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2016 MAY 21 PM 3:56

No. 64614-1-I

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

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LACEY M. FILOSA,

Plaintiff-Respondent,

v.

PAINLESS STEEL-EVERETT LLC, et al.,

Defendants-Respondents.

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REPLY BRIEF OF APPELLANT SCOTTSDALE  
INSURANCE COMPANY

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## I. INTRODUCTION

Plaintiff, Lacey Filosa settled her suit with Painless Steel-Everett, LLC (“Painless Steel”) and Mandy and James Lee Burns based upon deliberate misrepresentations not only to the trial court during her first reasonableness hearing, but to Painless Steel and the Burnses themselves as the basis for their settlement. The Superior Court abused its discretion in finding the parties’ settlement reasonable by focusing on Ms. Filosa’s damages, rather than on the factual and legal plausibility of any of Ms. Filosa’s theories of liability. Specifically, Ms. Filosa simply does not have, and never has had, any supportable theory of causation. “A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Water’s Edge Homeowner’s Ass’n v. Water’s Edge Associates*, 152 Wn.App. 572, 216 P.3d 1110, 1118 (2009). When examined one-by-one, it is clear that not one of Ms. Filosa’s asserted claims for liability for either Painless Steel or the Burnses is valid.

### A. The Trial Court’s Oral Ruling is Nothing More than an Expression of its Informal Opinion; It is Not Findings of Fact or Conclusions of Law.

Ms. Filosa heavily relies on and quotes from the informal opinion of the trial court after the second reasonableness hearing. (RP 2-21). Yet, in its oral ruling declaring the settlement between the parties reasonable

and binding, the trial court did not enter any findings of fact or conclusions of law. (See CP 152-153). Rather, it entered an Order, simply stating that the settlement amount had been declared reasonable. (*Id.*). The trial court announced a more lengthy oral opinion in open court. (RP 2-21). But, “[a] trial court’s oral...opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Further, the trial court spent an inordinate amount of its oral ruling focusing exclusively on Ms. Filosa’s damages, rather than the *Glover/Chaussee*<sup>1</sup> factors and the actual liability and causation for Ms. Filosa’s injuries.<sup>2</sup>

**B. The Trial Court Was Required to Evaluate the Settlement Under the Nine *Glover/Chaussee* Factors.**

Ms. Filosa’s assertion that the settlement could be considered *per se* reasonable without evaluation of the *Glover/Chaussee* factors, is incorrect. (See *Resp’t Br.* at 22). There must first be a finding that the

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<sup>1</sup> See *Chaussee v. Mryld Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991); *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *ovr’d on other grounds Crown Controls, Inc. v. Smiley*, 47 Wn.App. 695, 756 P.2d 717 (1988) (outlining the nine factors for courts to consider in evaluating the reasonableness of a settlement).

<sup>2</sup> Notably, the oral announcement of the trial court referenced facts for which there was no evidence on the record, including referencing a \$1 million verdict that Judge Castleberry was personally aware of (RP 10).

insurer wrongfully refused to defend its insured before any discussion of *per se* reasonableness is appropriate. See *Werlinger v. Warner*, 126 Wn.App. 342, 350, 109 P.3d 22 (2005); *Truck Ins. Exchange v. Vanport Homes, Inc.* 147 Wn.2d 751, 765, 58 P.3d 276 (2002). No such finding exists here, and in fact, the parties are presently litigating this precise issue.

C. **Ms. Filosa Has No Viable Theory of Liability Against Painless Steel or the Burnses.**

Both Ms. Filosa and Scottsdale agree that the reasonableness of a settlement is determined at the time of the settlement. (*Appellant's Opening Br.* at pp. 19, 21; *Resp't Br.* at 10). But, where they disagree is that Ms. Filosa has not merely *emphasized* “different facts or legal theories in her original complaint” (*Resp't Br.* at 12), rather she has entirely changed her theory of liability each time her previous theory was proven untrue. Whether the record contained sufficient evidence of liability is an important consideration when Washington courts are evaluating the reasonableness of settlement. See *Werlinger*, 126 Wn.App. at 349; see also *Water's Edge*, 152 Wn.App. 572 (finding homeowner's association's \$8.75 million settlement unreasonable when the claims against it had been effectively “gutted” by its summary judgment motion). *Werlinger* is also instructive because it found the parties' settlement unreasonable where the

