

ORIGINAL

No. 68594-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RYAN E. MILLER, individually,

Respondent,

v.

PATRICK J. KENNY, individually,

Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,

Appellant.

2012 OCT 19 PM 2:03
STATE COURT

BRIEF OF APPELLANT SAFECO

Philip A. Talmadge, WSBA #6973
Randy A. Perry, WSBA #20680
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Timothy Parker, WSBA #8797
Emilia Sweeney, WSBA #23371
Jason Anderson, WSBA #30512
Carney Badley Spellman
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
Attorneys for Appellant
Safeco Ins. Co. of Illinois

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A. INTRODUCTION

This case demonstrates how an insurer can be “set up” for a bad faith claim. Too often, attorneys for claimants are not interested in actually settling their clients’ claims when they believe that the applicable liability insurance limits are low compared to the severity of the injuries at issue. Instead, they readily frustrate settlement efforts, looking to trap the insurer in the handling of the claim by manipulating events to set up the insurer for a bad faith action by the insured, an action their clients receive by assignment in the course of negotiating an inflated covenant judgment settlement. That is precisely what happened here.

The insurer, in this case, Safeco Insurance Company of Illinois (“Safeco”), was blamed for the lack of a settlement in the underlying case between driver/insured Patrick Kenny and his passengers, Ryan Miller, Ashley Bethards, and Cassandra Peterson. Safeco made a concerted effort to eliminate Kenny’s exposure. But Safeco was faced with paying all liability insurance to one of three injured claimants thereby leaving its insured with no coverage for the remaining two claims, or declining to pay the full limit to one of the three. It opted for the latter and was sued in bad faith for the failure to settle.

Settlement was frustrated at every turn by Ralph Brindley, Miller’s lawyer. The trial court, however, refused to allow any discovery regarding

Brindley's role in frustrating Safeco's settlement efforts on Miller's behalf and setting up Safeco for a bad faith action.

The trial court compounded this error in ruling despite this Court's earlier opinion in this same case, that Miller could present parol evidence to the jury that varied the terms of the written assignment of Kenny's claims to Miller and then refused to instruct the jury on the parol evidence rule.

The trial court treated Safeco unfairly at trial on a series of rulings that allowed Miller's counsel to paint Safeco in an entirely unfair light. It then exacerbated the unfair treatment of Safeco when it allowed Miller's trial counsel to engage in extraordinary misconduct and permitted Miller to recover damages in excess of the presumptive damages of the covenant judgment settlement.

Ultimately, Safeco was denied a fair trial. This Court should reverse the trial court's judgment on the jury's verdict, and remand the case for a new trial.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering the December 11, 2006 order denying Safeco's motion for partial summary judgment to establish that Cassandra Peterson's parents' UIM coverage limits were

\$100,000/\$300,000 and granting Miller's cross-motion for summary judgment establishing as a matter of law that the Petersons' UIM coverage limits on August 23, 2000 were \$500,000.

2. The trial court erred in entering the March 28, 2008 order quashing the deposition of Ralph Brindley.

3. The trial court erred in denying Safeco's motion to exclude evidence of damages exceeding the covenant judgment settlement amount.

4. The trial court erred in entering the November 4, 2011 order granting Miller's motion for partial summary judgment regarding the judgment rule.

5. The trial court erred in denying Safeco's motion in limine to exclude evidence of Safeco's loss reserves.

6. The trial court erred in permitting testimony and admitting evidence of the parties' unexpressed, subjective intent regarding the settlement agreement.

7. The trial court erred in refusing to give Safeco's proposed instruction number 6 on parol evidence.

8. The trial court erred in admitting, over Safeco's objection, deposition testimony of Safeco claims adjuster Maryle Tracy in an unrelated case.

9. The trial court erred in denying Safeco's motion to dismiss plaintiff's negligence claims.

10. The trial court erred in denying Safeco's motion to dismiss plaintiff's claim for damages premised on harm to Patrick Kenny's credit.

11. The trial court erred in denying Safeco's motion to dismiss plaintiff's breach of contract claims.

12. The trial court erred in giving instruction number 8 to the jury.

13. The trial court erred in giving instruction number 12 to the jury.

14. The trial court erred in giving instruction number 23 to the jury.

15. The trial court erred in giving instruction number 28 to the jury.

16. The trial court erred in giving instruction number 30 to the jury.

17. The trial court erred in entering the judgment on the jury's verdict on March 8, 2012.

18. The trial court erred in entering the order granting plaintiff's motion for attorney fees, costs, pre-judgment interest, and treble damages on March 8, 2012.

19. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 1.

20. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 2.

21. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 3.

22. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 4.

23. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 9.

24. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 10.

25. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 11.

26. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 12.

27. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 13.

28. Regarding the trial court's March 8, 2012 order on fees and costs, the court erred in entering finding of fact/conclusion of law number 14.

29. The trial court erred in entering the order denying Safeco's motion for a new trial entered on April 16, 2012.

30. The trial court erred in entering the order on post-judgment interest and supplemental attorney fees on June 14, 2012.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err by allowing the admission of subjective intent evidence to vary the terms of the Miller-Kenny settlement agreement and then refusing to instruct the jury on the parol evidence rule? (Assignments of Error Numbers 6, 7, 12, 17 and 29.)

2. Did the trial court abuse its discretion in refusing to allow Safeco discovery concerning the frustration of settlement efforts by Miller's attorney in the underlying personal injury action where Safeco's

alleged failure to settle was a basis for the bad faith action against it?
(Assignments of Error Numbers 2, 17 and 29.)

3. Did the trial court abuse its discretion in allowing the admission of evidence relating to Safeco's loss reserves? (Assignments of Error Numbers 5, 17 and 29.)

4. Did the trial court abuse its discretion in allowing the admission of evidence relating to the conduct of an adjuster in an unrelated case to establish liability against Safeco for bad faith when there was no nexus or evidence of similar conduct in the present case? (Assignments of Error Numbers 8, 17 and 29.)

5. Did the trial court err in determining that \$500,000 in UIM limits applied although the Petersons rejected those higher limits previously, but Safeco's recently acquired sister company renewed the insured's policy and the trial court treated the renewal policy as a new one? (Assignments of Error Numbers 1, 14, 15, 17 and 29.)

6. Did the trial court err in refusing to award a new trial for Miller's attorney's extensive misconduct during trial and in closing arguments? (Assignment of Error Number 29.)

7. Did the trial court err in allowing the jury in a covenant judgment settlement case to award damages in excess of that covenant

judgment settlement? (Assignments of Error Numbers 3, 4, 9-11, 13, 16, 17 and 29.)

8. Did the trial court err in applying a post-judgment 12% rate of interest instead of the tort judgment rate of RCW 4.56.110(3)(b)? (Assignment of Error Number 30.)

9. Did the trial court abuse its discretion in calculating Miller's fee award where it allowed attorney hourly rates far in excess of those charged in the community, failed to segregate unrecoverable hours, and allowed a multiplier on an already inflated lodestar? (Assignments of Error Numbers 18-30.)

C. STATEMENT OF THE CASE

On August 23, 2000, Patrick Kenny rear-ended a truck in Alberta, Canada. CP 5829, 5873. The collision injured his three passengers: Ryan Miller, Ashley Bethards, and Cassandra Peterson. CP 5828-29.¹ Kenny was driving Peterson's parents' car with their permission. CP 5829. Kenny admitted responsibility for the accident and the injuries and damages sustained by the passengers. *Id.*

¹ The four teenagers had been high school friends in Anacortes, Washington and were taking a road trip together before starting college. CP 5829, 5874.

Safeco extended liability insurance coverage to Kenny as a permissive user of the Petersons' car. *Id.*² Safeco also defended Kenny without a reservation of rights. RP (12-14-11) at 72.

The passengers' diagnoses and future treatment were uncertain and Miller's father, a doctor, and Bethard's mother, a nurse, wanted to see how their children recovered. CP 5862-63; RP (12-12-11) at 196, 202. It was two years before they all submitted settlement demands on Safeco. *See, e.g.*, CP 5856-69 (Miller), 5873-83 (Peterson), 5884-87 (Bethards). Attorney Ralph Brindley³ contacted Safeco on Miller's behalf in November 2001, asking how much insurance the Petersons had, but acknowledging that it would be some time before Miller's injuries would be stable and he would be ready to settle. CP 5844. Brindley demanded that Safeco disclose the Petersons' liability policy limits applicable to Kenny. CP 5844, 5846. When Safeco did not disclose the limits, Brindley threatened to sue Kenny, CP 5846, 5852, and filed suit against Kenny on Miller's behalf on December 20, 2001 in the Skagit County Superior Court. CP 1158-60, 5852. Safeco contemporaneously sought the

² The applicable liability limits of the Peterson's policy was \$500,000 automobile liability and \$1 million umbrella liability. CP 5869-79. In addition, Kenny had \$100,000/\$300,000 liability coverage under his parents' State Farm insurance policy. CP 5870.

³ Brindley is a partner of David Beninger who tried the case below on behalf of Miller. *See, e.g.*, CP 5844.

Petersons' permission to disclose their limits, and then disclosed the applicable limits. CP 5848-50. Brindley filed suit against Kenny on December 20, 2001. CP 5852. Brindley did not dismiss the suit after learning of the limits. CP 5830.

On July 1, 2002, Brindley demanded that Safeco pay Miller *all* of the insurance limits, to the exclusion of the other claimants, and unilaterally set a 30-day deadline for Safeco's response to that demand. CP 5856-71. Safeco adjuster Jamie Bowman wrote to Brindley before the 30-day deadline proposing mediation with all parties once all attorneys had submitted proposed settlement packages.⁴ CP 5889. Brindley

⁴ On July 24, 2002, Bowman wrote to the attorneys representing each of the passengers. CP 5889. The letter stated in relevant part:

This letter is to update you on the status of this case. To date we have received settlement packages from Mr. Wolff (Cassandra Peterson) and Mr. Brindley (Ryan Miller). I am in the process of reviewing these demands but will not be able to evaluate these cases until I have Mr. Barlow's settlement package for Ashley Bethards. I spoke with Mr. Barlow on 7-19-02 and he informed me that he would get me his settlement package very shortly.

Once we have had a chance to review all three of the settlement packages we would like to attempt settlement. Because of the amount of parties involved in this loss it, is my suggestion that we move this case to mediation once all parties have had the opportunity to review all of the relevant material. Please contact me if you are agreeable to this course of action.

CP 5889. In September 2002, Safeco tendered the \$500,000 automobile liability limits to Kenny's attorney for placement in trust pending settlement. CP 5893. Kenny's insurance defense counsel, Vicki Norris, offered the \$500,000 to the claimants without condition pending receipt of final diagnoses and prognoses. CP 5984, 6015. Safeco did not receive all the records and information needed for final evaluation of the claims until

declined and repeated his demand that all of Safeco's policy limits be paid exclusively to Miller by August 1, 2002. CP 5891. *See also*, CP 3664, 3666, 3668, 3673. He threatened to sue Safeco via assignment of a bad faith claim from Kenny. CP 5891.

In May 2003, the passengers entered into a settlement agreement with Kenny, granting him a covenant not to execute on a judgment in exchange for the policy proceeds, subject to later determination of the claimants' total damages ("covenant judgment settlement"). CP 5828-38. In order to prevent harm to Kenny's credit rating, all parties to the settlement agreement agreed to consider "alternatives to formal entry of judgment." CP 5833. Pursuant to the settlement, Kenny and Peterson assigned their extra-contractual rights to Miller.⁵ CP 5056, 5831. However, Kenny retained his claims for his personal emotional distress, attorney fees, damage to credit or reputation, and other non-economic damages⁶ and agreed to cooperate with Miller in pursuing claims against

March 2003; and it tendered the full policy limits for division among the claimants at that time. CP 5984-86.

⁵ Only the assigned claims of Kenny and Cassandra Peterson are at issue in this lawsuit. *See* CP 5056.

⁶ The agreement stated:

Defendant Kenny hereby reserves to himself claims for damages for his personal emotional distress, personal attorneys' fees, personal damages to his credit or reputation and other non-economic damages which arise from the assigned causes of action.

Safeco. CP 5831-32. Brindley and Beninger negotiated the covenant judgment settlement on behalf of Miller while attorney Jan Peterson represented Kenny. CP 5835, 5838.

Safeco intervened in the action to participate in a reasonableness hearing. CP 5898, 5903. Such a hearing became unnecessary when Safeco and Miller agreed that the settlement amounts established by the claimants were reasonable. CP 5898-900. The parties avoided entering judgment against Kenny by agreeing to treat the stipulated net settlement amounts as if judgment had been entered in those amounts. CP 5898.⁷

CP 5831. Miller and Kenny were, in effect, joint venturers. In *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 595-96, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010), it was just such a "joint venture" relationship between the insured and the plaintiff in which the plaintiff agreed to kick back some settlement proceeds to the insured that resulted in a finding of collusion, affirmed by the Court of Appeals.

⁷ That stipulation, which predated the Court of Appeals decision in *Water's Edge*, provided:

<u>Claimant</u>	<u>Gross Amount</u>	<u>Net Amount</u>
Miller	\$3,450,000	\$2,575,000
Bethards	\$2,100,000	\$1,425,000
Peterson	\$400,000	\$150,000

CP 5898. The "gross amount" represents the total covenant judgment amount for each claimant, while the "net amount" represents the outstanding judgment after apportioned insurance payments are applied. Safeco's counsel signed the stipulated order, and Miller's counsel signed it as "Attorneys for Miller and Assignees of Kenny, Bethards, and Petersons claims." CP 5900. In accordance with the agreement, Safeco paid the insurance proceeds and no judgment was entered against Kenny. *See* CP 5898 (The parties agreed to treat the stipulated amount "as though judgment in those amounts had been entered against . . . Kenny.").

The trial court entered the stipulated order regarding the reasonableness of settlements in May 2005. CP 5898-5900.

In June 2005, Miller amended his complaint, dropping all claims against Kenny and alleging bad faith against Safeco as assignee of Kenny's and Peterson's claims. CP 5902-06. Miller's amended complaint pleaded causes of action against Safeco for negligence, bad faith, Consumer Protection Act ("CPA") violations, breach of contract, breach of fiduciary duty, and breach of regulatory/statutory requirements. CP 5904-05. That complaint stated that the claims are brought by "Patrick Kenny, by and through Ryan Miller as assignee and individually," and specifically alleged, "The injuries and damages to assignor Patrick Kenny were sustained as a direct result of the conduct of Safeco Insurance Company in its failure to disclose the underlying liability policy limits thereby forcing a lawsuit to be initiated, and in the investigation, evaluation, negotiation, handling, settlement, indemnity, and/or adjustment of the claims arising from the automobile collision and injuries complained about herein." CP 5902-04. In April 2006, Miller filed a second amended complaint and cross claims against Safeco. CP 6485. That second complaint was brought by Miller "as assignee and individually." CP 6485. Kenny remained a named defendant in the first and second amended complaints, which sought "an award of all economic,

noneconomic, compensatory and exemplary damages” resulting from Safeco’s conduct. CP 5905, 6489.

Safeco deposed John Barlow and Monte Wolff, the attorneys who represented Bethards and Peterson, respectively, during the claim adjustment process and in the settlement negotiations.⁸ CP 5836-37, 5924-98 (Barlow), 6000-31 (Wolff). Barlow and Wolff testified that Brindley had been the driving force in the settlement negotiations. CP 5960, 5962-63, 5968-70, 5972, 5974-75, 5985, 6014. They testified that Brindley insisted that all extra-contractual rights be assigned to Miller, and that Brindley used Miller’s impending trial date as leverage to secure settlement terms favorable to Miller. CP 5977-80.

In February 2007, Safeco sent a notice of deposition to Brindley and served a subpoena duces tecum for “[a]ll documents relating to or arising from the *Miller v. Kenny* litigation that predate the intervention of Safeco Insurance Company of Illinois, including but not limited to correspondence (emails and otherwise), memoranda, memorializations of conversations, and discovery responses (this does not include depositions or unanswered discovery requests).” CP 6036. The trial court, the

⁸ The Barlow and Wolff depositions were not offered at trial, *see* RP (12-13-11) at 136, 138, 193, but were appendices to the Declaration of Jason Anderson in Support of Safeco’s Motion for New Trial. *See* CP 5769 Ex. P (CP 5923-98) and Ex. Q (CP 5999-6031).

