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No. 68594-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RYAN E. MILLER, individually,
Respondent/Cross-Appellant,

V.

PATRICK J. KENNY, individually

Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,
Appellant/Cross-Respondent.

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

BRIEF OF RESPONDENT/CROSS-APPELLANT MILLER

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I. INTRODUCTION

Safeco mishandled third-party liability and first-party UIM claims arising from a high speed rear-end automobile collision that caused admittedly devastating damages to three young passengers over twelve years ago. The jury heard overwhelming evidence, including from Safeco's own expert, that Safeco against the wishes of its insureds refused to disclose policy limits, forcing needless litigation among friends. Then, ignoring the advice of its chosen defense counsel and motivated by incentives to increase its profits by reducing payments on claims, Safeco breached its own standards of care by refusing to make any good faith attempt to settle any one of the multiple claims against its insured, and by steadfastly refusing to tender or interplead its limits or pay its UIM coverage until long after other insurers excess to Safeco had tendered theirs. Safeco left its insured defenseless against a devastating multi-million dollar judgment on the eve of trial, forcing him to consider bankruptcy before relinquishing his only asset— his claims against Safeco.

After eight years of litigation and a three week trial, a properly instructed jury in Phase II of a bifurcated trial unanimously found Safeco acted in bad faith, breached the insurance contract, was negligent, and violated the Consumer Protection Act. The experienced preassigned trial judge found that Safeco's misconduct warranted the maximum treble

damages under the CPA – a decision which is unchallenged on appeal. Similarly absent from Safeco’s appeal is any challenge to the sufficiency of the evidence, the trial court instructions supporting the jury’s liability determination, or the jury’s assessment of damages under an instruction and verdict form that Safeco itself proposed. Safeco’s new argument, that damages for bad faith should be limited as a matter of public policy to the reasonable covenant judgment of the injured plaintiffs against its insured defendant, is unsupported by Washington law and would eliminate any liability for the emotional distress, damage to credit, and other personal harm the insurer causes its insured.

Safeco’s challenge to Phase I of this bifurcated trial is equally without merit. In an unchallenged summary judgment order the trial court held following remand from this court that its insured Kenny’s assignee, respondent Ryan Miller, was the real party in interest with standing to pursue Kenny’s personal damages. While this order made moot any issue regarding Miller’s standing to pursue Kenny’s claims and eliminated any potential for Safeco’s “split” liability, the trial court nonetheless allowed the jury to find based on competent extrinsic evidence and proper instructions that Kenny intended to assign to Miller all his claims against Safeco.

Safeco primarily challenges the trial court’s discretionary rulings made during a three week trial, many of which were invited by Safeco and

none of which had any effect on the jury's verdict. Safeco has abandoned any evidentiary challenge to the various incentive programs that gave stock and bonuses to Safeco employees for meeting arbitrary targets to reduce claims payment and expert expenses. Instead, Safeco argues that the trial court erred in allowing the jury to consider its 20+ evaluations consistently establishing for purposes of its reserves that its insured Kenny was underinsured, and that mental processes and protected work product of Miller's counsel should have been freely discoverable, all to support a fact-bound argument that respondent Miller and his counsel "set up" Safeco, that Miller's demands (and not Safeco's self-interest) prevented settlement, and that Miller and his fellow passengers would not have agreed to release Kenny in exchange for a tender of Safeco's policy limits. The jury rejected Safeco's excuses, relying on overwhelming evidence from Safeco's own witnesses and its own "Ten Commandments" that Safeco and Safeco alone controls whether it acts in bad faith, and that Safeco and Safeco alone chose not to make an offer, negotiate, or mediate for thirty months, thereby depriving Kenny of the protection that Safeco's liability insurance was meant to provide.

Judge Rickert after presiding over this case for years properly rejected Safeco's arguments that the jury's verdict was driven by

inadmissible evidence or by the misconduct of Miller's counsel. This court should affirming his discretionary decisions and the judgment.

II. CONDITIONAL ASSIGNMENTS OF ERROR

Respondent is not seeking affirmative relief, but in an abundance of caution assigns error to preserve his challenge to these rulings:

A. The trial court erred in conducting Phase One of this bifurcated proceeding. (11/22 RP 54-55)

B. The trial court erred in refusing to give Miller's proposed instruction on damages and proposed verdict form. (CP 5009-10, 5308-10)

III. RESTATEMENT OF ISSUES

A. Issues related to Phase One of the bifurcated trial:

1. Once the trial court found as a matter of law that Miller was the real party in interest with standing to pursue all of Kenny's assigned claims, did the trial court err in conducting a trial to determine the scope of Kenny's assignment to Miller?
2. Did the trial court properly allow the jury to interpret an assignment whose meaning was undisputed by the parties to the agreement based on evidence and instructions directed to the circumstances leading up to the assignment, the parties' subsequent acts and conduct, and the reasonableness of their interpretations?

B. Issue related to Cassie Peterson's assigned UIM claims:

Did Safeco violate the UIM statute by unilaterally reducing its insured's UIM coverage from \$500,000 to \$100,000 without obtaining a signed waiver of the insured's right to UIM coverage in the same amount as liability coverage?

C. Issues related to Phase Two of the bifurcated trial:

1. Did the trial court abuse its discretion in allowing Safeco discovery of all the claimants' and its insureds' communications with Safeco, with each other and their counsel, protecting only the third party claimant's right to protect privileged attorney work product, and in allowing the jury to consider evidence of Safeco's reserves, which Safeco set using the same factors it used in evaluating the settlement value of the claims?
2. Did the trial court judge, who presided over eight of years litigation and a three-week trial, abuse his discretion in denying Safeco's motion for a new trial on the ground of misconduct of counsel based upon the court's treatment of leading questions, its assessment of sanctions against both counsel, or a "conscience of the community" closing argument, to which Safeco took no exception?

D. Issues relating to damages:

1. Did the trial court err in giving the damages instruction and verdict form that Safeco itself proposed?
2. May the jury in a bad faith case assess emotional distress and economic damages suffered by the insured, as established by unchallenged evidence at trial, in addition to the stipulated amount of the reasonable covenant judgment?
3. Was Safeco obligated to pay judgment interest on the reasonable covenant judgment entered against its insured in the amount established by the settlement agreement?

E. Issues related to attorney fees and costs:

1. Should this court defer to the findings of the judge who presided over eight years of litigation establishing under the lodestar method a reasonable hourly rate, the number of hours reasonably worked, and granting a 1.5 upward adjustment based on the contingent nature and exceptional quality of the representation?

2. May a plaintiff who is forced to sue to obtain the full benefit of his insurance policy recover all litigation expenses from an insurer who acted in bad faith?

IV. RESTATEMENT OF THE CASE

A. Statement Of Facts.

1. **Four Friends Were Seriously Injured, Two Suffering Critical Head Injuries, When One Rear-Ended A Truck After Falling Asleep On A Post-Graduation Trip To Canada.**

Ryan Miller, Patrick Kenny, Cassie Peterson and Ashley Bethards were close friends from their freshman year at Anacortes High School. All had academically and socially successful high school careers. Ryan, Pat, and Ashley participated in student government; Pat was class president and Ashley vice president senior year. (12/8 RP 204-05) Following graduation in June 2000, all four were accepted at the University of Washington, where Pat and Ryan planned to room together. (12/8 RP 205)

With summer coming to an end and the start of college close at hand, the four friends decided to take a trip to Edmonton, Alberta, where Ryan had family. They set out from Anacortes on the morning of August 22, 2000, in Cassie Peterson's 1994 Volkswagen Passat, crossed the border, and took turns driving through British Columbia. (12/8 RP 205)

The trip ended tragically. In the early morning hours of August 23, Pat Kenny fell asleep behind the wheel and the Passat slammed into the

back of a cement truck near Edson, Alberta. Ryan Miller and Ashley Bethards suffered critical head injuries and were airlifted to Edmonton. (12/8 RP 207) Ryan was in a coma and on a respirator for eight days. (Ex. 28) Ashley was in a coma and on a respirator, with multiple skull fractures, brain swelling, two thoracic spinal fractures and two burst vertebrae impinging her spinal cord. (12/12 RP 197) Cassie Peterson suffered a shattered ankle, facial cuts and bruises. (Exs. 28, 29) Kenny suffered bruises and lacerations requiring stitches to his face. (Ex. 29)

Only Pat Kenny was able to start at the UW in the fall of 2000. Cassie Peterson was unable to attend because of problems with her ankle. (12/8 RP 209, 212) Ryan Miller sustained obvious cognitive injuries affecting his speech and reasoning. (12/8 RP 211; Ex. 28) Given the severity of her injuries, Ashley Bethards rebounded remarkably well, but she suffered from hearing loss and cognitive deficit. (12/8 RP 212; Ex. 28)

2. Safeco Provided Primary Liability Coverage Of \$500,000 And Excess Coverage Of \$1 Million Under The Car Owner Petersons' Policy. Safeco Never Obtained A Statutory UIM Waiver Before Purporting To Unilaterally Reduce UIM Coverage From \$500,000 In The Preceding Policy Period To \$100,000 Per Person.

As a permissive driver of the Passat, Kenny was an additional insured under the Petersons' auto and umbrella liability policies with Safeco. The underlying policy had liability limits of \$500,000 per person

and per accident. (Ex. 26) The Petersons' Safeco umbrella policy had limits of \$1 million. (Ex. 28)

Kenny had his own liability insurance with State Farm with liability limits of \$100,000 per person and \$300,000 per accident. (12/6 RP 184; Ex. 63) Miller had auto insurance with Farmers that included a \$100,000 UIM policy. (12/6 RP 186, Ex. 63) The Bethards were also Safeco insureds. Ashley had a claim under their separate Safeco UIM policy, but its limits were only \$25,000. (Ex. 63; 12/9 RP 211)

The Petersons also had UIM coverage that was potentially available to the injured passengers. When the Petersons purchased the Passat for Cassie in 1999, they were insured by American States Insurance. The Petersons paid for UIM coverage in the same amount as their liability limits of \$500,000 per person and per accident under their policy with American States Preferred. (CP 67; Ex. 26; 12/13 RP 38-40) Safeco thereafter acquired the American States Insurance companies. When Safeco switched the Petersons' policy to Safeco in April 2000, it purported to unilaterally reduce the UIM coverage on the Passat from \$500,000 to \$100,000 per person and \$300,000 per accident. (CP 69; Ex. 26; 12/13 RP 41-42) But after acquiring the Passat in November 1999 the Petersons never requested nor signed a waiver to UIM coverage in the

same amount as their liability coverage, as required by RCW 48.22.030 to effect such a change. (12/13 RP 41)

Safeco's \$1.5 million in total liability coverage was primary to State Farm's \$100,000/\$300,000 coverage under the Kenny policy. (Ex. 71) Safeco's \$500,000 UIM coverage, as well the Millers' \$100,000 UIM coverage with Farmers and the Bethards' UIM coverage (also with Safeco), provided additional insurance to the injured passengers once the third party coverage under the Safeco and State Farm policies had been depleted. (Ex. 71)

3. Safeco Quickly Determined That Its Insured Kenny Was 100% At Fault And Set Its Reserves At Policy Limits Because of the Severity of The Injuries.

Safeco assigned this claim to Jamie Bowman, a junior adjustor who had been out of training less than ten months. Bowman's settlement authority was limited to \$25,000. He was responsible for 150 to 170 other claims and had never before handled a head injury claim, much less two. (12/12 RP 29-30) Within two days of the accident, Bowman knew that Ryan Miller was in and out of consciousness with a brain bruise, that Ashley Bethards was in critical condition with a coma and possible paralysis, and that Cassie Peterson required surgery to repair her fractured ankle. (Ex. 28) Bowman had talked with the RCMP investigating officer, who confirmed that Kenny was 100% responsible under any scenario, and

that there was no evidence of drug or alcohol use by any of the four friends. (12/6 RP 153; 12/8 RP 220; Ex. 32)

Safeco's adjusters evaluate claims not just to determine liability, but also to set reserves, by assessing the "most probable outcome" of a claim. (Exs. 194, 212; 12/5 RP 187-88, 191; 12/6 RP 191) In light of the evidence that its insured Kenny was 100% at fault and due to the severity of the injuries, on August 30, 2000, one week after the accident, Safeco set its reserves at what it believed to be policy limits of \$1.6 million.¹ (Exs. 30, 34, 186) Because its adjusters have an "ongoing responsibility" to "aggressively pursue information" relating to its insured's exposure (Ex. 212), over the succeeding 30 months, Safeco reviewed its reserves no less than 20 times. Each time Safeco determined that the most probable outcome left Kenny underinsured and required Safeco to pay its liability and UIM limits. (Ex. 186; 12/6 RP 136-37)

4. Safeco Refused To Disclose Its Policy Limits (Even Though Its Insureds Immediately Consented), Failed To Advise Its Insured Owner That She Had A Potential UIM Claim, And Attempted To "Pre-Sell" The Injured Claimants Structured Settlement Annuities.

Safeco had various incentive programs that provided cash and stock bonuses to its adjusters based on "performance goals" – targets to

¹ Although it had no written waiver to UIM limits at the same amount as its liability limit, Safeco set its reserves with UIM limits of \$100,000, rather than \$500,000. (CP 455; Ex. 30)

recover “loss economic opportunities” by reducing expenses and minimizing payments on claims. (12/8 RP 128, 162-68) One goal was to reduce legal fees and costs, such as expert expenses over the previous year. (12/8 RP 170; CP 6713-14) Another gave adjusters increased pay for reducing payments to injured claimants by 5%. (12/8 RP 134-36) Another goal was to refer claimants to Safeco affiliates for annuity or structured settlements rather than lump sum settlements. (12/6 RP 204-06) Each Safeco employee responsible for the claims against Kenny had to meet their performance goals to be eligible for these bonuses. (12/8 RP 177-78, 181-83; 12/12 RP 90-92; CP 6711)

Safeco knew that its insured Kenny’s liability was clear and that his passengers’ injuries were extensive. But because the accident occurred in Canada, it explored the possibility of asserting a seat belt defense under Canadian law, which might reduce the claimants’ recovery by at most a third, but could also significantly increase Safeco’s UIM and PIP limits. (12/6 RP 100, 147-48; 12/7 RP 153; Ex. 31) In addition to the dubious choice of Canadian damages law,² Safeco knew that to assert a seat belt defense it would need to hire several specialized experts – an accident

² Even if the forensic evidence had supported a defense that the passengers were not wearing seat belts (it did not), damages would be controlled by the law of Washington, as the forum with the most significant relationship. See *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976).

reconstructionist, a kinesiologist, and biomedical experts. It never did so. (Exs. 31, 42; 12/6 RP 100-01, 150) By fall 2001, Safeco had internally concluded that its seat belt defense was without merit. (Ex. 64)

Safeco continued to receive updated medical information regarding each of the three injured passengers throughout 2001. (*See, e.g.*, Exs. 66, 71) By early 2001, Safeco knew that both Ryan and Ashley were continuing to suffer from their head injuries. Ashley had hearing problems, and Ryan had been advised not to try to start at the UW, and both were experiencing depression. (Ex. 53)

Only one week after the accident, in August 2000, Bowman had obtained Mrs. Peterson's permission to disclose Safeco's policy limits to the injured passengers. (Ex. 29) But Safeco had forbidden the Petersons from disclosing the amount of the umbrella policy, thereby precluding any UIM claims.³ (12/8 RP 198-200; 12/9 RP 130; 12/6 RP 223-24; *see* Ex. 191) Safeco did not even disclose the limits available to pay claims to its insured Pat Kenny. (12/8 RP 209)

³ Safeco never advised Ashley or Ryan that they had potential UIM claims under the policy (12/6 RP 33, 197), and allowed its junior adjuster Bowman to simultaneously handle Cassie's first-party UIM and third-party liability claims for almost two years. Even when it "split the file," in April 2002, Safeco assigned Cassie's UIM claim to Bowman's manager Kim Smith rather than to an independent adjuster. (12/7 RP 13-16, 25; Ex. 104)

As Ryan's cognitive deficits and depression continued, however, Bowman learned in September 2001 that Ryan's father felt that Safeco's liability \$500,000 limits might not be adequate to cover Ryan's damages. (Ex. 58) In fall 2001, both Ryan and his father approached the Petersons about their Safeco umbrella policy. (12/13 RP 27-29) The Petersons thought that disclosing the amount of the policy would help Ryan resolve his claim. But they felt constrained by Safeco's instruction to keep their umbrella limits secret, concerned that disclosing this information without Safeco's permission would jeopardize their coverage. (12/13 RP 31-32; 12/8 RP 200)

Safeco trained its adjustors that refusing to disclose limits could be grounds for bad faith. (Ex. 223) Yet Bowman steadfastly refused to disclose limits, reporting that the Petersons "have not given [information regarding limits] to him and would not." (Ex. 58) Instead, Bowman in November 2001 attempted to "pre-sell" the injured claimants a structured settlement, expressing to his superiors his hope that they would settle without obtaining legal counsel. (Ex. 58; 12/9 RP 168, 182)

Bowman's hopes were misplaced. Prompted in part by Safeco's refusal to disclose the amount of available insurance, the injured passengers had each obtained legal counsel by the end of 2001. (Ex. 62, 70) When Ashley's and Ryan's lawyers inquired about limits, Safeco still

refused to disclose the amount of its \$1 million umbrella policy. (Exs. 62, 63)

5. Safeco's Refusal To Disclose Its Limits Forced Miller To Sue Kenny.

Ryan's lawyer persisted in demanding that Safeco disclose its limits, still without success. (Ex. 77) While Safeco now argues that it needed the Petersons' permission to disclose their limits (App. Br. 9-10), Safeco in fact had Mrs. Peterson's permission shortly after the accident in 2000. (12/13 RP 77; Ex. 29)

Safeco recognized that it was "not in its insured's best interest" to force a lawsuit over disclosure of policy information to which the claimant will ultimately be entitled. (Ex. 84; *see also* 12/5 RP 104; 12/6 RP 104, 107) Bowman admitted that, while he considered it in Kenny's best interest to do so, Safeco did not make any additional attempt to obtain the Petersons' permission to disclose limits in response to Ryan's counsel's request at the end of 2001. (12/12 RP 74; Ex. 72)⁴ As a result of Safeco's refusal to disclose any information regarding insurance limits, Ryan Miller filed suit against Pat Kenny in Skagit County Superior Court in December 2001. (CP 1158-60; Exs. 80, 87)

⁴ Safeco also justified its refusal to disclose limits by misrepresenting that its liability insurance was "sufficient" to cover the claimants' damages (Ex. 80; 12/6 RP 217), despite its establishment of reserve at limits in over 20 reviews.