defendant was in bankruptcy. *Werlinger* at 350. The bankruptcy court issued an order allowing a judgment in any amount to be taken against Warner, so long as it was meant only to pursue his insurance bad faith claims. *Werlinger* at 351. Despite this order from the bankruptcy court, the trial court held that “the fact that the [defendants] had been granted a discharge in bankruptcy of their personal liability to Werlinger made it unreasonable for them to settle for any amount in excess of the available policy limits” because “not a penny could ever be collected from Warner personally.” *Werlinger*, 126 Wn.App. at 351. Similarly, here, Ms. Filosa never stood to get more than the assets of Painless Steel - which were nowhere near \$3 million. Ms. Filosa had not completed any meaningful investigation of Defendant’s financial resources. (CP 507; CP 536). Subsequent discovery revealed that Painless Steel had approximately \$75,000 in assets, plus goodwill. (CP 570). Mr. Jackson estimated the Burnses’ net worth as approximately \$800,000. (CP 618). Thus, just as in *Werlinger*, where “not a penny could ever be collected from Warner personally,” nowhere near \$3 million could ever have been collected from Painless Steel, let alone from the Burnses in the unlikely event that personal liability was available. (See Part I(C)(3)(c) *infra*). One of the *Glover/Chaussee* factors directs the court to consider the ability of the

released party to pay - it is undisputed that Painless Steel and the Burnses could not have paid \$3 million, and as such the settlement value was unreasonable. *See Chaussee*, 60 Wn. App. at 512; *Glover*, 98 Wn.2d at 717.

Further, while “a trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence,” there was an utter lack of substantial evidence to support a finding of reasonableness below. *Howard v. Royal Spec. Underwriting, Inc.*, 121 Wn.App. 372, 380, 89 P.3d 265 (2004). Here, it is abundantly clear that Ms. Filosa has simply not presented a viable theory of liability at any point in the process, let alone at the time of settlement. *See Mavroudis v. Pitts.-Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997) (reasonableness of a settlement must be evaluated “in light of the posture of the case at the time the settlement[] w[as] reached.”). As such, the trial court abused its discretion in finding the settlement reasonable.

1. First, at the time of settlement, Ms. Filosa claimed that her injuries were caused by a contaminated labret.
  - a. As of at least January 2007, Ms. Filosa's counsel knew that Dr. Erhardt did not support the "contaminated labret" theory.

During the parties' negotiations and at the time of the settlement, the only theory of liability asserted by Ms. Filosa - and the only theory of liability that Ms. Filosa had any evidence for - was that the labret used to pierce her tongue was contaminated by Painless Steel. She claimed during settlement negotiations (CP 381), as part of the settlement (CP 473), and at the first reasonableness hearing (*see e.g.* CP 505) that her theory was supported by her treating physician, Dr. Erhardt's, expert testimony.

Ms. Filosa's representation of Dr. Erhardt's purported testimony turned out to be false. Dr. Erhardt never had opined that the product caused the infection. (*See* CP 562 ("I was not asserting that the labret was the source"); *id.* (Ms. Filosa's counsel did not call to ask whether the labret was infected). In fact, Dr. Erhardt testified that as of January 2007, he would have informed Ms. Filosa's counsel that his opinion was that "the infection that Ms. Filosa had was caused by saliva, germs in the saliva, entering into her tongue. (CP 560). If Dr. Erhardt was advised by Ms. Filosa's counsel "that he was going to allege that the labret itself was contaminated," Dr. Erhardt would have told Ms. Filosa's counsel he could

not support that opinion. (CP 560). Well ahead of the parties' settlement negotiations, Ms. Filosa's counsel knew that Dr. Erhardt's theory was that the infection was caused by Ms. Filosa's own saliva, not a contaminated labret, yet Ms. Filosa continued to pursue the "contaminated labret" theory and make representations that Dr. Erhardt supported it.

- b. Despite knowing that Dr. Erhardt did not support the "contaminated labret" theory, Ms. Filosa's counsel continued to represent that he did to the trial court.

At the first reasonableness hearing, approximately 16 months after Dr. Erhardt would have told Ms. Filosa's counsel that Ms. Filosa's own saliva caused her infection, the trial court was concerned with whether Ms. Filosa produced sufficient evidence of negligence (CP 495) and inquired "is it the theory of liability that the product itself was not sanitary, causing the carrier of the bacteria or whatever, or was it as a result of some procedure that was done by the defendants?" (CP 503). Despite Dr. Erhardt having told Ms. Filosa's counsel that the source of infection was her own saliva, Ms. Filosa's counsel confirmed to the trial court that her theory was that a contaminated labret caused the infection: "[O]ur position is going to be and it would have been at the time of trial, **that it was the product that caused the infection. We have testimony from Dr. Erhardt that it was.**" (CP 505) (emphasis added). Ms. Filosa also

represented in her written motion for reasonableness that “[t]he infection came from the Defendant’s product” and that Painless Steel and the Burnses “cannot point to any other source of Ms. Filosa’s infection other than the products it sold her.” (CP 488). Based on the evidence then available, the trial court declared the settlement reasonable (the “First Reasonableness Orders”). (CP 532-41).