Honorable David Needy of the Skagit County Superior Court, quashed the deposition notice and subpoena, precluding Safeco from deposing Brindley unless Miller notified Safeco 60 days before trial that Brindley would be a trial witness for Miller. CP 6038. Safeco never had the opportunity to depose Brindley to discover evidence and information in support of its defense.⁹

Safeco moved for summary judgment on the basis that the reservation provision of the settlement agreement reserved to Kenny the claims for damages arising from the assigned causes of action, depriving Miller of the ability to prove the essential element of harm: “An assignee is not entitled to a presumption of harm from a covenant judgment where the assignor retained the predicate claims for harm, i.e., claims for personal emotional distress, personal attorney’s fees, personal damages to his credit or reputation [or] other noneconomic damages.” CP 2256 (internal quotation marks omitted). The trial court, the Honorable Michael Rickert, denied summary judgment but certified the issue for immediate appeal. CP 6041-45. In an unpublished opinion, this Court ruled that interpretation of the assignment and reservation provisions was a question of fact based on disputed extrinsic evidence, but that the admissible

⁹ Beninger put Brindley on his witness list right before trial. Safeco objected because it violated Judge Needy’s order. Judge Rickert enforced that order and did not allow Beninger to belatedly call Brindley as a witness. CP 4960-65.

extrinsic evidence could not include evidence of the parties' unilateral, subjective intent. *Miller v. Kenny*, 2010 WL 4923873 at *7 n.17 (2010) ("*Miller I*").

Upon remand, the case was assigned to Judge Rickert. The trial court bifurcated treatment of the assignment and the principal liability issues. RP (11-22-11) at 55. The assignment issue was tried in Phase I. *See* RP (11-30-1, 12-1-11, 12-2-11). Over Safeco's objections, the trial court admitted evidence of the parties' unilateral, subjective intent,¹⁰ and refused to give the WPI instruction, proposed by Safeco, on the parol evidence rule, which would have directed the jury not to consider extrinsic evidence to add terms to an integrated agreement or to add any terms that contradicted the writing. RP (12-2-11) at 61-62; CP 6140-41, 6164. In Phase I, the jury returned a verdict that Miller was entitled to pursue the claims here. RP (12-2-11) at 110-11; CP 5051.

In Phase II, Miller moved for partial summary judgment arguing that the settlement amounts were a floor, but not a ceiling, and that he could recover additional damages, including damage to Kenny's credit rating (from a judgment that was never entered), and for Kenny's and Peterson's emotional distress. CP 3468-77. The trial court granted Miller

¹⁰ *See* RP (11-30-11) at 82, 90-93; RP (12-1-11) at 148-49; CP 6130, 6132-35, 6139.

summary judgment on that issue and denied Safeco's motion to exclude evidence of damage exceeding the covenant judgment settlement amount. CP 6048, CP 4232-33.¹¹

The jury returned a verdict of \$13 million, including \$9.65 million on Kenny's assigned bad faith claim, even though the covenant judgment settlement amount was only \$4.15 million. CP 5898, 6052-54. The jury awarded \$350,000 on Peterson's assigned bad faith claim. CP 6052. In addition, the jury awarded \$750,000 to Miller for each of Kenny's assigned CPA, negligence, and contract claims, and \$250,000 to Miller for each of Peterson's assigned CPA, negligence, and contract claims. CP 6053-54.

On March 8, 2012, the trial court entered a judgment on the jury's verdict as well as an order granting fees and pre-judgment interest. CP 5698. The same day, the trial court awarded Miller attorney fees and costs of more than \$1.7 million, treble damages of \$20,000, and pre-judgment interest of \$7.1 million. CP 5698-5700. The judgment totaled \$21,837,286.73. *Id.*

Safeco moved for a new trial. CP 6159-98. In the meanwhile, Safeco filed its timely appeal to this Court. CP 6199.¹² On April 16,

¹¹ Miller thus was allowed to present evidence of damages already encompassed by the covenant judgment settlement.

2012, the trial court denied Safeco's motion for a new trial. CP 6429-30. The parties addressed a final issue, the rate of post-judgment interest. RP (6-14-12) at 2-13. On June 14, 2012, the trial court entered orders applying 12% as the rate of post-judgment interest and making a supplemental fee award. RP (6-14-12) at 13; Supplemental CP ___ (Sub. nos. 750, 757).

D. SUMMARY OF ARGUMENT

The trial court erred in allowing Miller in Phase I to vary the terms of the assignment agreement by parol evidence and refusing to instruct the jury on parol evidence.

The trial court did not allow Safeco a fair trial in either Phase I or II. Safeco defended Kenny without a reservation of rights and would have paid the claimant passengers Kenny's applicable policy limits but for the insistence of Miller's counsel that Miller receive *all* of the insurance proceeds without consideration for the other two passengers. Ultimately, all of the passenger's claims and Miller's claims were prosecuted by the same firm whose conduct prevented mediation and resolution of the case.

¹² Miller filed a notice of cross-appeal on May 7, 2012. Suppl. CP ___ (Sub no. 720). Both parties have filed amended notices as to the trial court's posttrial decisions. CP 6430; Suppl. CP ___ (Sub. nos. 752, 754). Safeco filed a designation of supplemental clerk's papers with this Court on October 17, 2012.

The trial court, however, prevented Safeco from any discovery on that firm's role in preventing settlement.

The court allowed the testimony of a Safeco adjuster in another action (coincidentally, and confusingly, also concerning an insured named Peterson) regarding interrogatories she had changed to be used to improperly impeach her testimony in this case.

The court permitted Miller to recover on Cassandra Peterson's assigned uninsured/underinsured motorist ("UIM") coverage claim where Peterson's parents renewed coverage with Safeco with \$100,000, not \$500,000 limits, concluding as a matter of law that the higher limits applied. That error was used by Miller to assert a bad faith claim for misrepresentation against Safeco.

Further, the trial court allowed Miller's counsel to engage in misconduct, essentially acting as a witness in his interrogation of witnesses, and to make improper closing argument to the jury.

The trial court's decisions on damages, allowing the recovery of both the so-called presumptive damages derived from a covenant judgment settlement in a bad faith action *and* an array of extra-contractual damages, is unsupported in Washington law. The trial court, in effect, allowed the recovery of duplicative damages.

The trial court erred in applying the contract, rather than tort, judgment interest rate the judgment.

The trial court's excessive award of attorney fees to Miller in connection with the CPA claims was inconsistent with the proper calculation of a lodestar fee under Washington law because it employed excessive hourly rates, did not segregate wasteful and duplicative hours or hours spent on theories where fees were not available, and permitted a multiplier of the lodestar fee.

E. ARGUMENT¹³

(1) The Trial Court Erred in Its Handling of Issues Pertaining to Any Liability Owed by Safeco to Miller

(a) The Trial Court Improperly Allowed Miller to Present Evidence to Vary the Terms of the Settlement Agreement

The trial court abused its discretion by admitting evidence of the unilateral, subjective intent of the parties to the covenant judgment settlement and erred in its failure to give the WPI instruction proposed by Safeco on the parol evidence rule.¹⁴ The trial court ignored this Court's

¹³ Given the number of significant issues present in this appeal, Safeco has grouped the issues by liability, damages, and attorney fees/costs. The standard of review for the issues will be addressed issue-by-issue. The Court should not assume that Safeco is suggesting that any issue is stronger merely because it is presented earlier in the Argument section.

¹⁴ The trial court's decision to admit evidence is reviewed for abuse of discretion. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011),

application of the rule applied in *Miller I* that evidence of the parties' unilateral, subjective intent was inadmissible. *Miller I* at *7 n.17.

- (i) Parol evidence on the parties' intent regarding the settlement agreement was inadmissible

Washington contract law forbids the admission of parol evidence such as evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, evidence that would show an intention independent of the instrument, or evidence that would vary, contradict or modify the written word. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

This Court in *Miller I* applied the context rule, recognizing that "extrinsic evidence cannot be used 'to establish a party's unilateral or

review denied, 173 Wn.2d 1029 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.*

Also, whether to give a particular jury instruction is within the trial court's discretion, but alleged errors of law in jury instructions are reviewed de novo. *Boeing Co. v. Key*, 101 Wn. App. 629, 632, 5 P.3d 16 (2000), *review denied*, 142 Wn.2d 1017 (2001). While the trial court need not include specific language in a jury instruction, the instructions as a whole must correctly state the law. *Id.* Jury instructions are sufficient if they (1) permit each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Id.* Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *Id.* at 266-67. And, as with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be reversible error where it prejudices a party. *Id.* at 267.

subjective intent as to the meaning of a contract work or terms.” *Miller*, at *7 n.17. The Court held that the meaning of the settlement agreement’s assignment and reservation provisions depended in part on disputed extrinsic evidence – not of the contracting parties’ unilateral, subjective intentions, but of the circumstances under which the settlement agreement was executed and the parties’ conduct pursuant to the agreement. *Id.* at *7.

While Washington law permits the limited admission of “context evidence” to explain the background to the execution of the contract, such limited evidence may not contradict the written terms of the contract. As our Supreme Court stated in *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005):

We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written.

Id. at 503-04 (citations omitted).

The parol evidence rule restricts attempts to add unwritten terms to an integrated writing. If an agreement is fully integrated, extrinsic evidence is not admissible “to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.” *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990) (internal quotation marks and citation omitted); *see also*, WPI 301.06. The contract here is fully integrated.¹⁵

The principal purpose of the parol evidence rule is to protect the integrity of written contracts. *City Nat’l Bank of Anchorage v. Molitor*, 63 Wn.2d 737, 747, 388 P.2d 936 (1964). It is not a rule of evidence but one of substantive law, under which the act of embodying the complete terms of an agreement in a writing creates the complete contract of the parties. *Id.* By prohibiting evidence of parol agreements, the rule seeks to ensure the stability, predictability, and enforceability of finalized written instruments. *Id.*

¹⁵ Although the covenant judgment settlement did not contain a separate integration clause, its express purpose was to end the current litigation and to protect Kenny’s assets. CP 5828-29. To that end, the parties agreed to have “the full amount of damages/judgments for each of the plaintiffs’ claims” be determined as set forth in the agreement. CP 5832. The plaintiffs also covenanted not to execute any judgment against Kenny’s personal assets, and agreed to entry of “full satisfaction of judgments” under terms specified. CP 5833. Clearly, the covenant judgment settlement was “a writing intended as a final expression of the terms of the [parties’] agreement,” and thus qualified as an “integrated agreement” for purposes of the parol evidence rule. *See Berg*, 115 Wn.2d at 670.

In sum, extrinsic evidence regarding the circumstances under which a contract was made is admissible to aid in interpretation, but evidence of a party's unilateral, subjective intent is never admissible. Extrinsic evidence is admissible to supply additional terms only if the agreement is not fully integrated, and then only if the additional terms are consistent with the writing. Extrinsic evidence is never admissible to vary, contradict, or modify the written agreement.

The issue in Phase I was whether Kenny intended to assign his rights to claim damages to Miller or if he meant to retain these damages for himself. If the jury found that Kenny retained them for himself then the assignment would have been invalid as it would have been incomplete.

Over Safeco's objections, Kenny's attorney, Jan Peterson, was allowed to *repeatedly* answer the questions regarding his *subjective intent* with regard to the assignment, reservation, and related provisions of the settlement agreement. RP (11-30-11) at 82, 90-93. The trial court overruled Safeco's objections to these and similar questions by David Beninger, Miller's attorney. *Id.* at 82, 90, 92.

In addition, the trial court allowed Beninger, over Safeco's objection, to question Kenny regarding what he "expected to occur with the settlement agreement," *i.e.*, his unilateral, subjective intent. RP (12-1-11) at 148-49. There is no practical difference between Kenny's

expectation of how the contract would be performed and his intent regarding its terms. A contracting party expects his intent to be carried out.

Kenny answered the question regarding “what he expected to occur” by testifying that he expected to receive a share of Miller’s recovery. *Id.* at 149. Similarly, Jan Peterson was allowed to testify over Safeco’s objection, “[W]e were attempting to preserve to Mr. Kenny some claims to damages that were personal to him, should they be recovered by Mr. Miller and the plaintiffs in any subsequent action.” RP (11-30-11) at 93. This testimony was evidence of a party’s “unilateral or subjective intent as to the meaning of a contract word or term.” *Hollis*, 137 Wn.2d at 695; *see also*, *Miller*, 2010 WL 4923873 at *7 n.17. It was inadmissible.

Furthermore, the testimony that Kenny expected to share in Miller’s recovery was evidence that “would show an intention independent of the instrument” and “would vary, contradict or modify the written word.” *Hollis*, 137 Wn.2d at 695. The testimony not only read a nonexistent term into the settlement agreement, it directly contradicted the reservation provision, which stated that Kenny “reserve[d] to himself *claims* for damages ... which arise from the assigned causes of action.” CP 5831 (emphasis added). Where Kenny reserved to himself the “claims

for damages,” Miller had no right to pursue or recover on those claims, and there could not be a recovery by Miller in which Kenny would share.

The admission of this evidence was prejudicial error because the jury, in interpreting the covenant judgment settlement, was permitted to consider evidence of unilateral, subjective intent and evidence that contradicted the settlement agreement. The jury decided, consistent with the erroneously admitted extrinsic evidence, that Miller had the exclusive right to pursue Kenny’s claims under the covenant judgment settlement notwithstanding the reservation provision. Absent the improper extrinsic evidence, the jury could only have concluded that Kenny reserved to himself, and did not assign to Miller, the claims for damages that were necessary to prove harm, an essential element of all claims against Safeco. Miller admitted that was the plain meaning of the reservation clause. RP (12-1-11) at 137. Thus, Miller could not prove the essential element of harm.

(ii) The trial court erred in refusing to instruct the jury on the parol evidence rule

The trial court’s evidentiary error was compounded by its refusal to instruct the jury on the parol evidence rule. Safeco proposed, with appropriate modifications, WPI 301.06 regarding the parol evidence rule. CP 6064. Initially, the trial court included that instruction in the set it was

prepared to give the jury as Court's Instruction Number 6. But the Court decided moments before closing arguments to pull it from the set, stating only: "I think it's confusing. I don't think it applies." RP (12-2-11) at 61.

As noted *supra*, jury instructions must allow each party to argue its theory of the case and must not mislead the jury or misstate the applicable law. *Barrett*, 152 Wn.2d at 266 (reversing jury verdict where instructions misstated the law and misled the jury). "Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error." *Id.* at 266-67. Similarly, "a court's omission of a proposed statement of the governing law will be reversible error where it prejudices a party." *Id.* at 267 (internal quotation marks and citation omitted).

It was error not to give Instruction Number 6, a correct statement of the law based on a WPI. Although testimony regarding subjective intent should have been excluded, an instruction at least would have directed the jury, under the parol evidence rule, not to consider such evidence to contradict the terms of the covenant judgment settlement. Moreover, the instruction would have allowed Safeco to argue to the jury, consistent with the parol evidence rule, that it must not consider extrinsic evidence that would add to, subtract from, vary, or contradict an integrated

writing. Integration itself was a question for the jury, but the omission of the instruction precluded Safeco from arguing integration.

The omission of Instruction Number 6 prejudiced Safeco by allowing the jury to consider extrinsic evidence for the purpose of changing or adding terms to the settlement agreement, regardless of whether the agreement was integrated. Moreover, the additional term that Kenny would share in Miller's recovery contradicted the covenant judgment settlement because Kenny reserved to himself the claims for damages. The jury decided, consistent with the extrinsic evidence, that Miller had the exclusive right to pursue all of Kenny's claims notwithstanding the reservation provision. This was reversible error, particularly in light of *Miller I*.

(b) The Trial Court Erred in Denying Safeco the Opportunity to Depose Ralph Brindley¹⁶

The trial court erred in entering its order granting Miller's motion to quash the deposition of Ralph Brindley. CP 1163-64. Safeco was entitled to depose Brindley and to review his file relating to settlement.

¹⁶ This Court reviews the trial court's alleged error regarding its discovery decisions for abuse of discretion. *City of Lakewood v. Koenig*, 160 Wn. App. 883, 892, 250 P.3d 113 (2011); *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 191 P.3d 900 (2008), *review denied*, 165 Wn.2d 1033 (2009) (trial court's decision to limit discovery reviewed for abuse of discretion).

