, the direct contact was not before the Court during the 2017 trial except in that limited instance where the check was ultimately presented, which is why the Court of Appeals correctly said everything had been dismissed and dealt with but for that sanctions check, and that's why that evidence was presented to the jury.

JUDGE COLBURN: If the Court of Appeals was wrong regarding its resolution in that first appeal, I mean, either party had a chance to appeal that decision.

Correct?

MS. RIDER: Absolutely.

JUDGE COLBURN: And it's my understanding that nobody appealed that decision.

MS. RIDER: That's correct.

Turning back, Henderson is not really at issue here. And the controlling case would be -- the more recent case is Simbulan vs. Northwest Hospital and medical center. It's worth noting that Henderson is

also a post-verdict relief request, and it's undisputed that Ms. Lock did not make a Henderson request post the 2022 verdict. But perhaps most importantly, or more importantly, really, is that while Ms. Lock is requesting relief under Henderson, she's expressly stated that she doesn't want a new trial or really even a Henderson hearing.

JUDGE COLBURN: So is she really -- what she's arguing is an extension of the spirit of Henderson?

MS. RIDER: I'm not sure that that's what she is arguing, but ultimately she's requesting this court award, essentially, punitive damages. She doesn't want a new trial.

JUDGE COLBURN: Seems to me that she's arguing, based on her briefing, judicial bias throughout the proceedings on remand.

Correct?

MS. RIDER: I think she is arguing that. But ultimately, again, Henderson deals with --

JUDGE COLBURN: Right. So even if Henderson doesn't apply, there are -- there's case law on how to proceed if you are alleging judicial bias.

MS. RIDER: Sure. But that's not what's been briefed by Ms. Lock here. So, in other words, it -- of course, Ms. Lock had every opportunity to properly

challenge any of the judicial rulings and findings. At times, she did. And the record is large and before this court that she was successful on some and didn't actually -- and on others, she just simply did not do what she could have done under the civil rules and chose not to challenge it for whatever reason, or file a motion for reconsideration or whatever else.

So ultimately, that's not -- frankly, none of the judicial rulings would be subject to a Henderson or a Simbulan-type analysis because they have to do with the verdict. So in that sense, that's how we would address that issue.

JUDGE HAZELRIGG: Does the existing jurisprudence on judicial bias capture the claims of racial bias?

MS. RIDER: Well, there's no real claims of racial bias being brought here by Ms. Lock.

JUDGE HAZELRIGG: Well --

MS. RIDER: I mean, with --

JUDGE COLBURN: I think she mentions it several times in her briefing. I think she does allege it and argue it.

MS. RIDER: Well, there's been no presentation of evidence or claims that during the trial --

JUDGE HAZELRIGG: Right, but that wasn't the question. The question was whether the existing

jurisprudence on judicial bias broadly, is broad enough to capture claims of judicial bias.

MS. RIDER: If the Court is asking -- I'm not sure that it is currently. I mean, arguably, I think that's what Ms. Lock is trying to do is maybe expand that Henderson ruling in some way. But ultimately that's --

JUDGE COLBURN: I think she's saying systemically, like, how would you establish that a judicial officer is racially biased?

MS. RIDER: Sure, but there are proper procedures to go about and handle that. A motion, a CR --

JUDGE COLBURN: Are they the procedures outlined in the jurisprudence on judicial bias?

MS. RIDER: Yes. Secondly, Ms. Lock was afforded a full and fair trial on her UIM and bad faith claims at the 2017 trial. Significantly -- excuse me -- significantly and as evidenced by the record, during the 2022 trial, the trial court made numerous rulings that favored Ms. Lock, including, but not limited to, its finding that American Family acted in bad faith as a matter of law.

The 2022 trial -- jury trial also ended with a verdict in favor of Ms. Lock, and in an amount that was substantially greater than that suggested by American Family during its closing arguments. That's also

significant because it -- again, it differs from Henderson wherein the plaintiff -- the verdict was in favor of the plaintiff. However, the amount awarded by the jury was significantly less than that even suggested by defense counsel.

JUDGE CHUNG: So are you suggesting, Counsel, that if you end up with a verdict in your favor, that you don't have a basis for a racial bias claim?

MS. RIDER: I'm not suggesting that in a vacuum, right, but I think -- and Simbulan artfully articulates -- it's the totality of the circumstances. So, here, there are no racial -- racially based claims of misconduct by Ms. Lock that happened during the 2022 jury trial. The verdict does not --

JUDGE COLBURN: Isn't there a differ -- there's a difference in her, whether she's made the claim versus your position whether she's established that claim through the record or rulings or facts or evidence. I mean, there's a difference. I mean, she certainly can make the claim, right? Whether she's made that claim is one question. Whether she succeeds in making that claim is a different question.

MS. RIDER: I don't disagree with that. But ultimately, I think the record reflects that neither one of those cases happened here. Right? It's not -- and

Ms. Lock has been arguing about post-conflict litigation tactics or whatever else, but not with the -- not in terms of saying: Defense counsel at the 2020 jury trial brought up inferences of immigration status, of anything that would be a bias based on race, ethnicity or country of origin. That's simply not what's been either made a claim of or there's nothing in the record to evidence --

JUDGE COLBURN: So what I'm hearing you saying is, is that your position is that she has failed to cite specific actions or rulings that would lend itself to suggest judicial racial bias?

MS. RIDER: Right.

JUDGE COLBURN: Thank you.

MS. RIDER: Thank you, Your Honors.

MS. SARGENT: Your Honor, that is simply incorrect. Our brief and our reply brief go into extensive detail, in great detail about not only judicial bias, but the reason why it happened.

In June of 2020, our Supreme Court called upon everyone in our system to call out these sorts of issues and to listen to Black voices. And in the briefing, there is example after example after example of how the judiciary was misled deliberately by American Family in their argument --

JUDGE HAZELRIGG: Counsel, can you offer -- excuse

me -- some authority that supports your position of entitlement to an evidentiary hearing on racial bias? Under Henderson in particular, to address pretrial rulings of a judge, given the procedural distinctions here.

MS. SARGENT: Can I cite to some --

JUDGE HAZELRIGG: Some authority for the application.

MS. SARGENT: I would say Henderson and the courts -- and the Supreme Courts later, Your Honor. This is -- we're going into --

JUDGE HAZELRIGG: Right. But the focus of the Henderson determination had to do with appeals to implicit bias in the jury, right?

MS. SARGENT: Right.

JUDGE HAZELRIGG: Arguments of counsel and injection of racial animus or racial bias into the deliberative process of the jury.

MS. SARGENT: Yes.

JUDGE HAZELRIGG: And so I'm talking about the procedural distinction and how we would apply that to pretrial rulings by a judge.

MS. SARGENT: I think this court would have to go into a brave new world, Your Honor, and acknowledge that what happened in this case was based on systemic and

institutional bias. Counsel said that Lock had ample opportunity, and some rulings were in her favor. That is patently incorrect. On remand, Lock won one motion, and that was to amend the Complaint. Every other motion, bar none, was ruled against on Lock. And even the trial court who ultimately ruled on this case or tried the case --

JUDGE COLBURN: But American Family, there were multiple times where they were asking sanctions to be imposed that were denied.

MS. SARGENT: Okay.

JUDGE COLBURN: So isn't that a win in Lock's favor?

MS. SARGENT: That sanctions weren't applied? I guess if one wants to look at it that way, yes.

JUDGE CHUNG: Why is the existing case law regarding judicial bias not the right lens through which to view this?

MS. SARGENT: Because that case law does not recognize implicit and unconscious bias, Your Honor, because it doesn't address what it is that we're trying to do in this state, and that is eradicate racism at its base.

JUDGE CHUNG: So what's the remedy there? Because you are talking about decisions by the judicial officer,

not by the jury at this point, correct?

MS. SARGENT: That's correct.

JUDGE CHUNG: So are you suggesting that there should be some evidentiary hearing at the time, some other judge can --

MS. SARGENT: I requested two evidentiary hearings, both of which were -- one -- both of which were denied. So there was an attempt to have two evidentiary hearings. I was unable to have either one of them. So as far as what the remedy --

JUDGE HAZELRIGG: Logistically speaking, may I ask, so if the concern is the racial bias of the judge at pretrial, would that judge preside over the evidentiary -- how would -- logistically, how would this play out?

JUDGE COLBURN: You may briefly answer.

MS. SARGENT: I don't think so, Your Honor. I think that we should have a special master. We should have another judge. There should be some sort of proceeding. But like I stated earlier, it's a brave new world. It's a world where we are trying to change things from the way that they have been done. And in this case, the way that things were done in this case, a reasonable, objective observer who is aware of implicit bias could find that bias impacted the rulings from the

Court and impacted the way that Lock ultimately was allowed to try this case.

JUDGE COLBURN: Thank you, Counsel.

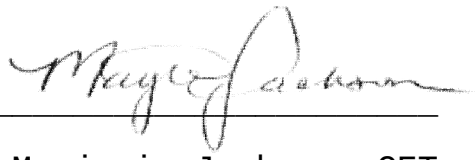
(Oral argument concluded.)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or legal recordings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including changes, if any, made by the trial judge reviewing the transcript; that I received the electronic recording in the proprietary court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of February, 2025.



s/ Marjorie Jackson, CET

Exhibit 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHENIE Y. LOCK, Appellant, v. AMERICAN FAMILY INSURANCE COMPANY, Respondent.	No. 1 0 0 4 7 6 - 1 RULING DENYING EMERGENCY MOTION FOR STAY

Petitioner Stephenie Lock filed an "EMERGENCY MOTION FOR STAY OF PROCEEDINGS PER RAP 17.4(b)," seeking a stay in King County Superior Court No. 15-2-05573-9 SEA pending consideration of her direct challenge to certain - superior court's orders concerning her action against respondent American Family Insurance Company (American Family). In particular, Ms. Lock seeks to prevent a contempt and apparently dispositive motion hearing set for January 14, 2022. American Family opposes a stay. Meanwhile, there is a pending trial on Ms. Lock's claim of common law bad faith by American Family, set to proceed on February 7, 2022. The emergency motion for a stay is denied for reasons explained below; however, the current temporary stay will remain in place to allow time for filing of a motion to modify.

The background history of this bitterly contested matter is reviewed only briefly. In February 2013, Ms. Lock was rear-ended by an uninsured driver. Ms. Lock

received medical treatment for neck and back pain. Her automobile insurance policy with American Family included PIP benefits of $35,000 and UIM benefits of $100,000. American Family paid for the damage to Ms. Lock's car and provided rental coverage while she shopped for a replacement vehicle. American Family also paid $13,541.98 in PIP benefits for Ms. Lock. American Family valued Ms. Lock's remaining insurance claim at up to $8,500. Ms. Lock rejected American Family's offer to settle the claim for $7,500.

In March 2015, Ms. Lock filed an uninsured motorist (UIM) action against American Family in King County Superior Court, amending the complaint in November 2015 to include extra contractual causes of action for violation of the Insurance Fair Conduct Act (IFCA) by means of unreasonable denial of a claim for coverage or denial of benefits, RCW 48.30.015, and for violation of the Consumer Protection Act (CPA), chapter 19.86 RCW, and a common law insurance bad faith claim.

American Family removed the action to federal district court twice based on its allegations about the amount in controversy but the federal court remanded the case to the superior court in both instances. When remanding the case for the second time, the federal court sanctioned American Family for "flat-out" lying to the court about the amount in controversy and for "cheap trial tactics." *Lock v. Am. Family Ins. Co.*, 12 Wn. App. 2d 905, 912, 460 P.3d 683 (2020) (quoting federal district court order).

In March 2017, while trial was pending, American Family's corporate counsel mailed a check for $4,153.75 and a cover letter offering the check as full and final settlement of all claims made by Ms. Lock, who was represented by counsel. Ms. Lock claimed the check and accompanying letter caused her emotional distress.

In July 2017, the jury awarded Ms. Lock $21,000 for her UIM claim. The jury also found that American Family did not act in good faith and awarded $413,575 on

the bad faith claim. The jury further found American Family had violated the CPA and awarded $8,500 on that claim. The jury also found that American Family did not violate the IFCA.

After the verdict, American Family moved for judgment notwithstanding the verdict (JNOV), which the superior court granted. The result was dismissal of the CPA and bad faith claims as a matter of law. The court let stand the jury's verdict awarding $21,000 on the UIM claim. The court also granted Ms. Lock attorney fees for American Family's bad faith litigation tactics but vacated the award on reconsideration.

The parties filed cross appeals. Ms. Lock sought direct review in this court but the court transferred her appeal to the Court of Appeals pursuant to RAP 4.2. In a published decision, the Court of Appeals (1) affirmed the superior court's order "excluding postlitigation conduct of trial counsel," (2) affirmed the superior court's JNOV dismissing the CPA claim, (3) reversed the superior court's order "excluding evidence American Family's direct contact with Ms. Lock during litigation and any damages supporting her insurance bad faith claim," and (4) reversed the superior court's JNOV dismissing Ms. Lock's insurance bad faith claim. *Lock*, 12 Wn. App. 2d at 932. The Court of Appeals remanded for a new trial on Ms. Lock's "insurance bad faith claim based on American Family's direct contact during litigation." *Id*. The court also remanded for the superior court for offset of the jury's UIM award by the amount paid under the PIP policy. The court vacated the superior court's decision on attorney fees and declined to award either party attorney fees on appeal.

Neither party sought further review in this court. RAP 13.4(a). The Court of Appeals issued its mandate on May 13, 2020.

The parties resumed litigation in anticipation of the new trial. On September 22, 2020, the superior court granted American Family's motion to amend

the judgment to apply an offset of the UIM judgment with paid PIP benefits, reducing the judgment by $13,129.55, resulting in an amended judgment of $7,870.45. The court further ordered that American Family was entitled to interest on the overpayment of the UIM verdict. Ms. Lock did not seek discretionary review of that order.

In 2021, American Family filed a motion for partial summary judgment as to extra contractual claims, such as the CPA cause of action, seeking to clarify the issues to be tried on remand. Ms. Lock did not file a response to the motion and her counsel conceded at the September 24, 2021, motion hearing that no response was filed. When asked by the trial court whether Ms. Lock opposed the motion, her counsel did not give a direct answer, summarizing that Ms. Lock believed "that the motion for summary judgment is merely an attempt—a billing attempt for the defense, and that it is just a reiteration of the Court of Appeals' opinion asking this court to affirm the what the Court of Appeals has already ruled is going to be allowed in this case." Response to Emergency Motion for a Stay, App. I at 6. A bit later in the hearing, counsel reconfirmed Ms. Lock did not oppose American Family's motion, characterizing the situation as an "exercise in futility." *Id*. at 7.

The court granted the motion for partial summary judgment and issued an amended order on October 13, 2021, dismissing Ms. Lock's IFCA, CPA, and attorney fee claims with prejudice and clarifying that the sole issue to be decided at trial was common law insurance bad faith as it related to the check and letter sent directly to Ms. Lock. Ms. Lock does not seek review of that order.

Meanwhile, a few days after the partial summary judgment hearing, Ms. Lock filed a "Motion for Entry of Partial Judgment," seeking entry of judgment on the original jury verdict of $415,375, plus interest. The superior court denied that motion on October 13, 2021. Ms. Lock moved for reconsideration on October 25, 2021. The

superior court denied that motion on November 22, 2021. Ms. Lock now seeks review of the October 13 and November 22 orders concerning her motion for entry of partial judgment.

Some mention of an ongoing discovery dispute is warranted. American Family has tried since late April 2021 to get Ms. Lock to sit for a videotaped deposition. The videotaped deposition kept being put off for various reasons. Ms. Lock appeared for a videotaped deposition on August 27, 2021, but her counsel refused to let the deposition proceed on the basis Ms. Lock was not given proper notice that the deposition would be videotaped. On American Family's motion, the superior court issued an order on October 7, 2021, compelling Ms. Lock to appear for deposition within 14 days and requiring Ms. Lock's counsel to pay costs for the failed August 27 deposition and the deposition ordered by the superior court. Ms. Lock moved for reconsideration but the superior court denied it as untimely made. American Family's efforts to get Ms. Lock to agree to sit for a deposition on December 10, 2021, failed. On December 13, 2021, the superior court granted American Family's motion to compel, ordering Ms. Lock to appear for a videotaped deposition at 9:00 A.M. on December 16, 2021. Ms. Lock filed the instant motion for an emergency stay at 9:30 A.M. on December 16, 2021. She did not appear for the deposition noted for that day. American Family represents that Ms. Lock's counsel has not paid for the costs ordered by the superior court and that it filed a motion for contempt, which is apparently going to be heard at the same time as a motion for summary judgment, on January 14, 2022. Ms. Lock does not dispute these specific assertions.

Returning to the matter at hand, Ms. Lock moves to stay superior court proceedings pending review of the October 13 and November 22 orders.[1] Preliminary

[1] On December 22, 2021, I entered a temporary stay pending a decision on the instant motion.

questions here are whether the instant matter relates to an appeal of right or a motion for discretionary review, and whether the appellate challenge is timely in whole or in part. The parties submitted letters addressing these questions, as well as briefing on whether a stay is justified.

Regarding appealability, Ms. Lock seeks review of interlocutory decisions, particularly decisions relating to a partial summary judgment, not any final decisions appealable of right under RAP 2.2(a); *see e.g.*, *In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012) (order denying motion for summary judgment is not a final decision). Contrary to Ms. Lock's assertion, neither order constituted an appealable decision terminating an action. RAP 2.2(a)(3). The challenged orders relate to the scope of trial on remand. These are matters of discretionary review; therefore, Ms. Lock's notice of appeal will be treated as a notice for discretionary review. RAP 2.3(a).[2]

As for timing, Ms. Lock seeks review of the order denying reconsideration entered by the superior court on November 22, 2021, and the underlying order denying her motion for partial judgment entered on October 13, 2021. Her challenge to the November 22, 2021, order is timely. RAP 5.2(b)(1) (30-day limit). Whether Ms. Lock's challenge to the October 13, 2021, order denying her motion for partial summary judgment is timely depends on whether she timely moved for reconsideration of that decision. RAP 5.2(b)(2). A motion for reconsideration must be filed "not later than 10 days after" the challenged order. CR 59(b). American Family is correct that Ms. Lock filed her motion for reconsideration on October 25, 2021, 12 days after entry of the order denying her motion for partial summary judgment. But that was a Monday. The tenth day after October 13, 2021, landed on Saturday,

[2] Ms. Lock must persuade the court to allow direct review in accordance with criteria listed in RAP 4.2.

October 23; therefore, the 10-day filing period was extended to the next Monday, October 25, 2021. CR 6(a). Ms. Lock's motion for reconsideration was timely, thus extending the time in which she could challenge the underlying order entered on October 13, 2021. RAP 5.2(b)(2). In sum, Ms. Lock's discretionary review challenge is timely with respect to both the November 22 and October 13, 2021, orders, but nothing decided before then.

As for whether to enter a stay, Ms. Lock must make a persuasive showing that a stay is necessary to insure effective and equitable review. RAP 8.3.[3] The purpose of this rule is to provide appellate courts with authority to provide preliminary relief so as to preserve the fruits of a successful appeal. *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983). The appellate court applying this rule undertakes an analysis similar to that applied with RAP 8.1(b), pondering whether debatable issues exist and a stay is necessary to preserve the fruits of a successful appeal, and considering the equities of the circumstances. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998).

There is no persuasive showing that there are debatable issues justifying a stay in this instance. Ms. Lock's argument for a stay relies on a misinterpretation of the Court of Appeals decision, which is now final. A careful review of that decision indicates the Court of Appeals reversed the superior court's JNOV only with respect to Ms. Lock's claim of bad faith based on American Family's direct contact with her pending trial. *Lock*, 12 Wn. App. 2d at 926. The court otherwise affirmed the superior court's JNOV order, which had the practical effect of extinguishing the jury's award of $413,575. The Court of Appeals thus reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation,

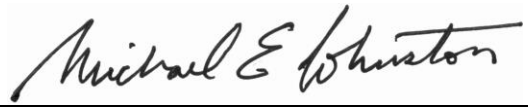
[3] Ms. Lock did not cite or argue RAP 8.1 as a basis for seeking a stay, therefore only RAP 8.3 will be considered here.

meaning the check and cover letter mailed to her by American Family's corporate counsel. *See Lock*, 12 Wn. App. 2d at 926, 931-32. The superior court merely clarified that issue when it entered the order granting American Family's motion for partial summary judgment, which Ms. Lock did not oppose and for which she does not seek review. The superior court's order denying Ms. Lock's motion for partial judgment is consistent with the Court of Appeals decision and the order granting American Family's motion for partial summary judgment.

Furthermore, American Family has established that Ms. Lock consistently refused to sit for a videotaped deposition, even when ordered to do so by the superior court. In apparent response to Ms. Lock's delay tactics, American Family filed the motions she now seeks to stay. American Family's contention that the so-called emergency is one of Ms. Lock's own making is well-taken.

Having reviewed the papers submitted, and considering the equities of the situation, I conclude that the interests of justice are better served if the case proceeds in the superior court. The aggrieved party may still seek appellate review.