6. Against The Advice Of The Lawyer Paid By Safeco To Represent Kenny, Safeco Made No Attempt To Settle Even After The Other Insurers Excess To Safeco Had Tendered Their Limits.

In February 2002, Safeco received from Ryan Miller's counsel all of his medical records. Within several months, Safeco had the reports from the UW neuropsych rehabilitation program that Ryan had attended. (Exs. 94, 96, 407; 12/6 RP 236) Safeco also had all of Ashley Bethard's medical records, and those of its UIM insured Cassie Peterson. (Exs. 116, 117) Although Safeco knew full well that Kenny's liability was clear and that his passengers' injuries were catastrophic, it still made no affirmative efforts to settle the claims. Safeco preferred to wait to see if Ashley or Cassie would "blow" the two-year Canadian statute of limitations, taking the position that it could not settle with one of the claimants without jeopardizing a release of Kenny by the others. (Ex. 99; 12/6 RP 240; 12/7 RP 22) At trial, however, Safeco's CR 30(b)(6) representative Greg Hansen confirmed that an insurer "can settle claims on a first come, first served basis." (12/5 RP 157; Ex. 224)

Safeco still made no affirmative efforts to settle in summer 2002 after it received demands and accompanying documentation from all three claimants, including a demand from Cassie Peterson of \$350,000 (well within her \$500,000 UIM limits), Ryan Miller's limits demand, which

expired at the end of July 2002, and Ashley Bethard's proposal for a global settlement that could have fully protected its insured Kenny. (Exs. 117, 125, 127, 130, 134; 12/7 RP 81-82)

Ashley's lawyer recognized that the cumulative demands already exceeded limits, and asked Safeco (as its own standards of care suggested) to pay its limits into a fund on behalf of all claimants in exchange for a release, as the injured passengers would likely release Kenny and amicably agree to divide the proceeds. (12/7 RP 213-14; 12/8 RP 218; 12/9 RP 84-85; 12/5 RP 160; Ex. 224) Safeco did not respond to this August 2002 request, and still took no steps to achieve a settlement, claiming that it still lacked sufficient information to value the injured passengers' claims. (12/6 RP 169)

That same month, even though their policies were excess to Safeco's \$1.5 million in limits, and based on the same information provided to Safeco, State Farm paid its \$300,000 limits under the Kennys' liability policy, and Farmers paid its \$100,000 UIM limits to Ryan Miller. (Ex. 130; 12/6 RP 157-59)

With a potential two year statute of limitations under Canadian law about to expire, and despite her demand for less than the available coverage, Safeco still had not offered to pay Cassie's UIM coverage. (12/12 RP 56) Cassie filed suit against Kenny on August 9, 2002. (Ex. 136)

On August 29, 2002, defense lawyer Vickie Norris, who Safeco had retained to defend Kenny against his injured friends' claims, recommended that Safeco tender its liability limits of \$1.5 million into court in exchange for a release. (Ex. 143; 12/7 RP 138; 12/12 RP 102; 12/13 RP 155) Even though none of the claimants wanted to sue their friend, and even though they each believed that their friendship made it highly likely that they would be able to amicably divide the insurance proceeds, Safeco still refused to offer its limits. (CP 90-92; 12/6 RP 176; 12/8 RP 216; 12/9 RP 85)

Rather than offering its limits in exchange for a full release of its insured, Safeco authorized Norris to offer only the \$500,000 underlying primary liability policy limits. (Ex. 145; 12/7 RP 145) Norris tendered \$500,000 of Safeco's \$1.5 million in coverage to the claimants on November 8, 2002. (Ex. 155; 12/7 RP 59) In lieu of a release, and in light of Safeco's refusal to offer more than one-third of its limits, Norris proposed that Kenny assign to the claimants his bad faith claims against Safeco in exchange for a covenant not to execute. (Ex. 155; 12/7 RP 211)

In its opening brief and at trial, Safeco blames its refusal to settle on the claimants and their counsel (and particularly Miller's counsel), alleging that they refused to mediate or settle. The jury's unanimous verdict rejected this contention, which was contradicted by Safeco's own

contemporaneous file and its admissions at trial. In truth, and as its witnesses acknowledged, Safeco was not interested in a global mediation to obtain a joint release of its insured Patrick Kenny if it meant tendering limits. (12/13 RP 121, 222-24; 12/7 RP 97-98) Kim Smith, Safeco's highest ranking supervisor on these claims, testified that Safeco rejected Norris' request that Safeco offer its limits solely because it did not believe that the value of the claims exceeded its \$1.5 million liability limits. (12/5 RP 94; 12/7 RP 139; 12/13 RP 223; Exs. 144, 145) The decision not to mediate, not to negotiate and not to settle was Safeco's and Safeco's alone.

7. Safeco's Abandonment Of Kenny Left Him No Alternative But To Consent To A Judgment And Assign All Of His Claims Against Safeco To Miller. Safeco Stipulated To The Reasonableness Of The Plaintiffs' \$5.95 Million In Damages.

For six months after the other excess insurers tendered their limits Safeco continued to refuse to settle or to mediate. Safeco offered a number of excuses – that Kenny might not be under-insured, that Safeco needed independent medical examinations by physicians specializing in the claimants' particular injuries. Safeco even revived the long-discredited seat belt defense under Canadian law. (Exs. 145-47, 149)

Ryan Miller's trial against Patrick Kenny was set for June 2003. By March 2003, Safeco had again dropped the seat belt defense, even as it

explored an equally meritless “negligent entrustment” claim against Cassie for letting Pat drive. (12/7 RP 170) With trial looming, Safeco had not retained a single expert, nor arranged for a single IME (and none was ever performed). (12/7 RP 146-49; CP 2365) Instead, Safeco retained a neuropsychiatric expert to review Ashley’s and Ryan’s medical records, using the same medical information that had been provided eight months earlier in the summer of 2002. (12/6 RP 99-101; 12/7 RP 139-40; 12/12 RP 37) The expert told Safeco that both Ryan and Ashley had been under diagnosed, and that their prognoses were far less favorable than their doctors had reported. (Ex. 28; 12/12 RP 25) The expert’s report was so devastating that Safeco asked him not to reduce it to writing. (12/7 RP 150; 12/12 RP 40-41; Ex. 28)

Finally, on the eve of trial, Safeco offered Cassie \$100,000 in UIM coverage, and offered all the claimants its limits in exchange for a full release. But it was too late. (12/12 RP 42-43; Ex. 170) Facing what was sure to be an excess judgment at the imminent trial, Kenny, on Norris’ advice, had considered bankruptcy and hired at his own expense attorney Jan Peterson to negotiate a global settlement. (11/30 RP 54-55; 12/12 RP 118, 170-71) Safeco threatened to pull Kenny’s coverage if he assigned his bad faith claims. (11/30 RP 85-87; Ex. 5)

Safeco eventually consented to the settlement and paid Cassie Peterson a portion of her UIM benefits. (CP 272; 12/7 RP 160) The May 2003 settlement reached by the parties required payment of Kenny's liability limits, entry of reasonable covenant judgments approved by the court and an assignment to Miller of all Kenny's "rights, privileges, claims and causes of action that he may have against his insurers." (Ex. 1) Kenny also was required to cooperate in Miller's prosecution of the assigned claims, and had to pursue himself any claims that may not be assignable. In exchange, Miller agreed to execute on the judgment only against the assigned assets. (Exs. 1, 15; CP 2735)

Safeco intervened to participate in the determination of the reasonableness of the amount of the stipulated judgments. (CP 1792-97, 2405) Based on the same medical records that had been available to it in July 2002 (when it claimed it could not determine the value of the claimants' damages), Safeco now stipulated that Ryan's damages were \$3.45 million (more than two times his original settlement demand), that Ashley's were \$2.1 million, and that Cassie's were at least \$400,000, resulting in a reasonable total covenant judgment of \$5.95 million. Safeco also agreed that the settlement was not the result of fraud or collusion. (CP 2735-36; 12/7 RP 103)

After receiving credit for all insurance proceeds, the net covenant judgment of the injured plaintiffs totalled \$4.15 million. (CP 75; Ex. 15) Under the settlement agreement, interest on the unpaid damages accrued at the statutory rate of 12% compounded annually. (Exs. 1, 15) Safeco does not challenge on appeal the trial court's summary judgment that interest on the unpaid damages accrues at the 12% rate, compounded annually, from the date of the agreement, May 20, 2003. (CP 995)

In the twelve years following the 2000 accident that upended their young lives, Ryan, Pat, Ashley, and Cassie have tried to remain close friends. But the stress of Safeco's claims handling took a toll on their friendships. Safeco's refusal to disclose its limits, its refusal to settle, and the resulting litigation and threat of bankruptcy caused Kenny considerable emotional distress and anxiety. (11/30 RP 88-89; 12/8 RP 218-19) His closest friends had no choice but to sue him, he faced a crippling judgment, and he was forced to hire private counsel, at a cost of over four thousand dollars that Safeco refused to fully reimburse. (11/30 RP 103; 12/12 RP 172; Ex. 21) Safeco's bad faith forced Kenny at the age of 23 to consent to a covenant judgment that he will have to disclose and that will indefinitely affect all his credit applications, including those for a home loan, insurance, and bonding as he attempts to develop a contracting business. (12/8 RP 78-79, 82-88; 12/9 RP 62-64)

B. Procedural History.

In June 2005, Miller amended his complaint to seek as assignee all of Kenny's economic and noneconomic damages against Safeco under theories of negligence, bad faith, and breach of contract, fiduciary duties, and regulations and statute, including the CPA. (CP 30, 33-53) Miller filed a second amended complaint in April 2006 to pursue all of Cassie's, as well as Kenny's, assigned claims. (CP 6483-6506) Kenny has remained a named party, bound by any decision.⁵

Before trial in 2011, the superior court entered a series of orders, many of which are unchallenged by Safeco on appeal:

1. The Trial Court Granted Summary Judgment Confirming That UIM Limits Were \$500,000 And Awarding *Olympic Steamship* Attorney Fees.

The court granted summary judgment that Safeco's unilateral decision to lower the UIM coverage available to Cassie Peterson on her VW Passat violated RCW 48.22.030, and that the Peterson UIM limits were \$500,000, and not \$100,000 as Safeco maintained. (CP 228-30)⁶ In

⁵ Safeco has not challenged the denial of its eve of trial motion to dismiss Kenny. (11/29 RP 29-41) He therefore remains a party to cure any real party in interest or other issues relating to his assignment.

⁶ The decision was limited to UIM coverage. After initially holding that Safeco's actions were "debatable . . . and do not constitute bad faith," (CP 549), the trial court held on reconsideration that Cassie's assigned UIM bad faith claim presented triable issues of fact. (CP 740-41, 755) The jury found as a matter of fact that Safeco's actions were in bad faith. (CP 5411)

an unchallenged February 15, 2008 order, Judge Michael Rickert (“the trial court”) awarded \$43,487.32 as reasonable fees and expenses incurred in establishing Peterson’s right to UIM coverage under *Olympic Steamship*. (CP 997-98)

2. Safeco Obtained An Order Prohibiting Miller’s Counsel From Testifying Unless Miller Waived The Attorney-Client Privilege.

Safeco mischaracterizes the trial court’s orders regarding the discovery and testimony of Miller’s counsel, Ralph Brindley. The court did not order a “blanket prohibition” against discovery from Miller’s counsel. Instead, the court barred discovery of what Safeco conceded was privileged or protected work-product (3/28/08 RP 5) unless Miller notified Safeco that he intended to call Brindley as a witness at trial. (CP 1164, 1781) When Miller sought to have Brindley testify without waiving the privilege, Safeco successfully excluded him as a witness (CP 4984) – precisely the relief that Safeco requested. (CP 1172, 1584; 7/18/08 RP 24 (“he can’t be called to testify. If they want [counsel] to testify then they need to waive [the privilege].”))

3. The Trial Court In A “Concession” To Safeco Conducted A Bifurcated Trial In Which The Jury Found That Kenny Intended Miller To Pursue All His Assigned Claims.

In December 2008, after Miller’s bad faith action had been

pending for over three years and after an unsuccessful challenge to an assignee's right to bring CPA claims (CP 880-83), Safeco for the first time challenged Miller's standing to sue for bad faith, alleging in a motion for summary judgment that Kenny had impermissibly "split" his bad faith claim by reserving for himself the right to "personal damages" (CP 2252-77) and that Miller "is not the real party in interest." (CP 2393) The trial court denied Safeco's motion, but certified its order for interlocutory review under RAP 2.3(b)(4). (CP 2402-04, 2450-51) This court affirmed the trial court in an unpublished decision on December 6, 2010. *Miller v. Kenny*, 158 Wn. App. 1049, 2010 WL 4923873 (No. 64003-8-I, 2010). Limiting its review to the certified question, the court held that whether Kenny had intended in 2003 to assign Miller all his claims against Safeco, or whether (as Safeco argued) Kenny intended to reserve for himself all compensable harm, was a material issue of fact.⁷

Both Cassie Peterson and Kenny had clarified and modified their assignments to state that Miller had the right to assert all causes of action and "elements of damages" related to those assigned causes of action including but not limited to emotional distress, personal attorney fees,

⁷ This court did not address Miller's argument that he was the real party in interest to assert Kenny's claims as it had not been decided or certified by the trial court. (Slip Op. 7, n.11)

credit and other personal damages. (CP 3139; Exs. 9, 18)⁸ In light of this clarification, the trial court on remand granted summary judgment “establishing Miller as the real party in interest to continue pursuing all assigned causes of action and all harm thereto.” (CP 3184)⁹ In what it characterized as a “concession” to Safeco (4/16/12 RP 36), the trial court nonetheless granted Safeco’s motion to bifurcate and to have the jury resolve in an initial trial the intent of the parties in assigning Kenny’s claims to Miller. (11/22 RP 54-55) The jury unanimously found that Miller had the right to pursue all of Kenny’s claims. (CP 5051)

4. The Trial Court Entered Judgment On The Jury’s Verdict Against Safeco And Awarded Attorney Fees To Miller.

The trial court also granted partial summary judgment allowing Miller to present evidence of “non-economic general damages of Mr. Kenny,” and instructed the jury, as Safeco proposed, that those damages could be awarded in addition to the net covenant judgment amount of \$4.15 million if it found in favor of Miller on his bad faith claim. (CP 4512, 5405) Following a three-week trial in December 2011, and using Safeco’s verdict form (CP 5317), the jury returned a verdict in favor of Miller for \$11.9 million on Kenny’s assigned claims for bad faith (\$9.65

⁸ Safeco never challenged the Peterson assignment, which was materially identical to Kenny’s, and does not do so now on appeal.