As Miller's attorney in the underlying personal injury action, Brindley was a participant in the claim adjustment and negotiation process in which Safeco was later alleged to have acted in bad faith.¹⁷ Indeed, Miller's allegations of bad faith against Safeco *were based on Safeco adjuster Jamie Bowman's interactions with Brindley*. Brindley initially requested that Safeco disclose the applicable policy limits, threatened to sue Kenny if Safeco did not disclose them immediately, and then filed suit against Kenny while Safeco attempted to obtain the Petersons' permission to disclose their limits. Unlike the other passengers' attorneys, Brindley rebuffed Safeco's attempts to facilitate mediation. *See* CP 3664, 3666, 3668, 3673, 5889, 5891. Brindley also made the draconian demand that Safeco pay all of the applicable policy proceeds to Miller, to the exclusion of the other injured passengers. Brindley was the driving force behind the assignment of Kenny's and Cassandra Peterson's rights to Miller. He negotiated the terms of the settlement agreement with the other claimants' attorneys and with Kenny's attorney, Jan Peterson.

The relevant information in Brindley's file and personal knowledge included at least (1) the rationale behind his negotiation tactics,

¹⁷ This issue has an added ethical dimension. *See* RPC 3.7 (relating to lawyer as witness). *See also, Am. States Ins. Co. v. Nammathao*, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009) (while an attorney can be removed from the litigation when he or she is a necessary witness, the trial court must make findings).

including whether he demanded all the insurance proceeds for Miller in good faith or did so merely to support a later claim that Safeco acted in bad faith; (2) his intent and understanding regarding the meaning of the reservation of claims provision, and (3) whether discovering the policy limits was his sole motivation to sue Kenny, or whether it was primarily to assume the advantageous position of having a trial date ahead of the other claimants. Safeco deposed and obtained discovery from the other claimants' attorneys regarding the same crucial topics.¹⁸

Recognizing that *discovery*, not the admissibility of evidence is at issue here, the trial court's blanket rule was extremely prejudicial to Safeco's defense.¹⁹ Brindley's testimony was vital to Safeco's defense of

¹⁸ Attorney-client privilege does not apply to this information. *Utica Mut. Ins. Co. v. Lifequotes of Am., Inc.*, 2011 WL 611667 at *5 (E.D. Wash. 2011) (“[Claimant’s attorneys] clearly [have] relevant and non-privileged information that is crucial to [insurer’s] case preparation.”); *Meritplan Ins. Co. v. Superior Court*, 177 Cal. Rptr. 236, 239 (Cal. App. 1981) (“We can conceive of many relevant questions which would not violate the privilege.”); *Fireman’s Fund Ins. Co. v. Superior Court*, 72 Cal.App.3d 786, 790, 140 Cal. Rptr. 677, 679 (1977) (“[W]e think the facts fall outside attorney-client privilege, and outside the work product rule, and the deposition of the attorney may be taken, subject to all proper objections.”). Moreover, even if applicable, the privilege may have been waived. *Am. Reliance Ins. Co. v. Nat’l Gen. Ins. Co.*, 149 A.D.2d 554, 539 N.Y.S. 2d 1004 (1989) (privilege was waived in a case where the defendant insurer in a bad faith action sought to depose the attorney who represented the plaintiff in the underlying action, where plaintiff affirmatively placed in issue its attorney’s knowledge of facts or communications which might tend to prove bad faith by the insurer). Even if privilege applied as to some issues, the trial court could have ordered production of the nonprivileged portions of Brindley’s file. See *Fireman’s Fund*, 72 Cal. App. 3d at 790 (deposition of attorney may be taken subject to all proper objections).

¹⁹ In the usual covenant judgment case, unlike this one where the parties agreed on reasonableness, the reasonableness of any settlement is adjudged by the *Glover* factors. See *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717-18, 658 P.2d 1230 (1983). One of those factors is the absence of fraud or collusion. To rebut the settlement

the bad faith claim because Safeco's refusal to disclose the policy limits immediately and to accede to Brindley's policy limits demand were the cornerstones of Miller's bad faith action. Because Brindley represented Miller in negotiating the covenant judgment settlement, the information was also crucial to Safeco's defense discussed *supra* that Kenny reserved claims to himself and thus failed to convey the claims to Miller.

This lack of discovery deprived Safeco of key evidence on bad faith because Miller explored Brindley's role in the settlement process *extensively* at trial. Beninger took advantage of the trial court's ruling and asked *numerous* questions about Brindley's actions of Kenny's attorney, Jan Peterson. Peterson testified that Brindley sued Kenny strictly to discover the policy limits. CP 6125-29, 6131. This was obviously untrue where Brindley continued to press claims after Safeco disclosed the limits. CP 3034, 5830. Peterson further testified to Brindley's negotiation tactics and settlement posture and whether he was "being greedy" when he demanded all the insurance proceeds for Miller. CP 6136-37. Peterson testified on his own recollection and state of mind regarding whether Safeco was willing to mediate. RP (11-30-11) at 55; CP 6121. Kenny and

as the insured's presumptive damages in a subsequent bad faith action, the insurer is entitled to present evidence of fraud or collusion. The proof of such activities will be rendered virtually impossible by any ruling supporting the trial court's analysis as the person taking the lead on any collusion will be effectively exempted from testifying or even producing relevant documents.

Peterson were also allowed to testify, over Safeco's objections, regarding their unilateral, subjective intent in agreeing to the reservation and other provisions in the covenant judgment settlement.

In Washington, parties have a right to discovery, a right which is constitutionally based. *Doe v. Puget Sd. Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (plaintiff has a right of access to the courts and in the civil context that right includes discovery); *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense); *Lowy v. PeaceHealth*, 174 Wn.2d 769, 772, 280 P.3d 1078 (2012) (policy favoring open discovery requires that privileges in derogation of the common law must be narrowly construed). The right to access to the courts includes the right of discovery authorized by the civil rules because "extensive" discovery is necessary to allow a defendant to pursue its defenses. The trial court's ruling tied Safeco's hands while it allowed Miller to openly pursue the *very same issue* without affording Safeco the opportunity to explore and present evidence on the issue from Brindley, the key witness on Miller's settlement efforts.

The trial court apparently concluded that opposing counsel may not be subject to discovery except in limited circumstances, based on

Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986),²⁰ an Eighth Circuit case severely limiting the ability of a party to depose opposing counsel.²¹

Washington has never adopted *Shelton's* restrictive test for deposing counsel. Even assuming it applied, discovery should have been allowed because Miller's personal injury action against Kenny was concluded long before April 2007, when Safeco sought to depose Brindley. *See Pamida*, 281 F.3d at 730. Miller and the other accident claimants executed the covenant judgment settlement in May 2003, 4 years earlier. Kenny had the benefit of a covenant not to execute any judgment that might be entered against him. *See Maguire v. Teuber*, 120 Wn. App. 393, 396, 85 P.3d 939, *review denied*, 152 Wn.2d 1026 (2004) (holding that a covenant not to execute has the same effect as a release). In June 2005, Miller formally ended his case against Kenny by filing an amended complaint that dropped all claims against Kenny and asserted claims only against Safeco. CP 3033-37.

²⁰ Miller's motion to quash Brindley's deposition argued *Shelton*. CP 601.

²¹ The Eighth Circuit clarified in a subsequent decision that the *Shelton* test applies only where a party seeks to depose opposing counsel regarding a *pending* case, not a *concluded* case. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002).

Shelton is not the rule in Washington,²² given the constitutional dimension to discovery under our case law. *Nothing* in the applicable civil rules exempts an attorney from discovery.²³

Courts in other jurisdictions have held that an insurer in a bad faith case is entitled to discovery from the attorney who represented the claimant in the underlying action. *See, e.g., Meritplan Ins. Co. v. Superior Court*, 177 Cal. Rptr. 236, 239-42 (Cal. App. 1981) (defendant insurer sought to depose the attorney who negotiated on behalf of the claimant in the underlying action and had made a settlement demand that the insurer rejected; vacating a protective order, court held that the insurer was entitled to the deposition because the circumstances of the various negotiations and communications between the involved individuals are plainly relevant to assessing the bad faith question); *Utica Mut. Ins. Co. v. Lifequotes of Am., Inc.*, 2011 WL 611667 at *5 (E.D. Wash. 2011) (defendant insurer entitled to depose attorneys who negotiated on behalf of

²² *Shelton* is mentioned in only one Washington case in a concurring opinion. *See Matter of Firestorm* 1991, 129 Wn.2d 130, 164, 916 P.2d 411 (1996) (Madsen, J., concurring).

²³ “[A]ny party may take the testimony of any person, including a party, by deposition upon oral examination.” CR 30(a). Leave of court is required only where the plaintiff seeks a deposition within 30 days of serving the summons and complaint. *Id.* The scope of a deposition is subject only to the limitations of CR 26(b). CR 26(b)(1) provides that a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other

claimants in underlying action); *Am. Reliance Ins. Co. v. Nat'l Gen. Ins. Co.*, 149 A.D.2d 554, 539 N.Y.S. 2d 1004 (1989) (same); *Fireman's Fund Ins. Co. v. Superior Court*, 72 Cal.App.3d 786, 790, 140 Cal. Rptr. 677, 679 (1977) (attorney's status as the principal negotiator for the claimant in the underlying action qualified as "extremely good cause" for deposition by insurer in bad faith claim).

Neither Safeco, nor this Court, can know what such plainly relevant evidence would have disclosed about Brindley's role in frustrating settlement and possibly setting Safeco up for a bad faith action. This Court should therefore presume that Safeco was prejudiced by the denial of an opportunity to depose Brindley and discover his file.²⁴

(c) The Trial Court Should Not Have Admitted Evidence of Safeco's Loss Reserve

A further example of the trial court's unfair treatment of Safeco was its denial of Safeco's motion in limine to exclude evidence regarding its loss reserves. RP (11-22-11) at 96-97. This decision was particularly prejudicial to Safeco because Miller insisted at trial that Safeco's reserves

party." A party may obtain discovery of materials from any person by subpoena under CR 45.

²⁴ Where relevant and material information was wrongfully withheld or denied in discovery, a new trial is required precisely because the court cannot know what impact the evidence would have had on the outcome of the trial. *Cf. Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984), *affirmed*, 104 Wn.2d 613, 707 P.2d 685 (1985) (ordering a new trial because the impact full disclosure in response to discovery requests would have on the outcome could not be known).

at policy limits for all of the claims were evidence of Safeco's bad faith. *See, e.g.*, RP (12-15-11) at 112. Such evidence was not relevant under ER 401, but, even if it was relevant, its probative value was outweighed by its prejudicial, confusing, or misleading effect. ER 403.

Reserves are statutorily-required "estimate[s]" of the amounts needed to pay, adjust, or settle losses and claims in the future. RCW 48.12.030(2), .090. These estimates are used in determining an insurer's financial condition, to ensure its financial stability. *See* RCW 48.12.030(2). A reserve is required to assure that an insurer's financial statements reflect potential future liabilities and "to preserve financial stability given the unpredictability of future liabilities." *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1191 (Colo. 2002). Numerous considerations relate to compliance with the statutory directive. Loss reserves must reflect not only the potential liability under the policy but all potential costs of adjusting the claim, including attorney fees and litigation expenses. RCW 48.12.090(1), .140; *Silva*, 47 P.3d at 1189. Accordingly, "[r]eserve amounts are only partially within the insurer's control." *Silva*, 47 P.3d at 1189. Especially in the early stages of a claim, the loss reserve is a bare estimate of the insurer's potential liability due to the limited, and often undocumented, facts known at that point by the insurer about the claim.

A common misconception, and one that Beninger argued to the jury, is that an insurer's loss reserves are the same as settlement authority. They are not. Courts have thus excluded evidence regarding loss reserves from trial. In *Light v. Allstate Ins. Co.*, 48 F. Supp.2d 615 (S.D. W. Va. 1998), after Allstate denied a UIM claim, the insureds sued alleging breach of contract, bad faith, and violation of a statute prohibiting unfair claims settlement practices. *Id.* at 616. The district court granted Allstate's motion in limine to exclude evidence that it had set a UIM claim reserve. The court ruled that the probative value of the reserves, as applied to that case, was substantially outweighed by its prejudicial aspects, thus no evidence regarding the insurer's reserves would be allowed at trial. *Id.* at 619. *See also, e.g., Fed. Realty Inv. Trust v. Pac. Ins. Co.*, 760 F. Supp. 533, 540 (D. Md. 1991) (granting a motion in limine to exclude evidence on reserves, because "reserve decisions are mere guesses at the outcome of litigation based on conservative accounting principles"). *Cf. Molony v. USAA Prop. & Cas. Ins. Co.*, 708 So.2d 1220, 1225-26 (La. App. 1998) (reversing a bad faith determination after a bench trial due to improper reliance upon the amount of UIM carrier's loss reserve in determining the "undisputed portion" of the claim).

One of the reasons courts exclude evidence regarding reserves is so that insurers may set reserves without concern for their potential use in litigation, thus preserving their function ensuring insurers' financial stability for the benefit of their insureds and the public:

The discovery and admission of reserves has a tendency to undermine the important purpose for which reserves are maintained. When the amount of a reserve may be used to subject an insurer to liability for bad faith, the claims people responsible for setting reserves may be tempted to fudge the numbers in order to avoid an unpleasant dichotomy between the insurer's settlement posture and its reserves position. . . .

...

. . . [I]n view of the importance of reserves in insurance financial reporting, we should prefer rules of evidence that minimize the insurer's temptation to manipulate its reserves.

Stephen S. Ashley, *Bad Faith Actions: Liability and Damages*, § 10:31 (2d ed. 2008 supp.). Here, Safeco conservatively established loss reserves equal to the policy limits, including the amount determined to be the limit of UIM benefits available under the Peterson's policy. The reserve was set just days after the accident when little was known regarding the extent of the injuries.

Miller argued that the loss reserve for Peterson's claim is relevant in light of Safeco's policy that a reserve should reflect the most probable

outcome of a claim.²⁵ But the law requires that a loss reserve be set regardless of the amount of information available to the insurer regarding the value of the claim, or lack thereof. As one of Safeco's claim adjusters explained, a reserve is set based on the available information, however limited, and does not reflect the adjuster's *level of certainty* (or uncertainty) regarding the outcome. In contrast, the settlement value of a claim, taking into account liability and damages, is not determined until the claimant's injury has stabilized and the claim is fully documented. CP 3879-80. Safeco's establishment of loss reserves was not relevant to any issue for trial and was unfairly prejudicial.

Even if Safeco's loss reserves had some relevance to the issues, the evidence should nonetheless have been excluded under ER 403 as Safeco argued in its motion in limine because any minimal probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Because Beninger repeatedly conflated reserves and settlement authority, there is a substantial likelihood that the jury did not understand the purpose of reserves and

²⁵ In response to Safeco's motion in limine to exclude the loss reserve evidence, Miller argued that the loss reserve was relevant to show Safeco's bad faith (state of mind) in that Safeco reevaluated the reserve amount (\$1.5 million) 21 times but never changed it, later offered only \$500,000 on liability and made no UIM offer for years. RP (1-22-11) at 93-94. Miller also emphasized at trial that Safeco investigated, evaluated, and set its reserves at the maximum amount 21 times. *See, e.g.*, RP (12-15-11) at 112.

improperly considered them as the amount Safeco's adjusters believed should be paid. *See Light*, 48 F. Supp.2d at 619.

The trial court abused its discretion in admitting evidence of Safeco's loss reserves.

(d) The Trial Court Improperly Permitted Evidence Regarding the Conduct of a Safeco Adjuster to Be Used to Establish Bad Faith Here

A further example of the trial court's unfair disposition toward Safeco was its admission of the videotaped deposition of Maryle Tracy regarding her conduct in a South Dakota case, *Peterson v. Safeco*, involving a UIM claim. Tracy was not called as a witness in this case, but the trial court permitted her deposition responses regarding the South Dakota case to be presented to the jury. This evidence was irrelevant and unduly prejudicial to Safeco,²⁶ and the trial court abused its discretion in admitting it.