Ms. Lock's notice of appeal is redesignated a notice for discretionary review. The emergency motion for a stay is denied; however, the current temporary stay of proceedings in superior court will remain in place until the time for filing a motion to modify expires, or if such motion is timely filed, until further notice from this court.



COMMISSIONER

January 13, 2022

Exhibit 4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHENIE Y. LOCK, Appellant, v. AMERICAN FAMILY INSURANCE COMPANY, Respondent.	No. 1 0 0 4 7 6 - 1 RULING DENYING DIRECT DISCRETIONARY REVIEW

Petitioner Stephenie Lock seeks direct discretionary review of King County Superior Court interlocutory orders entered on October 13, 2021, and November 22, 2021, concerning an unsuccessful motion for partial entry of judgment against respondent American Family Insurance Company (American Family). Ms. Lock sought an emergency stay of superior court proceedings pending consideration of the instant motion for discretionary review. I denied the stay on January 13, 2022, and Ms. Lock did not move to modify that ruling. The trial on Ms. Lock's claim of common law bad faith by American Family is still pending. For reasons explained below, (1) the motion discretionary review is denied, (2) there is no need to consider whether to transfer this case to the Court of Appeals pursuant to RAP 4.2, (3) Ms. Lock's request for attorney fees is denied, and (4) American Family's request for attorney fees is denied.

Many of the facts related below were recounted in my January 13, 2022, ruling denying Ms. Lock's motion for an emergency stay. Additional facts are included as needed. In February 2013 Ms. Lock was rear-ended by an uninsured driver. She received medical treatment for neck and back pain. Her automobile insurance policy with American Family included PIP benefits of $35,000 and UIM benefits of $100,000. American Family paid for the damage to Ms. Lock's car and provided rental coverage while she shopped for a replacement vehicle. American Family also paid $13,541.98 in PIP benefits for Ms. Lock. American Family valued Ms. Lock's remaining insurance claim at up to $8,500. Ms. Lock rejected American Family's offer to settle the claim for $7,500.

In March 2015 Ms. Lock filed a UIM action against American Family in King County Superior Court, amending the complaint in November 2015 to include extracontractual causes of action for violation of the IFCA and CPA and a common law insurance bad faith claim. American Family removed the action to federal district court twice, but the case was remanded back to the superior court.

While trial was pending, American Family's corporate counsel mailed a check for $4,153.75 and a cover letter offering the check as full and final settlement of all claims made by Ms. Lock, who was represented by counsel. Ms. Lock claimed the check and accompanying letter caused her emotional distress.

In July 2017, the jury awarded Ms. Lock $21,000 for her UIM claim. The jury also found that American Family did not act in good faith and awarded $413,575 on the bad faith claim. The jury further found American Family had violated the CPA and awarded $8,500 on that claim. The jury also found that American Family did not violate the IFCA.

After the verdict, American Family moved for a JNOV, which the superior court granted, resulting in the dismissal of the CPA and bad faith claims as a matter of law.

The court let stand the jury's verdict awarding $21,000 on the UIM claim. The court also granted Ms. Lock attorney fees for American Family's bad faith litigation tactics but vacated the award on reconsideration.

The parties filed cross-appeals. Ms. Lock sought direct review in this court but the court transferred her appeal to the Court of Appeals pursuant to RAP 4.2. In a published decision, the Court of Appeals (1) affirmed the superior court's order "excluding postlitigation conduct of trial counsel," (2) affirmed the superior court's JNOV dismissing the CPA claim, (3) reversed the superior court's order "excluding evidence of American Family's direct contact with [Ms.] Lock during litigation and any resulting damages supporting her insurance bad faith claim," and (4) reversed the superior court's JNOV dismissing Ms. Lock's insurance bad faith claim. *Lock v. Am. Family Ins. Co.*, 12 Wn. App. 2d 905, 931-32, 460 P.3d 683 (2020). The Court of Appeals remanded for a new trial on Ms. Lock's "insurance bad faith claim based on American Family's direct contact during litigation." *Id*. The court also remanded for the superior court to offset the jury's UIM award by the amount paid under the PIP policy. The court vacated the superior court's decision on attorney fees and declined to award either party attorney fees on appeal.

Neither party sought further review in this court. RAP 13.4(a). The Court of Appeals issued its mandate on May 13, 2020.

The parties resumed litigation in anticipation of the new trial. On September 22, 2020, the superior court granted American Family's motion to amend the judgment to apply an offset to the UIM judgment with paid PIP benefits, reducing the judgment by $13,129.55 and resulting in an amended judgment of $7,870.45. The court further ordered that American Family was entitled to interest on the overpayment of the UIM verdict. Ms. Lock did not seek discretionary review of that order.

In 2021 American Family filed a motion for partial summary judgment as to extracontractual claims, such as the CPA cause of action, seeking to clarify the issues to be tried on remand. Ms. Lock did not file a response to the motion, and her counsel conceded at the September 24, 2021, motion hearing that no response was filed. When asked by the trial court whether Ms. Lock opposed the motion, her counsel did not give a direct answer, summarizing that Ms. Lock believed "that the motion for summary judgment is merely an attempt—a billing attempt for the defense, and that it is just a reiteration of the Court of Appeals' opinion asking this court to affirm what the Court of Appeals has already ruled is going to be allowed in this case." Response to Emergency Motion for a Stay, Append. I at 6. A bit later in the hearing, counsel reconfirmed Ms. Lock did not oppose American Family's motion, characterizing the situation as an "exercise in futility." *Id*. at 7.

The court granted the motion for partial summary judgment and issued an amended order on October 13, 2021, dismissing Ms. Lock's IFCA, CPA, and attorney fee claims with prejudice and clarifying that the sole issue to be decided at trial was common law insurance bad faith as it related to the check and letter sent directly to Ms. Lock. Ms. Lock does not seek review of that order.

Meanwhile, a few days after the partial summary judgment hearing, Ms. Lock filed a "Motion for Entry of Partial Judgment," seeking entry of judgment on the original jury verdict of $415,375, plus interest, statutory attorney fee, and reasonable costs. The superior court denied that motion on October 13, 2021. Ms. Lock moved for reconsideration on October 25, 2021. The superior court denied that motion on November 22, 2021. Ms. Lock now seeks review of the October 13 and November 22 orders concerning her motion for partial judgment and asks for attorney fees under RAP 18.1(b). In my ruling of January 13, 2022, I determined her challenges concerning the motion for entry of partial judgment are timely and that the orders at issue are subject

to discretionary review criteria under RAP 2.3(b). Ms. Lock also filed a statement of grounds for direct review. RAP 4.2. American Family opposes review, direct or otherwise, and asks for attorney fees for opposing a frivolous motion for discretionary review and as sanctions. RAP 18.9.

As in my previous ruling, a brief mention of an ongoing discovery dispute is warranted. American Family has tried since late April 2021 to get Ms. Lock to sit for a videotaped deposition. She has not cooperated. On December 13, 2021, the superior court granted American Family's motion to compel, ordering Ms. Lock to appear for a videotaped deposition at 9:00 A.M. on December 16, 2021. Ms. Lock did not appear for the deposition noted for that day. American Family represents that Ms. Lock's counsel has not paid for the costs ordered by the superior court and that Ms. Lock has still not appeared for the deposition.

As indicated, Ms. Lock seeks review of the order denying reconsideration entered by the superior court on November 22, 2021, and the underlying order denying her motion for partial judgment entered on October 13, 2021.[1] As discussed in my unchallenged ruling on January 13, 2022, these are interlocutory decisions. It is well-settled that appellate courts disfavor piecemeal appeals, being reluctant to interject themselves into pending lower court proceedings. *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959); *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010).

Ms. Lock therefore must establish that the superior court committed obvious error that renders further proceedings useless, probable error that substantially alters the status quo or that substantially limits a party's freedom to act, or that the superior court departed so far from the accepted and usual course of judicial proceedings that appellate

[1] Ms. Lock does not challenge the superior court's order granting American Family's motion for partial summary judgment.

review is justified. RAP 2.3(b). Ms. Lock cites RAP 2.3(b)(1) (obvious error) but seemingly contends the superior court committed obvious or probable error. RAP 2.3(b)(1)-(2).

The superior court commits "obvious error" under RAP 2.3(b)(1) only when its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I WASHINGTON APPELLATE PRACTICE DESKBOOK, § 4.4(2)(a) at 4-34—4-35 (4th ed. 2016). The error also must render further proceedings "useless." *See id*. at 4-36. Or stated more simply, the court "made a plain error of law that markedly affects the course of the proceedings." II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-14 (4th ed. 2016) (discussing RAP 13.5(b)(1)).

There was no obvious error under this standard. Ms. Lock's argument turns on a misinterpretation of the Court of Appeals decision, which has been final for nearly two years. Of particular importance, the Court of Appeals affirmed the superior court's JNOV order, which dismissed Ms. Lock's bad faith claims as a matter of law. That post-verdict order extinguished the jury's award of $413,575. The Court of Appeals reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation, meaning the check and cover letter mailed to her by American Family's corporate counsel. *See Lock*, 12 Wn. App. 2d at 932. The superior court clarified that issue when it entered the order granting American Family's motion for partial summary judgment, *which Ms. Lock did not oppose and for which she does not seek review*. Ms. Lock's motion for entry of partial summary judgment was essentially an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review. It was therefore not surprising that the superior court denied Ms. Lock's motion to enter partial judgment on the original, but no longer valid, jury verdict, and denied reconsideration

of that decision. Here, Ms. Lock spends much of her time relitigating these issues that are not properly before this court.

Even if there was obvious error (and there was none), further proceedings were not rendered useless within the meaning of RAP 2.3(b)(1). To the contrary, there will be a trial on the remaining issue: bad faith in relation to American Family's direct contact with Ms. Lock.

There was no probable error either (there was no error at all really) for purposes of RAP 2.3(b)(2). Even if there was probable error, it has been said that the probable error criterion is not satisfied if the alleged error merely affects the instant litigation; the petitioner must show some prejudicial effect outside the scope of the present case. Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV., 1541, 1546 (1986); *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014). Ms. Lock makes no meaningful effort to satisfy this requirement.

In sum, there is no persuasive showing that discretionary review is justified under RAP 2.3(b). It is therefore unnecessary to determine whether to retain this case or transfer it to the Court of Appeals under RAP 4.2.[2]

Ms. Lock requests attorney fees under RAP 18.1(b) "for having to bring this case back for review." Mot. for Discretionary Review at 20. That rule applies only when the Court of Appeals issues a decision on the merits and the prevailing party is entitled to attorney fees by rule, statute, or contract. The rule does not apply to consideration of a motion for discretionary review, and Ms. Lock is not the prevailing party here in any event.

[2] Ms. Lock makes no persuasive argument that review is appropriate in this court in any event. But instead of transferring the motion for discretionary review to the Court of Appeals for initial consideration there, the more efficient use of judicial resources in this instance is to dispose of the matter here.

American Family also seeks attorney fees under RAP 18.1 and RAP 18.9(a). As discussed above, RAP 18.1(b) applies only when the Court of Appeals decides a case on the merits. That has not occurred here. A subsection of RAP 18.1 applies when the Court of Appeals awards attorney fees to the prevailing party on appeal and that party prevails again when this court denies a petition for review. RAP 18.1(j). That scenario does not apply here, either. This court may award terms or compensatory damages when a party files a frivolous appeal or uses the appellate rules for the purposes of delay. RAP 18.9(a). Ms. Lock's motion for discretionary review is devoid of merit but I would not go so far as to call it frivolous or intended solely for purposes of delay. She exercised her right to seek discretionary review and this court will not get into the accusations the parties have been throwing at each other in this bitterly contested matter.[3]

The motion for discretionary review is denied.

COMMISSIONER

April 20, 2022

[3] A review of the superior court records provided in this matter shows Ms. Lock may have misrepresented the meaning of my January 13, 2022, ruling in pleadings filed in that court. My ruling indicated that the temporary stay of superior court proceedings would expire if no motion to modify was filed. None was, so the stay should have expired at that point; however, Ms. Lock represented to the superior court that the stay remained in effect until further order of this court. That was true only if she filed a motion to modify. She did not; therefore, the stay should have expired automatically. Ms. Lock also suggested to the superior court that her filing of the instant motion for discretionary review continued the temporary stay. It did not. The only thing that would have continued the temporary stay was the filing of a motion to modify. As indicated, that did not happen. I do not know whether these misrepresentations were deliberate, but they are troubling nonetheless. In any event, the superior court denied American Family's motion to reinstate the trial date.

Exhibit 5

THE SUPREME COURT OF WASHINGTON

STEPHENIE Y. LOCK, Petitioner, v. AMERICAN FAMILY INSURANCE COMPANY, Respondent.	)	**CERTIFICATE OF FINALITY** Supreme Court No. 100476-1 King County Superior Court No. 15-2-05573-9 SEA

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County

This is to certify that the Supreme Court Commissioner's "RULING DENYING DIRECT DISCRETIONARY REVIEW", which was filed on April 20, 2022, is now final. Accordingly, this case is remanded to the superior court for such further proceedings as that court finds appropriate.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Olympia, Washington on May 23, 2022.

SARAH R. PENDLETON
Deputy Clerk of the Supreme Court
State of Washington

cc: Clerk, King County Superior Court
Vonda Michell Sargent
Alison Elyse O'Neill
Kimberly Larsen Rider
Rory W. Leid
Reporter of Decisions

Exhibit 6

THE SUPREME COURT OF WASHINGTON

STEPHENIE LOCK, Appellant/Cross-Respondent, v. AMERICAN FAMILY INSURANCE COMPANY, Respondent/Cross-Appellant.	)	No. 101865-7 **O R D E R** King County Superior Court No. 15-2-05573-9 SEA

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud and Montoya-Lewis, considered at its October 2, 2023, Motion Calendar whether this case should be retained for decision by the Supreme Court or transferred to the Court of Appeals. The Department unanimously agreed that the following order be entered.

IT IS ORDERED:

That this case is transferred to Division I of the Court of Appeals.

DATED at Olympia, Washington, this 3rd day of October, 2023.

For the Court

González C.J.

CHIEF JUSTICE

Exhibit 7

No. 85844-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STEPHENIE Y. LOCK,

Appellant/Cross-Respondent

v.

AMERICAN FAMILY INSURANCE COMPANY,

Respondent/Cross-Appellant.

ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF RESPONDENT/CROSS-APPELLANT AMERICAN FAMILY

Rory W. Leid, III, WSBA #25075
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I. INTRODUCTION

This Court should deny Lock's appeal and affirm the 2022 jury verdict and post-verdict findings. In the event this Court does affirm the 2022 jury verdict and post-verdict findings, the Court need not consider American Family's cross-appeal. In other words, American Family waives all its cross-appeal issues if the Court denies Lock's appeal.

First, Lock's requested relief falls outside the scope of the appellate court's authority. Lock expressly states that she does not want a new trial. Instead, Lock asks the Court to simply award sanctions against American Family in excess of $10,500,000.[1] To that end, Lock improperly seeks monetary

[1] Lock's request for monetary compensation is comprised of $10,000,000 (*i.e.*, sanctions), $413, 575 (*i.e.*, reinstatement of the first jury verdict), $40,000 (*i.e.*, vacate the offset post-verdict), and vacation of prior sanctions orders against Lock.

damages outside RAP 18.1(b) or RAP 18.9 (a). [2,3]

Moreover, while Lock "asks for her fees on appeal under the basis of equity,"[4] Lock comes to this Court with unclean hands as evidenced by the record in the matters of: (1) King County Superior Court, Cause No. 15-2-05573-9 SEA; (2) Supreme Court, Cause No.: 95508-5; (3) Court of Appeals, Cause No.: 79255-5-I; (4) Supreme Court, Cause No.: 100476-1; (5) Supreme Court, Cause No.: 101865-7; and (6) Court of Appeals, Cause No.: 85844-1.

There is no legitimate dispute that *Lock v. Am. Family Ins. Co.*, 12 Wn. App. 2d 905, 460 P.3d 683 (2020) is the governing law in this matter.[5] Nevertheless, on remand Lock's counsel

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[2] RAP 18.1(b) applies only when the Court of Appeals issues a decision on the merits and the prevailing party is entitled to attorney fees by rule, statute, or contract.

[3] Under RAP 18.9(a), an appellate court may award terms or compensatory damages when a party files a frivolous appeal or uses the appellate rules for the purposes of delay.

[4] *See* Lock's Opening Brief ("LOB") at 75.

[5] As noted by the Supreme Court, "[n]either party sought further review in this court. RAP 13.4(a)." *See* A-6. The COA

pushed a legal fallacy that the 4/6/20 COA Published Opinion is merely an "advisory opinion."[6]

Lock, on her third appeal, may have discarded her use of the phrase "advisory opinion." Nevertheless, Lock's underlying strategy remains the same as Lock continues to relitigate foreclosed issues of law and fact in this appeal. Lock continues to mischaracterize this matter's litigation history using the same

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subsequently issued its Mandate on 5/13/20. CP 3887. The Mandate states in part, "the opinion of…Division I, filed on April 6, 2020, became the decision terminating review of this court…[.]" CP 3887; *see also,* RAP 12.2 & RAP 12.5.

RAP 12.2, states in part, as follows:

> … Upon issuance of the mandate … the action taken or decision made by the appellate court is *effective and binding on the parties to the review* and *governs all subsequent proceedings in the action in any court*,… After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court*.
>
> *Id*. (emphasis added).

[6] Since the 2020 remand, Lock has baselessly argued that the COA's Published Opinion is merely "advisory," subject to a "difference of opinion." *See e.g.*, CP 181-189 (emphasis in original). This is a legal fallacy.

unsupported claim of institutional and systemic bias. To that end, Lock's 47 "examples" of "unfair and biased decisions" are, at best, conclusory statements, while many are outright misrepresentations. All are rebutted by the record.[7] To that end, American Family offers a comprehensive rebuttal chart identified as *American Family's Rebuttal Chart Re: Lock's 47 Examples of "Unfair and Biased Decisions"* (hereinafter, "Rebuttal Chart" located at A-120 – A-149). American Family incorporates the same by reference as if fully set forth herein.

Ultimately, Lock is wrong. Racism and bias are not implicit or systemic in this case simply because the courts followed the governing law. To that end, our Supreme Court, this Court of Appeals, and six (6) Superior Court judges have all disagreed with the issues raised by Lock.

In fact, our Supreme Court previously considered substantially similar arguments when it denied Lock's 2022

[7] *See generally* A-120 – A-149.

motion for discretionary review and subsequently denied Lock's 2023 request for direct review.[8] In its 2022 denial of Lock's interlocutory appeal, the Supreme Court: (1) affirmed Division I's rulings;[9] (2) found that there was no obvious error committed by the Superior Court on remand;[10] and (3) found that there was no probable error committed by the Superior Court on remand.[11]

As affirmed by the Supreme Court, "[t]he court otherwise affirmed the superior court's JNOV order, which had the practical effect of *extinguishing the jury's award of $413,575*. The Court of Appeals thus *reinstated the common law bad faith claim only to the extent* it was based on American Family's direct contact during litigation, *meaning the check and cover letter*

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[8] A-20 – A-21 and A-34.

[9] A-4 – A-11 and A-12 – A-19.

[10] *See* A-17 – A-18 ("There was no obvious error under this standard…Lock's argument turns on a misinterpretation of the Court of Appeals decision…").

[11] *See* A-18 ("There was no probable error either (there was no error at all really) […].").

mailed to her by American Family's corporate counsel."[12]

Nevertheless, on appeal Lock ***still*** seeks reversal and award of the $413,575.[13] It is worth noting that the Supreme Court found Lock's prior attempts to reinstate the $413,575 to be, "an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision…"

Lock's appeal also turns on the false narrative that, due to implicit and systemic bias, American Family and its trial counsel have manipulated the Washington judiciary in its favor. These meritless allegations are rebutted by the record. For example, Lock's counsel expressly acknowledged she filed the emergency stay as a discovery tactic – for which she was ultimately sanctioned.[14]

Despite numerous findings (both factual and legal) refuting Lock's frivolous accusations, Lock has baselessly

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[12] *See* A-10 – A-11 (emphasis added); *see also* A-12 – A-19.

[13] *See* A-17 – A-18.

[14] *See* Rebuttal Chart at ¶12.

defamed numerous members of Washington State's esteemed judiciary. Lock's conduct remains unchecked, culminating in Lock's recent motion for recusal during her third attempt at direct review before the Supreme Court.[15] The motion was denied.[16] Ultimately, the record speaks for itself. The record not only evidences an *absence* of legal or factual bias against Lock but further establishes an indelible truth – sometimes the law and facts are not on your side.

Likewise, Lock's argument that she was denied a fair trial is substantively false. Lock always had the full opportunity to be heard, often to American Family's detriment.[17] Significantly, if Lock and her counsel truly believed their allegations had any merit, Lock had every opportunity to raise them in accordance with the rules of civil procedure. Lock did not; thus, Lock is

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[15] *See* Lock's Motion for Recusal, filed 4/28/2, Supreme Court Cause No. 101865-7 (transferred to this Court on 10/3/23).