⁹ Safeco has not assigned error or challenged this order on appeal.

million), as well as for breach of contract, negligence and violation of the CPA (\$750,000 per claim). (CP 5410) The jury also found in favor of Miller on Cassie Peterson's assigned claims, based on Safeco's handling of her UIM claim, awarding damages of \$1.1 million for bad faith (\$350,000), as well as for breach of contract, negligence and the CPA (\$250,000 per claim). (CP 5411-13)

The trial court entered a \$13 million judgment on the verdict against Safeco. (CP 5698-5726) The trial court confirmed its previous summary judgment that interest runs on the \$4.1 stipulated damages owed by Kenny to Miller and Peterson at the contract rate of 12% compounded annually from May 2003 (CP 5676), and awarded prejudgment interest of \$7,115,049.04. (CP 5699)¹⁰ The trial court also found that Safeco's unfair and deceptive acts and practices warranted treble damages on both CPA claims at the pre-2009 maximum of \$10,000 per claim, for a total of \$20,000. (CP 5678, 5683-84) Using the lodestar method and applying trial counsel's previously approved historic hourly rate of \$400, the trial court awarded attorney fees of \$1,563,803.75, including a 1.5 multiplier, and costs of \$138,433.94 for over eight years of litigation. (CP 5676-78, 5681-83)

¹⁰ Safeco has not assigned error or challenged this order on appeal.

After denying Safeco's motion for a new trial (CP 6429), the trial court granted additional fees (CP 6663), and set post-judgment interest on the "mixed judgment" at the uniform rate of 12% compounded annually. (CP 6666)

V. ARGUMENT

A. **Safeco Has Abandoned Any Challenge To Its Liability For Bad Faith, To The Amount Of Economic And General Damages, Or To The Trial Court's Pre-Trial Orders.**

Safeco makes no challenge to the instructions under which the jury found Safeco liable for breach of contract, insurance bad faith, negligence, and violation of the CPA. It has abandoned any arguments regarding the sufficiency of the evidence to support the jury's liability determination. Safeco has also abandoned its post-trial arguments that the jury's separate award of damages under each of the assigned claims lacks evidentiary support.

Safeco now argues that the trial court's damages instruction and verdict form authorized "duplicative damages" by allowing the jury to award Safeco's insured the amount of the reasonable covenant judgment as well as separate economic and non-economic damages. But Safeco itself proposed the damages instruction and the verdict form the jury used in finding it liable. (Arg. F, *infra*) The jury fairly considered and soundly rejected Safeco's argument that it acted reasonably or that Safeco was "set

up” for bad faith. The jury’s decision, based on overwhelming evidence and proper instructions, is not at issue on appeal.

Safeco’s attack on the jury’s verdict is instead based on a host of procedural challenges to discretionary evidentiary and discovery decisions in both phases of the bifurcated trial – the first half of which was unnecessary. Safeco failed to object to many of the rulings it now complains of on appeal during trial, and has failed to assign or argue error in the trial court’s pre-trial summary judgment orders, discovery rulings, and orders in limine, including its order establishing Miller as the real party in interest (CP 3184) (Arg. B, *infra*), its order that Miller never waived his attorney-client privilege (CP 1165) (Arg. D.1, *infra*), its denial of a motion in limine regarding Safeco’s bonus program (11/22 RP 88) (Arg. D.3, *infra*), its order establishing prejudgment interest on the covenant judgment under the claimants’ settlement agreement with Kenny (CP 995) (Arg. G, *infra*), and its February 2008 order establishing as reasonable trial counsel’s hourly rate of \$400. (CP 997-98) (Arg. H.1, *infra*). While Miller addresses each of Safeco’s arguments on the merits below, Safeco either waived, invited, or failed to preserve its 30 assignments of error, or fails to argue the claimed error on appeal.

B. No Error Occurred During Phase One, Which Was In Any Event Unnecessary Because Miller Had Standing To Assert Kenny's Claims Both As The Unchallenged Real Party In Interest And As Assignee.

1. The Trial Court's Unchallenged Summary Judgment That Miller Is The Real Party In Interest Is The Law Of The Case And Establishes Miller's Standing. (Cross-Appeal Assignment of Error 1)

Once the trial court on remand affirmed as a matter of law Miller's standing as the real party in interest to assert all of Kenny's assigned claims, it was error to submit Safeco's technical "partial assignment" defense to the jury. This court in *Miller I* affirmed the trial court's denial of summary judgment on the ground that there were "genuine material fact issues related to the meaning of the settlement agreement's assignment and reservation provisions." *Miller v. Kenny*, 158 Wn. App. 1049, 2010 WL 4923873 at *7 (No. 64003-8-I, 2010). That technical issue became moot, however, when on remand the trial court granted partial summary judgment establishing Miller as the "real party in interest" with standing to assert Kenny's claim. (CP 3184) This unchallenged order disposes of Safeco's evidentiary and "parol evidence" challenges to the jury's finding in Phase One that Miller had been assigned Kenny's claims. (CP 5051) *Nordstrom, Inc. v. Tampourlos*, 43 Wn. App. 370, 375-76, 717 P.2d 293 (1986) (unappealed order "final and binding on both parties"), *rev'd on other grounds*, 107 Wn.2d 735, 733 P.2d 208 (1987).

The real party in interest order affirmed Miller's standing to continue to pursue all of Kenny's claims regardless whether at the time of the initial assignment Kenny fully or (as Safeco argued) only partially assigned those claims to Miller. Kenny's 2009 ratification and clarification of the terms of the assignment (Ex. 9) made Miller the real party in interest under CR 17 regardless of the parties' original intent in the 2003 Settlement Agreement – the issue that Safeco insisted on having the jury resolve in Phase One.

Under CR 17, "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." The rule is designed to foreclose technical challenges to standing, such as those Safeco raises here, based on the timing or the scope of an assignment. *See Eastlake Const. Co., Inc. v. Hess*, 33 Wn. App. 378, 380-81, 655 P.2d 1160 (1982), *remanded on other grounds*, 102 Wn.2d 30, 686 P.2d 465 (1984); 6A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1545 (3d ed).

An assignment simply requires some proof of real party in interest, ratification, or joinder. *See Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 481-82, ¶ 17, 260 P.3d 915 (2011) (assignor personally testified to assignment, foreclosing "any possibility of more than one person

seeking recovery on the debt”). For instance, in *Kommavongsa v. Haskell*, 149 Wn.2d 288, 317-18, 67 P.3d 1068 (2003), the Supreme Court held that an assignment of a legal malpractice claim was void against public policy, but even after judgment and appeal remanded to authorize substitution of the assignor as the real party in interest. *See also Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 226-28, 734 P.2d 533 (real party in interest may be added at any time, even after trial), *rev. denied*, 108 Wn.2d 1026 (1987). Here, Kenny and Miller both remained joined as parties, ensuring they will be bound by any decision on Safeco’s liability and damages, and neither party questioned the validity or meaning of the assignment.

As the trial court recognized, Phase One was nothing more than a “concession” to Safeco, because determining the scope of the Kenny assignment was irrelevant once the court determined as a matter of law that Miller was the real party in interest. (CP 3184; 4/16/12 RP 36) The trial court gave an overly narrow reading to this court’s mandate in *Miller I*, particularly in light of this court’s express acknowledgment that Miller’s standing as the real party in interest was not at issue on discretionary review, *Miller I*, at *7, n.11. *See Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 170 Wn. App. 1, 9, ¶ 17, 282 P.3d 146 (2012) (“when construing an opinion for purposes of determining the scope of remand, it

must be read in its entirety without any particular emphasis.”). The trial court was thus free to resolve that issue on remand – as it did in an order that is not challenged in this appeal.

The trial court thereafter erred in forcing the parties to try Safeco’s technical “split assignment” defense, which had nothing to do with the merits of Safeco’s liability for bad faith, as Safeco could be liable only once on Kenny’s assigned claims. Because the trial court’s unchallenged real party in interest order is the law of the case, the bifurcated Phase One trial and Safeco’s assignments of error to how that trial was conducted are superfluous.

2. Safeco Was Not Entitled To A Parol Evidence Instruction And Failed To Preserve Its Objection Below.

Regardless, the jury found based on proper instructions that the parties to the settlement agreement intended that Miller as assignee assert all of Kenny’s claims.¹¹ The trial court’s instructions accurately set out the “context rule” of contract interpretation, and allowed Safeco to argue its theory that Kenny did not assign to Miller his “personal damages.”

¹¹ The trial court does not abuse its discretion where its instructions (1) permit the parties to argue their theories of the case; (2) are not misleading; and (3) when read as a whole properly inform the jury of the applicable law.” *Knowles v. Harnischfeger Corp.*, 36 Wn. App. 317, 321, 674 P.2d 200 (1983). A party must except to the failure to give a proposed instruction by stating with particularity and on the record the basis for the exception. CR 51(f).

Using WPI 301.05, the trial court instructed the jury to interpret “the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.” (CP 5046)

When the court told counsel that it had decided not to give a separate parol evidence instruction, Safeco’s only (and irrelevant) exception was that Miller had originally proposed the instruction, “so he’s waived his objection.” (12/2 RP 62) Because Safeco offered no further justification for the instruction, its argument that it was entitled to a parol evidence instruction is not preserved for appellate review. *See Bitzan v. Parisi*, 88 Wn.2d 116, 124-25, 558 P.2d 775 (1977) (general objection to instruction does not preserve error for appellate review).

Safeco’s proposed parol evidence instruction was confusing and unnecessary – as the trial court recognized in rejecting it. (12/2 RP 61) Even under Safeco’s interpretation of this court’s mandate on discretionary review, the only issue for the jury in Phase One was the interpretation of the 2003 contract terms. *See Miller I* at *5-7. Neither Safeco nor Miller argued that the settlement agreement was not an

integrated contract, and neither relied on prior negotiations, conversations, or other “evidence outside the written document to add to, subtract from, vary, or contradict” the terms of the instrument. WPI 301.06; **Berg v. Hudesman**, 115 Wn.2d 657, 669-70, 801 P.2d 222 (1990). The jury considered the circumstances surrounding the contract to interpret the meaning of the assignment, cooperation, and reservation clauses of the settlement agreement, just as **Berg** dictates. 115 Wn.2d at 670-71; *see, also Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 777, ¶ 11, 202 P.3d 960 (2009). Because Safeco was fully able to argue its theory under the instructions given, the trial court’s choice of instructions was not an abuse of discretion.

3. The Trial Court Properly Allowed The Jury To Consider Extrinsic Evidence On The Parties’ Intent In Entering Into The Assignment.

Safeco’s arguments that the trial court abused its discretion in its admission of evidence in Phase One are also meritless. Even an erroneous evidentiary decision is reversible error only if “it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred.” **Lutz Tile, Inc. v. Krech**, 136 Wn. App. 899, 905, ¶ 15, 151 P.3d 219 (2007), *rev. denied*, 162 Wn.2d 1009 (2008); **Brown v. Spokane County Fire Protection Dist. No. 1**, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Here, there was neither error nor prejudice.

First, Safeco waived its argument that Kenny's counsel Jan Peterson's testimony constituted inadmissible evidence of "subjective intent" by failing to object to much of the testimony and by failing to ask for a cautionary instruction after some of its objections were sustained.¹² *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999) ("admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.")

Second, Peterson's testimony was admissible extrinsic evidence and not unexpressed subjective intent. Consistent with *Berg*, Peterson testified to the context in which Kenny signed the settlement agreement, the circumstances leading up to the agreement, and the parties' subsequent acts and conduct. He recounted how Safeco placed Kenny in an untenable position by exposing its insured to a certain multi-million dollar personal

¹² Safeco did not object when Kenny's attorney Peterson first testified to "my understanding of the agreement." (11/30 RP 90) Then, the trial court sustained Safeco's objection to evidence of subjective intent, ordering that "Mr. Peterson can testify to what he did and why he did it." (11/30 RP 90) Safeco did not then object when Peterson testified that the obvious purpose of the agreement was to "protect Mr. Kenny from potential multi-million dollars in excess judgments against him . . . and to preserve to Mr. Kenny at least the options of recovering damages personal to him. . ." (11/30 RP 91)

Safeco also did not object when Miller's counsel asked Peterson what the "assignment" meant. (11/30 RP 93-94) The court then sustained Safeco's objection to the question: "what does this [cooperation] mean?" (11/30 RP 95) Safeco also failed to object when Miller was asked "what you understood the purpose of these provisions of the settlement agreement to be." (12/1 RP 133)

judgment and bankruptcy, causing Kenny considerable distress and anxiety, and then sued Kenny in 2005, further exacerbating those personal damages and costs. (Ex. 6; 12/1 RP 23-26)

Third, any statements of unexpressed subjective intent were harmless. Once Kenny testified to his subsequent ratification of a full assignment in favor of Miller (12/1 RP 150-51; Ex. 9), any ambiguity in the terms of the original assignment became irrelevant. *Unifund CCR Partners v. Sunde*, 163 Wn. App at 481-82 (“when the assignor personally testifies to the assignment . . . the testimony forecloses any possibility of more than one person seeking recovery on the debt.”).¹³

Finally, any error was harmless because overwhelming objective evidence, including the circumstances leading up to the agreement and the parties’ subsequent conduct, allowed the jury to find that the parties continually intended to authorize Miller to pursue all of Kenny’s claims, and to allow Kenny to share in the recovery of any “personal” damages for attorney fees, emotional distress, or damage to credit. Should the court review Safeco’s unpreserved challenges to Phase One, it should hold that

¹³ Kenny’s testimony regarding his “expectation” to bring the claims on his own behalf if the court found that some of those claims were “not assignable,” explained the cooperation and prosecution clauses attendant to the assignment clause, all of which supported the covenant not to execute and did not violate the context rule. (12/1 RP 150-52)

the trial court committed no reversible error in its evidentiary rulings and choice of instructions.

C. Safeco Failed To Obtain A Written Waiver Before Unilaterally Reducing Cassie Peterson's UIM Limits From \$500,000 To \$100,000.

Safeco violated Washington's under-insured motorist statute, RCW 48.22.030(3), when it unilaterally reduced the Petersons' UIM coverage on Cassie's Passat from \$500,000 to \$100,000 in the six month policy period covering the August 2000 accident following Safeco's takeover of the Petersons' prior carrier, American States *Preferred*. (CP 228-30) Safeco cannot rely on a UIM waiver executed with American States *Economy* in 1997 to unilaterally reduce UIM coverage on a newly acquired vehicle three years later, particularly where it is undisputed that Safeco did not even know the waiver existed until it reviewed the broker's files *after* the August 2000 accident.

Washington law requires insurers to offer UIM coverage "in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage . . .". RCW 48.22.030(3); *see also* RCW 48.22.030(4) (rejection must be "in writing"). Washington with no exceptions requires a written waiver to lower UIM limits below liability limits, placing "upon an insurer the burden of obtaining a knowing written rejection in order to avoid the statutory requirement for

UIM coverage.” *Clement v. Travelers, Indem. Co.*, 121 Wn.2d 243, 250, 255, 850 P.2d 1298 (1993). The written waiver requirement of RCW 48.22.030(3)-(4) is strictly followed. See *Corley v. Hertz Corp.*, 76 Wn App. 687, 693-94, 887 P.2d 401 (1994) (rental car customer’s signature on agreement containing a waiver of UIM coverage was not “affirmative and conscious act.”), *rev. denied*, 128 Wn.2d 1007 (1996).

The Petersons had \$500,000 in UIM and primary liability coverage on Cassie’s Passat when they added her car to their American States Preferred policy in November 1999, and paid the additional premium for UIM coverage of \$500,000. (CP 67, 88, 5816) Safeco did not disclose to the Petersons that it purported to unilaterally lower their UIM limits to \$100,000 when it issued the Petersons a declaration page for the new policy period starting April 20, 2000, at a premium rate that was \$4.30 less than the \$500,000 UIM coverage they had previously purchased. (CP 67-70, 88-89) The Petersons, who wanted the maximum amount of coverage at the most reasonable rates, never requested nor signed a writing waiving UIM coverage at the \$500,000 level of their liability insurance, never consented to reducing their coverage, and would not have consented had they been asked by Safeco. (CP 87-89)

No evidence supports Safeco’s contention that the Petersons’ \$500,000 coverage for Cassie’s Passat was due to a “scrivener’s error”

(App Br. 54-55) – or that Safeco was entitled to the benefit of the error if it was. Ignoring Safeco’s burden as an insurer to obtain a written waiver, Safeco’s record custodian asserted, with no personal knowledge whatsoever, that the Passat coverage was “erroneously” set at \$500,000 based on nothing more than the absence of evidence that the Petersons had requested “higher UIM limits” – that is, at the same level as their liability limits. (CP 6426-27, 6525)

Safeco cannot rely on a waiver executed in 1997, two years before the Petersons acquired Cassie’s Passat, to argue that the coverage they paid for in November 1999 was “erroneous.” Safeco did not have a copy of the 1997 waiver in its underwriting files and was not even aware of the documents signed by Mrs. Peterson in 1997 until after the August 2000 accident. (CP 447-50, 463, 573, 575) When confronted with the evidence, Safeco’s adjusters, its CR 30(b)(6) representative and the supervisor who set Cassie’s limits at \$100,000, agreed the contract must be reformed to restore the \$500,000 limits. (CP 455; 12/5 RP 172-78; 12/12 RP 62-66)

Safeco’s “scrivener” excuse also fails because Safeco kept and did not refund the Petersons’ additional premium for the statutory \$500,000 in UIM coverage. See *Gattavara v. General Ins. Co. of Am.*, 166 Wash. 691, 697, 8 P.2d 421 (1932) (rejecting insurer’s defense of mistake when

it failed to refund premium). In “welcoming” the Petersons to Safeco, and in its nine pages of forms and declarations in April 2000, Safeco did not notify the Petersons that it considered their previous UIM coverage with American States “erroneous,” and did not notify the Petersons that it was lowering their UIM coverage on the Passat. (CP 5819: “your policy history will follow you to SAFECO”); 5820-26) *See* WAC 284-30-590(1) (insurer must clearly notify insured of changes in terms of policy).