Tracy was asked about answers to interrogatories she gave under oath, and then changed, in the South Dakota case. Safeco objected to the

²⁶ The admission of unfairly prejudicial evidence that should have been excluded may result in a new trial where the admission results in a verdict based on passion and prejudice. *See, e.g., David Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986). In *Jenkins*, the trial court improperly allowed the deposition testimony of a child without performing the required analysis for admissibility. The trial court granted an additur after it found the verdict to be based on passion and prejudice. While the appellate court accepted that the verdict was based on passion and prejudice, it granted a new trial instead as the improper admission of evidence went to a central issue in the case and compounded the prejudice. *Id.* at 103.

use of this excerpt. RP (12-8-11) at 139-44; CP 5060-62. There was no evidence that Tracy changed interrogatory answers in this case. Because the impeaching material involved a contradictory fact that could not be offered as evidence for any purpose other than for mere contradiction of the witness, the excerpt was collateral, and should have been excluded. Moreover, because the other litigation was with a plaintiff with the same name as one of the assignors in this case, involving a UIM claim as in this case, and because the subject involved bonus pay never adequately tied to this case, the erroneously admitted testimony was prejudicial to Safeco.

Generally, a witness may be impeached by introducing extrinsic evidence on a material fact, but the witness cannot be contradicted on a collateral matter. *See State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157, *review denied*, 130 Wn.2d 1008 (1996) (extrinsic evidence cannot be used to impeach a witness on a collateral issue); *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 789, 498 P.2d 870 (1972) (to be admissible, extrinsic evidence tending to impeach by contradiction must be independently competent and must be admissible for a purpose other than that of attacking the witness' credibility).

Here, the excerpt of the deposition testimony of Maryle Tracy was offered for the sole purpose of contradiction, as any answers she gave in another case could not be offered in this case for any purpose. The

excerpt was therefore improperly admitted and was unfairly prejudicial. The trial court in denying Safeco's motion for a new trial observed, "The Tracy – the next issue is the Maryle Tracy and her testimony. All I can say to that is Maryle Tracy is Safeco's person. She did what she did. She said what she said. She was a – she was not a good witness for Safeco. The jury mentioned Ms. Tracy several times in their comments. Her testimony, I think, was important to the jury." RP (4-16-12) at 42. The jury could have easily confused the South Dakota case with this case because of the similar names and claims, and could have concluded, based on that excerpt, that the adjusters and management for Safeco wrongly delayed its payments here in order to maximize their own personal profit—and then tried to cover it up, or lie about it. The jury may also have understood that the changed answers did involve another case, but that Safeco acted in this case in conformity with that other case—an impermissible construction under ER 404(b). Whether the jury wrongly confused the South Dakota case with this case, or construed the actions taken in that case to mean that Safeco acted in conformity here, the evidence was improperly admitted, and according to the trial judge who spoke with the jurors, "important to the jury." RP (9-16-12) at 42.

(e) Miller's Trial Counsel Engaged in Repeated Misconduct in the Course of Trial²⁷

Washington law prohibits the misconduct of counsel both during trial and in closing arguments. A new trial may be granted based on the prejudicial misconduct of counsel if the movant establishes “that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record.” *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (internal quotation marks and citation omitted). *See also*, CR 59(a)(2) (providing for new trial based on misconduct of prevailing party). Misconduct of counsel includes misstatements regarding the law, improper argument and comment, and violations of pretrial orders. *Id.* Here, Miller’s counsel engaged in egregious misconduct in the questioning of witnesses and in closing arguments.

(i) Improper questioning of witnesses

²⁷ This issue was raised below as part of Safeco’s motion for a new trial, which the trial court denied. CP 6159-98, 6429. The granting or denial of a motion for a new trial is reviewed for abuse of discretion. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012); *Detrick v. Garretson Packing Co.*, 73 Wn.2d 804, 812, 440 P.2d 834 (1968). A much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial. *Teter*, 174 Wn.2d at 222; *Detrick*, 73 Wn.2d at 812.

Throughout the trial of this case, Miller's counsel persistently and unrelentingly asked objectionable, leading questions of his own witnesses in a manner that can only be described as testimonial. These leading questions were objected to, and sustained.²⁸ A pattern of leading or objectionable questions may add to the "aura of unfairness" and is a factor to be added in the balance of determining whether or not the matter was fairly tried. *State v. Torres*, 16 Wn. App. 254, 258-59, 554 P.2d 1069 (1976). "While the asking of leading questions is not prejudicial error in most instances, the persistent pursuit of such a course of action is a factor to be added in the balance." *Id.* at 258 (citations omitted). Where the incidents of misconduct are numerous, they will irreparably taint the proceedings, and a new trial is required. *Id.* at 262-63. Repetitive, flagrant misconduct cannot be cured by instruction or series of instructions. *Id.*

Persistent improper questioning of witnesses constitutes misconduct of counsel and such misconduct is prejudicial error. *State v.*

²⁸ In denying Safeco's motion for a new trial the trial court commented, "there's no doubt Mr. Beninger is the king of leading questions." RP (4-16-12) at 44. The court also noted that the number of objections for both sides was "above average" and that when Safeco's counsel objected to Beninger's leading questions, "they were always sustained." *Id.* The court noted that had Safeco asked for a curative instruction regarding the quantity of leading questions the court "probably would have given one." *Id.* Nevertheless, the court said it "did not believe the number and nature of those questions was so obnoxious and tainted the jury to a degree that a new trial would be warranted." *Id.* But, as discussed herein, Beninger's conduct drew more than 150 objections, the majority of which were sustained.

Simmons, 59 Wn.2d 381, 384-87, 368 P.2d 378 (1962). Similarly, cumulative remarks on immaterial matters are an irregularity in the proceedings. *Storey v. Storey*, 21 Wn. App. 370, 374, 585 P.2d 183 (1978), *review denied*, 91 Wn.2d 1017 (1979). If they are sufficiently pervasive, they can prejudice the outcome, even with curative instructions, *id.* at 374-75, and a new trial is warranted. In *Storey*, one party made a series of immaterial and prejudicial remarks on the stand. *Id.* at 373-74. Despite numerous sustained objections, orders to strike, and admonishments from the judge, the cumulative impact of the statements was found to be prejudicial and incurable. *Id.* at 373-75.

Our Supreme Court recently emphasized these very points in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), where in granting a new trial, it stated:

The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury. ER 103(c). Persistently asking knowingly objectionable questions is misconduct. 14A Karl B. Tegland, *Washington Practice: Civil Practice* § 30:33 (2d ed. 2009). Even where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. *Id.* These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important. Misconduct that continues after warnings can give rise to a conclusive implication of prejudice. *Id.* § 30:41.

Id. at 223.

Here, Miller's counsel began the trial with a pattern that would be repeated throughout the trial. A long, testimonial leading "question" would be asked of the witness; the question would be objected to; the objection sustained; the testimonial, leading question would be rephrased and the cycle would begin again. Below are several examples, among *many* others in the record:

Q: Is that what lawyers in your profession know, when an insurance company says, would you like to mediate, that they want to pay less than their insurance?

MR. PARKER: Your Honor, I have to object to this on two bases. This witness does not have the baseline knowledge of the negotiations before he was involved. Second, he's being asked for expert opinion. He was never identified as an expert witness.

THE COURT: Sustained.

MR. PARKER: Thank you.

Q: (BY MR. BENINGER) Now, there was a whole lot of discussion early on with Mr. Parker, about the negotiations, the mediation – the only witness that really has any knowledge on any of that in this phase of the trial is yourself. So let me ask you then, if there was offers to mediate, allegedly, and they weren't putting the limits on the table, is the only reason the insurance company would do that is to try to save money?

MR. PARKER: Same objection, your Honor.

THE COURT: Sustained.

RP (11-30-11) at 63.

Q: Whose fault was it that he was on the eve of trial without the money being offered and on the table?

MR. PARKER: Same objection, your Honor. There's no foundation.

THE COURT: Sustained.

Id. at 64-65.

Q: I would like to know your understanding and your impression as to whose fault it was that Mr. Miller found himself or Mr. Kenny found himself on the eve of trial –

MR. PARKER: Your Honor –

Q: Facing an excess judgment and you're having to step in to try to negotiate some sort of settlement?

MR. PARKER: Your Honor, the witness's understanding of his own opinion is no more admissible than his opinion, and there is still no foundation.

THE COURT: Sustained.

Id. at 65.

Beninger's pattern of "persistent pursuit" of leading, objectionable questioning along with the showing of exhibits not admitted was repeated throughout the trial. There are many such examples in the record.²⁹ Yet this was just one element of what became an unfair trial.

²⁹ In Phase I alone Safeco's counsel made 19 sustained objections to Beninger's leading questions. *See* RP (11-30-11) at 56-57, 62, 71, 75, 79, 80, 93, 96; RP (12-1-11) at 22, 74, 75, 78, 89, 102, 103, 105. Safeco's counsel also made numerous other objections (42), almost all of which were sustained in some fashion during Phase I. *See* RP (11-30-11) at 55, 63-65, 67, 69, 73, 75, 76, 78, 82-83, 87, 90, 92-93, 95, 106; RP (12-1-11) at 18-21, 72, 81, 85, 87, 90-91, 111-14, 132-33, 147-49, 150, 152, 153.

Similarly in Phase II, Safeco's counsel made 17 objections to Beninger's leading questions. *See* RP (12-6-11) at 58, 90, 107, 113, 125-26; RP (12-8-11) at 48, 107, 110-11, 221, 226; RP (12-9-11) at 59, 64, 71, 73. The court sustained all but one objection. *Id.*

On two occasions during Beninger's lengthy monologue to a witness, Safeco's counsel and the court interrupted to ask if there was a question being posed. RP (12-7-11) at 11-13 ("THE COURT: We need a question in there somewhere."); *Id.* at 157 ("THE COURT: Is there a question here?"). Later in frustration, Safeco's counsel

In addition to repeatedly asking testimonial leading questions, in spite of sustained objections, Beninger repeatedly showed on screen evidence that was not admitted, again, in spite of sustained objections. As an example, he prepared a list of “principles” that bore a handwritten signature of “Deborah Senn.” RP (12-5-11) at 109. This document, never admitted with the signature, and never authenticated by Deborah Senn, was shown *repeatedly* (and deliberately) to the jury in spite of repeated, sustained objection. *See, e.g.*, RP (12-5-11) at 109-17, 136-38, 138-40; CP 5357.

Beninger “represent[ed]” to his witness that “all the principles and all the various standards as you can see, were all approved by Deborah Senn.” RP (12-5-11) at 109. Despite Safeco’s objection, Beninger repeatedly commented (5 times) to his witness that Deborah Senn is the

complained to the court outside the jury’s presence that Beninger continued to improperly ask leading questions. RP (12-9-11) at 64-65. Safeco’s counsel observed that he had only objected to about a third of the improper leading questions because he did not want to appear obstructive to the jury. *Id.* The court acknowledged that Beninger’s questions “have been leading,” and directed Beninger, “Don’t lead with Mr. Kenny,” his current witness. *Id.* Beninger responded that he would “try to cut back,” *id.* at 66, but soon lapsed into more leading questions, which drew more sustained objections. *See id.* at 71, 73.

Safeco’s counsel also made numerous other objections (81) in Phase II, the majority of which (51) were sustained in some fashion. *See, e.g.*, RP (12-5-11) at 109, 122, 131, 136, 138, 140, 144, 145, 152, 163, 183, 185-86, 192, 195; RP (12-6-11) at 19-20, 23, 38, 41, 45, 56, 57, 59-61, 65, 68, 69, 74, 91, 113, 114-15, 123, 166, 177, 207, 214, 216, 241; RP (12-7-11) at 40, 51, 56, 58, 69-70, 73, 79-80, 104, 111-13, 121-23, 125, 127, 147, 152, 157-59, 166, 179, 216, 218, 222-23, 225, 230; RP (12-8-11) at 47, 51, 76, 108, 222; RP (12-9-11) at 61, 69-70, 79.

former Insurance Commissioner for the State of Washington, *id.* at 109-11, thereby inferentially adding the former Commissioner's imprimatur to the proffered principles without any appropriate testimony or foundation on the matter. Senn was not called as a witness and Beninger's repeated references to her status and her unauthenticated signature on an illustrative exhibit, despite numerous sustained objections, was improper. The submission of improper evidence to the jury is reversible error. *Magana v. Hyundai Motors*, 123 Wn. App. 306, 315, 94 P.3d 987 (2004).

Further, while attempting to impeach plaintiff's expert Rob Dietz on the stand, Beninger interrupted the cross-examination and asked to see the impeaching material. RP (12-7-11) at 245. Moments later, when the impeachment of Dietz had resumed, Beninger again interrupted the proceedings to ask that a bailiff or sheriff be sent in case there were "issues." *Id.* at 246. When that failed to disrupt the impeachment, Beninger interrupted the questioning again to ask if the rest could be read in. *Id.* at 248. The Court replied that he could do that on redirect, but Beninger continued the interruption by indicating that he did not then have a copy. *Id.* The Court asked Parker to mark the document so that Beninger could have it, but, unhappy with that result, Beninger insisted the impeachment was collateral, and so needed to be taken up by the Court. *Id.* at 249. When Parker remarked that it was perjury when "you say there

were no other bad faith claims,” Beninger responded “we need to have a fine.” *Id.* The trial court excused the jury. *Id.*³⁰

³⁰ There was apparently some pushing of paper between counsel that is not clearly disclosed in the written record. *See* RP (12-7-11) at 245-57. Beninger called for a fine, calling Parker’s conduct “unconscionable” and “darn near [an] assault,” “[o]ut of control” and “dangerous, to me and others.” *Id.* at 251. Parker stated for the record that Beninger was attempting to create a false record. *Id.* Then the following transpired.

MR. BENINGER: It is not being created, and your Honor was there, and saw him take that and thrust it at me –

THE COURT: Let’s drop that subject for just a second, and we will deal with everything.

MS. SWEENEY: Are you winking at me, Mr. Beninger?

MR. BENINGER: You? Not likely, not likely, not here, not now, not ever, not in fantasy land, not in reality.

MR. PARKER: Call the bailiff.

MR. BENINGER: Mr. Parker is trying to win thinking he’s cute, which he just did, which he’s not, and your Honor, if we want to have a showdown, I’m more than happy to take on Mr. Parker, I’m more than happy to do it, it will be a very, very short fight.

THE COURT: Let’s drop the subject.

MR. BENINGER: I can’t, your Honor, not when I’ve been threatened that way, there’s no way.

THE COURT: Nobody’s fighting.

Id. at 251-52. After addressing the impeachment issue the court lectured both counsel on comportment, admonishing them to act more professionally. The court stated, “So things aren’t going well. There isn’t going to be any fighting. Or yelling. Or screaming. So we’ve had two little blowups today. I expect a check from both of you tomorrow for \$500.” *Id.* at 256. Beninger replied as follows:

MR. BENINGER: If you might, Your Honor, I would like a record made exactly what you think I did wrong after your warnings. I obviously didn’t make any statement out loud, didn’t do anything out loud, other than what I am entitled to do, which is to review the documents. Then he yanked the thing and pushed it at me and yanked it out?

The call for a bailiff or a sheriff in case there were “issues” and the demand for a fine against Parker served to interrupt the successful impeachment of Dietz, and to cast Safeco’s counsel in a poor light before the jury. This conduct was just one more example of the unfairness that permeated the trial.³¹

(ii) Beninger engaged in improper closing argument to the jury

In closing argument, Beninger made a calculated appeal to local pride and prejudice, asking that the jury make a decision based not on the facts of the case, but on their place in history and in their community. His

THE COURT: It was an episode over there from both sides.

MR. BENINGER: I was sitting there, your Honor.

THE COURT: I saw what happened.

Id. at 256-57.

³¹ Other misconduct included Beninger’s behavior toward Safeco’s co-counsel Emelia Sweeney. Outside the presence of the jury, Sweeney objected to Beninger’s comments and belittling tone toward her as a woman made in the presence of the jury. RP (12-5-11) at 207. The court agreed, acknowledge that Sweeney did not deserve such treatment, and admonished Beninger to “be careful” about his conduct before the jury. *Id.* at 207-08.

argument also entailed a Golden Rule argument³² telling the jury to place themselves in the shoes of a party.³³ Such arguments are forbidden because they are attempts to appeal to the personal passion and prejudice of a jury: “Such an argument is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *Adkins*, 110 Wn.2d at 139. Whether a plaintiff recovers, and in what amount, or whether a defendant prevails, are questions the jury must resolve solely on the evidence and the law, and not on the basis of appeals to sympathy, passion or prejudice. *Id.*

Appeals to community pride or prejudice generally constitute improper argument. *Pederson v. Dumouchel*, 72 Wn.2d 73, 431 P.2d 973

Such conduct is not merely boorish, it can subtly impact trial results. In a landmark Ninth Circuit study on gender bias, female attorneys surveyed in that jurisdiction “expressed particular concern about interactions in which [female attorneys] are demeaned or disparaged, subtly or overtly, before juries, clients and other counsel, by judges or opposing counsel.” *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745 (1994) at 816. Such inappropriate conduct “negatively affects a female attorney’s credibility to the jury” because it sets her apart as not fully accepted within the established legal profession. Mary Stewart Nelson, *The Effect Of Attorney Gender On Jury Perception And Decision-Making*, 28 Law and Psychology Review 177 (2004) at 184. This is yet another example of how Safeco was denied a fair trial.