[16] A-35.

[17] *See e.g.*, CP 1141-1149.

estopped from raising those issues. For example, Lock failed to: (1) challenge or object to the JNOV Findings of Fact;[18] (2) object to or seek discretionary review of the COA's 4/6/20 Published Opinion; [19] (3) object to or challenge the Superior Court's amendment of the UIM Verdict on remand; [20] (4) object to or challenge American Family's first motion for summary judgment on remand and/or the Superior Court's order granting partial summary judgment thereto; [21] (5) object to or move to modify the Supreme Court's 1/13/22 denial of Lock's motion for emergency stay of proceedings;[22] (6) object to or challenge the Supreme Court's 4/20/22 "Ruling Denying Discretionary

[18] *Lock,* 12 Wn. App. 2d at 916.

[19] *See* A-14.

[20] A-14.

[21] A-15; *see also*, A-17.

[22] *See* A-12 ("I denied the stay on January 13, 2022, and Ms. Lock did not move to modify that ruling.").

Review;"[23,24] (7) object to or challenge the Superior Court's finding of a question of fact on American Family's second summary judgment motion following the reinstatement of proceedings;[25] and (8) timely object to American Family's post-2022 verdict motions.[26] This list is not exhaustive.

Lock's specious claim that American Family, together with the Superior Court and Supreme Court, have acted in concert to propagate systemic bias in this matter is meritless.[27] Try as she might, this case is not *Henderson v. Thompson* – and Lock has not carried her burden of proof – that bias (or an

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[23] *See* RAP 12.3(a) (*Decision Terminating Review*), RAP 12.3(c) (*Ruling*), and RAP 12.4 (*Motions for Reconsideration of Decision Terminating Review*).

[24] CP 5581-5582; *see also*, RAP 12.5(e) (*Certificate of Finality*) and RAP 12.7(a) (*Finality of Decision*).

[25] RP at 1106:21-1107:2 and 1107:21-1109:8.

[26] *See* Rebuttal Chart.

[27] Lock alleges systemic and institutional bias against every assigned Superior Court judge in this matter including: (1) Judge Andrus, a white woman, (2) Judge Schubert, a white man, (3) Judge Oishi, an Asian man, (4) Judge Diaz, a Hispanic man, (5) Judge Thorp, a Black woman, and (6) Judge McKee, an Asian woman.

inference of racial bias) was so pervasive that it was sufficient to deny the litigant fair proceedings. *See Henderson v. Thompson*, 200 Wn.2d 417, 435, 518 P.3d 1011 (2022) (finding that the litigant raising the issue of bias must make a showing sufficient to draw an inference of racial bias). To the contrary, the record establishes that Lock failed to take valid, legal steps to preserve and/or object to proper rulings and findings.

Of equal import, Lock has wholly failed to make a *prima facie* showing sufficient to draw an inference of racial bias through these 47 "examples," in whole or part.[28]

Lock has failed to make the requisite showing, thus the burden has never shifted to American Family to establish that racial bias did not affect the proceedings in this matter. *See Henderson*, 200 Wn.2d at 435 (referencing *State v. Berhe,* 193 Wn.2d 647, 656-66, 444 P.3d 1172 (2019)) (when a civil litigant makes a *prima facie* showing sufficient to draw an inference of

[28] *See* Rebuttal Chart.

racial bias under this standard, the court must grant an evidentiary hearing to determine if racial bias affected the proceeding at which time the party benefiting from the alleged racial bias has the burden to prove it did not).

Here, Lock has not, because she cannot, carried her burden and proved bias. Lock's appeal should be denied.

II. COUNTER-STATEMENT OF THE CASE

A. Case Overview

1. The 2013 Motor Vehicle Accident and the American Family Policy.

This case arises from a minor 2/22/13 motor vehicle accident wherein Lock was rearended by an uninsured driver.[29] At the time of the loss, Lock had an auto insurance policy with American Family which included PIP benefits of $35,000, and UIM benefits of $100,000.[30]

[29] CP 2 at ¶3.1.

[30] *Lock,* 910.

a. *No Claim Denial.*

At no time did American Family deny Lock's claims or deny coverage under the subject policy. American Family paid for the damage to Ms. Lock's car and provided rental coverage while she shopped for a replacement vehicle.[31]

b. *PIP was Paid.*

American Family paid $13,541.98, in PIP benefits under the subject policy.[32] All of Lock's bills were timely paid by American Family; there was no evidence of any specific out of pocket expense that American Family did not timely pay.[33]

c. *A UIM Offer was Made.*

The record establishes that American Family valued Lock's remaining UIM claim at up to $8,500.[34] On 12/15/14, American Family offered $7,500 to settle; Lock did not accept

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[31] *Lock*, 910.

[32] *Lock,* 911.

[33] *Lock*, 917.

[34] The Court of Appeals adopted the unchallenged findings of fact contained in the JNOV. *Lock,* 917.

the $7,500 offer to settle.[35] Notably, Lock "[] did not present evidence that she would have accepted an $8,500 offer of settlement."[36]

2. Lock Files Suit in 2015.

On 3/5/15, Lock filed her UIM lawsuit against American Family due to the Parties' valuation dispute of the UIM claim; Lock's suit alleged only breach of contract.[37]

On 11/30/15, Lock amended her complaint for damages, adding claims under IFCA, violation of the CPA, and common law insurance bad faith.[38]

On 7/26/17, Lock's jury trial against American Family for contractual and extra-contractual claims concluded. At trial, Lock asked the jury to award $17,000,000.[39] Following post-

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[35] *Lock*, 917.

[36] *Id*.

[37] CP 1-5.

[38] CP 8-19.

[39] *Lock,* 916.

trial motions practice, a UIM verdict in favor of Lock was awarded in the amount of $21,000.[40]

During trial, Lock failed to present any evidence of damages to make a *prima facie* case for IFCA and/or CPA violations.[41] Thus, post-verdict, the Superior Court properly dismissed the extra-contractual claim(s).[42] However, the Superior Court improperly denied American Family's post-verdict motion to reduce the $21,000 UIM verdict by the PIP offset.[43] Thus, on 1/17/18, a $21,000 UIM judgment in favor of Lock was entered.[44] American Family satisfied the UIM Judgment on 1/25/18.[45]

In February 2018, the Parties filed cross-appeals, resulting in the *Lock* opinion.

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[40] CP 3732-3734.

[41] *Lock* at 924-931.

[42] *Lock* at 931; *see also* CP 3434-3440.

[43] *Lock* at 928-931.

[44] CP 3732-3734.

[45] CP 3764-3765.

B. The Supreme Court Affirmed the Governing Law and Advanced the Superior Court's Rulings on Remand.

The *Lock* opinion sets forth both the undisputed facts and operative law of this matter.[46] Our Supreme Court expressly affirmed Division I's findings, "…the Court of Appeals affirmed the superior court's JNOV order, which dismissed Ms. Lock's bad faith claims as a matter of law. That post-verdict order extinguished the jury's award of $413,575. The Court of Appeals reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation, meaning the check and cover letter mailed to her by American Family's corporate counsel."[47]

The Supreme Court further affirmed the Superior Court's 10/13/21 amended order, "dismissing Ms. Lock's IFCA, CPA, and attorney fee claims with prejudice and clarifying that the sole issue to be decided at trial was common law insurance bad faith

[46] *See* fn. 23 & 24.

[47] A-10 – A-11.

as it related to the check and letter sent directly to Ms. Lock. Ms. Lock does not seek review of that order."[48]

The Supreme Court went on to address Lock's motion for entry of partial judgment (wherein Lock sought to reinstate the $413,575 jury verdict) as "an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review…*Ms. Lock spends much of her time relitigating these issues that are not properly before this court*."[49] Lock did not challenge or seek review of the Supreme Court's rulings. Accordingly, a certificate of finality issued on 5/23/22.[50]

C. The Case on Remand.

1. The Superior Court Affirmed the Sole Issues on Remand.

In compliance with RAP 12.2, the Superior Court, on remand prior to the second trial, properly: (1) entered the

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[48] A-15.

[49] A-17 (emphasis added).

[50] A-20 – A-21; *see also*, fn. 24.

Amended UIM Judgment reflecting a judgment in favor of American Family for $7,870.45;[51] and (2) made findings consistent with the governing law.[52]

The COA expressly found that the "direct contact" was the at-issue check:

> We remand for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation.[53]

As also noted by the Supreme Court, "…the superior court granted American Family's motion to amend the judgment to apply an offset to the UIM judgment with paid PIP benefits, reducing the judgment by $13,129.55 and resulting in an amended judgment of $7,870.45.[54] The court further ordered that American Family was entitled to interest on the overpayment

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[51] CP 35-38.

[52] CP 31-34 and CP 176-180.

[53] *Lock* at 931-932.

[54] *See* A-14.

of the UIM verdict.[55] Lock did not seek discretionary review of that order."[56]

2. Consistent with the *Lock* Opinion, the Superior Court Granted American Family's First Summary Judgment Motion, Limiting the Trial on Remand to Common Law Bad Faith Re: the "Direct Contact."

American Family moved for a summary judgment order finding that Lock's only viable cause of action for retrial is for common law bad faith, based upon American Family's direct contact with Lock post-litigation.[57] Lock did "not challenge the superior court's order granting American Family's motion for partial summary judgment."[58] However, Lock did improperly

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[55] A-14 (emphasis added); *see also*, CP 35-38.

[56] *Id*.

[57] American Family expressly reserved the issue of common law bad faith "American Family does not address in this motion the elements of Lock's common law bad faith claim (*i.e., tort elements of duty, beach, causation, damages*). However, American Family does not waive any of its rights and defenses and/or its arguments and objections in opposition to Lock's claims and arguments in this regard." CP 198-217 at 199:1-4.

[58] *See* A-16 at fn. 1.

attempt to bootstrap an argument requesting reconsideration of the extinguished $413,575 jury award.[59] The Supreme Court made express note of Lock's impropriety, "…*Ms. Lock spends much of her time relitigating these issues that are not properly before this court*…[.]"[60]

3. The Superior Court Denied American Family's Second Summary Judgment Motion, Finding a Question of Fact for the Jury on Lock's Remaining Common Law Bad Faith Claim Re: the "Direct Contact."

Following the interlocutory appeal proceedings, American Family moved for summary judgment dismissal of the remaining common law bad faith claim.[61] The basis of American Family's motion was the facts and circumstances surrounding the at-issue check.[62] The evidence establishes that the sending of the 3/30/17

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[59] CP 6959-6994 and CP 5521-5538.

[60] A-17 – A-18 (emphasis added).

[61] Due to the interlocutory proceedings, American Family's previously noted summary judgment was stayed. Judge Diaz subsequently heard the renoted summary judgment motion on 7/8/22. *See* CP 269-270.

[62] *See* Rebuttal Chart.

check and letter was a good faith mistake made by American Family when trying to timely pay attorney's fees owed to Lock's counsel. An insured may not base their bad faith claim on a good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest. *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808 (2005).

Significantly, Lock did not argue that the law was incorrect or inapplicable. Rather, Lock's argument was limited to her position that there were genuine issues of material fact precluding summary judgment:

> All of the arguments from American Family are all factual. *If they want to argue to the jury that it was a mistake, a clerical error, it's a question of fact, it's not a question of law*. Merely coming before the Court and saying that it is a mistake does not make it a mistake. So, these are questions of fact. And American Family's bad faith, which we will present will, in our opinion, lead the jury to believe that, in fact, it was not a mistake, that a pattern

> and practice of their bad faith conduct.[63]

The Superior Court agreed there was a question of fact for the jury and denied American Family's summary judgment:

> I find that [] the *fact issue generated by the key document here itself* a reasonable jury could find that [] it wasn't a mistake, that it was an example of bad faith. *I'm not saying they will or they won't, but they could*, based upon a reasonable reading of the language in there, and the fact that it was signed by Mr. Strickland, even if there is evidence going the other way that he didn't sign it, or there might be evidence at trial, at which time Ms. Sargent will have a chance to cross-examine Mr. Strickland on that. And so I'm going to deny the motion for summary judgment. I'm going to sign an order after this hearing just stating that for the reasons put on the record on this date, there is such a denial.[64]

Nevertheless, despite both the Supreme Court's express finding that, "…there will be a trial on the remaining issue: bad

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[63] RP at 1106:22-25 & 1107:1-6 (emphasis added).

[64] RP at 1108:10-23 (emphasis added).

faith in relation to American Family's direct contact with Ms. Lock," and the Superior Court's post-interlocutory denial of American Family's second summary judgment for a question of fact, the 2022 Trial Court erroneously found that the at-issue check to be a predetermined act of bad faith conduct, and excluded evidence that American Family's 3/30/17 sending of the check and letter was an inadvertent mistake.[65] American Family appeals.[66]

D. Division I Remanded the Issue of the 3/30/17 Check and Cover Letter (*i.e.*, the "Direct Contact") for Common Law Bad Faith.

While Lock's underlying UIM/bad faith litigation was proceeding toward the July 2017 jury trial, American Family inadvertently mailed a check for $4,153.75, along with a corresponding cover letter, directly to Lock rather than to her counsel on 3/30/17.[67]

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[65] *See* A-18 and CP 269-270; *see also,* RP 28:22-25 and 33:2-9.

[66] CP 367-372 at ¶¶ 1, 2, 4-8, and 11.

[67] The check was for court-ordered sanctions. *See* A-43 – A-44 (designated as supplemental Clerk's Papers as of the filing of this

On appeal, Division I found that the Trial Court erred when it excluded evidence of the at-issue check:

> The trial court did not abuse its discretion in excluding the postlitigation conduct of trial counsel, including evidence of bad faith in the filing of untimely motions for summary judgment and removing the case to federal court.[68]

This finding is significant because the at-issue check was for court-ordered sanctions; "[p]ostlitigation conduct of the insurer's counsel is not the basis for liability for insurance bad faith. The remedy for bad litigation conduct is properly through motions to strike, compel discovery, secure protective orders, or impose sanctions—such as what both Judge Robart and Judge Andrus did here."[69]

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brief). It is worth noting that the sanctions award stemmed from Lock's representations re: jurisdictional amount in controversy requirements. *See Lock* at 912. Despite that, Lock requested the jury award **$17,000,000**. *See Lock* at 916.

[68] *See Lock* at 923.

[69] *See Lock* at 923 (citing, *Richardson v. Gov't Emps. Ins. Co.*, 200 Wn. App. 705, 719-20, 403 P.3d 115 (Wash. Ct. App.

It is further significant because Lock, like American Family, was sanctioned for "bad litigation conduct" (*i.e.*, Lock's discovery sanctions which she is appealing).[70] This is yet another example of the court's equitable application of the pertinent rules and authority to ***both*** parties; there is no judicial bias in favor of American Family.

1. <u>The "Direct" Contact is Not *Per Se* Evidence of Bad Faith</u>.

During the original 2017 trial, the jury never saw or heard all evidence or testimony related to the facts and circumstances surrounding the issuance of the subject 3/30/17 check and letter.[71] This was in part due to American Family's trial strategy; during pre-trial motions, the 2017 Trial Court granted American Family's associated motion in limine excluding all conduct post-

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2017)). Again, **<u>Lock asked for $17 million at trial</u>**. *Lock* at 916.

[70] CP 271-276.

[71] *See Lock* at 913-914.

litigation.[72] Thus, American Family made a strategic decision not to discuss the 3/30/17 check and letter to avoid opening the door to any other claims during its defense at the 2017 jury trial. Accordingly, Division I did not (because it could not) address the facts and circumstances surrounding the sending of the at-issue check and letter.

a. *The Facts & Circumstances Surrounding the 3/30/17 "Direct Contact."*

The following undisputed facts and evidence should have been presented during the 2022 trial on remand:[73]

1. On 2/10/17, Judge Robart ordered American Family pay Lock sanctions in the amount of $4,135.75.[74]

2. Following the unsuccessful 3/8/17 mediation Christopher Stickland, a former supervisory staff attorney for American Family, "*immediately sent an email to Angela Kosler*

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[72] *Id.;* it is worth noting that Mr. Stickland's declaration [CP 5459-5462] predates the first trial.

[73] CP 7183-7187.

[74] CP 4900-4902.

and Elouise White-Vaughn, both legal assistants, requesting that they go over the process of drafting a check for the fees awarded by the Court." [75] Because Ms. Kosler was new, Mr. Stickland included Ms. White-Vaughn on the email to assist with "*how to draft a check regarding awarded fees (which peril, fee or cost, etc.) to opposing counsel in a litigated matter*."[76]

3. Unfortunately, failed communications between Ms. Kosler and Ms. White-Vaughn caused them both to proceed with issuing the check. When the check was drafted there was confusion between Ms. Kosler and Ms. White-Vaughn regarding who was drafting the check. This is because if the check comes from the Phoenix office, Ms. Kosler would handle it. However, if the check comes from American Family's National Headquarters, Ms. White-Vaughn would handle it.[77]

4. As such, American Family, through Ms. Kosler and

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[75] CP 2059-2061 at ¶5.

[76] *Id.*

[77] CP 5460, ¶8.

Ms. White-Vaughn, ultimately caused three (3) checks to be issued.

i. One check (*i.e.*, Check #1) went directly to the Federal District Court on or about 3/17/17.[78]

ii. Another check (*i.e.*, Check #2) went directly to Ms. Sargent's office on or about 3/17/17.[79] The evidence establishes her office received the check on **3/22/17**.[80] This is ***before*** the at-issue check goes to Lock.

iii. Finally, the at-issue check (*i.e.*, Check #3), dated 3/30/17, was sent directly to Lock along with the 3/30/17 cover letter bearing the template signature of Christopher Stickland.[81]

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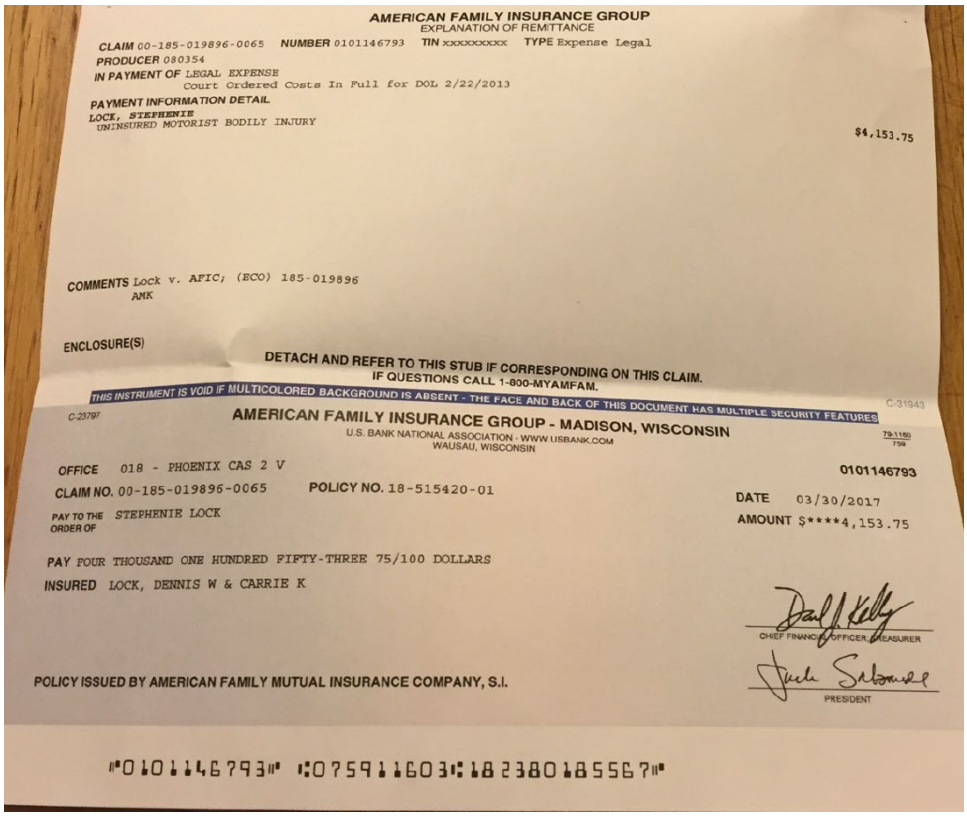
[78] *See* A-47 (designated as supplemental Clerk's Papers as of the filing of this brief).

[79] *See* A-48 – A-50 (designated as supplemental Clerk's Papers as of the filing of this brief).

[80] *See* A-119 (designated as supplemental Clerk's Papers as of the filing of this brief).

[81] CP 4904-4905; *see also,* CP 2059-2061 at ¶¶ 5-12.