Because it never obtained a written waiver when it purported to unilaterally reduce Cassie’s UIM coverage in 2000, Safeco’s discourse on whether a “new” policy was issued when Safeco took over American States in 2000, or whether Mrs. Peterson’s 1997 waiver remained effective three years later (App. Br. 56-60) is irrelevant.¹⁴ This court should affirm the trial court’s decision that Cassie was entitled to \$500,000 in UIM coverage.

¹⁴ Whether deemed new, renewed, or replaced between distinct sister companies, a reduction of UIM limits from one policy period to the next requires the insured’s waiver. *See 9 Couch on Insurance*, § 125.58 (3rd Ed. 2006).

D. The Trial Court Did Not Abuse Its Discretion In Its Trial Management Decisions Concerning Discovery And The Admission Of Evidence During Phase Two.

Safeco challenges a myriad of discretionary evidentiary and discovery orders, none of which either individually or in sum constituted error or deprived Safeco of a fair trial. “A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.” *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (quotation omitted), *op. corrected*, 22 P.3d 791 (2001); *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 617, 1 P.3d 579, *rev. denied*, 142 Wn.2d 1010 (2000). This court similarly “reviews a trial court’s discovery order for an abuse of discretion.” *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, ¶ 11, 138 P.3d 1053 (2006). An error that does not affect the outcome of the trial is not prejudicial and is not a basis for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Certainly none of these trial management decisions had any bearing on Safeco’s current theory that Miller “set up” Safeco for bad faith, particularly in light of Safeco’s failure to challenge the overwhelming evidence supporting the jury’s

Phase Two verdict, or the court's instructions to the jury on the law of bad faith.¹⁵

1. Safeco Waived Any Argument That It Had The Right To Discovery From Miller's Counsel. Miller Never Waived The Privilege And Safeco's Own Claims File Contained All The Evidence Of Miller's Settlement Strategy.

a. Safeco Abandoned Its Attempt To Seek Discovery From Brindley, Choosing Instead To Exclude Him As A Witness.

In denying Safeco's motion to compel certain discovery from Miller's counsel on the ground of privilege, the court held that "[n]o waiver [of the attorney-client privilege] has occurred." (CP 1165) Safeco has failed to assign error to this order, disposing of its contention that Miller automatically waived the privilege by suing Safeco as assignee on Kenny's and Peterson's assigned claims.

Safeco also waived its purported right to seek discovery from Miller's counsel when the trial court denied without prejudice Safeco's motion to compel Brindley's deposition. Safeco argued in 2007 that if the court placed any restrictions on discovery, Miller's counsel should be barred from testifying. (CP 618; 7/20/07 RP 5) The trial court agreed,

¹⁵ Safeco assigned error to five instructions in Phase Two, but addresses only the trial court's damages instruction in its brief. (App. Br. 4, 60) Those assignments of error are waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

ordering that “Ralph Brindley shall not testify in the trial of this cause unless plaintiff moves within 21 days for relief based on defendant’s [as yet to be filed amended] answer.” (CP 1164)

In the following four years, Safeco never renewed its attempt to depose Brindley and never argued that Brindley’s testimony was “vital to the bad faith claim” (App. Br. 30-31), or to the “incomplete assignment” defense that Safeco first concocted in 2009. Safeco obtained in discovery all documents between Brindley, Safeco and the other claimants. Safeco deposed Ryan Miller and his father without restriction. (CP 6271; 7/20/07 RP 7-8) Miller, not Safeco, later sought modification of the trial court’s 2007 order when he offered Brindley as a witness in support of his bad faith claim. (CP 1167-68) Safeco opposed the motion, arguing that if Miller “want[ed counsel] to testify, then they need to waive [the privilege].” (7/18/08 RP 24; CP 1172, 1584) The trial court again agreed with Safeco, ordering that Safeco could “seek leave” to depose any attorney listed as a witness. (CP 1781) When Miller again sought to present Brindley as a witness in Phase One, Safeco again successfully excluded his testimony, citing the court’s previous orders. (11/29 RP 37-

38; CP 4964)¹⁶

Safeco knew full well that the price of deposing Miller's counsel was that Brindley would give non-privileged testimony on the issue of Safeco's bad faith. Faced with a choice of having Brindley support the other parties and their lawyers, who uniformly testified that the three friends would surely have released Kenny upon a tender of Safeco's limits to divide as they saw fit, or excluding that testimony altogether, Safeco clearly and unambiguously chose the latter.

Safeco may not claim error from the exclusion of evidence that Safeco objected to when Miller sought to introduce the evidence at trial. *McLeod v. Keith*, 69 Wn.2d 201, 417 P.2d 861 (1996). Safeco's acceptance of the benefits of the trial court's rulings bars its post-trial challenge.

b. The Trial Court Properly Exercised Its Discretion Under CR 26 Because Miller Did Not Waive The Attorney-Client Privilege Or Work Product Protection Merely By Suing Safeco For Bad Faith, And Safeco Had No Compelling Need For Discovery.

Though this court need not address the issue, the trial court's 2008 order excluding Brindley as a witness unless Miller waived the privilege

¹⁶ Notably, though it now complains that his testimony was damaging (App. Br. 31-32), Safeco never attempted to depose Jan Peterson, who testified in Phase One. Further, Safeco never argued below that Peterson's testimony concerning Kenny's assignment constituted a broad waiver of the privilege as to Miller's trial counsel. Brindley remained counsel of record in the bad faith case and argued motions on Miller's behalf. (*See, e.g.*, 2/4/08 RP 1; CP 6271)

was not an abuse of the court’s broad discretion under CR 26. Safeco sought information from counsel about “how he thinks . . . what factors he took into account . . . and why he took [a] position with Safeco” (7/20/07 RP 6)¹⁷ that, as the trial court recognized (7/20/07 RP 13) and Safeco conceded (3/28/08 RP 5), went to the heart of the privilege and the work-product doctrine. See *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 742, ¶ 37, 174 P.3d 60 (2007) (Work product doctrine “protects those documents that tend to reveal an attorney’s thinking almost absolutely”).

Safeco’s argument that the privilege was automatically waived when Miller amended his complaint to assert an assigned bad faith claim is unsupported by any Washington law, or for that matter by decisions from other states cited by Safeco.¹⁸ As Safeco instructs its adjusters, and its supervisor acknowledged, “[t]he Insurer controls if there is bad faith.” There can be “no set up.” (Ex. 226; 12/7 RP 227) Plaintiff counsel’s

¹⁷ See App Br. 29, 30 (Safeco sought to discover why Brindley made a limits demand on behalf of Miller, Brindley’s “intent and understanding regarding the meaning of the reservation of claims provision,” and “whether discovering the policy limits was [Brindley’s] sole motivation to sue Kenny . . .”).

¹⁸ See, e.g., *Fireman’s Fund Ins. Co. v. Superior Court*, 72 Cal. App. 3d 786, 140 Cal.Rptr. 677 (1977) (in dispute over disability coverage, attorney required to disclose information provided to examining doctor) (App. Br. 30, 35); *American Reliance Ins. Co. v. Nat’l General Ins. Co.*, 149 A.D.2d 554, 539 NYS 2d 1004 (1989) (allegation that insurer failed to provide plaintiff’s counsel with information necessary to evaluate tort action “affirmatively placed in issue its attorney’s knowledge of facts or communication which might tend to prove bad faith”) (App. Br. 20, 35).

motivation had no bearing on Safeco's actions, and whether Safeco's actions were in its insureds' best interests.

Safeco owes a duty of good faith to its insureds, not to third party claimants. Miller's assigned allegations of bad faith put *Safeco's* actions, not his own, at issue. See *State Auto Prop. & Cas. Co. v. Griffin*, 2012 WL 1940797 at *2 (M.D. Ga. May 29, 2012) ("It is clear that the focus in a bad faith failure to settle claim is on the conduct of the insurance company.")¹⁹ Miller, who was suing as assignee on behalf of Safeco's insureds Kenny and Peterson, never put his own counsel's advice at issue, and Safeco never asserted fraud, collusion or any other defense that would have made counsel's thought processes relevant. (See CP 4929-30) (unchallenged order barring any unpled defenses).

Safeco therefore did not have "substantial need" for protected work product, nor could it show that it was "unable without undue hardship to obtain the substantial equivalent of the materials by other

¹⁹ See also *Lee v. Progressive Express Ins. Co.*, 909 So.2d 475 (Fla. App. 2005) (plaintiff alleging bad faith refusal to settle for policy limits did not waive privilege); *Harter v. Plains Ins. Co., Inc.*, 579 N.W.2d 625 (S.D. 1998) (rejecting argument that attorney was necessary witness in bad faith refusal to settle claim where his correspondence with insurer was admitted into evidence); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322 (9th Cir. 1995) (in arguing that settlement was reasonable, plaintiff did not rely on privileged communications with counsel in underlying case and did not waive privilege).

means.” CR 26(b)(4).²⁰ Safeco’s own files, as well as the non-privileged documents produced by Miller and his counsel, contained each of Brindley’s communications with Safeco and the other claimants. (CP 6271; 7/20/07 RP 7-8). This was all the evidence Safeco needed to defend against the claim that Safeco acted in bad faith toward its insureds by refusing to disclose or offer their policy limits.

Safeco’s discourse on the constitutional right to discovery in a civil case (App. Br. 32) ignores the fact (and the law of the case) that Brindley’s work product and discussions with Miller were privileged. “The discovery rules contemplate conflicts between one party’s rights in the discovery process and other rights or interests, and the rules expressly grant courts discretion to balance these interests and limit conflicts.” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000), *rev. denied*, 143 Wn.2d 1012 (2001). The trial court’s order that Brindley could be deposed only if Miller called him as a witness fairly balanced the parties’ rights and was not an abuse of discretion.

²⁰ This test for protected work product is not substantially different from that used by other courts when a party seeks discovery from opposing counsel. See *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (App. Br. 33).

c. Safeco Was Not Prejudiced By Its Inability To Ask Miller's Counsel About His Thought Processes In Seeking Disclosure Of Limits Or In Making A Limits Demand.

Safeco was not prejudiced by the trial court's initial 2007 order in any event. Nothing precluded Safeco from asking Miller or his father about Miller's own decisions at deposition or at trial. (CP 6271) Miller, not his lawyer, was responsible for each and every important decision in his case. Safeco makes no argument that it was unable to determine what Miller demanded or when he demanded it.

The jury heard overwhelming evidence that Safeco acted unreasonably, violating its own "Ten Commandments" (Ex. 226) and persistently putting its own interests before those of its insured. Safeco, not Brindley, refused to disclose limits, after its insured consented. Safeco, not Brindley, refused to engage in settlement discussions, even while the insurers excess to Safeco were tendering their limits. Safeco, not Brindley, refused to offer Cassie Peterson her \$500,000 UIM limits, which she would have readily accepted. Safeco, not Brindley, left its insured Kenny with no defense and no experts on the eve of trial. And Safeco, not Brindley, refused to offer policy limits, on the pretext that its own evaluation did not warrant limits, and despite the advice of the lawyer

it paid to represent Kenny, when the claimants would have readily agreed to divide the insurance proceeds.

2. The Trial Court Properly Exercised Its Discretion To Allow The Jury To Consider Safeco's Loss Reserves Based On Safeco's Testimony That The Method Of Setting Reserves Was The Same As Evaluating The Claim.

The trial court did not abuse its discretion in admitting evidence of Safeco's reserves as relevant to Safeco's knowledge that the "most probable outcome" was payment of its limits to resolve the claims against Kenny. (Ex. 212) Safeco concedes that an insurer has a duty to continually evaluate the evidence and assess the value of claims – a process that results in coverage, negotiation, settlement, and reserve decisions. Safeco's own policies, and each of its witnesses, confirmed that Safeco set its reserves based on the same factors it used to evaluate this claim and make settlement decisions, and that it then re-evaluated and reconfirmed those reserves 20 times using those same factors. (12/5 RP 102-03, 187-89; 12/6 RP 137, 191; 12/7 RP 12-13; Exs. 186, 212)

As this court has previously held "the dollar amount of [the insurer's] previous evaluations and the documents supporting those evaluations are clearly relevant to a bad faith action based on an allegation that there never was a good faith dispute as to the dollar amount of the claim." *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 392-93, 743 P.2d 832

(1987), *rev. denied*, 109 Wn.2d 1025 (1988), *disapproved on other grounds by Ellwein v. Hartford Acc. and Indem. Co.*, 142 Wn.2d 766, 781 n.10, 15 P.3d 640 (2001). All the cases cited by Safeco recognize that the admissibility of reserves is a discretionary decision for the trial court given the particular facts.²¹

There was no abuse of discretion here, and Safeco's allegation of undue prejudice rings particularly hollow.²² No ruling precluded Safeco from explaining "the reason the reserve was established, the reasonableness of the amount of the reserve, the allocation between indemnity and loss adjustment expense," or any other explanation for its reserves decision. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 56 Cal.Rptr.2d 341, 350 n.17 (1996); *see also Stone v. Allstate Ins. Co.*, 2000 WL 35609369 at *3-4 (S.D. W. Va. 2000) (denying motion in limine to

²¹ The primary case relied upon by Safeco rejected a right to discovery of reserves by the insured third party in an ordinary personal injury case, but recognized that reserves would be relevant in a bad faith claim because "the insurance company owes a duty to its insured to adjust a claim in good faith that the insurance company does not owe to the plaintiff in the present third-party personal injury claim." *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1191, 1193 (Colo. 2002) (App. Br. 36). *See also Molony v. USAA Property & Cas. Ins. Co.*, 708 So.2d. 1220, 1225-26 (La. App. 1998) (Tender of UIM payment in amount less than reserves but within range of insurer's evaluation not per se bad faith, particularly where reserves included defense costs) (App. Br. 37).

²² Safeco fails to cite to the record in asserting that Miller "argued to the jury" that "loss reserves are the same as settlement authority" (App. Br. 37) and its assertion is false. Further, Safeco did not allege that it was prejudiced by the jury's consideration of its reserves in moving for a new trial. (CP 5728-67)

prohibit reference to reserve calculations). The trial court's discretionary evidentiary decision left the jury free to accept or reject Safeco's contention that its settlement decisions were in good faith.

3. The Trial Court Properly Allowed The Jury To Consider Deposition Testimony Of Safeco's Designated Agent Concerning Safeco's Bonus And Cost-Reduction Incentive Programs.