³² A Golden Rule argument urges “the jurors to place themselves in the position of one of the parties to the litigation, or granting a party the recovery they would wish themselves if they were in the same position” and is improper. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139, 750 P.2d 1257, 1264 (1988).

³³ Objections to closing arguments are not necessary when counsel’s misconduct is so flagrant and prejudicial that no instruction could have cured it. *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967).

(1967). Such improper arguments generally cannot be cured by a limiting instruction. *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958). Indeed, the cumulative effect of repeated prejudicial conduct was so pervasive that no instruction or series of instructions could cure it, and retrial is required. *Torres*, 16 Wn. App. at 263.

Miller's counsel began his closing argument by stating that jury trials take place in the location "where things happen," because the local jury reflects the "conscience of the community, and serves as a protector and ... guardian for the community." RP (12-15-12) at 63. The verdict the jury was to give was to reflect "your community values." *Id.* at 66. He reminded the jury that the verdict would become public property and that anyone could see how this jury reflected their community values. *Id.* He asked if Safeco did things "the right way to reflect how we, as a community, want to be treated?" *Id.* at 72. Beninger concluded:

But there is also the findings of liability for each and every one of these things, but the minimal amount to satisfy the judgments, so that this doesn't happen, that we aren't in these positions, that our public trust and public interest is preserved and protected, and that you have a verdict that you're going to be proud of. Not just today, but next year, next week, ten years from now, you may see these things in the appellate decisions and changes have been made, you know you can feel proud. The twelve, ten, whatever it is, did the right thing, and for the right reasons.

Id. at 132.

This argument violated the trial court's order in limine precluding Golden Rule arguments in closing. RP (11-22-11) at 83. As he had done repeatedly throughout the trial, counsel simply ignored that ruling, and appealed to the jury's sense of how they as a community would want to be treated.

This improper argument, together with all the other improper conduct, created a trial permeated with unfairness and prejudicially impacted the jury's verdict.

(f) The Trial Court Erred in Concluding that Cassandra Peterson's Parents' UIM Coverage Limits Were \$500,000 Rather Than \$100,000

From 1997 to 1999, Michael and Monica Peterson maintained automobile insurance with American States Preferred Insurance Company ("American States") with policy limits of \$500,000 per person/\$500,000 per accident. CP 5773. Monica Peterson twice signed written partial rejection of UIM coverage, waiving UIM bodily injury coverage equal to the liability limits and instead selecting UIM limits of \$100,000 per person/\$300,000 per accident. CP 5773-74, 5781, 5790. Effective November 3, 1999, the Petersons added a car to the policy. CP 5774. Due to a scrivener's error, the UIM coverage limits for that vehicle were set equal to the liability limits of \$500,000/\$500,000, rather than the \$100,000/\$300,000 limits the Petersons had selected. CP 5774-75, 5816.

Safeco acquired American States in October 1997; it thereafter renewed policies American States had issued to insureds like the Petersons. CP 5774. On April 20, 2000, the Petersons' policy was renewed with Safeco Insurance Company of Illinois. CP 5775, 5819, 5824. At the same time, four months before the accident, CP 5873, Safeco corrected the scrivener's error with respect to the UIM limits on the Peterson's auto, restoring the Petersons' selected UIM limits of \$100,000/\$300,000. CP 5822, 5824. Safeco wrote to the Petersons and advised them that their selection of the lower UIM limit was reflected in the replacement policy.

The amount of coverage you previously selected for protection against uninsured and/or underinsured motorists was less than the bodily injury liability coverage you selected, or you rejected the coverage altogether. The choice you made has been reflected on this replacement policy. Other limits and prices are available.

CP 5822. The Petersons requested no changes following the transfer and paid the premium for \$100,000 UIM coverage. CP 5776.

Cassandra Peterson was eligible to seek UIM benefits under her parents' Safeco policy. *See* CP 5824. Following the accident, Safeco confirmed that the Petersons had executed a written waiver and determined the limit of UIM coverage was \$100,000/\$300,000. CP 5775. The trial court, however, ruled on December 11, 2006 as a matter of law

that the UIM coverage limit at the time of the accident was \$500,000. CP 229, 5841. The jury was later instructed to determine if Safeco had misrepresented coverage to the Petersons. CP 5403.³⁴

The trial court erred in granting summary judgment to Miller that the UIM coverage limits available to Cassandra Peterson³⁵ under her parents' policy were \$500,000, not \$100,000, as they had requested, and as Safeco confirmed following the accident.

Insurers must make UIM coverage available to Washington policyholders. RCW 48.22.030(2). The UIM coverage limits must equal the liability limits unless the insured has rejected the coverage or selected lower limits in writing. RCW 48.22.030(3); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 254, 850 P.2d 1298 (1993). Once the insured has signed such a rejection, it remains valid upon subsequent renewals of the policy.³⁶ RCW 48.22.030(4). Only if the insurer issues a *new* policy,

³⁴ The trial court initially ruled that Safeco was not guilty of bad faith in connection with this limits issue because Safeco's actions were "debatable," CP 549, but reversed itself on reconsideration. CP 741.

³⁵ Peterson assigned her claims to Miller. CP 5056.

³⁶ In situations where a higher limit and premium are incorrectly imposed, the insurer is allowed to leave it in place until the end of the policy term. WAC 284-30-590(7)(c).

must it offer UIM coverage limits equal to the liability limits. *Id.*; *Johnson v. Farmers Ins. Co. of Wash.*, 117 Wn.2d 558, 570, 817 P.2d 841 (1991).

Washington courts have held that a “new” policy is created only by *significant, material* changes in the policy upon its renewal. *Koop v. Safeway Stores*, 66 Wn. App. 149, 154, 831 P.2d 777 (1992). A material change is one that is (1) initiated by the insured and (2) modifies the liability or UIM coverage limits. Changes that do not affect the liability or UIM limits – such as replacing or adding an automobile, changing the named insured, changing or eliminating other coverages, and other similar changes – do not result in a new policy even if initiated by the insured. *See, e.g., Johnson*, 117 Wn.2d at 572-74.

In numerous cases, our courts have held that routine policy changes are *not* sufficient to meet this test. *Johnson*, 117 Wn.2d at 527-74 (insured changed the named insured from her ex-husband to herself, her address, and her insurance agent, and replaced a vehicle); *Am. Commerce Ins. Co. v. Ensley*, 153 Wn. App. 31, 220 P.3d 215 (2009), *review denied*, 169 Wn.2d 1010 (2010) (insured changed her deductibles and insurer corrected erroneous deletion of liability and UIM coverages on one vehicle); *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952, 957 P.2d 1283 (1998); *Jochim v. State Farm Mut. Ins. Co.*, 90 Wn. App.

408, 413-16, 952 P.2d 630 (1998) (insureds replaced a vehicle and added collision, comprehensive, and death indemnity coverage; insurer increased the UIM property damage limit). Similarly, the transfer of the Peterson's policy to a sister company and the correction of the scrivener's error after the Petersons added a car to their policy were nonmaterial and did not combine to create a new policy merely because they occurred simultaneously.

Nothing in RCW 48.22.030 indicates that when one insurer purchases another and offers coverage to an insured that a "new policy" is created. Further, although Washington courts have not specifically addressed the issue, a change in the insuring entity among sister companies is analogous to substituting the named insured, which our Supreme Court held in *Johnson* was not material and thus did not give rise to a new policy. 117 Wn.2d at 572-74. Courts in other jurisdictions have held under statutes analogous to Washington's that renewal by an acquiring company does not result in a new policy and that the new insurer may rely on a UIM rejection obtained by the previous insurer. *See, e.g., Bell v. Progressive Specialty Ins. Co.*, 744 So.2d 1165 (Fla. Ct. App. 1999); *Nationwide Mut. Fire Ins. Co. v. Markow*, 720 So.2d 322, 323 (Fla. Ct. App. 1998); *Merastar Ins. Co. v. Wheat*, 469 S.E.2d 882 (Ga. App. 1996), *cert. denied*, (1996). The Georgia Court of Appeals cogently

observed in *Wheat* that a different rule would create a potential windfall for insureds and needlessly increase costs. *Id.* at 469 S.E.2d at 884.

Here, no material changes took place in the Petersons' UIM coverage that required a new election under RCW 48.22.030 by them as to UIM limits. The renewal of the Peterson's policy by Safeco was part of a major transfer of policies to Safeco from American States. The Petersons did not initiate the change. No new application or underwriting was required. The Petersons selected their UIM coverage and maintained that selection after being informed of their options. The trial court's ruling gave them a windfall by allowing them the benefit of five times the limit they selected or paid for.

Similarly, the correction of the scrivener's error in the UIM limits did not result in a new policy. RCW 48.22.030(4) places the burden *on the insured* to request a change in limits. *Johnson*, 117 Wn.2d at 525. The Petersons did not request the temporary, erroneous increase of UIM coverage limits on one vehicle. Indeed, they had *twice* expressly requested UIM bodily injury coverage limits of \$100,000/\$300,000 for all vehicles and maintained those limits for several years.³⁷

³⁷ Four months *before* the August 23, 2000 motor vehicle accident here, Safeco informed the Petersons that their written partial rejection of UIM coverage remained in effect, that their UIM bodily injury coverage limits were \$100,000/\$300,000 for all vehicles, and that other levels of coverage were available. CP 5822, 5824. The Petersons *knew* the lower limits applied and took no contrary action.

In *Ensley*, the insurer mistakenly cancelled all coverage on one vehicle when the insured requested cancellation of only the collision coverage. *Ensley*, 153 Wn. App. at 36. The insured pointed out the mistake and simultaneously changed her deductibles. This Court held that these changes did not result in a new policy. *Id.* at 41-42. Safeco's correction of the error did not result in a new policy, invalidating the Petersons' partial written rejection.

The trial court's error was prejudicial. Miller *repeatedly* argued that Safeco "misrepresented" the limits and that, but for the misrepresentation, Ms. Peterson's claim could have been settled sooner and additional policy proceeds would have been available to protect Kenny by settling the other claims. *See, e.g.*, RP (12-5-11) at 30, 33, 37 (plaintiff's opening argument); RP (Dec. 15-16, 2012) at 100, 107, 117, 123-25, 128 (plaintiff's closing argument).

(2) The Trial Court Erred in Its Treatment of Damages

(a) The Jury Should Not Have Been Permitted to Award Damages that Exceed the Covenant Judgment

The trial court erred in permitting the jury to award Miller additional items of damage beyond the covenant judgment settlement between Miller and his passengers. The trial court's Instruction Number 30, CP 5405-07, was an incorrect statement of the law in permitting the

jury to recover entirely speculative damages in addition to the covenant judgment settlement amount such as “lost or diminished assets or property, including value of money,” and “lost control of the case or settlement,” items of damage that are either not proven on these facts or not recognized in Washington law.

A settlement approved as reasonable is the presumptive measure of damages in any subsequent action by the insured against the insurer for bad faith. *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). Insofar as an insurer is deprived of any opportunity to rebut the reasonableness of a covenant judgment settlement in a bad faith action, an insured should be put to an election. It must either prove all of its damages or it may choose to confine any bad faith recovery to the covenant judgment settlement amount. As a matter of law, it should not be able to recover both.

Washington law in this setting has been somewhat confusing because courts have described the covenant judgment settlement as evidence of harm to the insured *and* as the insured’s presumptive damages in a bad faith action. In *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992), the insured entered into a covenant judgment with the insured victim and stipulated to damages of \$3 million. The insured also assigned his rights to any bad faith claim to the plaintiff in

return for which, the plaintiff agreed not to execute on the judgment against the insured. Safeco argued there was thus no harm to the insured because the covenant not to execute insulated the insured from harm. In essence, Safeco argued it was not liable because the insured could not prove harm, an essential element of a prima facie bad faith claim. The Court rejected that argument, noting that “even though the agreement insulated the insured from liability, it still constitutes a real harm because of the potential effect on the insured’s credit rating . . . [and] damage to reputation and loss of business opportunities.” *Butler*, 118 Wn.2d at 399 (citations omitted). The Court concluded that the presumption of harm was not rebutted if, as part of any settlement with the plaintiff, the insured is released from liability. *Id.* at 396-400.

Critically, the *Butler* court also stated that a covenant judgment settlement amount is intended to compensate for the harm caused to the insured, including “the potential effect on the insured’s credit rating . . . [and] damage to reputation and loss of business opportunities.” *Id.* An insurer may rebut the presumption of harm by showing by a preponderance of the evidence that it did not harm the insured. *Id.* at 394.

Justice Dolliver dissented, criticizing the majority for presuming harm when some aspects of the insured’s harm could be established by

actual evidence. He identified specific types of harm the majority was presuming that were susceptible to actual proof:

Is the harm economic loss, such as attorney fees and costs incurred by Butler in settling with Zenker? If so, do we need to *presume* those losses when they are so easy to prove and document? Or is the harm at issue an insured's emotional distress associated with the anxiety of an unsettled claim? If so, is that the kind of harm that, as a matter of policy, we should ever presume? Or is the harm, as the majority suggests, the whole penumbra of loss, including an unfavorable credit rating and damage to reputation, which emanates from the fact of liability? If so, then it is unreasonable to presume that harm because Safeco can never rebut it.

Butler, 118 Wn.2d at 406-07 (J. Dolliver, dissenting).

In *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007), the insurer, MOE, reargued Justice Dolliver's theme—that it was unfair to presume harm because of the difficulty in rebutting it. MOE's effort was rejected. The *Dan Paulson* court examined Justice Dolliver's *Butler* dissent and again rejected it. *Id.* at 921.³⁸

³⁸ Washington courts, however, have found that the insured's presumptive harm may be rebutted. In *Werlinger v. Clarendon Natl. Ins. Co.*, 129 Wn. App. 804, 809, 120 P.3d 593 (2005), *review denied*, 157 Wn.2d 1004 (2006), the presumption of harm was rebutted where the insured filed for bankruptcy. Similarly, in *Ledcor Indus., Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255, *review denied*, 167 Wn.2d 1007 (2009), this Court held that an insured suffered no harm from a breach of the duty to defend where other insurers provided a vigorous defense to Ledcor so that the breach by the insurer made no practical difference. *See also, Nat'l Union Fire Ins. Co. v. Greenwich Ins. Co.*, 2009 WL 1794041 (W.D. Wash. 2009).

The issue of presumed harm is not before the Court here. Rather, this case involves what damages are encompassed by a covenant judgment settlement. Not to be confused with the cases pertaining to the presumption of harm as to the prima facie bad faith claim are those cases that address the remedy for the tort of bad faith handling of an insurance claim. In *Butler*, our Supreme Court held that the basic remedy for an insurer's bad faith is that the insurer is estopped to deny coverage. 118 Wn.2d at 392-94. See also, *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764-66, 58 P.3d 276 (2002).

The first instance in which our Supreme Court addressed the issue of the amount of the covenant judgment settlement as the insured's presumed damages in a later bad faith action was in *Besel*. There, the Court held that the "amount of a covenant judgment is the presumptive measure of harm caused by an insurer's tortious bad faith." 146 Wn.2d at 738. The Court concluded that covenant judgment settlement approved by a trial court as reasonable is the proper measure of damages when an insurer acts in bad faith because "if a reasonable and good faith settlement

does not measure an insured's harm, our requirements that such settlements are reasonable [would be] meaningless." *Id.* at 738-39.³⁹

To avoid the problem of possible fraud or collusion between an insured and a plaintiff in establishing a reasonable settlement amount, the Court imported the criteria for a reasonable settlement under RCW 4.22.060 from *Glover*, 98 Wn.2d at 717-18, and provided that once a settlement is determined to be reasonable under those criteria, "the burden shifted to [the insurer] to show the settlement was the product of fraud or collusion." *Besel*, 146 Wn.2d at 739; *Truck Ins. Exchange*, 147 Wn.2d at 765; *Dan Paulson*, 161 Wn.2d at 925.