5. Check #3 was expressly drafted to identify it was made in payment for "LEGAL EXPENSES Court Ordered Costs in Full for DOL 2/22/2013"[82]:



AMERICAN FAMILY INSURANCE GROUP
EXPLANATION OF REMITTANCE

CLAIM 00-185-019896-0065 NUMBER 0101146793 TIN xxxxxxxxx TYPE Expense Legal
PRODUCER 080354
IN PAYMENT OF LEGAL EXPENSE
Court Ordered Costs In Full for DOL 2/22/2013
PAYMENT INFORMATION DETAIL
LOCK, STEPHENIE
UNINSURED MOTORIST BODILY INJURY
$4,153.75

COMMENTS Lock v. AFIC; (ECO) 185-019896
AMK

ENCLOSURE(S)

DETACH AND REFER TO THIS STUB IF CORRESPONDING ON THIS CLAIM.
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C-23797 C-31943

AMERICAN FAMILY INSURANCE GROUP - MADISON, WISCONSIN
U.S. BANK NATIONAL ASSOCIATION - WWW.USBANK.COM
WAUSAU, WISCONSIN
79-1150
759

OFFICE 018 - PHOENIX CAS 2 V
0101146793
CLAIM NO. 00-185-019896-0065 POLICY NO. 18-515420-01
DATE 03/30/2017
PAY TO THE ORDER OF STEPHENIE LOCK
AMOUNT $****4,153.75

PAY FOUR THOUSAND ONE HUNDRED FIFTY-THREE 75/100 DOLLARS
INSURED LOCK, DENNIS W & CARRIE K

CHIEF FINANCIAL OFFICER, TREASURER

POLICY ISSUED BY AMERICAN FAMILY MUTUAL INSURANCE COMPANY, S.I.

PRESIDENT

"0101146793" :075911603: 18238018556?"

6. Significantly, Mr. Stickland did not know that any of these events were transpiring. Mr. Stickland did not draft Check#3. Mr. Stickland did not author the 3/30/17 letter. Nor

[82] CP 4905.

did Mr. Stickland execute the subject 3/30/17 letter. Mr. Stickland testified that, "*I did not approve or sign the March 30, 2017, letter to Ms. Lock. The signature on the subject letter to Ms. Lock was [printed] onto the letter, rather than actually signed by me. I never saw the letter or knew about the letter until Mr. Roslaniec told me about it after receiving it with my trial subpoena.*"[83]

7. Neither American Family nor Mr. Stickland ever instructed Ms. Kosler that payment was to be sent to the insured, that it was for a final settlement, or that it should be sent with a form letter with Mr. Stickland's signature with final settlement language.[84]

8. Mr. Stickland also testified that, "*[t]his is a clear administrative error. I would have never authorized this letter*

[83] CP 2059-2061 at ¶10.

[84] CP 2059-2061 at ¶11.

to be sent out, and I have addressed the issue with staff to avoid this from occurring in the future."[85]

b. *American Family's Corporate Testimony Further Evidences the "Reasonableness" of American Family's Conduct.*

The 3/30/17 letter sent to Lock by an assistant at American Family was the result of an administrative error; Mr. Stickland did not directly contact Lock.[86] American Family's corporate designee, James Peterson, testified during the 30(b)(6) deposition that the proper process for issuing payments is through American Family's national headquarters.[87]

Unfortunately, instead of following proper procedure, Ms. Kosler printed and issued the check locally, from the Phoenix office.[88] Mr. Stickland did not sign the 3/30/17 cover letter; rather, Ms. Kosler used a tool from American Family's claims

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[85] CP 2059-2061 at ¶12.

[86] CP 5464-5471 at 5470:14-18.

[87] CP 5468:3-7; CP 7338:19-25 and CP 7339:1-4.

[88] CP 5471:11-18; CP 7349-7352

system to generate the cover letter with his signature.[89] Mr. Peterson also confirmed that neither Mr. Stickland nor any representative of American Family instructed Ms. Kosler to send the letter to Lock.[90]

These factual assertions are further supported by discovery materials (*i.e.*, claims file materials) which were disclosed and produced to Lock on 7/9/21, including but not limited to, internal American Family emails demonstrating clear administrative error, communications breakdown and related actions leading to an inadvertent mistake (*i.e.*, the subject check and letter).[91]

American Family was entitled to its day in court on the issue of bad faith in relation to American Family's direct contact with Lock; a sentiment advanced by the Supreme court, "[t]o the contrary, there will be a trial on the remaining issue: bad faith in

[89] CP 5469:1-10; CP 7368:1-10.

[90] CP 5469:19-25 and CP 5470:1-4.

[91] CP 4839 at ¶13 and CP 4906-4920.

relation to American Family's direct contact with Ms. Lock."[92, 93] However, and over Defendant's multiple objections, the Trial Court excluded the relevant evidence and testimony regarding the same.[94]

E. The Second Trial.

On 12/16/22, Lock's eight-day jury trial against American Family on remand (*i.e.*, the 3/30/17 check and cover letter mailed directly to Lock) concluded. The jury returned a verdict in Lock's favor for $40,000.[95]

1. <u>The Trial Court Erred When It Excluded Evidence/Testimony of "Mistake" re: the</u>

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[92] *See* A-18.

[93] To succeed, the insured must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322, 329 (2002); *see also,* CP 239-254.

[94] CP 367-461.

[95] CP 7438.

"Direct Contact."

American Family incorporates by ¶¶1, 2, 4-8 & 11 of its Notice of Cross-Appeal.[96] American Family also incorporates by reference its rebuttals to Lock's 47 "examples" of "unfair and biased decisions".[97] This list is not exhaustive.

2. Lock Failed to Present Evidence of Damages at the Trial on Remand.

At trial, Lock once again failed to present evidence of any damage. For example, Lock admitted that she did not take time off, did not receive medical treatment, did not send emails, texts or other communications to friends or family regarding her anger at receiving the 3/30/17 check, nor did she have any specific receipts to evidence damages incurred.[98] Lock also testified that she did not seek counseling for at-issue check.[99] She went on to testify that while she had discussed depression and anxiety with

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[96] CP 367-461.

[97] *See* Rebuttal Chart at ¶¶ 20, 24-27.

[98] RP 546:16-25 and 547:1-20; RP 552:21-25 and 553:1-7.

[99] RP 548:1-4.

Dr. Mayeno, it had been multiple years since she had any such discussion with him.[100] Lock also admitted that she did not discuss the at-issue check with Dr. Mayeno.[101]

3. Post-Verdict Offset.

On 3/7/23, the Superior Court properly granted American Family's motion to enter and reduce the $40,000 verdict to judgment, offset by Lock's outstanding Amended UM Judgment to American Family.[102] American Family has deposited those funds into the Court registry.[103]

4. Lock's Third Attempt at Direct Review.

In 2023, Lock made a third attempt at direct review by the Supreme Court. The Supreme Court denied Lock's request for direct review of the 2022 trial and related rulings, remanding the matter to Division I. This appeal follows.

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[100] RP 548:7-19.

[101] RP 548:20-25 and RP 552:1-20.

[102] CP 365-366; *see also,* CP 1168-1174 and CP 1248-1249.

[103] *See* A-23 – A-27; *see also,* Rebuttal Chart at ¶47.

III. ARGUMENT AND AUTHORITY

Lock's arguments of racism and institutional bias are simply unsupported by the record. To the contrary, the record conclusively establishes that neither American Family (in its arguments) nor the Superior Court (in its Orders) have deviated from the governing law in this matter.

A. Litigation Conduct Cannot Be the Basis of Bad Faith.

Lock argues that "American Family's bad faith litigation tactics on remand violated its fiduciary duty and should be sanctioned." Lock's position is meritless. As set forth by Division I, "[p]ostlitigation conduct of the insurer's counsel is not the basis for liability for insurance bad faith. The remedy for bad litigation conduct is properly through motions to strike, compel discovery, secure protective orders, or impose sanctions […].[104]

Furthermore, Lock's position that the Court of Appeals remanded this matter for "the imposition of sanctions and

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[104] *See Lock* at 923 (citing, *Richardson*, 200 Wn. App. at 719-20).

attorney fees due to American Family's bad faith litigation conduct" is "*quite simply a misstatement of the published COA decision*."[105] Lock's improper tactics have continued despite the numerous reprimands she has received for her conduct.[106,107,108]

The record establishes Lock's continued practice of improperly ignoring the governing law in this case.

B. Lock was Not Denied Due Process.

Lock posits "the trial court [erred] by modifying this Court's mandate for a new trial without authority." Lock further argues, "the trial court's decision to limit Lock's 'new trial' to the single issue excluded from the first trial is an error of law and violated her due process under Washington Law."[109]

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[105] CP 178:3-6 (internal citation omitted) (emphasis added).

[106] CP 223, ¶¶4-5.

[107] *See* A-17.

[108] *See* A-17 – A-18.

[109] LOB at pg. 56.

The Trial Court decision to which Lock refers is the 9/15/20 Order [Dkt#519].[110] Lock summarizes the issue as follows:

> On 9/15/2020, the trial *sua sponte* changed the parties' stipulation for a new trial date and falsely filed it as an "agreed order." CP 29-30; 31-34. The order states that the remand was "based on" the $4,135.75 check, *altering the holding of this Court, which states the remand was "based on" AmFam's conduct*."[111]

This is patently false. In that same vein, Lock's use of the term "sua sponte" is misleading. First, and to the contrary of Lock's statement, Division I expressly held:

> *We remand for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation.*
> …
> American Family next contends that the trial court erred in allowing introduction of exhibit 61—the $4,153.75 check and cover letter—as impeachment evidence. American

[110] CP 31-34.

[111] LOB at pg. 14, ¶1 (emphasis added).

> Family's argument is based on the assumption that the pretrial order excluding evidence of the check was correct. As discussed above, evidence of American Family's direct contact with Lock, and any resulting damages, should have been admissible to support her bad faith insurance claim. [].[112]

Accordingly, in granting the Parties' stipulated motion for a trial date for the issue on remand, the Superior Court made express note of the issue for trial on remand: (1) as set forth by Division I (and for which Lock did not subsequently seek further review) and (2) as permitted by the appellate and civil rules:

> The Court of Appeals remanded "for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation [by sending her the $4,135.75 check]."[113]

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[112] *See Lock* at 931-932 (emphasis added).

[113] *See* CP 31-32. Pursuant to RAP 13.5, RAP 12.2, and RAP 12.5, the unchallenged 4/6/20 Court of Appeals' opinion is the governing law of the case; accordingly, the Superior Court's advisement is warranted and proper pursuant to RAP 12.2. *See also, Lock* at 931-932.

Racism and bias are not implicit or systemic because a court upholds the governing law. To that end, our Supreme Court rejected any claimed policy issues or concerns as legitimate when it denied Lock's third attempt at direct review.

C. The Record is Absent Evidence re: Systemic and/or Institutional Bias.

Lock's continuing claim of systemic and institutional bias is meritless. A party cannot simply assert bias or discrimination when a ruling does not go in its favor. In fact, both Parties have won and lost motions in the instant matter. And while Lock asserts she was not afforded a fair trial during the 2022 trial on remand, her arguments are, once again, predicated on misstatements of facts and law.

In fact, many of the Superior Court's rulings were in *favor* of Lock and against American Family. These rulings occurred after the 2017 trial, on remand (both prior to and post the 2022 interlocutory proceedings), and during the 2022 trial on remand.

For example, during the 2022 trial the Superior Court ruled that American Family's actions were bad faith as a matter

of law, prohibiting American Family from presenting argument or evidence that its actions were merely a "mistake" – despite Division I's remand for trial on that very issue.[114]

While American Family does not agree with that ruling, it is a clear example of the Superior Court ruling in favor of Lock on a very critical issue. Nevertheless, because Lock did not like the jury's verdict, she takes the position that the jury and judge were biased, a position that is simply unsupported by fact or law.

As set forth above and in prior briefing, Lock was not denied due process.[115] Nor does the record support that Lock was denied due process when the court consistently denied her motions with explanation. To the contrary, Lock was <u>*always*</u> provided a full opportunity to be heard, often to the detriment of

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[114] *See* CP 367-369 and CP 393; RP at 27:4-12 and 82:3-15 and CP 8410 (*quoting*, "[t]he Court has already determined that the Defendant, American Family Insurance Company, failed to act in good faith by sending the 3/30/17 check and letter directly to the Plaintiff. This is not a question for the jury.").

[115] American Family incorporates its prior briefing at CP 5521-5538 and CP 6882-6914.

American Family. For example, during the December 2022 trial on remand, Lock attempted to introduce "evidence" (*i.e.*, Lock's misrepresentations of operative facts) expressly foreclosed by the Court of Appeals.[116] Nevertheless, the Superior Court gave Lock wide latitude, even permitting her to file an Offer of Proof during pre-trial proceedings while American Family had only three hours to respond.[117]

In her 12/9/22 Offer of Proof, Lock listed the following "examples" of American Family's bad faith conduct:

- American Family did not fairly investigate Lock's claim; it did not conduct a complete or thorough investigation by sending some but not all of Lock's medical records to its defense medical doctor.

- American Family chose to rely upon the Defense Medical Examination it knew was drafted on incomplete medical information to cut off her benefits before she finished treating.

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[116] CP 1141-1146; *but cf.,* CP 7121-7129 (referencing the COA's Published Opinion).

[117] RP at 296:15-22.

- American Family valued Lock's claim at $8,500 but offered her less than $8,500.[118]

Not only are these statements unfounded, Lock *previously* raised, and the Court of Appeals *previously* rejected, these same issues:

> Lock contends that the trial court substituted its judgment for the jury's in finding that she failed to prove damages proximately caused by American Family's bad faith. This is so, she asserts because the jury (1) knew American Family cut off her benefits, (2) knew that American Family *failed to investigate fairly by not providing Dr. Chong with all of her medical records* and not consulting with her treating physician…
>
> First, *there was no evidence American Family denied or cutoff Lock's insurance benefits*. The jury was asked by special verdict "Did American Family unreasonably deny a claim or benefit?" The jury responded "no." Further, *Lock did not present evidence of any medical treatment that American Family did not pay. Nor did she present evidence of any out-of-pocket expenses*.
>
> Second, there was *no evidence* that Lock was damaged by the Independent Medical Examination review and conclusion. *Lock's treating physician*, *Dr. Mayeno*, *testified* t*hat by February 2014, Lock reported being pain free*. Mayeno further testified

[118] CP 1142.

> that between February 2014 and her second accident in May 2014, *Lock had fully recovered and that there was no permanent injury of any kind*.[119]

It is undisputed that: (1) American Family paid $13,541.98 of Lock's PIP benefits; all of Lock's medical bills were paid by American Family, (2) the reserve set by American Family for Plaintiff's claim in this matter was $8,500 prior to litigation, (3) the amount of American Family's last pre-litigation offer of settlement was $7,500 and Plaintiff did not accept this offer of settlement; and (4) Plaintiff did not present evidence that she would have accepted an $8,500 offer of settlement.[120] To that end:

> […] Lock's claim was based on the value paid for her claim. Value disputes are not coverage denials. "[T]he *Olympic S.S. Co.* rule applies only to disputes over coverage, and not to disputes over the amount of a claim."[121]

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[119] *Lock* at 925-926 (emphasis added).

[120] *Lock,* 917; *see also,* CP 7123 at ¶5 (referencing *Lock*, 926).

[121] *Lock,* 926 (internal citation omitted); *see also,* CP 7123 at ¶5.

The above is not exhaustive. Again, Lock's "evidence": (1) misstates unchallenged findings of fact, and (2) ignores the governing law, but that did not stop Lock from raising these and other baseless allegations as "proof" (*i.e.*, "evidence"). Like the Supreme Court's prior finding re: Lock's misguided attempt to raise a foreclosed issue, Lock's 12/9/22 Offer of Proof was "essentially an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review."[122]

D. *Henderson* and Systemic/Institutional Bias.

Henderson is inapplicable in the instant matter. Contrary to *Henderson*, Lock has not established a prima facie case where an objective observer could conclude that racial bias was a factor in the jury's verdict.[123] Moreover, because Lock failed to request a *Henderson* hearing post-verdict, it was waived.

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[122] *See* A-17.

[123] *See Henderson* at 423.

Henderson is a third-party, admitted liability matter arising from a MVA involving Janelle Henderson, a Black woman, and Alicia Thompson, a white woman.[124] The *Henderson* court specifically noted that:

> Henderson's lead trial counsel was a Black woman; Thompson's was a white woman. The judge was a white woman, and there were no Black jurors. The only Black people in the courtroom were Henderson, her attorney, and her lay witnesses.[125]

In the instant matter, Lock's lead trial counsel was also a Black woman. But the similarities end there.

In this first-party action, Plaintiff Lock, an Asian woman, sued her insurer, American Family. At the 2022 trial, American Family's trial counsel was a white man and an Asian woman. The American Family trial representative, a Black woman, was present for the duration of the trial. The trial judge was an Asian

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[124] *Id.*

[125] *Id*.

woman. Moreover, in addition to Lock's Asian witnesses, her jury included one Black juror and at least one Asian juror.

In *Henderson*, the plaintiff asked the jury to award her damages in the amount of $3,500,000; defendant Thompson requested the jury award Henderson damages in the amount of $60,000.[126] However, the jury returned a verdict for Henderson in the lesser amount of $9,200.[127]

Here, Lock asked the jury during her 2022 trial to award her damages in the amount of $800,000.[128] American Family asked the jury to award Lock damages in the amount of $7,000.[129] The jury returned an award in favor of Lock for $40,000.[130]

Finally, and unlike the fact pattern in *Henderson* wherein plaintiff pointed to <u>*specific*</u> examples throughout trial and during

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[126] *Id.,* 424-426.

[127] *Id*.

[128] RP at 1039:9-11.

[129] RP at 1051:24-1052:1.

[130] CP 7438.

Thompson's closing argument that appealed to racial bias, Lock does *not* make such claims against American Family.

Nevertheless, Lock attempts to bias this Court against American Family by mischaracterizing this matter's litigation history, positing that Lock was denied a fair trial at the December 2022 trial on remand. Lock follows a familiar tactic – mischaracterizing this matter's litigation history as "a series of biased, unfair, and erroneous rulings based on misleading and false arguments."[131] In fact, during the 2022 interlocutory proceedings Lock made (and this Supreme Court rejected) these similar arguments:

> **"**[t]his is a case of institutional and systemic bias culminating in the denial of a judgment on a jury verdict and denying the new trial mandated by the Court of Appeals."[132]

Again, these meritless allegations are rebutted by the record, which firmly establishes a complete absence of bias. The

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[131] *See* Lock's Statement of Grounds, filed on 5/16/23, at pg. 20.

[132] CP 6921-6938 at 6922.

Supreme Court agreed that Lock failed to establish that the Superior Court's correct application of settled law created any question in need of urgent resolution by the Supreme Court when it denied Lock's 2023 request for direct review. To that end, the 2022 Trial Court expressly affirmed the *Henderson* case when addressing Lock's *Henderson* request, found no basis.[133] Lock's baseless posturing does not support Lock's requested relief and her appeal should be denied.

IV. CROSS-APPEAL

In the event this Court affirms the 2022 jury verdict and post-verdict findings, the Court of Appeals need not consider American Family's cross-appeal.

A. Assignments of Error on Cross-Appeal

1. The Trial Court Erred in Finding Bad Faith as a Matter of Law.

[133] RP at 26:20-27:4.

2. The Trial Court Erred in Instructing the Jury that American Family's sending of the subject 3/30/17 check and letter was bad faith.

B. Issues Pertaining to Assignment of Error

1. Whether the Trial Court erred in precluding American Family from presenting evidence or testimony of "mistake" re: American Family's direct contact during litigation by sending her the subject check and letter
2. Whether the evidence that the sending of the subject check and letter was a mistake should have been presented to the jury.
3. Whether Lock's failed offer of proof during trial mandated a reversal of the Trial Court's jury instructions re: predetermined findings that American Family committed bad faith when it sent the subject 3/30/17 check and letter.

4. Whether the Trial Court erred in failing to instruct the jury that an Insurer's reasonable conduct is a complete defense.

V. AUTHORITY & ARGUMENT

A. The Trial Court Erred in Finding that American Family Acted in Bad Faith as a Matter of Law.[134,135,136]

1. <u>The Trial Court Erroneously Pre-Determined that American Family Acted in Bad Faith with the Sending of the Subject 3/30/17 Check and Letter</u>.

The Court of Appeals remanded "for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation [by sending her the $4,135.75]."[137]

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[134] American Family filed a Motion for Reconsideration re: Bad Faith and Checks on 12/7/22. CP 7078-7090. It was denied. *See* RP 373:6-11.

[135] American Family filed a Notice of Mistrial and Motion for Curative Instructions on 12/9/22. CP 1150-1160. It was denied. *See* RP 373:12-16.

[136] *See generally,* American Family's Memorandum of Law re: WPI 320.01 & WPI 21.02. CP 7130-7136.

[137] CP 31-34; *see also, Lock* at 931-932.

Thereafter, the Supreme Court's expressly affirmed the Court of Appeals' finding, affirming that, "[…] there will be a trial on the remaining issue: bad faith in relation to American Family's direct contact with Ms. Lock."[138]

Post the Supreme Court's 4/20/22 denial of Lock's interlocutory appeal, the Superior Court subsequently denied American Family's Motion for Summary Judgment re: Common Law Bad Faith, finding that there remained a question of fact for the jury.[139]

Nevertheless, at the trial on remand, the Trial Court erroneously: (1) found that the at-issue check to be a predetermined act of bad faith conduct;[140] and (2) excluded evidence that American Family's 3/30/17 sending of the check and letter was inadvertent, a mistake.[141]

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[138] A-18.