Safeco's bonus and incentive programs, including its \$1.2 billion "turnaround" program in 2001 under "Quantum Leap," gave its adjusters an incentive to refuse to offer policy limits, to refuse to hire experts for defense of insureds, and to limit UIM coverage despite the absence of a valid written waiver. Several Safeco witnesses, including Maryle Tracy, Safeco's senior claims analyst who became responsible for Kenny's claim in 2003, senior supervisor Hildebrand, as well as plaintiff's expert Rob Dietz, testified that Safeco in 2002 implemented a series of defense cost and claims cutting programs that linked employee bonuses to "performance," and paid "turnaround bonuses" to eligible employees, including those who were responsible for handling these UIM and liability claims. (12/6 RP 77-79; 12/8 RP 127-36, 164-72, 177-83; CP 6712-15) Having failed to assign error to the trial court's denial of its motion in limine regarding Quantum Leap (11/22 RP 86-88), Safeco has waived any argument challenging the jury's consideration of evidence of

its bonus and incentive programs with respect to the bad faith of its adjusters, supervisors or as an institution. *In re Det. of Brock*, 126 Wn. App. 957, 960 n.1, ¶ 2, 110 P.3d 791 (2005) (“If a party fails to assign error, we cannot review the issue.”).²³

Safeco has also waived any allegation of error in allowing the jury to consider Tracy’s CR 30(b)(6) testimony regarding interrogatory answers in another case, in which she listed the scope and details of each of Safeco’s incentive and bonus programs available to those involved in adjusting these claims. Safeco did not object below on the ground that this testimony was “improper impeachment evidence,” as it now argues on appeal. (App. Br. 41) Instead, Safeco claimed that the testimony was “irrelevant; confusing, misleading, violative of motion in limine excluding other cases” (CP 5061) Before the Tracy deposition was read to the jury, Safeco again objected that the jury could not consider other bad faith litigation against Safeco. (12/8 RP 139-44) Safeco has waived any “collateral impeachment” argument for appellate review. See *Peters v. Ballard*, 58 Wn. App. 921, 934, 795 P.2d 1158 (1990) (failure to object to

²³ See, e.g., *Zilisch v. State Farm Auto. Ins. Co.*, 196 Ariz. 234, 995 P.2d 276 (Ariz. 2000) (bad faith verdict supported by evidence that adjusters’ compensation was influenced by how much adjusters paid out in claims); *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004) (“compensation of Grange’s employees could be keyed to obtaining low settlements . . . might encourage bad faith practices by adjusters”).

testimony at trial on specific grounds raised on appeal waives issue for review), *rev. denied*, 115 Wn.2d 1032 (1990); *DeHaven v. Gant*, 42 Wn. App. 666, 671, 713 P.2d 149 (“An objection that evidence is ‘prejudicial’ is a general objection and is of little assistance to the court.”), *rev. denied*, 105 Wn.2d 1015 (1986).

Moreover, the record refutes Safeco’s contention that Tracy’s testimony was “improper impeachment evidence” offered to establish that she changed Safeco’s interrogatory answer in the unrelated case. (App. Br. 40-41) Tracy’s interrogatory answers confirmed that senior adjusters received incentive bonuses that increased their base salaries while they were responsible for supervising the claims against Kenny. (12/8 RP 180-83) As the trial court found in denying Safeco’s motion for a new trial (4/16/12 RP 43), there was nothing “collateral” about Tracy’s testimony, which was offered not for impeachment purposes, but as evidence of Safeco’s motive to ignore its duties of good faith. (12/8 RP 140-41)²⁴ See *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 789, 498 P.2d 870 (1972) (evidence that has “direct and independent relevance to a material fact in issue” is not collateral).

²⁴ The trial court characterized Safeco’s Quantum Leap program as one of the “most amazing and interesting smoking guns I had ever seen.” (4/16/12 RP 43)

Finally, Safeco suffered no prejudice. The interrogatory answers themselves were not admitted or even shown to the jury, and the fact that Safeco had to amend its interrogatory response to identify the specific incentive programs was only briefly mentioned (12/8 RP 174-76) in the nine pages of testimony concerning the various incentive programs put into place by Safeco to reduce costs and increase profits. (12/8 RP 174-183)²⁵ Tracy's admittedly relevant testimony provides no ground for reversal of this three week trial.

E. The Trial Court Did Not Abuse Its Discretion In Denying Safeco's Motion For A New Trial After Finding That Plaintiff's Counsel Did Not Engage In Misconduct.

Judge Rickert, who presided over this three week trial, carefully considered and definitively rejected Safeco's allegations of misconduct both in the conduct of this trial and in closing argument. (CP 6429) Particularly in a civil case, "where life and liberty are not at issue," the trial court has "wide discretionary powers" to determine within the context

²⁵ Safeco cites the trial court's statement that the jury found Tracy's testimony was "important." (App. Br. 42) But juror statements regarding their deliberations inhere in the verdict. *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003). In any event, the trial court's comments lend no support to Safeco's argument that the jury was influenced by the change in the interrogatory answer in the Peterson case.

All I can say is Maryle Tracy is Safeco's person. She did what she did. She said what she said. . . . [S]he was not a good witness for Safeco.

(4/16/12 RP 42)

of the entire trial whether counsel engaged in misconduct and whether any misconduct so severely prejudiced the opposing party as to warrant a new trial, and “generally upholds [the] trial court decision[.]” *ALCOA v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) (affirming order denying new trial on grounds of misconduct).²⁶

In order for the conduct of opposing counsel to provide grounds for a new trial, Safeco had the burden of establishing that “misconduct (and not mere aggressive advocacy) . . . is prejudicial in the context of the entire record,” that Safeco “properly objected to the misconduct at trial, . . . and that the misconduct must not have been cured by court instructions.” *ALCOA*, 140 Wn.2d at 539-40 (quoting 12 James Wm. Moore, *Moore’s Federal Practice*, (3d. Ed. 1999)). By not requesting a curative instruction, the defendant waives any claimed error relating to opposing counsel’s conduct at trial. *Strandberg v. Northern Pacific Railway Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961). This court should defer to the trial court’s decision rejecting Safeco’s motion for a new trial on the ground of misconduct.

²⁶ *Accord, Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (App. Br. 45). Safeco ignores the Court’s holding in *Teter*, which *affirmed* the trial court’s decision to grant a new trial as a proper exercise of the trial court’s discretion, *citing ALCOA*, 174 Wn.2d at 222, ¶ 28. The trial court considered *Teter* in denying the motion for a new trial. (4/16/12 RP 43)

1. Safeco Waived Any Objection To Leading Questions, Which In Any Event Provide No Grounds For Reversal.

“Allowing or refusing leading questions is not generally a ground for reversal, unless there appears to be a clear abuse of discretion.” *Bristol v. Streibich*, 24 Wn.2d 657, 658, 167 P.2d 125 (1946) (quotation and emphasis removed). Safeco cites “19 sustained objections” to leading questions in Phase One, and 17 in Phase Two, over 10 days of trial. (App. Br. 47 n.29) But the trial court found that Safeco’s objections were no more frequent than Miller’s, and rejected Safeco’s complaint that a “persistent pursuit” of leading questions justified a new trial, noting that “the number of objections by both sides was, I would say, above average,” that it had sustained Safeco’s objections to leading objections when they were made, and that Safeco never asked for a curative instruction. (4/16/12 RP 43-44)

“To preserve an error relating to misconduct of counsel, a party should object to the statement, seek a curative instruction, and move for a mistrial or new trial.” *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). The trial court stated that had Safeco asked for a curative instruction, it may have given one. (4/16/12 RP 44) There was no abuse of discretion.

2. Safeco Was Not Entitled To A New Trial Where The Trial Court Sanctioned Safeco's Counsel, Not Miller's, For Misconduct In Accusing Miller's Expert Of Perjury Before The Jury.

Safeco's argument that Miller's counsel engaged in misconduct by interrupting Safeco's cross-examination of Miller's expert misstates both the record and the trial court's ruling. (App. Br. 49-51) The trial court found that Safeco's counsel, not Miller's, committed misconduct.

The incident occurred when Safeco's counsel attempted to impeach Miller's expert with a prior statement in an unrelated lawsuit in violation of ER 613, refusing to show Miller's counsel the statement before it was displayed to the jury. When Miller's counsel reached for the document, Safeco's counsel yanked it away, in a rush to cross-examine the witness without further objection. (12/7 RP 245-49) In response to Miller's objection that Safeco was improperly impeaching his expert on a collateral issue and before the court could rule, Safeco's counsel accused Miller's expert of "perjury." (12/7 RP 249)

The trial court discharged the jury, admonished counsel to act professionally, assessed sanctions of \$500 against each lawyer, directed Safeco's counsel to comply with ER 613 by disclosing any documents used for impeachment, and issued a cautionary instruction directing the jury to ignore Safeco's counsel's remarks. (12/7 RP 253-56; 12/8 RP 6,

12, 58-67) Safeco has not appealed this order. Here again, Safeco cannot establish that the trial court's first hand assessment of the situation or its sanctions decision was an unreasonable resolution of this isolated incident.²⁷

3. The Trial Court Refused To Admit An Exhibit Containing The Undisputed Standards Of Conduct For Insurers Approved By Plaintiff's Expert And Former Insurance Commissioner Deborah Senn.

A defendant's own standards of conduct, as well as those imposed by regulatory authorities, are admissible evidence of the standard of care. *See Joyce v. State, Dept. of Corrections*, 155 Wn.2d 306, 324, ¶ 45, 119 P.3d 825 (2005); *Kelly v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 336, 582 P.2d 500 (1978). Miller had two insurance experts, former Insurance Commissioner Deborah Senn and Rob Dietz. Both were deposed, both gave declarations, and both were disclosed as potential trial witnesses. As Mr. Dietz testified, both worked together to compile the exhibits on Principles and Standards of Care, which were based on industry standards and Safeco's own internal claims handling rules and

²⁷ In a footnote, Safeco accuses Miller's trial counsel of "winking" at female trial counsel immediately after the trial court discharged the jury to assess Safeco's counsel's misconduct. (App. Br. 51 n.31) Miller's counsel denied "winking," the trial court made no finding that he had, and Safeco failed to pursue the matter further. (12/7 RP 251) On a single previous occasion, the trial court told Miller's counsel "to be careful" in front of the jury. (12/5 RP 207-08) Safeco did not ask for a mistrial or assert the "mistreatment" of counsel as grounds for a new trial.

testimony. (12/6 RP 54-58; Exs 222-226) Safeco had no objection to admission of the principles of good faith conduct for insurers, as well as Safeco's own standards of conduct, including those it called "The Ten Commandments of Bad Faith," each of which was espoused by Safeco's own witnesses and reflected in the insurance code. (*See, e.g.*, Exs.192, 200, 212, 218, 222, 223-26; 12/5 RP 118, 136; 12/7 RP 12, 54; 12/12 RP 77)

Miller's counsel committed no misconduct by briefly referring to Ms. Senn's signed approval of these undisputed principles and standards. Safeco acknowledges that the trial court did not even admit into evidence the version of the "Principles of Insurance," that bore the signature of expert Senn. (Ex. 214; 12/6 RP 62: clerk directed to redact signature before displaying document to jury) Safeco did not object when the trial court admitted a redacted copy of the document, which Safeco's representative and Miller's expert verified as reasonable standards of conduct. (Ex. 218; 12/6 RP 128; *see* 12/5 RP 138-41; 12/6 RP 56) Safeco also failed to object when Dietz testified as foundation that co-expert Senn had "signed off" on these principles and rules. (12/6 RP 56)

Although her signature was redacted from the admitted exhibit, Safeco argues that it was prejudiced by the mere mention of Senn's

name.²⁸ This argument puts form over substance. Given the overwhelming evidence that Safeco repeatedly disregarded the standards of reasonable care and good faith that it had adopted as its own, Safeco undoubtedly suffered “prejudice” from the jury’s consideration of the standards of conduct, which were admitted without objection. But that is not the type of prejudice that justifies a new trial. See *Wilson v. Olivetti North America, Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (only “unfairly” prejudicial evidence is inadmissible, not evidence that proves harmful to the party opposing its admission), *rev. denied*, 133 Wn.2d 1017 (1997). The mention of Senn’s name was not misconduct, and it certainly did not warrant a new trial.

4. Miller’s Counsel Properly Told The Jury In Closing Argument That It Served As The Conscience Of The Community.

Safeco failed to object at trial to any portion of Miller’s closing argument, in which he reminded the jury that it served as the conscience of the community. Safeco’s untimely attempt to recast Miller’s closing argument as misconduct is without merit.

The trial court refused to grant Safeco’s broad motion in limine to

²⁸ Safeco complains that Ms. Senn’s signature on the document was briefly shown to the jury, but Judge Rickert noted that the exhibit “went up there [on the screen] and went off so quickly” that he “didn’t know what it was.” (12/5 RP 135)

preclude “send a message” arguments, recognizing that Miller should not be barred from arguing that the public policy of deterring insurer misconduct underlies both a claim for breach of the duty of good faith as well as a claim under the Consumer Protection Act. (11/22 RP 86) *See Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 392-94, 823 P.2d 499 (1992). Miller began his closing argument by explaining that under the Consumer Protection Act, the jury’s verdict would affect the relationship between “an insurance company and the public trust and the public interest.” (12/15 RP 61) He told the jury that insureds must serve as private attorney generals under the law in order to enforce the “public compact” that binds insurance companies to proper standards of conduct. (12/15 RP 83, 86) He asked the jurors to ask whether Safeco did “things the right way to reflect how we, as a community, want to be treated?” (12/15 RP 72)

“Appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury.” *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). For instance, in *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 231 P.3d 1211 (2010), the court held that plaintiff’s counsel did not make an improper appeal to passion and prejudice in an employment case by urging the jury to “put a value on their suffering that other departments will look up and say, ‘We can’t do that’ And in so

doing, also let HR departments know that there's a better structure, there's a better way to do this." 155 Wn. App. at 94-95, ¶¶ 106-07.

Here, it was proper for Miller to inform the jury that its verdict has consequences. See *State v. McNallie*, 64 Wn. App. 101, 110-11, 823 P.2d 1122 (1992) (approving argument telling jury that it sits "as representatives of this community" and that the defendant will be set free or held to account as a result of its verdict), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993). Miller's argument, which echoed the trial court's instruction that the CPA prohibits practices "injurious to the public interest" (CP 5396), was a proper appeal to the "conscience of the community," and not an impermissible "Golden Rule" argument. See *State v. Borboa*, 157 Wn.2d 108, 123-24, ¶¶ 28-29, 135 P.3d 469 (2006) (argument that jurors should imagine "disfigurement of your face" not misconduct in assault prosecution).

Safeco's burden is particularly high here because it failed to object or offer a curative instruction and the court told the jury to disregard any argument not supported by the facts or the court's instructions (CP 5375):

Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative instruction. This is especially true when the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded.

In this case, the jury was so instructed and with regard to the debatably improper arguments no contemporaneous objections were made.

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993).

Safeco's argument also demonstrates the importance of a timely objection. Because the distinction between a permissible "conscience of the community" argument and an impermissible "golden rule" argument may not be clear cut, the trial court must be given the opportunity to instruct the jury that it is impermissible to place themselves in the shoes of the plaintiff in determining liability and damages before counsel's argument could be a basis for reversal. See *Bombardi v. Pochel's Appliance & TV Co.*, 9 Wn. App. 797, 809, 515 P.2d 540, *modified*, 10 Wn. App. 243, 518 P.2d 202 (1973) (argument, without objection, suggesting that jurors could be in same position as plaintiff "was not flagrant or highly prejudicial"), *rev. denied*, 83 Wn.2d 1009 (1973).²⁹

²⁹ No Washington court has overturned a jury's verdict for counsel's suggestion that the jurors put themselves in the shoes of the plaintiff in the absence of a timely objection. For instance, in *Adkins v. ALCOA*, 110 Wn.2d at 138-39 (App. Br. 52), "ALCOA's counsel made an improper 'golden rule' argument, which was promptly objected to by Adkins' counsel, and reversal is required in light of the trial court's failure to give a curative instruction as requested by Adkins' counsel." The Court held that "the prejudicial effect of such an argument can be removed by the trial court sustaining a proper and timely objection and then promptly instructing the jury to disregard the improper argument." 110 Wn.2d at 142.

Safeco chose to gamble on the verdict rather than to object to an argument that it now claims was improper. Any alleged error has been waived.

F. The Trial Court Properly Allowed The Jury To Assess Economic And Non-Economic Damages Caused By Safeco's Bad Faith In Addition To The Stipulated Reasonable Covenant Judgment Imposed Against Kenny.

Safeco failed to preserve its attack on the trial court's "treatment of damages." (App. Br. 60) First, Safeco itself proposed the instruction and the verdict form that allowed the jury to award damages beyond the reasonable covenant judgment amount of \$4.15 million, and took no exception to the trial court's damages instruction or to the verdict form. (CP 5301-02, 5405-07) Second, the trial court's Instruction No. 30 accurately stated Washington law, which allows the jury in a bad faith action to award economic and noneconomic damages suffered by an insured in addition to the reasonable stipulated judgment. Third, the jury was instructed to and had a basis to award separate damages on Kenny's separate assigned claims. Finally, because Safeco has abandoned its argument, rejected by the court below, that the jury's verdict lacks evidentiary support or was motivated by passion or prejudice, the amount of compensatory damages is not at issue on appeal.

1. By Proposing The Damages Instruction Given To The Jury, Safeco Waived Its Argument That The Jury's Award Must Be Limited To The Reasonable Stipulated Covenant Judgment.