Washington courts, however, have not been precise in defining exactly what is meant by "presumptive damages" or how those presumptive damages operate in a later coverage/bad faith case. For example, this Court in *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001), noted that in a bad faith tort action generally an insured could recover for economic harm and emotional distress that arose from the bad faith. *Id.* at 333. Few cases since *Anderson* have elaborated on how additional "actual

³⁹ In *Mutual of Enumclaw Ins. Co. v. T&G Constr. Co., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008), the Court applied the general principle that a reasonable settlement established the insured's presumptive damages in a case involving breach of contract where no bad faith was at issue. *Id.* at 266.

damages” can be recovered beyond the artificial “presumed damages” arising out of a covenant judgment settlement. Plainly, the items of damage set forth in Instruction 30 exceed these elements and duplicate any recovery under a negligence count.

Obviously, an item of damages for an insured in any bad faith action is the amount of any actual judgment against the insured or settlement with the claimant. But in the covenant judgment settlement scenario, our courts since *Besel* have indulged in a legal fiction. The insured is not *actually* harmed by a covenant judgment settlement because the insured receives a covenant not to execute or similar device that is tantamount to a release on any judgment to which the insured has agreed and has assigned to the claimant. The covenant judgment settlement is often an inflated amount agreed to by the insured, who has no real interest in limiting the number, and a claimant who has every reason to maximize it. Nevertheless, the *full* amount of such a judgment is recoverable against an insurer by the insured (or the claimant as the insured’s assignee) in a subsequent contract/bad faith action. It is difficult to conceive of any real additional actual damages a claimant has against an insurer under these circumstances.

The *Besel* court believed a covenant judgment itself might harm an insured given its potential effect on the insured’s credit rating, damage to

reputation, and loss business opportunities but did not address the issue extensively. 118 Wn.2d at 399. But *Butler* certainly suggested that any such damages were addressed in the covenant judgment settlement itself. *Id.* at 394.

It is patently unfair that an insurer should face the artificial construct of presumptive damages of a covenant judgment settlement where the insured is not *actually* harmed *and* an array of additional damages alleged by the insured. This is particularly so where the insurer is effectively foreclosed from challenging the presumptive damages before the jury in a bad faith action.⁴⁰

In other settings where presumptive damages are employed, a plaintiff must elect to accept presumptive damages or must prove its actual damages.⁴¹ Presumed damages have been allowed, for example, in the defamation and civil rights contexts. *Gertz, supra* (defamation); *Carey v. Phipus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed.2d 252 (1978) (defamation); *Memphis Community School Dist. v. Stachura*, 477 U.S.

⁴⁰ The question of whether an insurer has a right to trial by jury with respect to a covenant judgment settlement in a subsequent bad faith/breach of contract action is before our Supreme Court. *Bird v. Best Plumbing Group, LLC*, 161 Wn. App. 510, 260 P.3d 209, review granted, 172 Wn.2d 1010 (2011).

⁴¹ Such instances of presumed damages are recognized as an oddity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50, 94 S. Ct. 3997, 41 L.Ed.2d 789 (1974) (“As we have observed in another context, the doctrine of presumed damages in the common law of defamation *per se* is an oddity of tort law, for it allows recovery of purported compensatory damages without evidence of actual loss.”).

299, 106 S. Ct. 2537, 91 L.Ed.2d 49 (1986) (civil rights). But such presumed damages are a substitute for “ordinary” damages proved in the usual way, they are not a “supplement” to them. They are intended to approximate the harm suffered by the plaintiff in those types of cases because the harm itself is deemed difficult to establish. *Id.* at 310-11. *See also, Conboy v. AT & T Corp.*, 241 F.3d 242, 249 n.6 (2d Cir. 2001); *Pembauer v. Cincinnati*, 745 F. Supp. 446, 455 (1990); *Virgo v. Lyons*, 551 A.2d 1243, 1248 (Conn. 1998).

In this case, the implications of the trial court’s damages decision are staggering. Safeco provided Kenny \$1.5 million in coverage and either \$100,000 or \$500,000 in UIM coverage to the Petersons. The covenant judgment settlement was for \$5.95 million, less the applicable insurance coverage, a net of \$4.15 million. CP 5898. Those settlements should have represented *the entirety* of any loss experienced by the insureds as a result of Safeco’s alleged bad faith. Nevertheless, the trial court’s Instruction Number 30 itemized additional damages available to Kenny for that same bad faith. CP 5405-07. The jury complied in awarding an additional \$5.5 million to Kenny and \$350,000 for Peterson for those other damages that should have been subsumed and resolved under the covenant judgment settlement. CP 5411. To keep piling on, the trial court’s Instruction Number 30 allowed the jury to separately award

damages to Kenny and Peterson (both of whose claims were assigned to Miller) for claims against Safeco that again should have been subsumed and resolved under the covenant judgment settlement -- \$2.25 million more to Kenny representing \$750,000 each for breach of contract, negligence, and violation of the CPA,⁴² and \$750,000 to Peterson for those claims. CP 5411-13.⁴³ This result is blatantly unfair and improper.

Miller may not recover the amount of the covenant judgment settlement as presumed damages, an amount that must approximate his harm, *and* an array of additional items of damage. A plaintiff in a bad faith action based on a covenant judgment settlement must *elect* to recover presumptive damages, the reasonable settlement amount, or it should be put to its proof as to the damages actually sustained.

(3) The Trial Court Erred in Its Treatment of Post-judgment Interest

The trial court's judgment on the jury's verdict is silent on the applicable post-judgment interest rate. CP 5698-700. The trial court ruled

⁴² The CPA damages for both Kenny and Peterson look more like personal injury damages that are not recoverable under the CPA. *Ambach v. French*, 167 Wn.2d 167, 173, 216 P.3d 405 (2009).

⁴³ The recovery by Kenny and Peterson in tort for bad faith and negligence is plainly duplicative. An action in bad faith is a tort. *Butler*, 118 Wn.2d at 389. Safeco challenged the award of damages for bad faith and negligence below. CP 5326-28. *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 971 P.2d 953, *review denied*, 138 Wn.2d 1009 (1999) requires that the jury be instructed on both theories, but that case does not stand for the proposition that the jury can recover *twice* in tort for essentially the same harm.

posttrial that 12% was the proper post-judgment interest rate, consistent with its prior interest ruling regarding pre-judgment interest based on the settlement agreement. RP (6-14-12) at 12-13. The Kenny-Miller covenant judgment settlement stipulated to gross damages of \$5.95 million, and net damages of \$4.15 million after the application of Safeco's insurance proceeds, CP 5832, 5898, and provided for interest at 12%, compounded annually, on the net figure. CP 5833. Safeco was not a party to that settlement and made no agreement on interest.

Two years after the settlement agreement, Safeco and Miller stipulated to the claimants' net damages of \$4.15 million after distribution of insurance proceeds. CP 5898-5900. Safeco and Miller agreed to treat the "net stipulated amounts as though judgment in those amounts had been entered against Patrick Kenny," and the trial court entered a stipulated order on the reasonableness of the settlement. CP 5898-99. Again, Safeco and Miller did not agree on interest, and the court made no ruling on interest at that time. CP 5899.

In February 2008, Miller moved to establish "the applicable interest for the principle [sic] judgment amounts which have previously been stipulated to as reasonable." CP 797. In other words, Miller asked the trial court to determine the rate of interest that accrued on the May 12, 2005 stipulated judgment. CP 797, 810, 825. Based on *Jackson v. Fenix*

Underground, Inc., 142 Wn. App. 141, 173 P.3d 977 (2007), the trial court ruled that the stipulated sum referenced above bore interest at twelve percent, and that the interest compounded annually. RP (2-15-08) at 13; CP 798, 995.

RCW 4.56.110 sets forth the interest rates applicable to four categories of judgments: (1) breach of contract where a rate is specified; (2) child support; (3) tort claims; and (4) all other claims. *See Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165, 208 P.3d 557, *review denied*, 167 Wn.2d 1008 (2009). Where a judgment is "mixed" in that it is based on multiple types of claims, the court must apply a single interest rate to the entire judgment, depending on the "primary" basis of the judgment. *Id.* at 164, 173. *See also, Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 250 P.3d 121 (2011).

In *Jackson*, this Court held that a covenant judgment settlement bore interest at the rate specified in the parties' agreement although the underlying claims sounded in tort. 142 Wn. App. at 146-47. The court reasoned, "Once parties have agreed to settle a tort claim, the foundation for the judgment is their written contract, not the underlying allegations of tortious conduct." *Id.* at 146.

In *Woo*, the insured, Dr. Robert Woo, incurred defense costs when his insurer refused to defend, and he eventually settled with the plaintiff

for \$250,000. 150 Wn. App. at 162. Dr. Woo then successfully sued his insurer for bad faith, breach of contract, and violation of the CPA, and obtained a judgment of more than \$1 million, which included the \$250,000 underlying settlement based on the tort remedy of coverage by estoppel. *Id.* at 163, 172. The parties disputed the rate of post-judgment interest applicable during subsequent appeals. This Court held that the tort judgment rate in RCW 4.56.110(3)(b) applied to a judgment founded on claims of tortious conduct applied because tort claims were the “primary” basis of the judgment. 150 Wn. App. at 172-73.

Under *Unigard* and *Woo*, the interest rate for purposes of an insurer’s interest liability is determined according to the nature of the judgment entered against the insurer. Because the judgment against Safeco was founded on claims of tortious conduct,⁴⁴ the applicable interest rate is the tort judgment rate. RCW 4.56.110(3)(b).

(4) The Trial Court Abused Its Discretion by Awarding Excessive Attorney Fees and Costs to Miller⁴⁵

⁴⁴ An action for insurer bad faith is a tort claim. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). Instruction Number 26 told the jury that in order to find bad faith, it must find that Safeco's conduct was unreasonable, frivolous or unfounded. CP 5401. If it so found, it was obliged to award, on the claim arising out of Kenny's claim for bad faith, the stipulated settlement amounts under the theory of coverage by estoppel. The fact that this was a tort claim is made ever the clearer by the fact that Miller sought recovery of items of damage beyond the covenant judgment settlement amount for *both* negligence and bad faith.

⁴⁵ Appellate courts review a trial court’s award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998), *impliedly limited in part on other grounds as recognized in Matsyuk v. State Farm Fire &*

The trial court here abused its discretion in determining the fees to which Miller was entitled. The trial court misapplied the lodestar fee calculation⁴⁶ and erred in permitting recovery of legal expenses in a CPA case beyond the costs allowed in RCW 4.84.010.

(a) The Time Records Here Were Neither Contemporaneous Nor Adequate

Miller conceded below that there are no contemporaneous billing records to support the attorney fee with the exception of those of Howard Goodfriend. Beninger's time records were reconstructed. CP 5424. Those time records contain short, vague phrases, none of which delineate how much time was devoted to a particular task within the broad category for which an award is sought. See CP 5422-83. The records also include undifferentiated blocks of time that fail to provide the detail required for the trial court to properly assess. For example, one of the entries in question lists: "Misc. Pleadings, Notices, Outside Correspondence" for 6

Cas. Co., 173 Wn.2d 643, 272 P.3d 802 (2012). See also, *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, ___ Wn. App. ___, 282 P.3d 146, 150 (2012).

⁴⁶ The lodestar method applies in determining an award of attorney fees. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993); *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998). Under that test, the lodestar is calculated by multiplying a reasonable hourly rate times a reasonable number of hours. In calculating the reasonable number of hours, a court must exclude wasteful, duplicative, or otherwise unproductive efforts. *Id.* at 434. Our Supreme Court in *Weeks* indicated the lodestar analysis could be reduced to a basic assessment: a court should look to the amount of time it would take a "competent practitioner" to address the issues. 122 Wn.2d at 151.

years for a total of 250 hours. CP 4850. *See also*, CP 5725 (entry noting “Motions (2004-2009)” for 574 hours). Miller sought a total of attorney and paralegal fees, before multiplier, of \$1,071,470.00. CP 5724. The trial court did not reduce that request by a single penny.⁴⁷ CP 5691, 5699, 5721, 5724.

The early enunciation of the lodestar calculations in Washington required only that “reasonable documentation of the work performed” be provided to the court. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Later, our Supreme Court required “contemporaneous records documenting the hours worked.” *Mahler*, 135 Wn.2d at 434. This evolution is in keeping with development of the lodestar calculation method in the federal courts.⁴⁸

Where the documentation of hours was found to be inadequate, federal district courts reduced the award accordingly. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983). Many federal circuits make the failure to maintain contemporaneous records grounds to deny a fee request because the reviewing court is

⁴⁷ With the multiplier Miller recovered \$1,563,803.75 in fees and \$138,433.94 in expenses. CP 5724.

⁴⁸ Washington developed its lodestar calculation rule based upon the federal model. *See Bowers*, 100 Wn.2d at 596-97. It is appropriate, therefore, to continue to look to the federal courts for interpretation of this rule.

denied a basis upon which to assess the legitimacy of the fee request; after-the-fact re-creations of fees are time-consuming and inappropriate. *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir. 1983); *In re North*, 32 F.3d 607 (D.C. Cir. 1994).

When presented with vague or incomplete billing records, federal courts routinely reduce the requested fee award by a fixed percentage. *See, e.g., Smart SMR of New York v. The Zoning Commission*, 9 F. Supp.2d 143 (1998) (30% reduction); *Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 520 (S.D. N.Y. 1994) (30% reduction for vague entries such as “draft and edit brief”); *Marisol A. v. Giuliani*, 111 F. Supp.2d 381, 401 (S.D. N.Y. 2000) (15% reduction to address numerous problems with requested hours); *Jackson v. Cassellas*, 959 F.Supp. 164, 169 (W.D. N.Y. 1997) (15% reduction to take account of vagueness of entries and failure to allow review of contemporaneous entries).

Here, Miller’s counsel made *no effort* to maintain contemporaneous billing records. Instead the time has been reconstructed years after the fact. Neither the trial court, nor this Court, can evaluate the reasonableness of the reconstructed time.

(b) The Trial Court Abused Its Discretion in Allowing Recovery of Grossly Inflated Hourly Rates

Miller's counsel sought recovery at an hourly rate of \$400 per hour for work performed prior to 2010, and \$450 per hour for work charged after 2010. CP 5723, 5725. Michael Lewis, a Skagit County attorney, opined that the average hourly rate charged in Skagit County is closer to \$225 per hour. CP 5653. While Lewis notes that he has charged \$325 per hour for more complex matters, the rates sought by Beninger and his office are much higher than that routinely charged in the locality. CP 5653.

One of the factors in determining the proper rate is the fee customarily charged in the locality for similar legal services. *Mahler*, 135 Wn.2d at 433 n.20. The lodestar methodology requires the Court to determine what a reasonable hourly rate is in the community for work of this nature, taking into account the uniqueness of the question, the novelty of the issues, the experience of the attorneys, and the venue in which the parties find themselves. *West v. Port of Olympia*, 146 Wn. App. 108, 123, 192 P.3d 926 (2008).⁴⁹ It is highly unlikely the Luvera firm bills real Skagit County people the hourly rates they now seek to recover.

⁴⁹ In *West*, this Court declined to award a former Washington Supreme Court Justice his usual hourly rate of \$300 per hour, noting the rate was unreasonable in Thurston County for that case. *Id.* The prevailing plaintiffs complained on appeal that restricting attorney fee awards to the amounts charged by Olympia-based attorneys would

(c) Miller's Requested Hours Were Excessive

Miller's requested hours were excessive because they were duplicative, unsegregated, and failed to excise time pertaining to unsuccessful activities.

First, Miller sought recovery for duplicative time. Miller recovered fees for work performed for which his firm was already compensated. The trial court awarded fees to Miller on the issue of Peterson's UIM as a discovery sanction, but allowed recovery of those fees a second time. CP 5461-64, 5691 (court awarded attorney fees "as requested"), 5699.