[139] RP at 1108:10-23; *see also,* CP 269-270.

[140] CP 8410.

[141] RP 32:13-25 & 33:1-12.

The Trial Court instructed the jury that, "[t]he Court has already determined that the Defendant, American Family Insurance Company, failed to act in good faith by sending the 3/30/17 check and letter directly to the Plaintiff. *This is not a question for the jury*."[142]

The Trial Court's finding as a matter of law is subject to *de novo* review.

2. Evidence Supporting a Good Faith Mistake Cannot Be Evidence of Bad Faith.

The Trial Court's predetermination that American Family's "direct contact" amounts to *per se* bad faith deprived American Family from defending the remaining common law bad faith claim on remand.

As established above, the sending of the at-issue check and letter was nothing more than an administrative error. In fact, the 3/30/17 communication is evidence of a good faith mistake in making sure that the sanctions ordered were paid. This evidence

[142] CP 8410 (*emphasis added*).

further supports that the Trial Court erred as it demonstrates the court failed to "take the facts in the light most favorable to American Family" as required.[143]

An insured may not base their bad faith claim on a good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest. *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808 (2005). Here, the undisputed facts show that the 3/30/17 letter was a good faith mistake made by American Family when trying to timely pay attorney's fees owed to Lock's counsel.

American Family acknowledges that, due to administrative error (*i.e.*, confusion from a new legal assistant, Ms. Kosler), the 3/30/17 check and letter was inadvertently sent directly to Lock's parents' home, rather than to her counsel. Ms.

[143] *Hostetler v. Ward,* 41 Wn. App. 343, 704 P.2d 1193 (1985).

Kosler also improperly used a form template with a pre-generated signature for Mr. Stickland.

However, and as set forth *supra.,* Mr. Stickland did not directly contact Lock. Mr. Stickland never reviewed, signed, or even knew that the letter was being sent to Lock. In fact, Mr. Stickland did not even have knowledge of the letter until he was subpoenaed for trial.

American Family's "direct contact" with Lock was an administrative error. An administrative error does not constitute *per se* bad faith pursuant to the applicable law and authority.

B. Whether American Family Engaged in Bad Faith When It Sent One of Three Checks Directly to Lock is an Issue for the Finder of Fact.

American Family takes exception to and appeals the Trial Court's jury instruction #7, wherein the Trial Court instructed the

jury that it had already determined American Family acted in bad faith as a matter of law.[144,145,146,147,& 148]

Washington's insurance bad faith law derives from statutory and regulatory provisions and the common law. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 128 (2008). RCW 48.01.030 states that "[t]he business of insurance is one affected by the public interest, requiring that all persons

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[144] Jury Instruction #7. CP 8402-8416 at CP 8410; *see also,* RP 1077:19-24**.**

[145] American Family appeals the Court's jury instruction/finding that American Family acted in bad faith and that the scope of the trial for jury determination is the nature and scope of Lock's damages. RP 100:3-10.

[146] American Family appeals the Trial Court's oral ruling that, "…[I] find that this trial is for the jury to determine what, if any, damages were causally related by the defendant's act of bad faith in sending the plaintiff the $4,135.75 check." RP 25:20-22.

[147] American Family appeals the Trial Court's oral ruling that the issue of American Family's bad faith was pre-determined. RP 28:22-25.

[148] American Family appeals the Trial Court's denial of mistrial, ruling that, "the jury…will be informed that American Family Insurance acted in bad faith by sending Ms. Lock directly the check knowing that she was represented." RP 367:12-16.

be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters."

C. The Law Requires Lock Prove Each Factor Under WPI 320.01 for the Jury to Find that American Family Committed the Tort of Bad Faith.

For the tort of bad faith to be found, the jury must apply factors under WPI 320.01. When applied together, the three factors determine whether there was a duty, breach of duty, damages or injury, and whether the damage or injury stemmed from the breach of duty. All factors are necessary for the tort of bad faith to be found.

The Trial Court erred when it failed to give American Family's proposed jury instruction #10, patterned off WPI 320.01 (Insurer's Failure to Act in Good Faith—Burden of Proof—General).[149] Relevant to this inquiry is the comments to WPI 320.01 (which American Family raised):

> **Terminology—Bad faith versus lack of good faith.** …This terminology [*i.e.*, "acted in bad faith" rather than

[149] CP 8295 & CP 7130-7135.

"failed to act in good faith"] was consistent with much of the analysis found in the case law and in the treatises…

The "bad faith" terminology, however, does not precisely state the plaintiff's actual burden of proof. The underlying duty for the insurer is to act in good faith. *See* RCW 48.01.030; WAC 284-30-300 *et seq*.; DeWolf & Allen, 16A Washington Practice at § 28:1. Consequently, the plaintiff's burden of proof is to show that the insurer failed to meet this duty, *i.e.*, *that the insurer failed to act in good faith*.

Although judicial opinions often simplify this burden by using the term "acted in bad faith" rather than "failed to act in good faith," the two requirements are not identical. *Some acts can occupy a middle ground between good faith and bad faith*. Appellate opinions discussing an insurer's bad faith implicitly recognize as much when they note that "[t]he duty to act in good faith or liability for acting in bad faith generally refers to the same obligation." *Van Noy v. State Farm Mut. Ins. Co*., 142 Wn.2d 784, 793 n.2, 16 P.3d 574 (2001) (quoting *Tank's* language); *Tank v. State Farm*, 105 Wn.2d at 385. In sum, the term "bad faith" is more a short-

> hand description of the duty than a precise statement of it.
>
> Because of the importance of accurately stating *the burden of proof to the jurors,* this pattern instruction, and the other instructions in this chapter, ***do not use the term "bad faith***."[150]

This standard applies even where the Court determined that the sending of the 3/30/17 check and letter was a breach of American Family's duty of good faith. To date, the courts have found only a breach of the duty of good faith. Jury determination is still warranted as to (a) whether Lock was injured/damaged, and (b) that it was American Family's failure to act in good faith that was a proximate cause of Lock's injury/damage. Relying solely upon one prong of a three-part analysis to pre-determine a finding of bad faith is an erroneous and prejudicial application of the law.[151]

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[150] 6A WAPRAC WPI 320.01, *Comment* [current as of September 2018](*internal citations omitted*) (*emphasis added*).

[151] CP at 7133-7134.

In *Roemmich v. 3M Co*., 21 Wn. App. 2d 939, Wash. Ct. App. 2022, the court held that erroneous instructions prejudice the outcome of a trial. Here, the facts are similar to *Roemmich*. In *Roemmich*, the jury instruction misstated the law when additional language was added to the jury instruction. The court held that an erroneous proximate cause instruction was provided to the jury. Furthermore, in *Keller v. City of Spokane,* 146 Wn.2d 237 (Wash. Ct. App. 2022), the court held that prejudice is presumed if the jury instruction clearly misstates the law.

Here, the Trial Court's opening statement re: American Family's failure to act in good faith is a misstatement, erroneously indicating to the jury that bad faith has been found when only a breach of the duty to act in good faith has been found.[152]

Moreover, and as American Family argued to the Trial Court, following the conclusion of the Parties' presentation of

[152] RP 100:7-10; *see also,* CP 367-372.

their cases, this three-part instruction is critical for jurors in finding for bad faith. The second and third part of the instruction help guide the jury in determining whether American Family was in bad faith when it sent the subject check and letter. To that end, the second and third parts of the instruction were to properly be determined by the jury, not predetermined by the Trial Court.

Accordingly, the Trial Court improperly applied the law when it found and subsequently instructed the jury that American Family's sending of the subject check was automatic bad faith. As a result, American Family was prejudiced.

D. Division I did Not Determine that the Sending of the 3/30/17 Check and Letter was *Per Se* Bad Faith.

Ultimately, this Court previously found that there was a *possibility* American Family had committed bad faith based upon the 3/30/17 letter and remanded the issue for a new trial. However, the Court of Appeals made no judicial findings as it pertains to corporate counsel.

During the first appeal, the parties did not brief or argue whether American Family's direct contact to Plaintiff was in bad

faith, therefore the issue was not properly raised for appellate review, and the Court of Appeals' decision was not dispositive on this issue for the same. Thus, while the first Trial Court did allow evidence of the letter and check to be admitted during trial, the jury was never presented any evidence regarding the facts and circumstances surrounding the issuance of the letter and check.

During summary judgment motions practice on remand, Lock relied on the COA's "finding" as it pertains to corporate counsel, Mr. Stickland, and the at-issue check and letter. A statement is dicta when it is not necessary to the court's decision in a case. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8-9 (1999). Dicta is not binding authority. *See Hildahl v. Bringolf*, 101 Wn. App. 634, 650-51 (2000). The Court of Appeals made this ruling without the benefit of the full context (*i.e.*, relevant facts and circumstances) surrounding the at-issue check.

However, there is no judicial finding that Mr. Stickland was untruthful. Appellate review is only proper when the parties

briefed and argued the issue in the lower court, and the lower court rules on the issue. *King County v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 660, 860 P.2d 1024, 1031 (1993).

Therefore, not only is the Court of Appeals' decision not dispositive on this issue, but its dicta is also not relevant either because the evidence of the surrounding circumstances of the direct contact were not considered by the Court of Appeals.

On remand, the evidence presented on summary judgment established that the 3/30/17 direct contact from American Family to Lock was a result of an administrative error, and was not unreasonable, frivolous, or unfounded.[153] Therefore, the Trial Court's finding of bad faith as a matter of law was erroneous.

E. The Trial Court Erred in Its Refusal to Give Proposed Jury Instruction(s) #7, #11, and #14.

Because the Trial Court found bad faith as a matter of law (to which American Family takes exception), the Trial Court also rejected several of American Family's proposed jury

[153] CP 987-1000.

instructions, including #7 (summary of claims), #11 (reasonableness of conduct by an insurer is a complete defense), and #14 (regarding specific findings of fact and conclusions of law in this case); American Family appeals.[154]

1. Lock did not Suffer any Damages as a Result of the "Direct Contact."

Lock's failure to establish damages on remand and at the 2022 trial further establishes the failure of the remaining bad faith claim. Lock testified in her deposition that she did not seek any type of medical care for any anger or confusion she had because of the 3/30/17 letter.[155] She did not seek any type of medical care because of the 3/30/17 check and letter.[156] In fact, Lock never spoke with any medical provider because of the

[154] CP 8292, CP 8296-8297, CP 8330-8331, and CP 367-372; *see also* CP 451 at 63:10-14; CP 459 at 93:3-25 to CP 461 at 100:1-8.

[155] CP 5857 at pg. 36:2-6.

[156] CP 5857 at pg. 36:9-10.

3/30/17 check and letter.[157] Lock did not incur any out-of-pocket expenses because of the 3/30/17 check and letter.[158]

2. Reasonableness of Conduct by an Insurer is a Complete Defense.

Insurer bad faith claims are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty." *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.,* 161 Wn.2d 903, 916, 169 P.3d 1 (2007). The damages element requires that in every bad faith action, the insured must establish that it was harmed by the insurer's bad faith acts. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). (quoting *Smith v. Safeco Ins. Co.,* 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)).

To establish bad faith, an insured is required to show not only that there was a breach, but that "the ***breach*** was unreasonable, frivolous, or unfounded." *Id.* (quoting *Kirk v. Mt.*

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[157] CP 5857 at pg. 36:19-23.

[158] CP 5857 at pg. 37:14-18.

Airy Ins. Co., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998)).[159] It has long been held by Washington courts that there is no bad faith if the insurer has a reasonable basis for its claims decision. *Dombrosky v. Farmers Ins. Co.,* 84 Wn. App. 245, 982 P.2d 1127 (1996)*; Miller,* 31 Wn. App. 475; *Transcontinental Ins. Co.*, 111 Wn.2d 452.

The Washington Supreme Court has confirmed that an insured has a heavy burden in proving that an insurer acted unreasonably or in a frivolous or unfounded manner. *Smith*, 150

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[159] *See also*, *American States v. Symes of Silverdale*, 150 Wn.2d 462, 78 P.3d 1266 (2003); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002); *Wolf v. League Gen. Ins. Co*., 85 Wn. App 113, 122, 931 P.2d 184 (1997); *Miller v. Indiana Ins. Co*., 31 Wn. App. 475 475, 642 P.2d 769 (1982); *Transcontinental Ins. Co. v Washington Pub. Utils. Dists' Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988); *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349(1978); *Tyler v. Grange Ins. Assoc.*, 3 Wn. App. 167, 473 P.2d 193 (1060); *Pruitt v. Alaska Pacific Assurance*, 28 Wn. App. 802, 626 P.2d 528 (1981); *Felice v. St. Paul Fire and Marine Insurance Co*, 42 Wn. App. 352, 711 P.2d 1108 (1986); *Smith v. Ohio Casualty Insurance Co.*, 37 Wn. App 71, 678 P.2d 829 (1984); *Villella v. Pemco Insurance Co.*, 106 Wn.2d 806 725 P.2d 957 (1986); *Phil Schroeder v. Royal Globe Insurance Co.*, 99 Wn.2d 65, 659 P.2d 509 (1983).

Wn.2d at 486. Further, the *Smith* court stated that if an insurer acted reasonably during its claims investigation, there is no bad faith "[i]f the insurer can point to a reasonable basis for its action." *Id*. This reasonable basis is significant evidence that the insurer did not act in bad faith.

F. Sanctions

Lock expressly states that she does not want a new trial. Instead, Lock improperly seeks monetary damages outside RAP 18.1(b) or RAP 18.9 (a).[160] However, there is no basis in fact or law for this Court to award RAP 18.1 or 18.9 sanctions in favor of Lock. To that end, RAP 18.9(a) permits the award of terms or compensatory damages only when a party files a frivolous appeal or uses the appellate rules for the purposes of delay.

Here, Lock asks the Court to award sanctions against American Family more than $10,500,000; that request is comprised of $10,000,000 (*i.e.*, sanctions), $413,575 (*i.e.*,

[160] See fn. 2 & fn. 3.

reinstatement of the first jury verdict), $40,000 (*i.e.*, vacate the offset post-verdict), and vacation of prior sanctions orders against Lock. For the reasons exhaustively briefed above, the $413,575 was vacated by the Trial Court and said vacation was affirmed by this Court. There is no legal or factual basis to reinstate the first jury verdict.

Moreover, there is no legal basis to vacate the post-verdict offset of American Family's overpayment on the prior UIM award from the $40,000 verdict given the *Lock* opinion and the related rulings on remand. Finally, there is no basis for the $10 million requested sanctions given that Lock is unable to support her claim(s) that, "American Family chose to delay, deny and defend against Lock or perhaps its goad was to punish and disparage her Black attorney" or "otherwise American Family and all insurance companies will know there are no sanctions or accountability for using litigation dishonestly and aggressively

against their own insured."[161] There simply is no evidence to support such claims. *See generally*, American Family's Rebuttal Chart.[162] It is also unsupported by the pertinent case authority in that, "[p]ostlitigation conduct of the insurer's counsel is not the basis for liability for insurance bad faith."[163] Likewise, there is no basis in fact of law for this Court to grant Lock's request for her fees on appeal under the basis of equity.

American Family respectfully requests that this Court award attorney fees and expenses under RAP 18.1 because the pending appeal has no legal basis and is premised solely on misstatements of law and fact. RCW 4.84.185 provides statutory basis to award attorney fees to a prevailing party for opposing a frivolous action. RAP 18.9(a) provides the appellate court with authority to impose terms or compensatory damages to be paid to the party harmed by a frivolous appeal. An appeal is frivolous

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[161] LOB at 74-75.

[162] A-120 – A-149.

[163] *Lock* at 923.

where there are no debatable issues on which reasonable minds might differ, and is devoid of merit, so there is no reasonable possibility of reversal. *Green River Community College Dist. No. 10 v. Higher Ed. Personnel Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986). *See also, PEMCO v. Rash*, 48 Wn.App. 701,740 P.2d 370 (1987); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510 (1987); *Federal Land Bank o/Spokane v. Redwine*, 51 Wn.App. 766, 755 P.2d 822 (1988). Lock's appeal is not only devoid of merit but is further frivolous in light of the prior proceedings and the resulting 2022 jury verdict in Lock's favor.

VI. CONCLUSION

As set forth above, Lock's appeal is without merit and should be denied in its entirety. In the event this Court does affirm the 2022 jury verdict and post-verdict findings, the Court need not consider American Family's cross-appeal. In the event this Court must consider American Family's cross appeal, this Court should find that the Trial Court erred in finding bad faith as a matter of law as it pertains to the at-issue check. This Court

should also grant American Family's request for RAP 18.8 and RAP 18.9 sanctions.

DATED this 22nd day of April 2024, at Seattle, Washington.

Respectfully submitted,

WATHEN | LEID | HALL | RIDER, P.C.

s/ Kimberly Larsen Rider
Rory W. Leid, III, WSBA #25075
Kimberly Larsen Rider, WSBA#42737
Attorneys for Respondent/Cross-Appellant American Family Ins. Co.

CERTIFICATION PURSUANT TO RAP 18.17

I certify that this brief contains 10,845 words and that American Family's Rebuttal Chart [located at Appendix A-120 to A-149] contains 4,247 words, together totaling 15,092 words, exclusive of the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g.,

photographs, maps, diagrams, and exhibits). A Motion for Overlength Brief is being filed simultaneously herewith, as the word count in these two (2) documents exceeds the 12,000-word limit contemplated by RAP 18.17.

Dated this 22nd day of April 2024.

s/ Kimberly Larsen Rider
Kimberly Larsen Rider, WSBA #42737

RESPONDENT'S APPENDIX

A-1 – A-3	Order Granting American Family's Motion to Continue Trial, dated 10/7/21 [Dkt #714]
A-4 – A-11	Supreme Court Commissioner's Public Ruling Denying Emergency Motion for Stay, Supreme Court Cause No.: 100476-1, dated 1/13/22
A-12 – A-19	Supreme Court Commissioner's Public Ruling Denying Direct Discretionary Review, Supreme Court Cause No.: 100476-1, dated 4/20/22
A-20 – A-21	Certificate of Finality, Supreme Court Cause No.: 100476-1, dated 5/23/22
A-22	Correspondence from Counsel for American Family to Counsel for Stephenie Lock, dated 5/31/23
A-23 – A-33	Correspondence from Counsel for American Family to the King County Superior Court Clerk, with enclosures, dated 7/20/23
A-34	Order, Supreme Court Cause No.: 101865-7, dated 10/2/23

A-35	Supreme Court Commissioner's Letter Ruling, Supreme Court Cause No.: 101865-7, dated 5/1/23
A-36 – A-39	Email chain between the King County Superior Court, Counsel for American Family, and Counsel for Stephenie Lock, dated 6/7/23 through 6/22/23
A-40 – A-42	Email chain between the King County Superior Court, Counsel for American Family, and Counsel for Stephenie Lock, dated 9/24/21 through 9/29/21
A-43 – A-44	American Family's Trial Exhibit #304
A-45	American Family's Trial Exhibit #306
A-46	American Family's Trial Exhibit #307
A-47	American Family's Trial Exhibit #310
A-48 – A-50	American Family's Trial Exhibit #311
A-51 – A-118	American Family's Trial Exhibit #316

A-119	American Family's Trial Exhibit #333
A-120 – A-149	American Family's Rebuttal Chart Re: Lock's 47 Examples Of "Unfair and Biased Decisions."

CERTIFICATE OF SERVICE

I, Samantha Pluff, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that on April 22, 2024, I caused to be filed and served: **ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF RESPONDENT/CROSS APPELLANT AMERICAN FAMILY** as indicated below:

COPY to Attorneys for Plaintiff: Vonda M. Sargent, WSBA #24552 Carol Farr, WSBA #27470 Vonda M. Sargent PS 119 1st Ave S. STE 500 Seattle, WA 98104 Tel: (206) 638-4970 sisterlaw@me.com carolfarr@gmail.com sargentlaw9@gmail.com	**Via E-Service/E-Mail**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of April 2024, at Seattle, Washington.

s/ Samantha Pluff
Samantha Pluff, Legal Assistant
spluff@wlhr.legal

Exhibit 8

No. 85844-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STEPHENIE Y. LOCK,

Appellant/Cross-Respondent

v.

AMERICAN FAMILY INSURANCE COMPANY,

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT AMERICAN FAMILY

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I. INTRODUCTION

Lock and American Family agree that there should be no retrial in this matter. Accordingly, this Court should affirm the 2022 trial verdict and bring this matter to an end. Sanctions against Lock are warranted and should be awarded in favor of American Family.

II. ARGUMENT

A. THERE IS NO EVIDENCE OF SYSTEMIC/INSTITUTIONAL BIAS OR LACK OF DUE PROCESS.

In contrast to *Henderson,* Lock has not presented any evidence of improper remarks, cross-examination, or conduct by defense counsel during trial, nor has Lock offered evidence of any improper remarks or conduct of the Trial Court.

In fact, many of the 2022 Trial Court's decisions and rulings were in favor of Lock and against American Family, just like the Trial Court's numerous rulings in favor of Lock and against American Family during the litigation on remand.