Safeco failed to argue at trial that Miller was required to “elect” between the covenant judgment and damages for emotional harm and damages to credit. Moreover, Safeco proposed both a damages instruction and the trial court’s verdict form that allowed the jury to award separate but non-duplicative damages on each of the various claims. (CP 5405-07, 5317-21, 5410-14; 12/14 RP 107) A party may not complain of an instruction or a verdict form that was similar or identical to the one it proposed. *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 584, 187 P.3d 291 (2008). The doctrine of invited error precludes a party from “setting up an error at trial and then complaining about it on appeal.” *Nania v. Pacific NW Bell Telephone Co., Inc.*, 60 Wn. App. 706, 709, 806 P.2d 787 (1991).

Safeco’s proposed damages instruction directed the jury to award Miller “the net amount of the Stipulated Order RE: reasonableness of Settlements,” and “in addition . . . future economic damages” suffered by Kenny, including “the reasonable value of business opportunities, loans, and preferred interest rates on loans . . . to be lost in the future.” (CP 5301) Safeco’s proposed instruction omitted non-economic damages.

(CP 5301) With Safeco's consent, the trial court corrected that omission before instructing the jury. (12/15 RP 37-38)³⁰ Safeco's proposed instruction additionally authorized the jury to separately award "the amount of money that will reasonably and fairly compensate the Plaintiff" for damages caused by Safeco's negligence, by Safeco's violation of Consumer Protection Act, and for breach of contract, "to 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." (CP 5301-02, 5341-42) Safeco's proposed verdict form directed the jury to award damages on each of Miller's separate claims and specifically directed the jury not to "include [as damages] any amounts stated above" in its prior awards. (CP 5317-21, 5410-14)

In the conferences preceding formal exceptions Safeco argued not that Miller had to "elect" between the covenant judgment amount and Kenney's economic and general damages, but that under the "judgment rule," the jury could award the covenant judgment amount only on the bad faith claim and not as damages for breach of contract, negligence and under the CPA. (12/4 RP 99-122; 12/15 RP 26-37) In adopting Safeco's

³⁰ Safeco's proposed instruction further authorized the jury to award Miller "the amount of money that will reasonably and fairly compensate the Plaintiff for [Cassie Peterson's] damages as you find were proximately caused by Safeco's failure to act in good faith." (CP 5302) Safeco makes no challenge to the jury's award of \$1.1 million on Cassie Peterson's assigned claims.

instruction and verdict form, the trial court determined that the issue would be moot if, as occurred, the jury first found bad faith. (12/15 RP 31-32) Safeco did not except to damages Instruction 30, and did not except to the verdict form. (12/15 RP 52-54)

Safeco has also abandoned its assignment of error to the partial summary judgment that allowed Miller “to present non-economic general damages of Mr. Kenny” and established the net stipulated judgment as the minimal amount of harm suffered by Kenny. (CP 4512) Safeco’s brief contains no argument that this summary judgment order was erroneous. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (assignments of error not argued in brief are abandoned). The trial court’s damages instruction, its application of the “judgment rule,” and the jury’s allocation of damages are the law of the case.

2. The Trial Court Properly Instructed The Jury That It Could Award Damages In Addition To The Amount Of The Covenant Judgment Against Kenny, But Should Have Directed The Jury To Do So As To Each Of The Claims. (Conditional Cross-Appeal Assignment of Error 2)

Safeco concedes that “a settlement approved as reasonable is the presumptive measure of damages in any subsequent action by the insured against the insurer for bad faith,” (App. Br. 61), and that “the issue of

presumed harm is not before the Court here.” (App. Br. 64)³¹ Miller also proved all of the insureds’ assigned damages “both financial and emotional,” beyond the covenant judgment under the CPA, contract, negligence and bad faith theories and in amounts now uncontested. See *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333, 2 P.3d 1029 (2000), *rev. denied*, 142 Wn.2d 1017 (2001). Safeco instead makes a new public policy argument that an insured must “elect” between the adverse reasonable covenant judgment entered in the underlying action and the separate economic and non-economic damages caused by the insurer.

Safeco’s new argument ignores Washington precedent. The Washington Supreme Court has bound an insurer who has defended its insured through retained counsel to a final, litigated judgment entered against the insured for the past century. *Kibler v. Maryland Cas. Co.*, 74 Wash. 159, 163-64, 132 P. 878 (1913). The “judgment rule” applies equally to settlements, *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 628-29, 245 P.2d 470 (1952), whether the insured is able to pay the excess amount, *Murray v. Mossman*, 56 Wn. 2d 909, 911, 355 P.2d 985 (1960),

³¹ Given Safeco’s concession, an insurer’s ability to “rebut” the presumption by establishing that the insured in fact suffered no harm from the insurer’s bad faith is irrelevant. (App. Br. 63 n.38, *citing Werlinger v. Clarendon Nat’l. Ins. Co.*, 129 Wn. App. 804, 809, 120 P.3d 593 (2005), *rev. denied*, 157 Wn.2d 1004 (2006); *Ledcor Industries, Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255, *rev. denied*, 167 Wn.2d 1007 (2009))

and whether the reasonable settlement is in the form of a formal judgment or order of the court. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998).

A “covenant not to execute coupled with an assignment and settlement agreement is not a release permitting the insurer to escape its obligation,” regardless whether the insurer is liable under a theory of breach of contract, negligence, violation of the CPA or bad faith. *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 198, 698 P.2d 90, *rev. denied*, 103 Wn.2d 1042 (1985). *See Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 228, 741 P.2d 1054 (1987) (applying judgment rule where “Steinmetz was forced to enter into a settlement agreement with Palmer because of Conway’s negligence.”), *rev. denied*, 110 Wn.2d 1006 (1988); *Greer v. Northwestern Nat Ins. Co.*, 109 Wn.2d 191, 202-04, 743 P.2d 1244 (1987) (breach of contract); *Mutual of Enumclaw Ins. Co. v. T&G Const. Co., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) (breach of contract). The Court extended this judgment rule to bad faith claims in *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992), and has

never held that it limits an insurer's liability as Safeco now argues.³²

While the *Butler* Court noted that “the potential effect on the insured’s credit rating, . . . damage to reputation and loss of business opportunities,” 118 Wn.2d at 399, as well as the insured’s “loss of control” over the lawsuit, all resulted in compensable harm, 118 Wn.2d at 392, it did not hold, nor did it imply, that the covenant judgment comprised the sole measure of the harm or included all personal damages suffered by the insured as well as the injured plaintiff, as Safeco now argues. Safeco’s argument is nonsensical, especially since the court determines the reasonableness of the covenant judgment with respect to the injured *claimant’s* damages and does not consider any of the *insured’s* personal damages. See *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487, *rev. denied*, 117 Wn.2d 1018 (1991). Most recently in *Bird v. Best Plumbing Group, LLC*, ___ Wn.2d ___, 287 P.3d 551 (2012), the Court expressly stated that the “presumptive” amount of an insurer’s liability for its insured’s reasonable settlement does not establish the insurer’s *maximum* liability. Instead, “the presumptive

³² In the unlikely event of a remand, this Court should direct the trial court to allow the jury to award Miller a minimum of the \$4.15 million covenant judgment amount if it finds for Miller on *any* of his claims, plus any separate compensable economic and non-economic damages, as Miller proposed in his verdict form. (CP 5316; 12/15 RP 51)

amount is added to any other damages found by the jury.” 287 P.3d at 558, ¶ 29. That is precisely what the jury did here.

The judgment rule is thus not “an artificial construct” (App. Br. 67), but the measure of the cost to discharge an obligation of the insured to the claimant. Here, for instance, Kenny has no covenant without the duty to cooperate and prosecute the assigned claims, and no right to satisfaction of the judgment until “final resolution of all [assigned] causes of action.” (Ex. 1 at 6) Kenny’s underlying obligation was not discharged by virtue of the covenant not to execute. (Ex. 1 at 4).

Safeco’s argument ignores established bad faith law. “[B]ecause bad faith is a tort, a plaintiff is not limited to economic damages” but may recover “the amount of damages, both financial and emotional caused by” the insurer’s bad faith. *Anderson v. State Farm*, 101 Wn. App. 323, 333, 2 P.3d 239 (2000). In *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), for instance, the Court affirmed a judgment against the insurer not just for the economic damages sustained by its insured in making a reasonable settlement, but an additional \$750,000 for the insured’s emotional distress, anxiety and fear caused by his insurer’s breach of the duty of good faith. See also *Greer*, 109 Wn.2d at 202 (damages available to an insured upon the insurer’s wrongful refusal to defend include “among other items . . .” (1) expenses, including

reasonable attorney fees, the insured incurred in defending the underlying action, and (2) the amount of the judgment entered against the insured in the underlying action, even if it exceeds policy limits and resulted from the insured's settlement) (emphasis added).

The judgment rule does not limit Safeco's liability for bad faith. The jury found, and Safeco no longer contests, that its insureds suffered compensable economic and general damages.

3. The Jury Was Instructed (As Safeco Requested) Not To Award Duplicative Damages And Its Award Was Supported By Substantial Evidence.

The trial court gave the jury Safeco's own damages instruction and verdict form, which expressly directed the jury not to assess duplicative damages. (CP 5412-13) ("do not include any amounts stated above.") The jury is "presumed to follow the court's instructions. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 291, 78 P.3d 177 (2003). As a matter of law, Miller was entitled to recover damages on both Kenny's and Peterson's assigned claims for bad faith, negligence, breach of contract, and damage to business or property under the CPA.

As Safeco concedes (App. Br. 69 n.43), because negligence and breach of the duty of good faith are "two separate and distinct causes of action," the jury may be instructed under both theories. *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 612, 971 P.2d 953, *rev.*

denied, 138 Wn.2d 1009 (1999). Just as a jury may consider independent tort theories in awarding damages, it may also be instructed under a theory of breach of contract, as well as for damage to business or property under the CPA. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990).

Damages awarded under different theories are not duplicative. In *Conrad*, for instance, the court affirmed a \$4.755 million verdict against a nursing home under theories of negligence and elder abuse or neglect. The jury separately allocated fixed amounts of damages for each of the specific injuries and pain and suffering of the decedent under each of two causes of action. 119 Wn. App. 286-88. The court rejected defendant's argument that the jury awarded "duplicate awards for the same injuries," 119 Wn. App. at 288-89, because "Conrad could legally recover for both common law negligence and neglect." 119 Wn. App. 291. The court held that a plaintiff recovering under two separate causes of action has no obligation to "show the substantial evidence upon which the jury differentiated between the damage awards."

Here, Conrad presented evidence of negligence. Conrad presented evidence of neglect. And they presented evidence of damages flowing from both negligence and neglect. It was then for the jury to sort out which damages were ascribable to which cause of action. Everything else inheres in this verdict. Inherent in this verdict is a finding that both causes of action contributed to Enid's injuries and

suffering. We need not, and indeed cannot, sort out exactly how the jury went about doing that.

119 Wn. App. at 292 (citations omitted).

As in *Conrad*, the jury was specifically directed in the verdict form not to award duplicative damages, and Safeco “made no objection at trial to the special verdict form and offered no alternative form.” 119 Wn. App. at 289. Safeco’s “double damages” argument is without merit.

4. Safeco Has Not Challenged The Sufficiency Of Evidence Of Damages. The Constitution Vests The Determination Of Damages In The Jury.

Safeco has waived its challenge to the sufficiency of the evidence to support the verdict or the denial of its motion for remittitur. (CP 5758) To the extent this court considers Safeco’s complaint that the verdict is “staggering” (App. Br. 68), it should reject Safeco’s unpreserved argument because the Constitution vests in the jury the sole responsibility to assess damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989). “The verdict of a jury does not carry its own death warrant solely by reason of its size.” *Bingaman v. Grays Harbor Community Hosp.*, 103 Wn.2d 831, 838, 699 P.2d 1230 (1985).

The jury had ample evidence upon which it could base an award of pecuniary or economic loss. Credit expert John Ulheimer testified that the underlying litigation and net stipulated judgments would damage Kenny’s

credit rating and impede his attempt to operate a general contractor business. (12/8 RP 114) Kenny testified that he had considered bankruptcy to protect against the certain excess judgments he faced when left defenseless by Safeco on the eve of trial. (12/8 RP 223-24) Jan Peterson observed his client's desperation when Kenny was forced to hire counsel at his own expense and give up his valuable rights against his insurer. (11/30 RP 88-89; 12/1 RP 108-09)

The jury observed first hand the effect of Safeco's conduct during the underlying litigation and the lasting damage that Safeco inflicted on Kenny's relationships with his close friends. This court cannot second guess the jury's verdict, no matter how "limited" that evidence may appear when viewed from the vantage point of a cold record. *Bunch v. King County*, 155 Wn.2d 165, 179, ¶¶ 23-24, 116 P.3d 381 (2005); *see also Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 70, ¶ 15 (affirming \$750,000 award of emotional distress for insurer's bad faith refusal to defend).

G. The Trial Court Properly Looked To The Parties' Settlement Agreement To Establish Judgment Interest.

Safeco takes issue with the trial court's award of *post*-judgment interest, but has failed to assign or argue error in the trial court's February 2008 order establishing *pre*-judgment interest on the covenant judgment at

12% interest compounded annually, from May 20, 2003 under Kenny's 2003 settlement agreement with Miller, Peterson and Bethards. (CP 995; 2/15/08 RP 13) The trial court's unchallenged February 15, 2008 order establishing the interest rate under the parties' agreement is the law of the case. *Beltran v. State, Dep't of Soc. & Health Services*, 98 Wn. App. 245, 254, 989 P.2d 604 (1999), *rev. granted*, 140 Wn.2d 1021 (2000).

Safeco's challenge to post-judgment interest under RCW 4.56.110 fails because *by contract* the unsatisfied covenant judgment against Kenny continues to accrue interest at the rate established by the settlement agreement until it is fully paid and satisfied. That settlement agreement provided that "12% statutory rate of interest shall accrue and compound annually on the unpaid damages from the date of this agreement." (Ex. 1 at 6) Following entry of judgment, the trial court properly relied on the settlement agreement and its previous order to establishing post-judgment interest at the same rate. (CP 5718-19, 6666)

Because the judgment interest owed by Kenny "is part of the 'amount to be paid' on a contract implementing a settlement of a tort suit, the court does not have authority to adjust the specified interest rate once the court has determined that the amount to be paid is reasonable." *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146, ¶¶ 11, 13, 173 P.3d 977 (2007) ("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.”). *See also Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co.*, 160 Wn. App. 912, 926, ¶ 31, 250 P.3d 121 (2011) (“our statement in *Jackson* referred to the allegations of tort liability that were resolved by the settlement in the underlying suit.”) (App Br. 71-72).

Safeco relies on *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 173, ¶ 38, 208 P.3d 557, *rev. denied*, 167 Wn.2d 1008 (2009) (App. Br. 60), where this court applied the interest rate for judgments based on tortious conduct, RCW 4.56.110(3), to a bad faith claim. But there was neither a settlement agreement establishing an interest rate nor an underlying court-approved judgment in *Woo*. Here, judgment interest was controlled by RCW 4.56.110(1) because the insured is bound to pay the rate set by the settlement agreement. *Jackson*, 142 Wn. App. at 147, ¶ 13.

The trial court did not abuse its discretion when it “examine[d] the component parts of the judgment,” and determined that the judgment “is primarily based on” a contractual obligation. *Unigard*, 160 Wn. App. at 925, ¶ 28. (CP 5718-19) In contrast to *Woo*, where the non-economic damages were three times the amount of economic damages on a tort claim for bad faith, here, the jury found that Safeco breached its obligations under the insurance contract. The trial court therefore entered judgment on that contract claim based on the jury’s verdict for \$1 million

in contract damages and over \$7 million in pre-judgment interest, on top of the \$4.15 covenant judgment. (CP 5698-99, 5707) The trial court's award of judgment interest at the contract rate should be affirmed.

H. The Trial Court's Fee Award, Based On Extensive Findings Under The Lodestar Method, Was Not An Abuse Of Discretion.

Safeco makes no argument challenging the trial court's legal determination that Miller was entitled to fees by statute and common law, or to its finding that the claims "involved a common core of facts and circumstances" and that attorney time "cannot be reasonably segregated." (CP 5682) The trial court entered extensive findings of fact under the lodestar method, establishing the reasonable hours expended by Miller's counsel, the reasonable hourly rate for their services in a case involving a high degree of skill in a specialized area of the law, and finding that the contingent nature of the representation over eight years without payment and the exceptional quality of representation mandated a 1.5 adjustment to the lodestar. (CP 5683)

Since a legal basis exists for the award and the findings are sufficient for appellate review, this court's review is limited to determining whether the trial court manifestly abused its discretion in setting the amount of fees and applying a multiplier. *See Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 789 P.2d

799 (1990), *modification denied*, 804 P.2d 1262 (1991). “[I]t is the trial judge who watches a case unfold and who is in the best position to determine the proper lodestar amount.” *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 351, ¶ 41, 279 P.3d 972, *rev. denied*, ___ Wn.2d ___ (2012), *quoting Morgan v. Kingen*, 141 Wn. App. 143, 163, ¶ 55, 169 P.3d 487 (2007), *aff’d*, 166 Wn.2d 526, 210 P.3d 995 (2009). Safeco would have this court ignore the trial court’s extensive familiarity with this litigation and substitute its own judgment for that of the trial court.