Miller sought recovery yet again on the UIM issue. CP 5471. Miller noted that the fee was paid by Safeco, but listed the hours expended (45), including those hours in the total. CP 5471-72. This may have been an oversight, but there are other entries related to that issue – Peterson's UIM – that are included in the fee request. Because Miller already was compensated for the reasonable and necessary costs incurred for resolution of the UIM coverage issue, CP 5461-64, he could not recover those fees again.

deter attorneys from larger markets from bringing public records cases such as that in *West* because suits of that type would almost invariably be brought in Thurston County. *Id.* The trial court rejected that argument, and was affirmed on appeal.

Second, Miller made no effort to segregate time associated with the CPA issue, on which fees were recoverable, from all other tort issues, on which fees were not recoverable. The *sole* basis for Miller's fee recovery was the CPA claim. He was not entitled to fees relating to his bad faith tort claim as tort claims are subject to the American Rule on fees.⁵⁰

Finally, Miller included time in his fee request on unsuccessful efforts. For example, Miller repeatedly argued for unprecedented pretrial instruction to the jury, i.e., his motion for partial summary judgment re: legal duties, yet not one of the "duties" claimed was ever given as an instruction by the court to the jury, either before trial or after the close of all the evidence. CP 5472, 5613, 5647-51. Miller also recovered for time spent on an IFCA claim that was never brought and opposed nearly all of Safeco's motions in limine, many of which were granted, while Miller's motions in limine were denied in whole or in part. *Id.*

Under *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007), the time should have been excluded. There, the trial court reduced

⁵⁰ The trial court concluded that the time spent by Miller's attorneys on the CPA issue was "intertwined" with the time spent on other theories. CP 5682. This is no excuse for the trial court's failure to do its job and segregate the hours spent on the CPA theory from the other work of those attorneys. Such segregation is *mandatory*. *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988). The court in *Smith v. Behr Processing Co.*, 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002) stated:

the plaintiff's fee by those hours spent on unsuccessful claims and motions. For example, the trial court there declined to award fees for an unsuccessful claim for injunctive relief, an unsuccessful cross-motion for summary judgment, a second amended complaint that was never filed, and development of media contacts. 159 Wn.2d at 539-40.

(d) Miller Was Not Entitled to a Multiplier

The general rule in Washington is that the lodestar fee is presumed to adequately compensate an attorney for his or her services. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000). This Court again reaffirmed that rule in *Fiore v. PPG Industries*, 169 Wn. App. 325, 355, 279 P.3d 972, 989 (2012). While Washington courts may award a multiplier to account for contingency risk and/or exceptional work, enhancements to reflect an attorney's contingency risk are "disfavored," and the "quality" factor is generally compensated in the attorney's reasonable fee. *Bowers*, 100 Wn.2d at 599.

Only in *rare* instances should the lodestar be adjusted to reflect factors such as the quality or contingent nature of the work *to the extent that it is not already reflected in the hourly rate*. *Pham*, 159 Wn.2d at

Regardless of the difficulty involved in segregation, the *Travis* court made it clear that the trial court has to undertake the task.

542.⁵¹ Here, Miller’s counsel made no effort whatsoever to indicate whether their hourly rates contained a factor for contingent risk, as the *Pham* court required, citing *Bowers*. *Id.* at 542. For example, in *Fiore*, this Court reversed a multiplier sought by the plaintiff in what this Court described as a “straightforward wage and hour case.” *Fiore*, 169 Wn. App. at 357. The Court noted that the case was hard fought, but that is not a sufficient basis for a multiplier: “. . . this litigation was made complicated only by the amount of time and skill it required—a consideration already accounted for in the lodestar amount.” *Id.* That is true here as well. Miller’s counsel’s inflated hourly rates more than adequately addressed any contingent risk.

(e) Miller Was Not Entitled to Recover Expenses Beyond Statutory Costs

Costs in Washington are generally limited to those set forth in RCW 4.84.010. Miller was not entitled to nearly \$140,000 in costs under that statute.

Our courts have clearly held that only statutory costs are recoverable in a CPA case. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d

⁵¹ Federal law generally rejects contingent risk multipliers. *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992). The lodestar is presumptively reasonable and a contingency multiplier would “likely duplicate in substantial part factors already subsumed in the lodestar.” *Id.* at 562. The difficulty of establishing the merits of the case is thus already reflected in the lodestar amount because the more difficult a case is, the more hours an attorney will have to prepare and the more

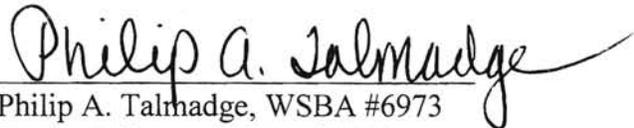
735, 743, 733 P.3d 208 (1987). Similarly, no Washington bad faith case has allowed recovery of costs beyond statutory costs. See *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001).

F. CONCLUSION

Safeco did not enter this litigation expecting to win every point of contention, but it did expect to receive a fair and impartial trial. Unfortunately, as the record reflects, Safeco did not receive the fair trial it is entitled to. This Court should reverse the judgment and remand the case to the trial court for a new trial, a recalculation of damages, fees, and costs, or other disposition as this court deems just. Costs on appeal should be awarded to Safeco.

DATED this 19th day of October, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Randy A. Perry, WSBA #20680

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188-4630

(206) 574-6661

skilled an attorney will have to be to succeed. *Id.* A contingency enhancement would result in double payment. *Id.* at 563.

Timothy Parker, WSBA #8797
Emilia Sweeney, WSBA #23371
Jason Anderson WSBA #30512
Carney Badley Spellman
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020
Attorneys for Appellant
Safeco Ins. Co. of Illinois

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APPENDIX

West's RCWA **4.56.110**

C

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.56. Judgments--Generally (Refs & Annos)

→4.56.110. Interest on judgments

Interest on judgments shall accrue as follows:

- (1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.
- (2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.
- (3)(a) Judgments founded on the tortious conduct of a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(b) Except as provided in (a) of this subsection, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.
- (4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

CREDIT(S)

[2010 c 149 § 1, eff. June 10, 2010; 2004 c 185 § 2, eff. June 10, 2004; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

West's RCWA **48.12.140**

West's Revised Code of Washington Annotated Currentness
Title 48. Insurance (Refs & Annos)
Chapter 48.12. Assets and Liabilities (Refs & Annos)

→48.12.140. "Loss payments," "loss expense" defined

"Loss payments" and "loss expense payments" as used with reference to liability and workers' compensation insurances shall include all payments to claimants, payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and claims field representatives, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other payments made on account of claims, whether such payments are allocated to specific claims or are unallocated.

CREDIT(S)

[2009 c 549 § 7054, eff. July 26, 2009; 1987 c 185 § 22; 1947 c 79 § . 12.14; Rem. Supp. 1947 § 45.12.14.]

HISTORICAL AND STATUTORY NOTES

Intent--Severability--1987 c 185: See notes following RCW 51.12.130.

Source:

RRS § 45.12.14.

West's RCWA **48.12.140**, WA ST **48.12.140**

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West's RCWA **48.12.090**

C

West's Revised Code of Washington Annotated Currentness

Title 48. Insurance (Refs & Annos)

 Chapter 48.12. Assets and Liabilities (Refs & Annos)

→ 48.12.090. Loss reserves--Liability insurance

The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance shall be computed as follows:

(1) The reserves for outstanding losses and loss expenses under policies of personal injury liability insurance and under policies of employer's liability insurance shall be computed in accordance with accepted loss-reserving standards and principles and shall make a reasonable provision for all unpaid loss and loss expense obligations of the insurer under the terms of such policies.

(2) Reserves under liability policies written during the three years immediately preceding the date of determination shall include any additional reserves required by the annual statement instructions of the national association of insurance commissioners.

CREDIT(S)

[1995 c 35 § 2; 1947 c 79 § .12.09; Rem. Supp. 1947 § 45.12.09.]

HISTORICAL AND STATUTORY NOTES

Source:

RRS § 45.12.09.

West's RCWA **48.12.090**, WA ST **48.12.090**

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West's RCWA **48.12.030****C**West's Revised Code of Washington Annotated CurrentnessTitle 48. Insurance (Refs & Annos) Chapter 48.12. Assets and Liabilities (Refs & Annos) **→ 48.12.030. Liabilities**

In any determination of the financial condition of an insurer, liabilities to be charged against its assets shall include:

- (1) The amount of its capital stock outstanding, if any; and
- (2) The amount, estimated consistent with the provisions of this chapter, necessary to pay all of its unpaid losses and claims incurred on or prior to the date of statement, whether reported or unreported, together with the expense of adjustment or settlement thereof; and
- (3) With reference to life and disability insurance, and annuity contracts,
 - (a) the amount of reserves on life insurance policies and annuity contracts in force (including disability benefits for both active and disabled lives, and accidental death benefits, in or supplementary thereto) and disability insurance, valued according to the tables of mortality, tables of morbidity, rates of interest, and methods adopted pursuant to this chapter which are applicable thereto; and
 - (b) any additional reserves which may be required by the commissioner, consistent with practice formulated or approved by the National Association of Insurance Commissioners, on account of such insurances; and
- (4) With reference to insurances other than those specified in subdivision (3) of this section, and other than title insurance, the amount of reserves equal to the unearned portions of the gross premiums charged on policies in force, computed in accordance with this chapter; and
- (5) Taxes, expenses, and other obligations accrued at the date of the statement; and
- (6) Any additional reserve set up by the insurer for a specific liability purpose or required by the commissioner consistent with practices adopted or approved by the National Association of Insurance Commissioners.

CREDIT(S)

[1973 1st ex.s. c 162 § 1; 1947 c 79 § .12.03; Rem. Supp. 1947 § 45.12.03.]

West's RCWA 48.22.030

(6) The policy may provide that if an injured person has other similar insurance available to him or her under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to coverage without regard to whether an incident was intentionally caused. However, a person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the event for which a claim is made under the coverage described in this section. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

CREDIT(S)

[2009 c 549 § 7106, eff. July 26, 2009; 2007 c 80 § 14, eff. July 22, 2007. Prior: 2006 c 187 § 1, eff. June 7, 2006; 2006 c 110 § 1, eff. June 7, 2006; 2006 c 25 § 17, eff. June 7, 2006; 2004 c 90 § 1, eff. June 10, 2004; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]

West's RCWA 48.22.030

CWest's Revised Code of Washington Annotated CurrentnessTitle 48. Insurance (Refs & Annos)Chapter 48.22. Casualty Insurance (Refs & Annos)**→ 48.22.030. Underinsured, hit-and-run, phantom vehicle coverage to be provided--Purpose--Definitions--Exceptions--Conditions--Deductibles-- Information on motorcycle or motor-driven cycle coverage--Intended victims**

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

C

West's Revised Code of Washington Annotated Currentness

Part IV Rules for Superior Court

Cr Superior Court Civil Rules (Cr)

5 5. Depositions and Discovery (Rules 26-37)

→ **RULE 30. DEPOSITIONS UPON ORAL EXAMINATION**

(a) When Depositions May Be Taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

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CREDIT(S)

[Amended effective July 1, 1972; April 2, 1979; September 1, 1985; September 1, 1988; September 1, 1989; September 1, 1993; September 1, 2005.]

Wash. Admin. Code 284-30-590

CWashington Administrative Code Currentness

Title 284. Insurance Commissioner, Office of

Chapter 284-30. Trade Practices

Trade Practices

→ → 284-30-590. Unfair practices with respect to policy cancellations, renewals, and changes

(1) It is unfair practice to utilize a twenty-day notice to increase premiums by a change of rates or to change the terms of a policy to the adverse interest of the insured thereunder, except on a one time basis in connection with the renewal of a policy as permitted by RCW 48.18.2901(2), or to utilize such notice if it is not, by its contents, made clearly and specifically applicable to the particular policy and to the insured thereunder or does not provide sufficient information to enable the insured to understand the basic nature of any change in terms or to calculate any premium resulting from a change of rates.

(2) In the unusual situation where a contract permits a midterm change of rates or terms, other than in connection with a renewal, it is an unfair practice to effectuate such change with less than forty-five days advance written notice to the named insured, or to utilize a contract provision which is not set forth conspicuously in the contract under an appropriate caption of sufficient prominence that it will not be minimized or rendered obscure.

(3) It is an unfair practice to effectuate a change of rates or terms other than prospectively. Such changes may be effective no sooner than the first day following the expiration of the required notice.

(4) If an insured elects to not continue coverage beyond the effective date of any change of rates or terms, it is an unfair practice to refund any premium on less than a pro rata basis.

(5) The cancellation and renewal provisions set forth in chapter 48.18 RCW do not apply to surplus line policies. To avoid unfair competition and to prevent unfair practices with respect to consumers, it is an unfair practice for any surplus line broker to procure any policy of insurance pursuant to chapter 48.15 RCW that is cancelable by less than ten days advance notice for nonpayment of premium and twenty days for any other reason, except as to a policy of insurance of a kind exempted by RCW 48.15.160. This rule shall not prevent the cancellation of a fire insurance policy on shorter notice in accord with chapter 48.53 RCW.

(6) Except where the insurance policy is providing excess liability or excess property insurance including so-called umbrella coverage, it is an unfair practice for an insurer to make a common practice of giving a notice of nonrenewal of an insurance policy followed by its offer to rewrite the insurance, unless the proposed renewal insurance is substantially different from that under the expiring policy.

(7) Where the rate has not changed but an incorrect premium has been charged, if the insurer elects to make a midterm premium revision, it is an unfair practice to treat the insured less favorably than as follows:

(a) If the premium revision is necessary because of an error made by the insurer or its agent, the insurer shall:

(i) Notify the applicant or insured of the nature of the error and the amount of additional premium required;
and

Wash. Admin. Code 284-30-590

- (ii) Offer to cancel the policy or binder pro rata based on the original (incorrect) premium for the period for which coverage was provided; or
 - (iii) Offer to continue the policy for its full term with the correct premium applying no earlier than twenty days after the notice of additional premium is mailed to the insured.
 - (b) If the premium revision results from erroneous or incomplete information supplied by the applicant or insured, the insurer shall:
 - (i) Correct the premium or rate retroactive to the effective date of the policy; and
 - (ii) Notify the applicant or insured of the reason for the amount of the change. If the insured is not willing to pay the additional premium billed, the insurer shall cancel the policy, with appropriate statutory notice for nonpayment of premium, and compute any return premium based on the correct premium.
 - (c) This subsection recognizes that an insurer may elect to allow an incorrect premium to remain in effect to the end of the policy term because the insured is legally or equitably entitled to the benefit of a bargain made.
- (8) If a policy includes conditions allowing the insured to cancel the policy, the insured may cancel the policy or binder issued as evidence of coverage.
- (a) The insured may provide notice before the effective date of cancellation using one of these methods:
 - (i) Written notice of cancellation to the insurer or producer by mail, fax or e-mail;
 - (ii) Surrender of the policy or binder to the insurer or producer; or
 - (iii) Verbal notice to the insurer or producer.
 - (b) If the insurer receives notice of cancellation from the insured, it must accept and promptly cancel the policy or any binder issued as evidence of coverage effective the later of:
 - (i) The date notice is received; or
 - (ii) The date the insured requests cancellation.
 - (c) If an insured provides verbal notice of cancellation to the insurer, the insurer may require the insured to provide written confirmation of cancellation, but may not impose a waiting period for cancellation by requiring written confirmation from the insured.
 - (d) Insurers may retroactively cancel a policy to accommodate the insured.
 - (e) Insurers must establish safeguards to ensure the person requesting cancellation:
 - (i) Is authorized to do so; and
 - (ii) Is informed that the request to cancel the policy is binding on both parties.

Wash. Admin. Code 284-30-590

Statutory Authority: RCW 48.02.060, 10-01-074 (Matter No. R 2008-12), § 284-30-590, filed 12/14/09, effective 1/14/10. Statutory Authority: RCW 48.02.060, 48.44.050 and 48.46.200, 87-09-071 (Order R 87-5), § 284-30-590, filed 4/21/87.

WAC 284-30-590, WA ADC 284-30-590

Current with amendments included in the Washington State Register, Issue 2012-19, dated October 3, 2012

(C) 2012 Thomson Reuters.