Throughout this matter's procedural history, Lock has always had a full opportunity to be heard and file pleadings but

failed to properly exercise those rights. However, Lock's litigation decisions cannot be the basis of claimed institutional bias. For example, Lock did not oppose American Family's first summary judgment on the scope of the single issue remaining for retrial, to wit: Lock's common law insurance bad faith based upon American Family's direct contact with Lock post-litigation (*i.e.*, 3/30/17 check and letter).[1] Despite Lock's failure to properly challenge and object to American Family's motion, Lock nevertheless subsequently claimed it was not the proper scope.[2]

Not only is the record devoid of evidence supporting Lock's claims of systemic, institutional, and judicial bias, but it is also replete with numerous, concrete examples evidencing Lock's improper gamesmanship during remand. For example,

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[1] *See* CP 198-217; *see also* CP 5153: 17-23, 5154:6-11, and CP 5155:1-21.

[2] *See e.g.,* CP 773: 24-26; *but cf.,* CP 198-217 at 198:16-21 and 203:10-18.

Lock played games with discovery, refusing to appear for her video deposition despite having notice for more than 300 days.[3]

1. The Record is Absent of Any Evidence that Any Judge Failed to Follow the Governing Law on Remand.

Lock has not been denied due process because the record demonstrates that the judges on remand followed the law established by the *Lock* opinion. The various Judges have rejected Lock's arguments time and again that: (1) the 2017 UIM verdict was improperly reduced by the PIP offset on remand,[4] (2) the scope of the retrial is not limited to Lock's common law bad faith tort claim involving the 3/30/17 check and letter,[5] (3) the award of $413,575 must be reinstated.[6] This list is not exhaustive.

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[3] *See* CP 7034-7038; A-8; A-11; and A-16.

[4] *Lock* at 932. *See also,* A-14; CP 35-38; CP 365-366; CP 1248-1249; CP 1268-1285; CP 1286-1287.

[5] CP 31-32; A-20 – A-21 and A-34; A-4 – A-11 and A-12 – A-19; *Lock* at 931-932; *see also,* RAP 12.2.

[6] A-10 – A-11; A-12 – A-19; CP 221-224.

2. There is No Evidence that the Trial Court Was Biased Against Lock During the 2022 Trial.

As referenced above and in American Family's underlying briefing, many of the Trial Court's decisions and rulings were in favor of Lock and against American Family. This continued through the 2022 trial on remand. For example, even though at least four (4) judges (*i.e.*, Judge Schubert, Judge Oishi, Judge Diaz, and Supreme Court Commissioner Johnston) agreed with American Family's position regarding the scope of the trial on remand, the 2022 Trial Judge (Judge McKee) found that the sending of the 3/30/17 check and letter is bad faith as a matter of law.[7,8]

3. Lock Expressly Rejects the Only Relief Afforded Under *Henderson*.

Lock understands her *Henderson* claims are meritless and, in fact, has expressly refused the only relief available under

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[7] *Lock* at 931-932; *see also,* RAP 12.2; CP 31-32; CP 269 and RP 1108:10-23; A-10 – A-11 and A-12 – A-19.

[8] CP 8410.

Henderson – a new trial.[9,10]

Without waiver, American Family agrees that it should not have had any direct contact with Lock. However, the 3/30/17 check and letter was not intentional contact, it was a mistake resulting from clerical error. At trial, American Family acknowledged that some damages for its mistake in sending the

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[9] See *Henderson v. Thompson*, 200 Wn.2d 417, 429 (finding that Henderson was entitled to an evidentiary hearing on her new trial motion under CR 59 because she presented a prima facie case that an objective observer could conclude that racial bias was a factor in the jury's verdict and that the trial court abused its discretion by failing to provide any remedy for Thompson's multiple discovery violations, and that Henderson is entitled to a hearing to assess appropriate sanctions. We reverse and remand for further proceedings consistent with this opinion.

[10] Lock's arguments regarding unsanctioned discovery tactics regarding disclosure of Christoper Stickland is meritless. First, Lock never moved to compel the discovery deposition of Stickland. Moreover, during trial and over American Family's objections, the trial court found a willful violation and underwent a *Burnet* analysis in determining that because Lock had knowledge of Stickland's anticipated testimony by virtue of his 2017 declaration, appropriate sanctions and resulting remedies included providing Lock 45 minutes to question Stickland outside the presence of a jury. *See* RP 745:24-25; *see also*, RP 746-747. Furthermore, there was no prejudice because Mr. Stickland did not ultimately testify.

check directly to Lock should be awarded. American Family's defense counsel presented for the jury's consideration a verdict award of $7,000.[11] Lock asked the jury to award damages in the amount of $800,000.[12] Ultimately, the jury returned a verdict of $40,000 – a verdict much larger than that presented by American Family.[13]

In juxtaposition, the plaintiff in *Henderson* asked the jury to award damages of $3,500,000, while defendant requested the jury award plaintiff damages in the amount of $60,000.[14] However, the *Henderson* jury returned a verdict for the plaintiff in the amount of $9,200, a far lesser amount than that even suggested by defense counsel in closing. Notably, the *Henderson* court found:

> After the verdict, Henderson filed a CR 59 motion for a new trial or, in the

[11] RP at 1051:24-1052:1.

[12] RP at 1039:9-11.

[13] CP 7438.

[14] *Henderson,* 200 Wn.2d 417, 424-426.

> alternative, for additur for an award of $60,000—the amount defense counsel proposed in closing argument. Henderson argued that the court erred in failing to give a spoliation instruction…moreover, that defense counsel's "biased statements in closing likely influenced the jury's unconscious bias against plaintiff such that justice was not done." She pointed to the award far below even the amount the defense had suggested and to the request for Henderson to leave the courtroom as evidence showing the appeals to racial bias must have affected the verdict. She and her attorneys also filed declarations recalling the judge saying the jury wanted Henderson to leave the courtroom before they would exit the jury room, which was "humiliating and embarrassing."[15]

Given the facts and circumstances specific to *Henderson*, including the jury's verdict for an amount less than proffered by defense counsel, coupled with specific examples of defense counsel's "biased statements," the *Henderson* court found that "[r]acial bias can affect a verdict even when it is not the product

[15] *Id.*, 200 Wn.2d 417, 428 (internal citations omitted).

of intentional misconduct by the prevailing party or jury."[16] In so finding, the *Henderson* court also expressly noted:

> That basis [*i.e.*, CR 59(a)(2)] for a new trial contains procedural prerequisites that may render it inapplicable here. In particular, Henderson is the prevailing party, as the jury rendered a small judgment in her favor.[17]

Lock is the prevailing party in the instant matter, receiving a jury verdict of $40,000 in her favor, an amount significantly greater than the $7,000 suggested by defense counsel in closing. Lock has not set forth specific instances of improper comments or remarks made during trial to establish any influence of "the jury's unconscious bias against plaintiff such that justice was not done."

4. American Family's Reliance on the Supreme Court Rulings is Proper.

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[16] *Id.*, 200 Wn.2d 417, 432.

[17] *See Henderson*, fn. 5.

American Family objects to Lock's statements that its reiteration of the record constitutes RPC 3.3 violations. Lock sets forth no evidence supporting any misstatements by counsel to this Court. Furthermore, Lock did not object to or challenge any of the Supreme Court rulings as permitted under the Rules of Appellate Procedure.[18] American Family has set forth evidence and testimony that the subject 3/30/17 letter was a form letter generated using a tool from American Family's claims system, which generated the cover letter with Stickland's signature.[19] There is no evidence that American Family attempted to negotiate a settlement directly with Lock. In fact, the evidence (*i.e.,* Robarts' sanctions order and surrounding factual circumstances) demonstrate that Lock knew this was a mistake, not intentional conduct.[20]

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[18] *See* American Family's Answering Brief & Cross-Appeal at pg. 8, fn. 22, and pg. 9, fn.23-34.

[19] CP 5469:1-10; CP 7368:1-10

[20] CP 4900-4902; CP 5459-5462.

B. THE TRIAL JUDGE'S FINDING OF BAD FAITH AS A MATTER OF LAW WAS IN ERROR.

1. The Superior Court Found the "Key Document" Generated Fact Issues Precluding Summary Judgment Dismissal.

On remand, American Family moved for summary judgment dismissal of Lock's only remaining claim left for retrial on remand – Lock's common law insurance bad faith claim pertaining to the 3/30/17 check and letter.[21] Judge Diaz denied American Family's summary judgment motion on 7/8/22, finding a question of fact surrounding the subject check and letter:

> I find that [] the ***fact issue <u>generated</u> by the <u>key document</u> here itself*** a reasonable jury could find that [] it wasn't a mistake, that it was an example of bad faith. I'm not saying they will or they won't, but they could, based upon a reasonable reading of the language in there, and the fact that it was signed by Mr. Strickland, even if

[21] *See* CP 239-254. On 7/8/22, more than six (6) months post American Family's filing of its underlying summary judgment motion, Judge Diaz took up American Family's motion for summary judgment following reinstatement of the case.

> there is evidence going the other way that he didn't sign it, or there might be evidence at trial, at ***which time Ms. Sargent will have a chance to cross-examine Mr. Strickland*** on that. And so I'm going to deny the motion for summary judgment. I'm going to sign an order after this hearing just stating that for the reasons put on the record on this date, there is such a denial.[22]

The Superior Court's finding is ultimately consistent with the *Lock* opinion remanding for retrial Lock's common law bad faith claim as it pertains to American Family's direct conduct (*i.e.*, 3/30/17 Check and Letter). This further demonstrates rulings against American Family, as the Superior Court's ruling was again in favor of Lock.

[22] RP at 1108:10-23 (emphasis added); *see also* CP 269 at 17-18, "[i]t is ORDERED that Defendant's Motion for Summary Judgment is DENIED ***for the reasons stated on the record*** on this date." *Id*., (emphasis added).

2. Lock Expressly Argued that Questions of Fact Precluded American Family's Motion for Summary Judgment Dismissal of Lock's Remaining Bad Faith Claim.

Lock **agreed** that there were questions of fact surrounding the subject check and letter for jury determination:

> All of the arguments from American Family are all factual. ***If they want to argue to the jury that it was a mistake, a clerical error, it's a question of fact***, it's not a question of law. Merely coming before the Court and saying that it is a mistake does not make it a mistake. ***So, these are questions of fact***. And American Family's bad faith, which we will present will, in our opinion, lead the jury to believe that, in fact, it was not a mistake, that a pattern and practice of their bad faith conduct.[23]

Lock did not object to or otherwise challenge the Superior Court's 7/8/22 Order denying summary judgment dismissal.

3. The Circumstances and Facts Surrounding the 3/30/17 Check and Letter were Not At-Issue During the First Appeal.

[23] RP at 1106:22-25 & 1107:1-6 (emphasis added).

The *Lock* opinion contains a dicta finding that American Family's corporate attorney violated WAC 284.30.330(19) and RPC 4.2 via his direct contact with the insured in the form of the 3/30/17 check and letter.[24] However, Lock's claim of bad faith predicated on American Family's 3/30/17 direct contact was not properly before the jury during the 2017 trial and, thus, not fully before Division I during the first appeal.[25] Appellate review is only proper when the parties briefed and argued the issue in the lower court, and the lower court rules on the issue.[26]

On appeal, there is no legitimate dispute of fact that the 3/30/17 check and letter was American Family's clumsy attempt

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[24] *Lock* at 924.

[25] While the 2017 trial court ultimately allowed evidence of the 3/30/17 check and letter to be admitted, no other evidence regarding the remaining elements of a bad faith tort claim was before the jury, including but not limited to Attorney Stickland's testimony that he did not issue the subject check, did not pen or sign the accompanying 3/30/17 letter.

[26] *See King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 660, 860 P.2d 1024, 1031 (1993).

to satisfy a sanctions award that resulted during litigation.[27] As noted by the Superior Court, "the ***fact issue generated by the key document here itself*** a reasonable jury could find that [] it wasn't a mistake, that it was an example of bad faith. I'm not saying they will or they won't, but they could […]."[28]

During the 2017 trial, the only evidence presented to the jury was: (1) copies of the at-issue 3/30/17 check and letter; and (2) American Family's testimony admitting that it had a duty not to make direct contact with its represented insured. Critically significant is that American Family's representative did not testify to the contents of the 3/30/17 letter; there was no testimony or evidence presented that American Family's 3/30/17 letter was an attempt to negotiate or settle a claim.

In fact, no other evidence regarding the 3/30/17 check and letter was presented to the jury. This includes not only evidence

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[27] CP 2059-2061; *see also*, CP 4900-4902.

[28] RP 1108:11-14.

(if any) of Lock's damages, including emotional distress that Lock may have experienced in response to receiving the subject check and letter, but also any evidence regarding the facts and circumstances surrounding the issuance of the 3/30/17 check and letter as it pertains to establishing Lock's common law bad faith claim. The Superior Court agreed, "I have before me, and I have reviewed again, Defendant's motion for summary judgment, which I find to be procedurally proper, given the way this case was remanded for the reversal of Judge Schubert's decision to exclude certain evidence *which hadn't yet been fully considered by the court in the way that it's being considered now or let alone in front of a jury*."[29]

4. American Family Did <u>Not</u> Attempt to Negotiate or Settle Directly with Lock.

The evidence establishes that Mr. Stickland did not directly contact Lock. In fact, Mr. Stickland never reviewed, signed, or even knew that the 3/30/17 letter was being sent to

[29] RP at 1107:23-25 and 1108:1-4 *(emphasis added).*

Lock; he had no knowledge of the 3/30/17 check and letter until he was subpoenaed for the first trial.[30] The subject check was always intended to be payment for court-ordered litigation sanctions; a fact that both Lock and her counsel were aware by virtue of the entry of the Sanctions Order.[31]

Thus, and while WAC 284.30.330 (19) defines as an unfair or deceptive act as, "[n]egotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent," the evidence establishes that American Family did not attempt to directly communicate with Lock in effort to negotiate or settle her claims. Rather, American Family's "direct contact" with Lock was an administrative error. An administrative error does not constitute bad faith pursuant to the applicable law and authority.[32]

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[30] CP 2059-2061, ¶10.

[31] CP 4900-4902; CP 2059-2061, ¶5.

[32] An insured may not base their bad faith claim on a good faith

Likewise, any dicta finding that corporate counsel violated RPC 4.2 is not binding law. Such a finding is further unsupported by both Mr. Stickland's testimony that he did not author, sign, direct the sending of the subject 3/30/17 letter and was, in fact, without knowledge of those events until he was subsequently subpoenaed for the 2017 trial.[33] Finally, a violation of the Rules of Professional Conduct ("RPC") cannot form the basis for any lawsuit or claims.[34]

5. *Coventry* Does Not Support the Trial Court's Finding of Bad Faith as a Matter of Law.

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mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest. *Werlinger v. Clarendon Nat'l Ins. Co.,* 129 Wn. App. 804, 808 (2005).

[33] CP 2059-2061, ¶10.

[34] "[A] breach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy." *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646, 651 (1992); *See also Brain v. Canterwood Homeowners Ass'n*, 2023 Wash. App. LEXIS 1385, 2023 WL 4574816 (Wash. Ct. App. July 18, 2023) (unpublished opinion) (holding that a violation of the Rules of Professional Conduct cannot form the basis of substantive bad faith)

Lock relies on *Coventry* to support her argument that, "the trial court had no discretion in finding AmFam had acted in bad faith and in instructing the jury." Lock's Reply at pg. 25-26. Lock misstates the law:

> **General duty of good faith**. To prove bad faith, the policyholder must show that the insurer's conduct was "unreasonable, frivolous, or unfounded." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 412–13, 229 P.3d 693 (2010) (specially noting the disjunctive nature of this standard); *Smith v. Safeco Ins. Co.* 150 Wn.2d 478, 78 P.3d 1274 (2003).
>
> An insured need not prove that the insurer's bad faith was intentional or fraudulent. *See Coventry Assoc. v. Am. States Ins. Co*., 136 Wn.2d 269, 961 P.2d 933 (1998); *Sharbono v. Universal Underwriters Ins. Co.,* 139 Wn.App. at 410–11.[35]

To that end, *Sharbono v. Universal Underwriters Ins. Co.*, held in pertinent part that:

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35 *See* WPI 320.02 (Insurer's Duty of Good Faith—General Duty) (Comments. Current as of September 2018).

> Insurers owe a statutory duty of good faith to their insureds. RCW 48.01.030. An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, ***although not by a good faith mistake***. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000) (*citing* ***Coventry Assocs. v. Am. States Ins. Co.***, 136 Wn.2d 269, 280, 961 P.2d 933 (1998); *Industrial Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990)).[36]

American Family's good faith mistake precluded a finding of bad faith.

C. LOCK'S REQUEST FOR AWARD OF SANCTIONS AND FEES IS MERITLESS.

On appeal, Lock asks the Court to award total sanctions against American Family in an amount exceeding $10,500,000. Lock's request is comprised of $10,000,000 (*i.e.*, sanctions), $413,575 (*i.e.*, reinstatement of the first jury verdict), $40,000 (*i.e.*, vacate the offset post-verdict), and vacation of prior

[36] *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 410, 161 P.3d 406 (2007).

sanctions orders against Lock. As set forth in American Family's briefing, the $413,575 was vacated by the 2017 Trial Court and said vacation was affirmed by this Court in the *Lock* opinion.

Lock provides no ***legitimate*** statutory or legal basis for sanctions or to recover fees.

- No legal basis to reinstate the first jury verdict.
- No legal basis to vacate the post-verdict offset of American Family's overpayment on the prior UIM award from the $40,000 verdict given the *Lock* opinion and the related rulings on remand.
- No legal or factual basis for the $10,000,000 requested sanctions.

Moreover, Lock's failure to cite "applicable law warranting [a fee] award" warrants denial of Lock's request.[37] For instance, while Lock cites to *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) and *Van Noy v. State*

[37] *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 171, 273 P.3d 965, 972 (2012).

Farm, 142 Wn.2d 784, 16 P.3d 574 (2001) in support of her argument that American Family should be sanctioned for its litigation tactics, neither case addresses the issue of sanctions. Not only are *Tank* and *Van Noy* both factually and legally inapplicable. Neither deals with a UIM claim which, pursuant to *Cedell*, is an adversarial coverage.[38]

Tank dealt with duty to defend under a reservation of rights, which is not at issue in the instant matter.[39] Similarly, *Van Noy* involved PIP benefits in a class action setting.[40] Here, the issue of PIP benefits was fully resolved with the first appeal. [41]

Lock's reliance on *Babcock v. State by & Through Pasco Cmty. Serv. Office of the Dep't of Soc. & Health Servs.*, 122

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[38] *Richardson v. Government Employees Ins. Co.,* 200 Wn. App. 705, 714-715, 403 P.3d 115 (Wash. Ct. App. 2017) (quoting *Cedell v. Farmers Ins. Co. of Wash.,* 176 Wn.2d 686, 697, 295 P.3d 239 (2013)).

[39] *Tank*, 105 Wn.2d 381, 383.

[40] *Van Noy*, 142 Wn.2d 784, 786-788.

[41] *Lock*, 932; CP 35-38.

Wn.2d 1028, 866 P.2d 40 (1993) is misplaced. First, in citing the dissent, Lock omits the contextualizing language from the dissent:

> The law of torts serves two basic functions: it seeks to prevent future harm through the deterring effect of potential liability and it provides a remedy for damages suffered. By effectively reviving sovereign immunity, the majority strips tort law of these essential functions as it relates to the actions of the State in foster placement.[42]

Second, the dissent cites no authority in its holding. Of further importance, the facts and circumstances of *Babcock* are entirely distinguishable. *Babcock* is a family law matter wherein a father and his children sought review of a summary judgment ruling in favor of the state and the individual caseworkers in a negligence and alienation of affection suit in connection with placement of the children in a foster home where they were

[42] *Babcock v. State*, 112 Wn.2d 83, 113. *But cf.*, Lock's Reply at pg. 34, which omits the second sentence.

molested by a foster parent. The Supreme Court affirmed the superior court's holding that the individual defendants and the State were immune from negligence liability and that there were no unresolved material facts regarding the claims of outrage and alienation of affections. *Babcock* is entirely inapplicable to the case at bar.

Lock's argument for fees is frivolous and should be denied.

1. Lock's Recovery is Limited to the Terms of the Jury Award Minus Offsets.

The trial court erred in finding bad faith as a matter of law. The subsequent jury instructions are therefore improper. In that vein, American Family does not dispute the $40,000 jury verdict if this Court affirms it and the associated post-verdict rulings. To that end, there is no legal basis to vacate the post-verdict offset of American Family's overpayment on the prior UIM award from the $40,000 verdict given the *Lock* opinion and the related rulings on remand.

Lock cites to *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014) and *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000) in support of her argument that insurance bad faith is a tort claim not limited to economic damages.[43] Lock's reliance is misplaced.

Miller v. Kenny stands for the proposition that a reasonable covenant judgment amount sets only the floor for properly awarded damages.[44] To the contrary, Lock does not deal with an assignment of first party rights or a covenant judgment. *Miller v. Kenny* is thus inapplicable.