1. The Trial Court Properly Rejected The “Locality” Rule In Setting Counsel’s Reasonable And Historic Hourly Rates.

The trial court did not abuse its discretion in determining counsel’s reasonable hourly rates under the lodestar method using counsel’s historic hourly rates as established in an unchallenged 2008 order. (CP 997-98) *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 153-54, 859 P.2d 1210 (1993) (reviewing trial court’s choice of reasonable hourly rate for abuse of discretion). The fee “customarily charged in the locality for similar legal services,” RPC 1.5(a)(3), is only one of the factors considered by the court in setting a reasonable hourly rate. A trial court abuses its discretion when it arbitrarily sets the hourly rate at the prevailing local rate, because “local fees are just one factor in determining the reasonableness of fees.” *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 774, ¶ 30, 115

P.3d 349 (2005) (reversing trial court’s limitation of fees to those charged in Whatcom County).³³ Safeco’s argument that the trial court set the lodestar at “grossly inflated” hourly rates both ignores the trial court’s finding and relies on a “locality rule” that this court has previously rejected as a matter of law.

Here, the trial court expressly considered all the RPC 1.5(a) factors. (CP 5681) It found that “[i]t is not appropriate to restrict the hourly rate to the locality of Skagit Valley” because the relevant geographic market includes “the entire Puget Sound region,” and because “[t]his case required a high level of skill in the specialized area of insurance bad faith . . . , a high level of skill in trial preparation and presentation,” and because “few law firms in the Puget Sound region are equipped to take these kinds of cases on behalf of a client.” (CP 5682)

Safeco’s attack on trial counsel’s historic hourly rates also ignores the trial court’s February 2008 order granting Miller prevailing party fees under *Olympic Steamship* on Cassie Peterson’s assigned UIM claim, in which the trial court found that “Mr. Beninger’s hourly rate of \$400 is reasonable.” (CP 997-98) This unappealed order establishes the law of

³³ By contrast, in *West v. Port of Olympia*, 146 Wn. App. 108, 123-24, ¶¶ 29-31, 192 P.3d 926 (2008), *rev. denied*, 165 Wn.2d 1050 (2009) (App Br. 76 & n.49), this court affirmed a trial court’s decision to reduce counsel’s rate to that charged locally as a proper exercise of discretion because it was supported by specific findings.

the case. *Beltran*, 98 Wn. App. at 254. The hourly rates established by the trial court, ranging from \$75 for paralegals to \$450 for lead trial counsel in 2011, were not an abuse of discretion. (CP 5694)

2. The Trial Court Did Not Abuse Its Discretion In Finding The Hours Reasonably And Necessarily Incurred Under the Lodestar Method.

The trial court expressly found under the lodestar method that the number of hours set forth in its order were “reasonable and necessarily incurred for the successful resolution on each of the interrelated causes of action.” (CP 5683, 5690-91) Safeco does not argue that it was unreasonable for the trial court to award 3,229.8 hours of compensable time in litigation that spanned eight years, that included an interlocutory appeal, a bifurcated three week trial, and an unprecedented motions practice to respond to Safeco’s litigation strategy, which the trial court described as “whack a mole.” (12/15 RP 33) Safeco argues only that Miller’s fees must be reduced for the failure to rely on contemporaneous time records, relying on federal cases, that are neither controlling nor persuasive under Washington law.³⁴ Even the federal courts recognize that contemporaneous billing records “are not a per se absolute

³⁴ For instance, though federal courts reject contingency enhancements under the lodestar, Washington expressly allows them. *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S.Ct. 2638-42, ¶ 22, 120 L.Ed.2d 449 (1992) (App. Br. 80 n.51); *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007).

requirement,” particularly in contingent fee cases such as this one. *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1506 (10th Cir. 1991).³⁵

No Washington court has ever reversed a fee award for the failure to provide contemporaneous billing records. Instead, Washington only requires “reasonable documentation of their work performed, the number of hours worked, and the category of attorney who performed it.” *Morgan*, 141 Wn. App. at 162; *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). While the Court has expressed a preference for contemporaneous billing records, it has repeatedly held that the documentation “need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the

³⁵ See *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (“fee requests can be based on ‘reconstructed records developed by reference to litigation files.’”), quoting *United States v. \$12,248 U.S. Currency*, 957 F.2d 1513, 1520 (9th Cir. 1991) (district court did not abuse discretion in “accept[ing] the reasonable estimate of 160 hours which Panzer spent on the merits of the case.”); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988) (“The question of whether reconstructed records accurately document the time attorneys have spent is best left to the discretion of the court most familiar with the litigation.”); *Dennis v. Warren*, 779 F.2d 245, 249 (5th Cir. 1985) (affirming fee award where “district court found the non-contemporaneous time records accurately reflected the amount of attorney time actually expended”); *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1207 (11th Cir.) (“the lack of contemporaneous records does not justify an automatic reduction”), cert. denied, 464 U.S. 994 (1983); *Spain v. Valley Forge Ins. Co.*, 152 Ariz 189, 731 P.2d 84, 90 (1986) (Court “unwilling to hold that counsel fees can never be awarded to those who work on a contingent fee basis and do not keep time records”); *City of Manchester v. Doucet*, 133 N.H. 680, 582 A.2d 288, 290 (1990) (“Despite the absence of time records, there was sufficient evidence before the trial judge upon which to calculate a reasonable attorney’s fee”).

type of work performed, and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).” *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 166 Wn.2d 526, 210 P.3d 995 (1998), *quoting Bowers*, 100 Wn.2d at 597.

The trial court here took “an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought,” *Mahler*, 135 Wn.2d at 434 (emphasis in original), relying on its “intimate” familiarity with this “marathon case:”

This Court is intimately familiar with the details and duration of this marathon case. This case has been ongoing since 2002 and is one of the most complex and difficult civil cases ever undertaken in Skagit County. The case took nearly eight years of litigation, a 14 day bifurcated jury trial, two previous trips to the Court of Appeals, 70,000 pages of documents, 95 motions, a \$25,000 discovery sanction imposed, and 669 entries in the trial court docket. This case was tough.

(CP 5690 (incorporated into trial court’s findings at CP 5681))

Miller’s counsel reconstructed the time spent on tasks, breaking out the time spent on individual motions (CP 5471-76), trial preparation (CP 5478), and days in trial (CP 5478), by reference to his correspondence and records. (CP 5424) There was no time allotted for interoffice communications, emails, phone calls, client communications, or time spent developing strategies or tactics. (CP 5424, 5662-63) Trial days were limited to a maximum of 12 hours, and 10 hours per day on

weekends, even though his actual time was substantially greater. (CP 5424) The trial court found that none of the attorneys charged for duplicative time. (CP 5682; *see* CP 5424, 5488, 5502, 5508)³⁶ The court found that “plaintiff has been conservative in presentation of the attorney hours spent on this case.” (CP 5682)

The fact that the trial court did not reduce the fees requested does not mean that it failed to exercise its independent judgment in fixing a reasonable fee. *Steele v. Lundgren*, 96 Wn. App. 773, 780-81, 982 P.2d 619 (1999), *rev. denied*, 994 P.2d 846 (2000). Safeco refused to provide its billing records in contesting the fee award, a fact noted by the trial court in assessing the reasonableness of plaintiff’s fee request. (CP 5678) The trial court’s fee award was supported by extensive findings and was not an abuse of discretion.

3. The Trial Court Did Not Abuse Its Discretion In Awarding A Multiplier Based On The Contingent Nature And Exceptional Quality of Representation.

Like a lodestar determination, this court reviews the trial court’s contingency enhancement for abuse of discretion. *Bloor v. Fritz*, 143 Wn. App. 718, 752, 180 P.3d 805 (2008); *Broyles v. Thurston County*, 147

³⁶ In arguing that Miller sought a duplicative award for fees “on the UIM issue” (App. Br. 77) Safeco conflates the motion related to UIM coverage for which fees were paid (CP 228-30; 997-98) , with the subsequent motion relating to its bad faith in handling Peterson’s UIM claim (CP 740-41), for which no fees had previously been awarded or paid.

Wn. App. 409, 452, 195 P.3d 985 (2008). Safeco concedes that a court is justified in applying a multiplier “to account for contingency risk and/or exceptional work,” but argues that this is not one those “*rare* instances” justifying a departure from the lodestar fee. (App. Br. 79) (emphasis in original).

The trial court’s findings dispose of Safeco’s argument. The trial court found that the case required “a high degree of talent and specialization” and that “[f]ew law firms in the Puget Sound region” would be able to represent Miller against Safeco. (CP 5682) It found that “this case was very contingent,” (CP 5690), and that the case presented significant risk of non-payment “at the inception and through the 8 years of non-payment.” (CP 5683, 5678) Safeco cannot seriously challenge the court’s finding regarding “the exceptional quality of representation provided to plaintiff by his counsel,” (CP 5683), by summarily comparing this eight year scorched earth litigation to a “straightforward wage and hour case.” (App. Br. 80, *citing Fiore*, 169 Wn. App. at 357.)

Safeco’s argument that counsel’s historic hourly rate of \$400 adequately took into account the factors relied upon by the trial court in granting a fee enhancement is without merit. There was no dispute that \$400 represents the historical hourly rate charged from inception of the case until early 2008, (CP 5423), as the trial court found in its

unchallenged 2008 fee award on Peterson's UIM claim. (CP 997-98) See *Steele v. Lundgren*, 96 Wn. App. at 785-86 (approving upward adjustment to historic hourly rates in public interest litigation). While Safeco argues that this court should make different findings, "[o]n this record, we cannot state that no reasonable person would take the view adopted by the superior court." *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 98-99, 52 P.3d 43 (2002), *modified*, 63 P.3d 800 (2003) (affirming 1.5 multiplier).³⁷

4. Miller Was Properly Awarded All His Litigation Expenses.

The trial court's award of litigation expenses was also proper. (CP 5678) Safeco ignores that Miller recovered his fees and costs not only under the CPA, but also based on the finding that Safeco acted in bad faith. That finding alone justified an award beyond statutory costs. See *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 144, 26 P.3d 910 (2001) ("To make such plaintiffs whole, "reasonable attorney fees" must, by necessity, contemplate

³⁷ *Accord*, *Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 334-36, 858 P.2d 1054 (1993) (1.5 multiplier based on quality of work and contingency of case); *Broyles v. Thurston County*, 147 Wn. App. at 452-53 (affirming 1.5 multiplier); *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 742-43, 75 P.3d 533 (2003) (affirming 1.5 multiplier; "we cannot say that its award was an abuse of discretion."), *rev. granted*, 150 Wn.2d 1017, *dismissed* (2004); *Ethridge v. Hwang*, 105 Wn. App. 447, 461-62, 20 P.3d 958 (2001) (1.5 "upward adjustment of the attorney fees was not an abuse of discretion.").

expenses other than merely the hours billed by an attorney.”) *See also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 148, 29 P.3d 777 (2001), *rev. denied*, 146 Wn.2d 1005 (2002), *citing Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 283, 961 P.2d 933 (1998) (expert and investigative expenses recoverable in CPA/bad faith action). The trial court did not err in making Miller whole by awarding him expanded costs.

I. Miller Is Entitled To Attorney Fees On Appeal.

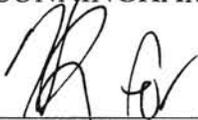
Miller is also entitled to his fees on appeal pursuant to RCW 19.86.090 and *Olympic Steamship*. RAP 18.1(a).

VI. CONCLUSION

This court should affirm and award Miller his fees on appeal.

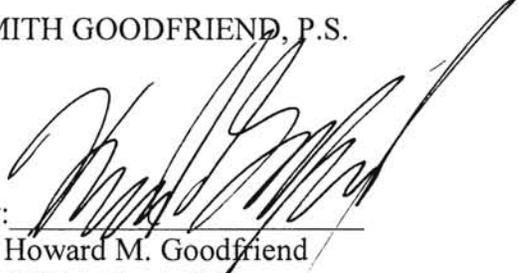
Dated this 7th day of January, 2012.

LUVERA, BARNETT,
BRINDLEY, BENINGER
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David M. Beninger
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DECLARATION OF SERVICE

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

That on January 7, 2013, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant Miller, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 7th day of January, 2013.



Victoria K. Isaksen

No. 68594-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RYAN E. MILLER, individually,
Respondent/Cross-Appellant,

V.

PATRICK J. KENNY, individually
Respondent,

and

SAFECO INSURANCE COMPANY OF ILLINOIS,
Appellant/Cross-Respondent.

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

UNPUBLISHED CASES CITED IN BRIEF OF RESPONDENT/
CROSS-APPELLANT MILLER

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United States District Court,
 M.D. Georgia,
 Columbus Division.
 STATE AUTO PROPERTY AND CASUALTY
 COMPANY, Plaintiff,
 v.
 Frank GRIFFIN, Karen Griffin and Rachel Griffin,
 Defendants.

No. 4:11-CV-14 (CDL).
 May 29, 2012.

J. Robert Persons, Smith Moore Leatherwood LLP,
 Jeffrey Alan Van Dwyne, William E. Turnipseed,
 Atlanta, GA, for Plaintiff.

E. Michael Moran, Peter Andrew Law, Edward A.
 Piasta, Atlanta, GA, for Defendants.

ORDER

CLAY D. LAND, District Judge.

*1 This action is the second declaratory judgment action filed by State Auto Property and Casualty Company ("State Auto") arising from Rachel Griffin's collisions with cyclists Matthew Scott Matty and Michael Davis. Matty died as a result of his injuries suffered in the collisions, and Davis suffered serious personal injuries. At the time of the collisions, State Auto insured Rachel Griffin and her parents, Frank and Karen Griffin. In the first declaratory judgment action, State Auto sought a declaration that the two collisions should be considered one accident under the Griffin's insurance policy, and therefore, the total policy limits available for both personal injury liability claims was \$100,000. State Auto lost that action, and it has been determined that there were two accidents with \$100,000 personal injury liability limits available for each claim. In this second action, State Auto seeks a declaration that it did not act in bad faith in addressing the settlement demands related to the

collisions. Specifically, State Auto contends that its initial decision to pay \$100,000 into the registry of the Court pursuant to its first declaratory judgment/interpleader action and its subsequent payment of an additional \$100,000 into the registry of the Court upon a determination that two accidents occurred negate any bad faith that would be required to hold State Auto legally responsible for any liability arising from these two accidents in excess of the \$200,000 that it has paid into the registry of the Court.

During discovery in this second declaratory judgment action, State Auto sent subpoenas to the attorneys who represented Matty and Davis in the first declaratory judgment action, seeking correspondence regarding that action between the attorneys for Matty and Davis. State Auto seeks the documents in an attempt to discover evidence that the attorneys colluded to "set up" State Auto for a bad faith claim. The attorneys for Matty and Davis filed a motion to quash the subpoenas, claiming that the subpoenas seek work product that was produced during a joint and common defense arrangement. The attorneys have produced the responsive documents, which they claim are privileged, for in camera inspection. Having reviewed the documents, the Court finds that they are not relevant to the issues to be decided in this present declaratory judgment action. For that reason, the subpoenas are quashed.

DISCUSSION

The issue presented in this declaratory judgment action is whether State Auto acted in bad faith when it failed to settle the underlying claims of Matty and Davis within its insureds' liability policy limits. *See Southern Gen. Ins. Co. v. Holt*, 262 Ga. 267, 268, 416 S.E.2d 275, 276 (1992) ("An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim."). To determine whether an insurer engaged in bad faith in its handling of a claim, the standard

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applied by the Court (and by the factfinder if a genuine factual dispute exists) is whether “the insurer, in view of the existing circumstances, has accorded the insured ‘the same faithful consideration it gives its own interest.’ ” *Id.* at 269, 416 S.E.2d at 276 (quoting *Great Am. Ins. Co. v. Exum*, 123 Ga.App. 515, 519, 181 S.E.2d 704, 707 (1971)). “[W]hen the [insurance] company has knowledge of clear liability and special damages exceeding the policy limits,” the issue is “whether the insurer acted unreasonably in declining to accept a time-limited settlement offer.” *Id.*

*2 It is clear that the focus in a bad faith failure to settle claim is on the conduct of the insurance company. Consequently, the Court cannot conceive of how correspondence between counsel for the injured parties who obtained judgments in excess of the insured's policy limits could be relevant to a subsequent bad faith failure to settle claim against the insurance company by its insured. State Auto suggests that such evidence may be relevant based on the following dicta from the Georgia Supreme Court's opinion in *Holt*, which quoted a federal district court judge from the district of Oregon as follows:

Nothing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could “set up” an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open.