END OF DOCUMENT

INSTRUCTION NO. _____

If you find that all of the provisions of an agreement between Ryan Miller and Patrick Kenny are contained in the Settlement Agreement and Assignment of Rights, Judgment and Covenant (the "Settlement Agreement"), and that the Settlement Agreement was intended by all the parties as their final agreement on the subjects addressed in it, then you may not consider evidence outside the written document to add to, subtract from, vary, or contradict that written document unless you also find that terms were included in the document as the result of fraud or mutual mistake.

However, if you find that such written document was not intended to be a complete expression of all of the terms agreed upon by those parties, that is, that the document does not contain all of the terms of their agreement, then you may also consider evidence of the circumstances surrounding the making of the agreement to supply additional terms of the agreement between the parties, but only if they are not inconsistent with the provisions of the written document.

INSTRUCTION NO 8

As a consequence of the first trial, Plaintiff Ryan Miller, is the assignee of the rights, claims and causes of action of Patrick Kenny and Cassandra Peterson against Safeco.

An assignee steps into the shoes of the assignor and has all of the rights of the assignors. The assignee's cause of action is direct, not derivative. The assignee may sue in his or her own name, and may speak in the place of the assignors.

As a result, Ryan Miller is the real party in interest and has the exclusive right to recover all damages related to the assigned causes of action. Who he has agreed to share those damages with, and in what amounts, is not material to his right to recovery.

INSTRUCTION NO. 12

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

1

INSTRUCTION NO. 23

Ryan Miller has the burden of proving each of the following propositions on the assigned claim from Cassandra Peterson:

- (1) That Safeco failed to act in good faith in one of the ways claimed by Cassandra Peterson;
- (2) That Cassandra Peterson was damaged; and
- (3) That Safeco's failure to act in good faith was a proximate cause of Cassandra Peterson's damage.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict on the claim of failure to act in good faith should be for Ryan Miller. On the other hand, if any of these propositions has not been proved, your verdict on the claim of failure to act in good faith should be for Safeco.

A.S.

INSTRUCTION NO. 28

The following are unfair or deceptive acts or practices in the business of insurance:

Misrepresenting pertinent facts or insurance policy provisions.

Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

Refusing to pay claims without conducting a reasonable investigation.

Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.

Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions.

Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

INSTRUCTION NO. 30

It is the duty of the Court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff on Patrick Kenny's or Cassandra Peterson's claim for negligence, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If your verdict is for the plaintiff on Patrick Kenny's claim that Safeco failed to act in good faith, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by Safeco's Failure to act in good faith.

If you find for the plaintiff on Patrick Kenny's claim for failure to act in good faith your verdict must include the following undisputed items:

The net amount of the Stipulated Order Re: Reasonableness of Settlements for \$4,150,000.

In addition, you should consider the following past and future elements of damages:

1. Lost or diminished assets or property, including value of money;
2. Lost control of the case or settlement;
3. Reasonable value of expert or other costs or reasonable attorney fees incurred for the private counsel retained by Patrick Kenny;
4. Damage to credit or credit worthiness;
5. Effects on driving or business insurance or insurability;
6. Emotional distress or anxiety.

The burden of proving Patrick Kenny did not suffer damages rests upon Safeco. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

~~OK~~

If you find for the plaintiff on Cassandra Peterson's claim for failure to act in good faith then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's failure to act in good faith.

The burden of proving damages on Cassandra Peterson's claim rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Consumer Protection Act, then you must determine the amount of money that will reasonably and fairly compensate the Plaintiff for such damages as you find were proximately caused by Safeco's violation.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for violation of the Washington Consumer Protection Act, you must consider injuries to business or property.

The burden of proving damages on the Consumer Protection Act claim rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

If you find for the Plaintiff on Patrick Kenny or Cassandra Peterson's claim for breach of contract, you should determine the sum of money that would put Patrick Kenny and/or Cassandra Peterson in as good a position as they would have been if the parties had performed all their promises.

The burden of proving breach of contract rests upon the Plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

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The Honorable Michael Rickert

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

RYAN E. MILLER, individually, <p style="text-align: center;">Plaintiff,</p> vs. PATRICK J. KENNY, individually, <p style="text-align: center;">Defendant.</p> and SAFECO INSURANCE COMPANY, <p style="text-align: center;">Intervenor/Defendant</p>	CAUSE NO. 01-2-01600-1 JUDGMENT ON JURY VERDICT
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30

I. JUDGMENT SUMMARY

1. **JUDGMENT CREDITORS:** Ryan Miller.
2. **ATTORNEYS FOR JUDGMENT CREDITOR:** David M. Beninger, Luvera Barnett, Brindley Beninger & Cunningham, 701 Fifth Ave. Suite 6700, Seattle, WA 98104.
3. **JUDGMENT DEBTOR:** Defendant Safeco Insurance Company of Illinois.
4. **PRINCIPLE JUDGMENT AMOUNT:** In favor of Ryan Miller and against Defendant Safeco Insurance Company in the amounts set forth in Exhibit 1, which totals \$13,000,00 and includes the following amounts on the assigned claims of:

700

11-9-02540-1
JUDGMENT ON JURY VERDICT - 1

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
6700 COLUMBIA CENTER • 701 FIFTH AVENUE
SEATTLE, WASHINGTON
206.467.61

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a. Patrick Kenny: \$11,900,000
b. Cassandra Peterson: \$1,100,000

TOTAL: \$13,000,000

5. **SUPPLEMENTAL JUDGMENT:** In favor of Ryan Miller and against Defendant Safeco for the following:

Prejudgment Interest \$7,115,049.04 (based on presumed judgment entry date of 3/8/12; an additional \$3378.16 per day must be added to this amount until actual date of entry).

Attorney Fees \$1,563,803.75

Expenses \$ 138,433.94

Treble Damages: \$ 20,000.00

6. **TOTAL JUDGMENT, FEES AND COSTS: \$21,837,286.73**

II. JUDGMENT ON JURY VERDICT

This matter was tried before a jury of twelve (12) starting on November 29, 2011, and concluding December 16, 2011 before the Honorable Michael Rickert.

Plaintiff Ryan Miller and his assignor Patrick Kenny appeared personally and through their attorney David M. Beninger of Luvera, Barnett, Brindley, Beninger & Cunningham.

Defendant Safeco Insurance Company of Illinois appeared through its counsel of record, Timothy Parker and Emilia Sweeney of Carney, Badley, Spellman.

The jury reached a unanimous verdict on Phase I of the bifurcated trial on December 2, 2011. See Exhibit 1, incorporated herein. Phase II commenced immediately following

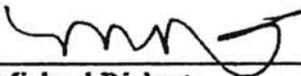
1 the verdict on Phase I on December 2, 2011. The jury reached its unanimous verdict on
2 Phase II on December 16, 2011. See Exhibit 2, incorporated herein.

3
4 **III. ORDER**

5 Accordingly, it is hereby ORDERED that:

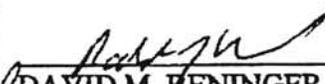
- 6 1. Judgment is entered in favor of Plaintiff Miller and for the reasons and amounts
7 set forth in Exhibits 1 and 2, incorporated herein.
- 8 2. Judgment is supplemented in accordance with the Court's Order Granting
9 Plaintiff's Motion for Fees, Costs, Pre-Judgment Interest and Treble Damages,
10 set forth in Exhibit 3, and incorporated herein.

11 Dated this 8 day of March, 2012.

12 
13 _____
14 Judge Michael Rickert

14 Presented by:

15 LUVERA LAW FIRM

16
17  # 8371
18 DAVID M. BENINGER, WSBA 18432
19 DEBORAH L. MARTIN, WSBA 16370
20 Attorney for Plaintiff

20 Copy Received;

21 CARNEY BADLEY SPELLMAN

22
23 _____
24 TIMOTHY J. PARKER, WSBA 8797
25 EMILIA SWEENEY, WSBA 23371
26 Attorneys for Safeco Insurance Company of Illinois

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
6700 COLUMBIA CENTER #
SEATTLE, WASHIN
206.467.6

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The Honorable Michael Rickert

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

<p>RYAN E. MILLER, individually, Plaintiff, vs. PATRICK J. KENNY, individually, Defendant. and SAFECO INSURANCE COMPANY, Defendant/Intervenor</p>	<p>CAUSE NO. 01-2-01600-1 ORDER GRANTING PLAINTIFF'S MOTION FOR FEES, COSTS, PRE- JUDGMENT INTEREST AND TREBLE DAMAGES</p>
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18

This matter comes before the Court upon Plaintiff's post-verdict motion for attorney's fees, costs, prejudgment interest and treble damages. The Court has reviewed the records, declarations, documents and briefing filed in support and opposition, and having presided over this litigation for many years now, and been the pre-assigned trial judge since 2008, the Court has personal and firsthand familiarity with the nature of the case, the risks involved, the quality of the representation and the difficulties encountered by the Plaintiff and his counsel in successfully obtaining the judgment against Defendant Safeco.

The Court's March 3, 2012 letter ruling addressing the parties' remaining questions

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
6700 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASH 98104
(206) 46

ORDER RE: PLAINTIFF'S MOTION FOR ATTORNEY'S FEES,
COSTS, PRE-JUDGMENT INTEREST & TREBLE DAMAGES - 1

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1 involving attorney's fees, costs, prejudgment interest and treble damages is attached to this
 2 Order as Exhibit A and is incorporated in the below findings and conclusions supporting the
 3 Court's award.

4 In making the lodestar award, the Court has relied upon its extensive familiarity with
 5 this case and has considered the factors set forth under RPC 1.5(a), including the time and
 6 labor required, the difficulty and novelty of the issues and questions involved, the skill
 7 required to perform the services, the length of this litigation, the delay in payment, the
 8 contingent nature of the representation of plaintiff, the prior fee award in this case, the
 9 reasonable and customary fee charged, the discovery complexity and multiple motions,
 10 hearings and proceedings limiting other work, the experience, reputation and quality of
 11 representation, the amounts at issue and the outstanding results obtained, and the efforts to
 12 avoid any wasteful or duplicative time, all of which support the reasonableness and
 13 multiplier applied to the award of fees and costs for this action pending since 2003. Now,
 14 therefore, The Court makes the following findings of fact and Orders based thereon:
 15
 16

17 **I. FINDINGS AND CONCLUSIONS:**

- 18 1. Attorney David Beninger's hourly rate of \$400-450 is reasonable;
- 19 2. Attorney Deborah Martin's hourly rate of \$325 is reasonable;
- 20 3. Attorney Patricia Anderson's hourly rate of \$325 is reasonable;
- 21 4. Attorney Howard Goodfriend's hourly rate of \$300-450 is reasonable;
- 22 5. Attorney Peter Wilburn's hourly paralegal rate of \$100 is reasonable;
- 23 6. Paralegal Catherine Galfano's hourly rate of \$100-125 is reasonable;
- 24 7. Smith Goodfriend's paralegal hourly rate of \$75 is reasonable;
- 25
- 26

LUVERA, BARNETT,
 BRINDLEY, BENINGER & CUNNINGHAM
 ATTORNEYS AT LAW
 6700 COLUMBIA CENTER
 701 FIFTH AVENUE
 SEATTLE, WASHIN
 (206) 467-

1 8. Attorneys Beninger, Martin, Anderson and Goodfriend are all senior attorneys
2 practicing more than 20 years each, with considerable experience and skill in the matters
3 required in this case, and who are or have been partner-level in lawfirms;

4 9. Plaintiff was successful on all of his pursued causes of action, which included
5 CPA, bad faith, contract and negligence, and all of which involved a common core of facts
6 and circumstances, in which the time devoted to discovery, pretrial motions and preparation
7 and trial of this intertwined action cannot be reasonably segregated (which is one reason this
8 Court previously denied Safeco's motion to bifurcate the causes of action);

9
10 10. Plaintiff has been conservative in presentation of the attorney hours spent on
11 this case, and has omitted billing time spent on certain routine, reasonable and necessary
12 matters such as phone calls, interoffice communications, developing theories and strategies,
13 and more, and has taken reasonable steps to avoid and reduce claims for fees that might
14 involve duplicative, non-productive or wasteful matters;

15
16 11. It is not appropriate to restrict the hourly rate to the locality of Skagit Valley,
17 as this Court enjoys and benefits from a rich exchange of lawyers from the entire Puget
18 Sound region, and while certain events or cases may be handled largely within a market of
19 this county, this kind of suit and litigation is not so geographically limited but instead
20 requires a much broader degree of talent and specialization. This case required a high level
21 of skill in the specialized area of insurance bad faith, assignments, contract and CPA, as well
22 as a high level of skill in trial preparation and presentation. Few law firms in the Puget
23 Sound region are equipped to take these kinds of cases on behalf of a client;

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12. The hours awarded and summarized in the tables attached as Exhibit B, and set out in the declarations of the attorneys and paralegals above, all of which are incorporated herein, are reasonable and necessarily incurred for the successful resolution on each of the interrelated causes of action, including CPA and bad faith for which fees are awarded;

13. The expenses and costs summarized in the attached table, incorporated herein, are reasonable and necessarily incurred for the successful resolution of the bad faith, contract and other intertwined causes of action;

14. A lodestar multiplier of 1.5 is appropriate given the contingent representation and risks this matter presented at the inception and throughout the 8 years of non-payment, and the exceptional quality of representation provided to the plaintiff by his counsel. Although the verdict was substantial, at the time of accepting the case it was of a significant risk and given the quality of the representation an upward adjustment is appropriate as set out above;

15. Treble damages under the CPA are appropriate given the jury's findings in plaintiff's favor on all issues and the evidence supporting the claims of bad faith, unfair or deceptive acts and practices presented at trial.

16. As explained in the Court's attached March 5, 2012 letter ruling, the issue of Safeco's liability for prejudgment interest was reserved for post-trial determination and was not submitted to the jury.

17. Safeco must pay Miller 12% compounded interest on the \$4.1 stipulated damage amount agreed to by Kenny in his May 20, 2003 settlement with Miller and Peterson, accruing from May 20, 2003. *See Moratti ex rel. Tauritis v. Farmers Ins. Co. of*

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
6700 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467

1 Washington, 162 Wn. App. 495, 254 P.3d 939 (2011), rev. denied, No. 86824-7 (March 6,
2 2012).

3 Based upon the above findings and conclusions, the Court enters the following:

4 **II. ORDER:**

5 1. Plaintiff's Motion for an award of attorney's fees, expenses and treble damages
6 is hereby GRANTED;

7 2. Plaintiff is the prevailing party on all intertwined causes of action, including
8 the CPA, bad faith and contract, requiring the court to award reasonable fees and costs;

9 3. Plaintiff is awarded attorney's fees in the amount of \$ 1,563,803.75;

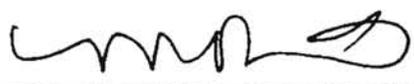
10 4. Plaintiff is awarded expenses in the amount of \$ \$138,433.94;

11 5. Plaintiff is awarded treble damages in the amount of \$ 20,000;

12 6. Plaintiff is awarded prejudgment interest in the amount of \$7,115,049.04
13 (based on presumed judgment entry date of 3/8/12; an additional \$3378.16 per
14 day must be added to this amount until actual date of entry).

15 7. **JUDGMENT IS HEREBY ENTERED in the amounts set out above.**

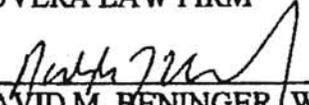
16 Dated this 8th day of March, 2012.



JUDGE MICHAEL RICKERT

17 Presented by:

18 LUVERA LAW FIRM

19  #8371
20 DAVID M. BENINGER, WSBA 18432
21 DEBORAH L. MARTIN, WSBA 16370
22 Attorney for Plaintiffs

23 LUVERA, BARNETT,
24 BRINDLEY, BENINGER & CUNNINGHAM
25 ATTORNEYS AT LAW
26 6700 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467-609

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Copy received;

CARNEY BADLEY SPELLMAN

TIMOTHY J. PARKER, WSBA 8797
EMILIA SWEENEY, WSBA 23371
Attorneys for Safeco Insurance Company of Illinois

LUVERA, BARNETT,
BRINDLEY, BENINGER & CUNNINGHAM
ATTORNEYS AT LAW
6700 COLUMBIA CENTER
701 FIFTH AVENUE
SEATTLE, WASHINGTON 98104
(206) 467 5000

ORDER RE: PLAINTIFF'S MOTION FOR ATTORNEY'S FEES,
COSTS, PRE-JUDGMENT INTEREST & TREBLE DAMAGES - 6