*Anderso*n is likewise distinguishable. The *Anderson* court held that the insurer acted in bad faith and violated the state consumer protection act when it failed to advise appellant that her benefits included underinsured motorist coverage; the amount of damages caused by respondent's failure to disclose

[43] Lock's Reply at pg. 31.

[44] *Miller v. Kenny,* 180 Wn. App. 772, 782.

coverages remained for trial court determination.[45] Lock does not claim that American Family failed to disclose applicable coverages rendering *Anderson* inapplicable.

D. AMERICAN FAMILY IS ENTITLED TO SANCTIONS UNDER RAP 18.1 & RAP 18.9.

American Family respectfully requests that this Court award attorney fees and expenses under RAP 18.1 because the pending appeal and requests for sanctions have no legal or factual basis. RCW 4.84.185 provides a statutory basis to award attorney fees to a prevailing party for opposing a frivolous action. RAP 18.9(a) provides the appellate court with authority to impose terms or compensatory damages to be paid to the party harmed by a frivolous appeal. An appeal is frivolous where there are no debatable issues on which reasonable minds might differ, and is devoid of merit, so there is no reasonable possibility of reversal.[46]

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[45] *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 326

[46] *Green River Community College Dist. No. 10 v. Higher Ed. Personnel Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986). *See also,*

Lock does not seek reversal. Lock wants the appellate court to merely award sanctions for which there is no basis in law or fact. To that end, Lock's appeal is not only devoid of merit but is further frivolous in light of the prior proceedings and the resulting 2022 jury verdict in Lock's favor.

E. AMERICAN FAMILY'S OPPOSITION TO LOCK'S MOTION TO STRIKE APPENDICES.

This Court should also deny Lock's Motion to Strike in its entirety. American Family is entitled to answer and challenge the claims raised in Lock's Opening Brief as well as the reliability of the evidence upon which Lock relies. Likewise, American Family is entitled to rely on evidence that supports its position on Cross-Appeal. Each document contained in American Family's Appendix is presented as part of American Family's good faith response to Lock's claims, and/or with

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PEMCO v. Rash, 48 Wn. App. 701,740 P.2d 370 (Wash. Ct. App. 1987); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 732 P.2d 510 (1987); *Federal Land Bank o/Spokane v. Redwine*, 51 Wn.App. 766, 755 P.2d 822 (Wash. Ct. App. 1988).

respect to its Cross-Appeal, and for the Court's convenience and ease of reference. No document was filed to harass or unfairly disadvantage another party, or for any other improper purpose.

1. Authority

Lock filed her Opening Brief on 3/21/24. American Family filed its Answer & Cross-Appeal on 4/22/24. Under RAP 10.3(b), American Family is entitled to answer the "the brief of appellant." RAP 10.3(b) further directs that the brief of a respondent who also seeks review, set forth "the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues."

Here, the appended materials are proper and relevant. *See* RAP 10.3(a)(8) and RAP 10.4(c). Moreover, RAP 1.2 authorizes an appellate court to exercise its discretion in considering cases and issues on their merits.[47]

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[47] *See Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d 143, 147, 437 P.3d 677 (2019).

2. American Family Previously Sought and Obtained Permission to File Its Rebuttal Chart.

On 4/22/24, in addition to its Answer & Cross-Appeal, American Family filed its: (1) Motion for Overlength Brief (hereinafter, "Overlength Motion"), and (2) American Family's Second Supplemental Designation of Clerk's Papers ("Second Supp. CP"). In its Overlength Motion, American Family expressly requested the Court accept its Answer & Cross-Appeal together with its Rebuttal Chart pursuant to RAP 10.7, RAP 17.4 (g), and RAP 1.2.[48] On 4/24/24, this Court granted American Family's Overlength Motion.[49]

Notably, American Family's Rebuttal Chart is a summary that does not contain new information or arguments. Rather, the Rebuttal Chart is "merely abbreviated and organized in an effort to make it easier for the court to understand them."[50]

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[48] *See* American Family's Overlength Motion, pg. 1.

[49] *See* COA's 4/24/24 Public Ruling.

[50] *See Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 35,

This appendix is proper and should not be stricken.

3. A 1-3, A 4-11, & A 12-19 are Properly Appended.

i. A 1-3. A 1-3 is a full copy of the Order for Continuance of Trial Date, dated 10/7/21 [Dkt#714] (hereinafter "Dkt#714"), whereas its counterpart at CP 534-536 is missing the operative language of the 10/7/21 Order, which should appear at CP 535 as follows:

> It is hereby ORDERED that American Family's Motion to Continue Trial is **GRANTED.** Because American Family has not been able to conduct a videotaped deposition of Plaintiff or conduct the necessary discovery arising from her deposition, substantial injustice will result if the case is not continued.
>
> Therefore, trial shall hereby be continued to February 7th, 2022, and the Bailiff shall issue a new case scheduling order in conformity with the new trial date.
>
> DATED this ____ day of October, 2021.
>
> **THE HONORABLE JUDGE PATRICK OISHI**

See A-2.

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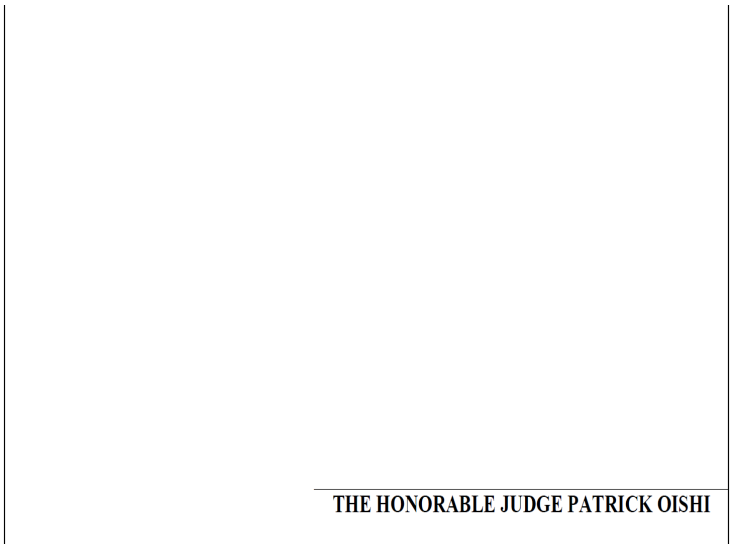
244 P.3d 438, 447 (Wash. Ct. App. 2010).

However, CP 535 is blank where the operative language should appear:



See CP 535.

Based on the judicial record, Dkt#714 should have been bate-stamped and transmitted as it appears at A 1 – A 3. As currently submitted, Dkt#714 is entirely missing the Superior Court's "rationale."[51]

Here, there is no legitimate dispute that CP 534-536 is missing operative language originally contained in Dkt#714.

[51] Without waiver, see Lock's Opening Brief at pg. 23 (*quoting,* the "trial court granted AmFam's motions ***fully explaining its rationale*** […]") (emphasis added).

American Family has made a good faith attempt to supplement the record for the convenience of the Parties and the Court. Thus, this Court should not strike said appendix.[52]

ii. <u>A 4 – 11 & A 12 – 19</u>. A 4 – A 11 and A 12 – 19 are both documents of public record. A 4 – A 11 is the Supreme Court Commissioner's Public Ruling Denying Emergency Motion for Stay, dated 1/13/22; A 12-19 is the Supreme Court Commissioner's Public Ruling Denying Direct Discretionary Review, dated 4/20/22. These Rulings were entered under Supreme Court Cause No.: 100476-1 (Lock's Interlocutory Appeal on Remand). As such, they were not formally designated under RAP 9.6.

Without waiver, American Family acknowledges that

[52] In this instance, American Family submits that the record on appeal is "sufficiently complete to permit a decision on the merits of the issues presented for review." Nevertheless, under RAP 9.10, this Court may "direct the transmittal or additional clerk's papers and exhibits," and/or "correct, or direct the supplementation or correction of" the record. *Id*.

these two (2) rulings are included in Lock's Appendix at Appendix F and Appendix A and are thus duplicative. American Family's counsel offers a *mea culpa* in this regard.[53] These limited duplicate materials were not offered to overburden Lock or the Court but rather amount to a reasonable oversight where the record is voluminous and spans numerous courts and cause numbers. Because the error does not overburden or prejudice Lock or the Court, American Family respectfully requests this Court not strike its A 4-11 and A 12-19.

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[53] A technical violation of the rules should normally be overlooked, and the case should be decided on the merits; this result is particularly warranted whether the violation is minor and results in no prejudice to the other part and no more than a minimal inconvenience to the appellate court. *State v. Olson,* 126 Wn.2d 315, 893 P.2d 629, 1995 Wash. LEXIS 153 (Wash. 1995); *see also, Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 864 P.2d 996 (Wash. Ct. App. 1994) (finding that although appellant's statement of facts and argument section did not conform to these rules, some factual statements were supported by reference to the record, others were not, and portions failed to designate the page and art of the record, the court did not strike portions of his brief pursuant to RAP 10.7, because it would not have been a profitable use of the court's time or the parties' resources to require attorney to amend or rewrite the brief).

For the reasons set forth above, the Court should deny Lock's request to strike the referenced appendices.

4. A 20-21, A 34, & A 35 (Public Records) along with A 22, A 23-33, & A 36-39 (Rebuttal Evidence) are Proper and Relevant.

RAP 10.3(a)(4) requires that reference to the record must be included for each factual statement.[54] In its underlying briefing, American Family sets out this matter's procedural history which is relevant and proper as a part of its rebuttal to Lock's argument of ongoing systemic and institution bias.

i. A 20-21. A 20-21 is the 5/23/23 Certificate of Finality issued in the 2022 Interlocutory Appeal under Supreme Court Cause No.: 100476-1. The 5/23/22 Certificate of Finality is a public record, is a part of this matter's procedural history, and provides yet another instance where Lock elected not to object to or challenge a court's ruling in this matter.[55]

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[54] *Bulzomi,* 72 Wn. App. at 524.

[55] *See* RAP 12.5(e) & RAP 12.7(a).

ii. **A-34 & A-35**. A-34 & A-35 are also documents of public record. A-34 is the 10/2/23 Order docketed under Supreme Court Cause No.: 101865-7 (Lock's Third Attempt at Direct Review). A-35 is the 5/1/23 Letter Ruling under Supreme Court Cause No.: 100476-1 (Lock's Interlocutory Appeal). Both these Rulings are public records available under separate cause numbers. Moreover, both Rulings are part of this matter's procedural history and referenced by American Family in its underlying briefing.

iii. **A 22, A 23 – A 33, & A 36 – A 39.** As a collective whole, these American Family appendices are entirely relevant to rebut Lock's misleading statement that:

> 47. On 5/30/23 the trial court entered a satisfaction of judgment, despite that AmFam had not paid Lock. CP 7699. On 6/16/23 it denied Lock's motion for reconsideration without explanation. CP 1268-1285; CP 1286-1287.

See Lock's Opening Brief at pg. 53 (highlight added); *see*

also, American Family's Rebuttal Chart at A 148 – A 149. Despite failure to strictly comply with RAP 10.3, appellate courts may consider the merits of the challenge where the nature of the challenge is perfectly clear and the challenged finding is set forth in the appellate brief.[56]

Lock's counsel had *received and returned* the judgment check prior to the Court's 5/30/23 Order.[57] In fact, American Family attempted to have the *judgment check delivered at least three times* ***before*** American Family mailed the check to Lock via her counsel on 3/21/23.[58] These are undisputed facts as Lock

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[56] *See Smith v. Employment Sec. Dep't*, 155 Wn. App. 24, 29, 226 P.3d 263 (Wash. Ct. App. 2010). *See also, Cena v. Dep't of Labor & Indus*., 121 Wn. App. 915, 91 P.3d 903 (Wash. Ct. App. 2004) (finding that RAP 10.4(c) allowed presentation of a variety of materials in an appendix where both parties appended materials not included in the record. But the complained-of attachments to the Department of Labor and Industries' brief helped the court understand the process of orders leading up to the actual order on appeal, such that there was no reason to strike the entire brief or require modification).

[57] *See* A 22; *see also,* CP 8431-8432 and CP 7699-7700.

[58] *See* CP 7693 and CP 8417-8426.

did not substantively oppose American Family's underlying motion.[59]

Moreover, Lock's counsel *admits she received American Family's check*.[60] Nevertheless, Lock's counsel inexplicably *returned the check six weeks later*; "American Family's check was placed in an envelope and put in the mail on 5/8/23."[61]

To that end, A 22 is a copy of the 5/21/23 letter from American Family's defense counsel requesting Lock's counsel advise whether she would like the previously returned judgment check to be forwarded again.[62] In that same communication, American Family stated it would void the previously issued judgment check and take steps to deposit the funds with the

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[59] *See* CP 7635-7649 and CP 7693-7698.

[60] *See* CP 7693 (internal citation omitted); CP 8427-8428; CP 8429; and CP 8430.

[61] *See* CP 8427-8428 and 8429; *see also*, A-22.

[62] *Id*.

Superior Court's registry pursuant to RCW 36.48.090.[63]

A 36 – A 39 is the email chain between the Superior Court and counsel of record, dated 6/7/23 through 6/22/23. A 23-A 33 is the correspondence from American Family's counsel to the Superior Court Registry of the Clerk, dated 7/20/23, to which Lock's counsel is copied. The 7/20/23 letter, together with its enclosures, establish not only that American Family has paid the judgment amount, but that Lock is expressly aware of that payment, despite Lock's contrary position in her appellate briefing.

These appendices are proper and should not be stricken.

5. A 45, A 46, A 47, A 48-50, & A 119 are Proper and Relevant to American Family's Cross-Appeal.

On cross-appeal, American Family argues that the Trial Court erred in finding bad faith as a matter of law. Among the issues pertaining to American Family's assignments of error is

[63] *Id*.

whether the Trial Court erred in precluding American Family from presenting evidence or testimony of "mistake" re: American Family's direct contact during litigation by sending her the subject check and letter. Not only is American Family entitled to submit supporting evidence, but a failure would also arguably prejudice American Family's arguments on cross-appeal.[64]

To that end, the at-issue appendices are all Trial Exhibits (*i.e.*, A 45 = Trial Exhibit #306; A 46 = Trial Exhibit #307; A 47 = Trial Exhibit #310; A 48-A 50 = Trial Exhibit #311; and A 119 = Trial Exhibit #333) (hereinafter collectively "American Family Trial Exhibits"), which American Family properly designated when it filed its 4/22/24 Second Supp. CP Designation.[65]

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[64] *See e.g., State v. Rasch*, 40 Wn. App. 241, 698 P.2d 559 (Wash. Ct. App. 1985) (generally, the court will not consider an assignment of error which is unsupported by facts and argument in the appellate brief).

[65] American Family appended Trial Exhibits 304, 306, 307, 310, 311, 316, and 333 to its Answer & Cross-Appeal filed 4/22/44 briefing. *See* RAP 9.6 ("[a]ny party may supplement the designation for clerk's papers and exhibits prior to or with the

Significantly, all the appended trial exhibits were admitted during the 2022 trial on remand.[66]

For ease of reference, American Family also appended said Trial Exhibits to its Answer & Cross-Appeal, filed and served on 4/22/24.[67] Therein, American Family noticed both Lock and this Court of its second supplemental designation.[68] These appendices are proper and should not be stricken.

In sum, granting Lock's Motion would work an injustice against American Family in both its Answer & Cross-Appeal. Thus, Lock's Motion should be denied in its entirety.

III. CONCLUSION

Both Lock and American Family agree that there should

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filing of the party's last brief"). The trial exhibits appended and designated by American Family were admitted during trial. *See* CP 1165-1167.

[66] *See* CP 1165-1167.

[67] *See* Answer & Cross-Appeal at pgs. 73-74.

[68] *See e.g.*, *id*., at pgs. 22-23 at fn. 67 (Trial Exhibit#304) and pg. 27 at fn. 78 (Trial Exhibit#310), fn. 79 (Trial Exhibit#311), and fn. 80 (Trial Exhibit#333).

be no retrial in this matter. Therefore, this Court should affirm the 2022 trial verdict, effectively concluding this case. Additionally, sanctions against Lock are justified and should be awarded in favor of American Family.

DATED this 21st day of June 2024, at Seattle, Washington.

Respectfully submitted,

WATHEN | LEID | HALL | RIDER, P.C.

s/ Kimberly Larsen Rider
Rory W. Leid, III, WSBA #25075
Kimberly Larsen Rider, WSBA#42737
Attorneys for Respondent/Cross-Appellant American Family Ins. Co.

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CERTIFICATION PURSUANT TO RAP 18.17

I certify that this document contains **5,085** words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits), in compliance with RAP 18.17.

Dated this 21st day of June 2024.

s/ Kimberly Larsen Rider
Kimberly Larsen Rider, WSBA #42737

CERTIFICATE OF SERVICE

I, Samantha Pluff, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the above-referenced action.

2. I hereby certify that on June 21, 2024, I caused to be filed and served: **REPLY BRIEF OF CROSS-APPELLANT AMERICAN FAMILY** as indicated below:

COPY to Attorneys for Plaintiff: Vonda M. Sargent, WSBA #24552 Carol Farr, WSBA #27470 Vonda M. Sargent PS 119 1st Ave S. STE 500 Seattle, WA 98104 Tel: (206) 638-4970 sisterlaw@me.com carolfarr@gmail.com sargentlaw9@gmail.com	**Via E-Mail**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of June 2024, at Seattle, Washington.

s/ Samantha Pluff
Samantha Pluff, Legal Assistant
spluff@wlhr.legal

Exhibit 9

THE SUPREME COURT OF WASHINGTON

STEPHANIE LOCK, Appellant/Cross-Respondent, v. AMERICAN FAMILY INSURANCE COMPANY, Respondent/Cross-Appellant.	)	No. 95508-5 **O R D E R** King County Superior Court No. 15-2-05573-9 SEA

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its November 27, 2018, Motion Calendar whether this case should be retained for decision by the Supreme Court or transferred to the Court of Appeals. The Department unanimously agreed that the following order be entered.

IT IS ORDERED:

That this case is transferred to Division I of the Court of Appeals.

DATED at Olympia, Washington, this 28th day of November, 2018.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

Exhibit 10

AMERICAN FAMILY'S REBUTTAL CHART RE: LOCK'S 47 EXAMPLES OF "UNFAIR AND BIASED DECISIONS."

American Family objects to Lock's 47 "examples" as averred. Simply stated, Lock's 47 "examples" are nothing more than conclusory, self-contradictory, and/or simply false statements, rebutted by the governing law and record in this matter.

¶	**Rebuttal**
1	Lock has already raised, and both the Superior Court and Supreme Court already rejected, these very same issues. Lock failed to timely raise objection(s) to Division I's findings and/or the Superior Court's 9/15/20 Order. Lock further misrepresents the COA's finding, stating that, "[t]he order states that the remand was 'based on' the $4,135.75 check, altering the holding of this Court, which states the remand was 'based on' AmFam's conduct." *See* LOB at pg.14, ¶1.