Pl.'s Reply to Defs.' Mot. to Quash Subpoenas to Non-Parties 6–7, ECF No. 31 (quoting *Holt*, 262 Ga. at 269, 416 S.E.2d at 276 (quoting *Grumbling v. Medallion Ins. Co.*, 392 F.Supp. 717, 721 (D.Or.1975))). Based on this dicta, State Auto argues that “[c]ollaboration among counsel for [Matty, Davis, and the Griffins] to ‘set up’ a bad faith case is the subject of legitimate discovery.” Pl.'s Reply to Defs.' Mot. to Quash Subpoenas to Non-Parties 11. The Court interprets *Holt* differently.

As previously noted, the issue for determination in a bad faith failure to settle action is whether the conduct of the insurance company, under all of the relevant circumstances, demonstrates that it acted in bad faith in its handling of the claims presented to it. An indicator of that bad faith is the extent to which the insurer favored its own interest over the interest of its insured. The *Holt* dicta, quoting the federal district judge from Oregon, does not indicate that the motivation of the insured's counsel is pertinent to the resolution of this issue. It simply indicates that the imposition of an unreasonably short time within which an offer to settle would remain open is a relevant factor in evaluating whether the insurance company acted unreasonably in failing to accept such an offer. The Court does not understand how the insured's motivation has any bearing on whether the insurance company responded properly. Of course, *the result* of that motivation, such as an unreasonably short deadline, may be relevant. It is relevant not because the insured or its counsel was attempting to “set up” the insurance company but because the amount of time that the insurance company was given to respond to an offer of settlement goes directly to the insurance company's conduct and the constraints on its ability to respond. The Court is unpersuaded that the *Holt* “set up” dicta means that the subjective intent of the parties or their attorneys has any relevance to the determination of bad faith on the part of the insurance company. Even if the attorneys for Matty and Davis did have the subjective intent to “set up” State Auto for a bad faith claim, their intent simply is not relevant to whether State Auto's response was in bad faith. State Auto has pointed the Court to no holding of any Georgia appellate court that supports State Auto's “set up” theory. Moreover, the Court does not find the authority relied on by State Auto to be persuasive on the point for which State Auto relies on it.^{FN1} If State Auto wishes to plow new ground, it will have to wait until the case gets to the Eleventh Circuit, at which time the Court of Appeals may have the opportunity to refer the question to the Georgia Supreme Court.^{FN2}

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FN1. Under State Auto's theory, if a lawyer for an insured drafted a letter consistent with *Holt* and part of his motivation in doing so was his hope that it would be rejected so that he could pursue a bad faith claim, then his motivation would be relevant in evaluating whether the insurance company acted in bad faith. The Court is convinced that the Georgia Supreme Court never envisioned that its quotation of a federal judge's dicta would ever be carried to this extreme.

FN2. This Court recognizes that it has the authority to certify the question to the Georgia Supreme Court, but it finds the resolution of the issue to be so clear, even as a matter of first impression, that referral to the Georgia Supreme Court would be a waste of that Court's limited time and resources and would unnecessarily delay the disposition of this action.

CONCLUSION

*3 Because the documents that State Auto seeks through its subpoenas are not relevant and are not reasonably calculated to lead to the discovery of admissible evidence, the Motion to Quash those subpoenas (ECF No. 26) is granted.

IT IS SO ORDERED.

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United States District Court, S.D. West Virginia.
Betty J. STONE and Ronald C. Stone, Plaintiffs,
v.
ALLSTATE INSURANCE COMPANY, Defendant.

Civil Action No. 2:00-0059.
July 24, 2000.

Named Expert: Dr. William H. Burke, Ph.D.
Shawn P. George, Esquire, George & Lorensen,
Charleston, WV, for Plaintiffs.

Brent K. Kesner, Kesner, Kesner & Bramble, Char-
leston, WV, Tanya M. Kesner, Ellen R. Archibald,
Esquire, for Defendant.

MEMORANDUM DECISION AND ORDER
JOSEPH R. GOODWIN, Judge.

*1 Pending before the court are the following motions, all filed by the defendant, Allstate Insurance Co. ("Allstate"): (1) a motion in limine to exclude the testimony of William H. Burke, Ph.D., or any reference to his proposed plan to rehabilitation and expenses for Betty J. Stone ("Mrs.Stone"); (2) a motion to exclude the testimony of the plaintiff Ronald Stone ("Mr.Stone") and the plaintiffs counsel, Shawn George ("George") with respect to settlement communications and to exclude the testimony of George's secretary or office staff on law office procedures; and (3) a motion in limine to prohibit reference to reserve calculations. The court considers each motion in turn below.

I.

On August 1, 1998, Mrs. Stone was seriously and permanently injured after she was involved in an automobile accident with Brian Jones. *See* Cmplt. ¶ 4. As a result of the accident, Mrs. Stone was rendered a paraplegic. *See id.* At the time of the accident, the Stones had automobile liability insur-

ance with Allstate that provided underinsured motorist coverage in the amount of \$100,000. *See id.* ¶ 1. After the accident, and with the written consent of Allstate, the Stones settled their claim against Jones with Dairyland/Sentry Insurance Co. for Jones' full policy limits of \$20,000. *See id.* ¶ 5. Thereafter, the Stones made a claim against Allstate for underinsured motorist coverage. *See* Pl.Ex. 1 at 45 (hereinafter Means Dep.). On November 23, 1999, the Stones filed suit in the Circuit Court of Kanawha County, West Virginia, alleging violation of West Virginia Code § 33-11-4(9), Unfair Claims Settlement Practices. The limits of the Allstate policy were eventually paid, and although neither of the parties has provided the court with a specific date of payment, it appears to have been in excess of one year after Mrs. Stone's accident.

II.

Allstate asserts that evidence of Mrs. Stone's rehabilitation expenses is irrelevant and moves to exclude any expert reports and testimony as irrelevant pursuant to Rule 403 of the Federal Rules of Civil Procedure. The Stones counter Allstate's argument by saying that under West Virginia law, evidence of economic and non-economic damages are permitted in insurance bad faith claims cases, and that at the time this motion was filed it was premature because more evidence may be disclosed that might support the expert's opinions and report.

Under West Virginia law, an insurer may be held liable "for the amount recovered up to the policy limits, the policyholder's reasonable attorney's fees, and damages [economic and noneconomic] proved for aggravation and inconvenience." *Marshall v. Sasseen*, 450 S.E.2d 791 (W.Va.1994). Furthermore, "upon a showing that actual malice motivated the actions of the insurer, punitive damages may be recovered." *McCormick v. Allstate Ins. Co.*, 475 S.E.2d 507, 514 (W.Va.1996). Any net economic loss, however, must have been caused by the delay in settlement. *See id.* citing *Hayseeds v. State Farm Fire & Cas. Co.*, 352 S.E.2d, Syl. Pt. 1

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(W.Va.1986). Here, the injuries complained of, while of the sort that would be typically covered by an un-or underinsured motorists policy, were not caused by any alleged delay or bad faith on the part of Allstate. Even with the completion of discovery, there would not be any factual basis to reveal what would merely be very prejudicial, and completely irrelevant evidence. The damages evidence in this case is not in relation to any injuries sustained by Mrs. Stone in the automobile accident. The purpose of this case is to compensate the plaintiffs for inconvenience and attorney's fees and costs in receiving their full policy amount-not to re-litigate issue of damages and fault from the accident. Accordingly, the court **GRANTS** the defendant's motion, and **ORDERS** that the evidence of Mrs. Jones' rehabilitation plan and the expert witness testimony of Dr. Burke be excluded.

III.

*2 Allstate has also filed a motion to exclude any testimony by Mr. Stone or George concerning Allstate representatives' alleged claim settlement communications with George. Allstate objects to Mr. Stone's testimony on the ground that it is inadmissible hearsay. With respect to George, Allstate submits that not only would such testimony be unduly prejudicial, but that George may not testify on behalf of his clients. In the alternative, Allstate moves to disqualify George. Allstate also moves for the exclusion of the testimony of Elise Adkins, George's secretary, on similar grounds.

A.

The court agrees that Mr. Stone's testimony would constitute inadmissible hearsay. According to George, Mr. Stone would be called to testify to what George told him Allstate employee Kevin Means said during settlement negotiations. Contrary to counsel's characterization, this is not an exception to hearsay as an admission of a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, but an exception to hearsay within hearsay. In order to determine whether or not the statement would be admissible, it is neces-

sary to examine each statement individually. The first statement, from Means to George would qualify as an admission by a party-opponent and would be admissible as an exception to hearsay under Rule 801(d)(2)(D). The second statement is the statement George made to Mr. Stone. This statement is not an admission of a party-opponent, nor does it fall under any other exceptions to the hearsay exclusions. Therefore, Mr. Stone is not permitted to testify about these statements allegedly made by Means.

B.

Allstate asserts that George, the plaintiff's attorney, should either not be permitted to testify about his discussions with Means and other Allstate employees or he should be disqualified. Allstate grounds its argument in Rule 3.7 of the West Virginia Rules of Professional Conduct. Rule 3.7 states:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Here, the testimony George would give does not concern an uncontested issue; Means' testimony would contradict George's in several respects. Neither would George's testimony relate to the nature or cost of legal services rendered.

In general, "it is unethical for a lawyer representing a client to appear as a witness on behalf of the client except under very limited conditions.

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Garlow v. Zakaib, 413 S.E.2d 112, 113, Syl. Pt. 2 (W.Va.1991). Courts have consistently held that when a lawyer is a necessary witness for his client, he should withdraw from representation of that client, at least for the purposes of trial. *Edmiston v. Wilson*, 120 S.E.2d 491, 502-03 (W.Va.1961); *City of Boston v. Mass. Comm'n Against Discrimination*, 7176 N.E.2d 259, 819 (Mass.App.Ct.1999) (attorney may be permitted in rare situations where there is no other source to testify on the issue, but in such situations, substitute counsel should be obtained well in advance of trial); *Whalley Dev'p Corp. v. First Citizens Bancshares, Inc.*, 834 S.W.2d 328, 330 (Tenn.Ct.App.1992). Indeed, in situations where the attorney would be a chief witness to material negotiations between his client and an insurer, disqualification from serving as an advocate at trial is generally warranted. See, e.g., *Int'l Woodworkers of America, AFL CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1273 (4th Cir.1981); *Mutual Group U.S. v. Higgins*, 611 N.W.2d 404, 409 (Neb.2000) (counsel who had represented insured under health care insurance policy in connection with insured's action against tortfeasor which during which insurer communicated with counsel regarding insurer's duty under policy was disqualified as he was likely to be a material witness in action against insurer); *Korfmann v. Kemper Nat'l Ins. Co.*, 258 A.E.2d 508 (N.Y.App.Div.1999) (holding that the plaintiffs attorney, who was involved in underlying negotiations with insurance company, was an essential witness in bad faith action and thus should have been disqualified). Even so, if an attorney will merely be testifying as to routine matters, such as authentication of documents, the attorney's testimony is permissible. See *Bogosian v. Bd. of Education of Community Unit School Dist. 200*, 95 F.Supp.2d 874, 876 (N.D.Ill.2000).

*3 If an attorney is disqualified from trial because of his need to serve as a witness, however, that does not mandate his exclusion from pre-trial or post-trial proceedings, especially where the attorney is uniquely familiar with the case. See

Columbo v. Puig, 745 So.2d 1106, 1107 (Fla.Dist.Ct.App.1999) (attorney may conduct pre-trial deposition); see also *In re Bahn*, 13 S.W.3d 865, 873 (Tex.Ct.App.2000) (attorney may assist in drafting pleadings, engaging in settlement negotiations and assisting in trial strategy). Furthermore, if an attorney represents that he does not intend to call himself as a witness, it is not required that he be disqualified. See *Doell v. McCarthy*, 261 A.D.2d 132 (N.Y.App.Div.1999).

At the present time it is not a certainty that George will testify. Although George has been deposed as a potential witness in this case, his name was not submitted on the potential witness list in response to Allstate's first set of interrogatories. See Def. Ex. E. Because it is not yet entirely clear to the court that George is a necessary witness and will indeed testify, the court DENIES Allstate's motion at this time. The court will reexamine the motion at a later time prior to trial at the request of either party.

C.

Allstate's motion with respect to Elise Adkins, George's secretary, is untenable. Allstate asserts that due to Adkins' relationship with George, it would be inappropriate for her to testify. According to Adkins' deposition, she would testify about the office procedures for typing letters, copying documents, and mailing documents. See, e.g., Def. Ex. F at 20-26, 66. See *id.* at 22. Allstate contends that Adkins' testimony should be excluded because of her position is not analogous to that of another attorney within George's firm because the "theoretical wall" applied in those circumstances is inapplicable to an attorney's secretary, as her testimony is, in effect, his testimony. Def. Rep. at 3. The court does not find this argument meritorious. Adkins would not testify as to the contents of the letters, only to the general office procedures with respect to mail, correspondence, and filing. The court is not of the opinion that Adkins' testimony as to her own actions is equivalent to the testimony of her supervisor; she is testifying to a completely dif-

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ferent set of facts solely within her personal knowledge.

IV.

Allstate also objects to the admission of reserve calculations with respect to the Stones' underinsured motorists claim. "Reserves are the amounts anticipated to be sufficient to pay all obligations for which the insurer may be responsible under [a] policy with respect to a particular claim." Timothy M. Sukel & Mike F. Pipkin, *Discovery and Admissibility of Reserves*, 34 Tort & Ins. L.J. 191, 393 (1998). Allstate contends that any reference to the amount of reserves set upon learning of the Stones' claim would be unduly prejudicial and irrelevant. In response, the Stones assert that evidence showing the timing of when the reserves were set and raised is relevant to a showing of bad faith. Specifically, the Stones assert that Allstate was aware of the gravity of Mrs. Stone's injuries, yet failed to raise the reserve.

*4 This court has previously held that under certain circumstances, admission of reserve calculations are not admissible in an action for bad faith insurance claims. See *Light v. Allstate Ins. Co.*, 48 F.Supp.2d 615, 618 (S.D.W.Va.1998) (Hallanan, J.). In *Light*, however, the reserve information was an assessment of what Allstate would owe should its insured have been liable for the accident at issue, and not an assessment of the Light's underinsured motorist claim. See *id.* In contrast, the reserve here was set after Allstate was on notice that the Stones would be pursuing remedies under their underinsured motorist policy. See *Means Dep.* at 47, 50.

In cases where a party has brought a bad-faith insurance claim, reserve evidence has been held admissible, when it "is relevant to show the insurer's state of mind in relation to its claim settlement practices." *First Nat'l Bank of Louisville v. Lustig*, 1993 WL 411377, *1 (E.D.La.); Cf. *Culbertson v. Shelter Mutual In. Co.*, 1998 WL 743592 *1 (E.D.La.) (stating that discovery of reserve information may lead to admissible evidence with respect

for the thoroughness with which defendant investigated and considered the plaintiff's complaint); *Athridge Aetna Cas. & Surety Co.*, 184 F.R.D. 181, 192 (D.D.C.1998) (stating that where a case involves fiduciary duties by the insurance company on behalf of the insured evidence of a reserve is relevant).

Here, the Stones submit that notwithstanding the fact that Allstate was on notice as to the seriousness of Mrs. Stone's injuries, it failed to set a reserve at the policy limits and did not raise the amount until well after it had been established that the other driver was 100% at fault and that Mrs. Stone was a paraplegic. The Stones have submitted evidence showing that Allstate and its employees were aware of the value of the claim far in advance of the increase of the reserve to the policy limits. Thus, evidence of the time of the increase is relevant circumstantial evidence for a showing of bad faith, and is probative. Accordingly, the defendant's motion to prohibit reference to the reserve calculations is **DENIED**.

IV.

Accordingly, the court **GRANTS** Allstate's motion to exclude evidence of Mrs. Stones' rehabilitation plan and the related testimony of Dr. Burke. The court also **GRANTS** Allstate's motion to exclude Mr. Stone's testimony with respect to any statements made by Means communicated to Mr. Stone by George, and **DENIES** Allstate's motion to exclude George's testimony at this time, but will reexamine the issue prior to trial upon request. The court also **DENIES** Allstate's motion to exclude the testimony of George's Secretary, Elise Adkins, and **DENIES** Allstate's motion to exclude reference to reserve calculations.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

S.D.W.Va.,2000.

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