	The Superior Court's 9/15/20 Order does not alter the COA's holding: > The Court of Appeals remanded "for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation [by sending her the $4,135.75 check]." *See* CP 31-32. The COA expressly found that the "direct contact" was the at-issue check: > We remand for a new trial on Lock's insurance bad faith claim based on American Family's direct contact during litigation. > …. > American Family next contends that the trial court erred in allowing introduction of exhibit 61—the $4,153.75 check and cover letter—as impeachment evidence. American Family's argument is based on the assumption that the pretrial order excluding evidence of the check was correct. As discussed above, evidence of American Family's direct contact with Lock, and any resulting damages, should have been admissible to support her bad faith insurance claim. Thus, we need not address American Family's argument that

	it was inadmissible as impeachment evidence. *Lock* at 931-932; *see also*, RAP 12.2.
2	The record speaks for itself. Lock's brief was a single page. CP 39. American Family exhaustively briefed the issues, including the alleged bias. CP 92-103 and CP 3976-4082. Ultimately, the Court in its Order (1) denied American Family's request to strike Sargent's declaration, and (2) noted that Lock could file a substantive motion in accordance with the Civil Rules and Local Rules. CP 104-106. Lock declined to do so.
3	First, the Court's 8/30/21 Order states in relevant part that, "Plaintiff's Motion to Compel is hereby DENIED in its entirety *on the merits*[.]" CP 725-727(emphasis added). Second, that Order was entered after the Court's original 7/29/21 Order Striking Lock's Moton to Compel Discovery of Plaintiff's Entire Claim File, without prejudice, for procedural deficiencies

	including but not limited to failure to comply with the discovery conferral requirement under CR26(i). CP 610-612. American Family's request for sanctions was, in part, due to Lock's continued violation of CR26(i), even after the Court's prior warning via its 7/29/21 Order. CP 657-671.
4	*See supra.*, ¶1. American Family disputes that the rhetoric was "vitriolic and degrading;" American Family posits that the tone of the rhetoric on reply matches the tone of the response briefing. CP 4688-4696. As set forth in its opinion, Division I remanded for retrial "[…] Lock's insurance bad faith claim based on American Family's direct contact during litigation." *Lock* at 931-932.
5, 6	Lock failed to timely challenge the 4/6/20 COA Published Opinion which is the governing law in this case. Therein, Division I vacated the trial court's

	decision on attorney fees. *See Lock* at 925. American Family does not dispute that fn.4 of the *Lock* opinion reads: > Lock also argued that the trial court erred in vacating its order granting her attorney fees for American Family's bad faith litigation tactics. Because we are remanding for trial on Lock's claim of bad faith, we also vacate the trial court's order awarding or denying attorney fees. Any claims for fees should be addressed on remand. However, Division I clearly is *not* directing the Superior Court to merely reduce the 2017 fee award to judgment on remand. Because the remaining bad faith claim re: American Family's "direct contact" was remanded for retrial, an associated fee award claim (if any) was not ripe. Moreover, the Superior Court noted that Lock was (as she continues to do now) relying on an order which had been vacated on reconsideration and on appeal. CP 221-224. With this, the Court noted that Lock's reliance on a court order that had been

	vacated by two courts was "not well-taken." *Id.* This does not constitute evidence of racial bias. This shows a plaintiff who continues to misinterpret and/or intentionally ignore a twice-vacated order to mislead and prejudice the court on remand. Finally, Lock misrepresented the facts in her underlying 8/16/21 motion wherein she sought to strike American Family's defense because it failed to appear for a noted 30(b)(6) deposition on 8/4/21, without seeking a protective order. CP 679-682. Yet, the record establishes that American Family did timely seek a protective order on 7/27/21, which the court granted on 8/16/21. *See* CP 152-170, CP 194-197, and CP 4921-4923.
7	Lock's habitual failure to comply with civil rules and court orders re: her video-taped deposition is well-evidenced. *See* CP 7034-7038 ("Timeline re: Lock's

	Videotaped Deposition"). On 1/13/22, the Supreme Court noted: > Some mention of an ongoing discovery dispute is warranted. American Family has tried since late April 2021 to get Ms. Lock to sit for a videotaped deposition…Ms. Lock does not dispute these specific assertions. *See* A-8. > … > Furthermore, *American Family has established that Ms. Lock consistently refused to sit for a videotaped deposition, even when ordered to do so by the superior court*. In apparent response to Ms. Lock's delay tactics, American Family filed the motions she now seeks to stay. American Family's contention that the so-called emergency is one of Ms. Lock's own making is well-taken. *See* A-11 (emphasis added). On 4/20/22, the Supreme Court further found: > American Family has tried since late April 2021 to get Ms. Lock to sit for a videotaped deposition. She has not cooperated…Ms. Lock did not appear for the deposition noted for that day. American Family represents that Ms. Lock has not paid for the costs ordered by the superior court and that Ms. Lock has still not appeared for the deposition. *See* A-16.

8	At the 9/24/21 hearing, American Family requested the Court enter American Family's proposed Amended Order on American Family's Summary Judgment Motion. *See* CP 5154:24-25 and 5156:1-12. Thereafter, the Superior Court inadvertently entered the original proposed Order filed and served with American Family's underlying Motion, rather than the proposed Amended Order. CP 227-229. As such, American Family respectfully requested the Superior Court correct the record as addressed at the 9/24/21 hearing and enter the Amended Order; Lock's counsel was copied to the request. Moreover, and contrary to Lock's implication/representation, American Family did not use the term "wrong" in its email request. *See* A-40 – A-42; *see also,* CP 230-233 and A-15. Ultimately, the Court directed American Family to file

	a motion for the requested relief, ***which it did***. *See* A-40 – A-42; *see also,* CP 510-513.
9	*See supra.,* ¶¶5-6. "The superior court clarified that issue when it entered the order granting American Family's motion for partial summary judgment, *which Ms. Lock did not oppose and for which she does not seek review*. Ms. Lock's motion for entry of partial summary judgment was essentially *an ill-conceived attempt to revive a superior court decision invalidated by a Court of Appeals decision for which she did not seek further review*. It was therefore not surprising that the superior court denied Ms. Lock's motion to enter partial judgment on the original, but no longer valid, jury verdict, and denied reconsideration of that decision. *Here, Ms. Lock spends much of her time relitigating these issues that are not properly before*

	this court." A-17 – A-18 (emphasis in original) (emphasis added).
10	The basis for American Family's prejudice argument was grounded in its need for Lock's discovery deposition on remand, which Lock was refusing; it was *not* based on a failure to disclose its own witness. CP 766-767. The trial court did not *sua sponte* extend the deadline for witness disclosures. CP 534; *see also* CP 353-537 and A-1-A-3. Rather, pursuant to KCLCR 40(e)(3), "[…] When a trial date is changed, the judge changing the trial date may amend the case schedule…".
11	*See supra.,* ¶7. First, Lock did not communicate to the Court or counsel that she was medically unable to appear for her deposition. Rather, Plaintiff communicated that Lock "has been unwell for some time and is also pregnant which is causing some

	concerns." CP 1116 and CP 1119-1120 at ¶8 (Lock testified that she was "unwell;" she did *not* testify she was medically unable.). Moreover, any implication from Lock's counsel that Lock's unfortunate loss (*i.e.*, Summer 2022 Stillbirth) has bearing on this appeal is misleading. Lock's loss was first disclosed during the 2022 trial. During sidebar, the Court inquired as to the timing of the stillbirth: MS. SARGENT: It was a matter of weeks after American Family's conduct. Their contempt and –" *See* RP 466:14-15. Given the approximate 5 years between the 3/30/17 letter and Summer 2022, the Court granted American Family's request for a jury instruction to disregard. RP 467:14-18.
12	*See supra.,* ¶7& ¶11. Lock's claim that she "filed a petition for direct review and a motion for an

	emergency stay to avoid a useless trial on a sole issue" is controverted by emails evidencing that Lock's petition/motion for direct review and emergency stay were admittedly part of the discovery gamesmanship surrounding Lock's videotaped deposition. Having advised only that Lock "has been unwell for some time and is pregnant which is causing some concerns," Lock's counsel quickly sent off another few emails threatening to move for relief from the Court's order, all without providing American Family's defense counsel an opportunity to respond. CP 1116-1117. Lock's counsel then advised, "[i]n light of your threat to seek sanctions against your insured, after she has informed you that she cannot physically appear for her deposition, we are seeking an Emergency Motion Order to Stay pursuant to RAP 17.4(b)." CP 1118. This was the first mention of any physical inability to

	appear for the court-ordered deposition (which was proceeding via Zoom).
13	*See* CP 269-270; CP 987-1002; CP 5699-5709; and RP 1096-1109.
14	*See supra.,* ¶7, ¶11, & ¶12. Lock's continued failure to comply with discovery obligations and related court orders is well-documented. CP 7034-7038, A-8, and A-16. Following reinstatement, the Superior Court noted, "Plaintiff took a risk in not attending the previously ordered depositions, hoping the appellate courts would accept early review of her case, which none did. Further the present Court will respect the orders of the prior Judges who presided over this matter." CP 266:22-267:1.
15	*See* CP 751-754; CP 5218-5223; and CP230-233.
16	The Court did not strike Lock's declaration: The Court hereby DENIES the Motion to Strike and DENIES WITHOUT PREJUDICE the Motion to Reinstate… Defendant may re-

note its Motion to Reinstate for a date after April 29, 2022 or after the Supreme Court declines discretionary or direct review, whichever is later.

CP 1072-1073.

Moreover, the Court denied American Family's motion to reinstate in Lock's favor. The Supreme Court's fn.3 is also noteworthy:

> A review of the superior court records provided in this matter shows Ms. Lock may have misrepresented the meaning of my January 13, 2022, ruling in pleadings filed in that court. My ruling indicated that the temporary stay of superior court proceedings would expire if no motion to modify was filed. None was, so the stay should have expired at that point; however, Ms. Lock represented to the superior court that the stay remained in effect until further order of this court. That was true only if she filed a motion to modify. She did not; therefore, the stay should have expired automatically. Ms. Lock also suggested to the superior court that her filing of the instant motion for discretionary review continued the temporary stay. It did not. The only thing that would have continued the temporary stay was the filing of a motion to modify. As indicated, that did not happen. *I do not know whether these misrepresentations were deliberate, but they are troubling nonetheless*. In any event,

	the superior court denied American Family's motion to reinstate the trial date. *See* A-19 at fn.3 (emphasis added).
17	The *Lock* opinion as well as the Supreme Court's 4/20/22 Letter Ruling [A-12 – A-19 at A-17] speak for themselves. Nevertheless, Lock mischaracterizes the Supreme Court's finding, "carelessly" omitting the Supreme Court's next sentence, which is the operative language: "[t]he Court of Appeals reinstated the common law bad faith claim only to the extent it was based on American Family's direct contact during litigation." *See* A-17; *but cf*., LOB's at pg. 29, ¶17.
18	American Family incorporates by reference its response in ¶7, ¶11, ¶12, & ¶14, *supra*. Further evidence contradicting Lock's claim that American Family failed to provide evidence of Lock's engagement in abusive discovery tactics to avoid submitting to her court-ordered deposition includes CP

	5765-5770, CP 5830-5837, and CP 271-276. *See also*, CP 5926-5928; *but cf*., CP 337-340 and CP 5917-5924 and 5928-5940.
19	Lock's argument is misleading. American Family respectfully states that the underlying pleadings and record speak for themselves. Significantly, American Family's motion to compel was predicated on Lock's continued willful disregard of the Court's 9/21/22 Order. *See* CP 6111-6122, 6206-6213, and 271-276. American Family further notes that Lock's implication that the court issued detailed explanations only when denying American Family's motions is likewise misleading. The orders Lock points to are authored by Judge Thorp whose orders are, *as a whole*, more detailed in their findings as opposed to other Superior Court Judges who have made rulings in this matter. Moreover, these detailed explanations do not solely

	pertain to orders denying American Family's requested relief. *See e.g.*, CP 337-340 & CP 5838-5839.
20	*See supra.*, ¶13; s*ee also, Lock* at 916-917 (upholding the trial court's order granting a JNOV containing 19 unchallenged findings of fact) and A-15. American Family appeals the Trial Court's finding of bad faith as a matter of law and rulings that American Family's bad faith was predetermined. *See* CP 367-372, including ¶¶1, 2, 4-8, & 11 and CP 5455-5461 (C. Stickland's 4/19/71 Declaration).
21	Lock's statement is narrow and misleading. The Trial Court expressly stated: [P]laintiff raises an extremely valid issue of racial bias. I'm saying extremely valid not because I thoroughly assessed the conduct of judicial officers' orders issued in this case but because I recognized that every single individual, including every single judicial officer, has inherent biases, and these inherent biases do play a role in certain decisions that we make. … even if I set aside the orders

	determining the parameters of the issue ... I still would go to the Court of Appeals... and the Supreme Court's clarification of the issue... I would arrive at the same conclusion that I just mentioned." *See* RP 25:23-25 and 26:1-19 (internal citations omitted). In so finding, the Trial Court explained that the evidentiary hearing was being denied because the result would be the same whether or not racial bias was found. Moreover, the Trial Court affirmed only that *Henderson* was valid in the general sense that its findings regarding inherent biases, not that the facts in the instant matter, present a valid issue of racial bias.
22, 23	Lock's claim that the Trial Court "frequently changed is rulings on the fly to benefit American Family" is unsupported. To the contrary, the record establishes that the majority of the Trial Court's rulings favored Lock, including but not limited to American Family's primary issue on cross-appeal – that American Family

	acted in bad faith as a matter of law – despite the *Lock* opinion and the subsequent finding by the Superior Court on remand of a question of material fact thus precluding American Family's summary judgment dismissal on the remaining bad faith claim. Moreover, the 2022 Trial Court: (a) provided Lock an opportunity to file an Offer of Proof re: evidence of "other bad faith" conduct (while American Family was provided only three hours to respond). Lock's offer of proof was solely predicated on issues previously resolved by the *Lock* opinion [*see* CP 1141-1149; CP 7121-7129]; (b) expressly stated that it was changing its ruling because Lock had opened the door [*see* RP 635:20 – 636:2; *also see generally*, RP 29:11-24], and (c) found Dr. Mayeno's medical records were admissible in order to show Lock's *failure* to discuss the check in the context of her medical treatment as evidence of no damages

	[RP 548:20-25 and RP 552:1-20]. *See also*, A-51 – A-118.
24	This ruling is in favor of Lock. American Family appeals. *See* CP 367-372 at ¶¶1, 2, 4-8 & 11.
25	Lock's argument is baseless and further confuses two unrelated issues – to wit, American Family's Notice of Mistrial and Motion for Curative Instructions with the basis of the at-issue check. CP 1150-1160. The sanctions check is irrelevant in that "[p]ostlitigation conduct of the insurer's counsel is not the basis for liability for insurance bad faith." *Lock*, 923. Moreover, the Trial Court <u>*denied*</u> American Family's Motion for Curative Instruction, in <u>*favor of Lock*</u>. *See* RP 373:12-16. To that end, Lock's ¶25 does not demonstrate unfair bias. American Family appeals.
26, 27	Lock's argument is misleading and out-of-context: I stand by my ruling that the jury…will be informed that American Family Insurance acted in bad faith by sending Ms. Lock directly

	the check knowing she was represented. But what I am going to change is my ruling regarding evidence of *prior* bad faith conduct on the part of American Insurance. *See* RP 367:11-18. The Court then stated on the record her reliance on the unchallenged JNOV findings. RP 367:19-25, 368:1-14. Finally, Lock's excerpted references notably exclude the Trial Court's operative language: [S]o, for example, she would be allowed to testify as to the basics such as up to the point of receiving that check. You know, she had been stressed about the amount of time, from the time she filed her initial claims to American, and up till the times she received the check. That stress was growing because, you know, litigation was taking longer than she expected….But, you know, she can provide some amount of context. She isn't limited solely to the instance of the check, but any evidence would only be admissible if it directly goes to the emotion distress, if any, that she felt upon receiving the check." *See* RP 368:15-25, 369:1-2. *See also*, RP 370-374:1-10 (therein further discussing the unchallenged JNOV

	findings and *Lock* opinion). The Court also denied American Family's Motion for Reconsideration and Motion for Curative Jury Instruction. RP 373:9-16. All to Lock's benefit and which American Family appeals.
28, 32	Lock mischaracterizes the record. Lock ultimately concedes that she was able to present the jury with evidence of her damages re: the direct contact (*i.e.*, her testimony that it felt like American Family was trying to trick her to get her to cash the check). In so doing, Lock opened the door. RP 607-610:22. On its face, Lock's ¶32 is not evidence of an "unfair and biased decision."
29	Lock's statement is misleading, mischaracterizes evidence, and improperly attempts to tie together unrelated issues. *See* RP 434-447:1-6. Moreover, the line of questioning was outside the scope of the MIL

	orders, which the Trial Court noted and sustained, then properly excused the jury. RP 432:2-22, 433:1-3, 13-14, and 23-25. The sidebar was Lock's counsel's request. *See* RP 434:3-12.
30	Lock's statement is misleading, mischaracterizes evidence, and improperly attempts to tie together unrelated issues. *See* RP 492-498.
31	Lock mischaracterizes the record. *See* RP 286:10-16 (re: scope of MIL ruling). Defendant's use of phrase "court-ordered sanctions" was well-within the Court's MIL ruling. RP 407:14-15; b*ut cf*., Lock's use at RP 506-510.
33	Lock's statement is misleading and mischaracterizes evidence. The Trial Court permitted Lock's own medical records to be admitted to rebut Lock's claims of emotional distress; Lock withdrew her objection. RP 469:7-25-470:1.

34	The referenced "arguments" are all sidebar arguments taken up outside the presence of the jury. Moreover, Division I found that Lock's prior claims (*i.e.*, UIM claim and related claims and issues) had been resolved and that Lock had been fully compensated. The remaining damages issue pertained only to the direct contact. *See* RP 936:20-24. Furthermore, the Trial Court improperly denied American Family's proposed jury instructions #7 (summary of claims) and #14 (finding of fact). CP 8292 and 8330.
35, 37	Lock's statement is a mischaracterization of the record. In sum, Lock opened the door. CP 607-610:22; *see also*, *State v. Wafford*, 199 Wn. App. 32, 33, 397 P.3d 926, 927 (2017)(it is well settled in Washington that a party that introduces evidence of questionable admissibility runs the risk of opening the door to the admission of otherwise inadmissible evidence by an

	opposing party. It is within a trial court's discretion whether the door is opened to otherwise inadmissible evidence by statements of counsel and, if so, what, if any, remedy is appropriate); *State v. Gefeller*, 76 Wn.2d 449, 450, 458 P.2d 17, 17 (1969).
36	The trial court ruled in Lock's favor and denied American Family's briefing re: admissible corporate witness testimony and admissible business records with attachments. CP 370 at ¶¶ 9-10. Ultimately, it was Lock's counsel who introduced and had admitted corporate documents during the cross-examination of American Family's 30(b)(6) witness; documents she had initially objected to. *For e.g.*, A-46.
38	First, Mary Owens gave no new opinions nor issued any reports on remand. Moreover, there was no reason for testifying bad faith experts on remand given the Trial Court's predetermination of bad faith as a matter

	of law. Finally, Defendant agreed that its bad faith expert, Bill Hight, would not testify given that Mary Owens was not testifying. RP 871:10-13 and RP 57:5-9.
39	Once again, Lock mischaracterizes the Court's finding by omitting the relevant, operative language. "*[i]t maybes [sic] me uncomfortable because it's not a WPI. And I'm not saying that, you know, we always have to issue instructions that are WPIs, Ms. Sargent, but I think we have -- I think we can all agree we have to -- I have to exercise caution when I do that. And I don't think it's necessary. Okay, so I'm not going to do it*." *See* RP 953:20-25 & 954:1-4; *but cf.*, LOB's at pg. 49 (citing, RP 954:3-4).
40	Lock failed to present sufficient evidence to warrant a "lighting up" instruction. *See* RP 962:3-964:22; RP 965:13-966:14; and RP 969:3-13. Moreover, and over

	American Family's objections, the Trial Court adopted a modified version of Lock's instruction re: eggshell plaintiff. CP 8390 and CP 8413-8414 (jury instruction #10). The Trial Court erred in instructing the jury to presume lock had a preexisting condition when Lock failed to present any medical evidence or testimony. American Family also takes exception to and appeals the Trial Court's jury instruction #10, as read, because it presumes a preexisting condition and Lock failed to present any medical evidence or testimony as to any such preexisting injury/condition. CP 443, *but cf.*, CP 444; *see also,* CP 449 at 13:4-14:11 and CP 451 at 63:7-9.
41, 43	*See supra.*, ¶¶ 22-23 and ¶33.

42	Lock's statement is a mischaracterization of the record. In sum, Lock opened the door. CP 607-610:22; s*ee also*, ¶37, *supra*.
44	American Family admits that the jury issued a $40,000 verdict in favor of Lock. CP 7438. American Family denies that the jury found American Family had acted in bad faith. In fact, and over American Family's objection, the Trial Court erroneously took that question of fact from the jury's hands when it found that American Family acted in bad faith as a matter of law by sending the at-issue check and then *expressly instructed* the jury that, "[t]he Court has already determined that the Defendant, American Family Insurance Company, failed to act in good faith by sending the 3/30/17 check and letter directly to the Plaintiff. *This is not a question for the jury*." CP 8402-8416 at 8410.

45	*See* §II(F) at ¶1; *see also*, A-4 – A-11 and A-12 – A-19.
46	On 2/24/23, contrary to Lock's statement, American Family filed its reply briefing, refuting Lock's "evidence." CP 7545-7553 and CP 7554-7633. Nevertheless, the court denied American Family's Motion on 3/6/23. CP 7634. Also contrary to Lock's statement, American Family did not file another "renewed" motion for sanctions on 3/6/23.
47	Lock's ¶47 is disingenuous. *See generally,* 7635-7698. On 5/5/23, American Family made its Motion for Entry of Judgment requesting the court find and order that: (1) American Family paid the judgment amount within the 3/6/23 Order; (2) because the judgment was timely paid, no interest accrued; and (3) the Clerk to enter a satisfaction of judgment in this matter. CP 7635-7645 at 7635. Lock did not

	substantively oppose the underlying Motion and does not dispute that American Family attempted to have the check delivered at least three times *before* it was successfully delivered by mail. CP 7693. American Family mailed the check to Lock via her counsel on 3/21/23. *See* CP 8417-8426 (Affidavit of Mailing). Moreover, *Lock's counsel admits that she received American Family's check*. *See* 7693 (internal citation omitted) and CP 8427-8430; *see also*, 8417-8426. Nevertheless, Lock's counsel *inexplicably returned the check six weeks later*; "American Family's check was placed in an envelope and put in the mail on 5/8/23." *See* CP 8427-8428 and 8429; *see also*, A-22. *See* A-36- 39; CP 8431-8432; 1286-1287. *See* A-23-A-33; CP 7721-7722; and CP 7723-7724. American Family has satisfied the judgment.

COLE WATHEN LEID HALL P.C.

April 08, 2025 - 3:35 PM

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