- c. Dr. Erhardt testified in February 2009 that he had no evidence to suggest the labret was contaminated.

Only later, after Ms. Filosa brought a separate suit against Scottsdale (CP 2307-15), and Scottsdale had unsuccessfully petitioned the trial court to vacate its reasonableness determination (CP 1338-48), did Scottsdale discover during its deposition of Dr. Erhardt that he did not support the contaminated labret theory put forth as Plaintiffs’ basis for liability of negligence against Painless Steel and the Burnses. Dr. Erhardt testified that he had **no “evidence to suggest” that the labret was contaminated.** (CP 558, 559, 560, 561-62). Instead, he opined that “two bacteria, prevotella buccae and Peptostreptococcus . . . came from Ms. Filosa’s mouth and made their way into the opening caused by the tongue piercing.” (CP 558).

- d. The trial court found that Ms. Filosa knowingly misled the court regarding Dr. Erhardt's opinion.

When Scottsdale again moved for relief from the first reasonableness hearing (CP 1062-1083), the Court found that Ms. Filosa made knowing representations about causation:

. . . I was misled in terms of what the opinion of Dr. Erhardt was concerning the causation of this infection. **Counsel clearly informed me that it was Dr. Erhardt's opinion that the product itself was the source of the bacterial infection.**

It is also clear from Dr. Erhardt's deposition that . . . his opinion was that on a more probable than not basis the bacteria was caused from [Ms. Filosa's] own body secretions and...got into the opening when the opening was made for the piercing. . . .

**That opinion was known to counsel prior to the assertions being made in court, and . . . it went to the very core of the issue of proximate cause.**

(CP 578-81) (emphasis added). Due to these knowing misrepresentations, the trial court vacated the First Reasonableness Orders for a second hearing. (*Id.*) Ms. Filosa did not appeal.<sup>3</sup>

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<sup>3</sup> At the Second Reasonableness Hearing, Dr. Erhardt continued to testify that it was “[u]nlikely” that “the labret itself was contaminated” (RP 42-43) and that he “had no evidence that the labret was contaminated with bacteria that actually caused the infection.” (RP 35).

- e. Ms. Filosa also misled the Burnses and Painless Steel regarding her sole basis for liability during the settlement.

Ms. Filosa not only misled the trial court about Dr. Erhardt's opinion - and in turn, the only support for her "contaminated labret" liability theory - but, she directly misled Painless Steel and the Burnses in their settlement. The settlement agreement, states that Ms. Filosa's injuries "allegedly resulted from the purchase of an infected tongue stud (the 'product')." (CP 473) (emphasis added). Painless Steel and the Burnses were led to believe that Ms. Filosa had expert testimony regarding causation, which, in fact, never existed. Ms. Filosa's counsel represented to the Burnses in correspondence that Dr. Erhardt "states that it is his medical opinion that [sic] tongue ring caused the flesh eating bacteria infection." (CP 381). Ms. Filosa's misrepresentations were not only to the Court, but to the Burnses and Painless Steel, since it was her sole basis for causation in the settlement negotiations and eventual settlement. Even if everything else about the parties' settlement was at arm's length, the basis on which the settlement was made was not only completely false, but was known to Ms. Filosa's counsel to be false at the time it was occurring.

- f. Dr. Erhardt's opinions are not on a "more probable than not basis," and therefore are inadmissible.

By Dr. Erhardt's own admission, his opinions did not meet the threshold for expert testimony because he could not testify "on a more probable than not basis as to the source of the organisms that caused Ms. Filosa's infection." (*Resp't Br.* at 33). Medical testimony to establish a causal connection between an injury and a subsequent condition must show that the injury *probably or more likely than not* caused the condition rather than *might have, could have, or possibly did*. *Orcutt v. Spokane Cy.*, 58 Wn.2d 846, 853, 263 P.2d 1102 (1961).

2. Second, and only after the trial court's ruling of misrepresentation, Ms. Filosa next argued that the piercer's ungloved hand contaminated the labret.

After the trial court found that Ms. Filosa had misrepresented her only evidence supporting a "contaminated labret" theory of liability, Ms. Filosa next asserted the "ungloved hand" theory - that bacteria from Mr. Doose's ungloved hand caused Ms. Filosa's infection. As a threshold matter, this theory should not be considered in determining reasonableness because it was not a theory of causation at the time of settlement, and thus, not the basis for the settlement. (*See Part A supra; Mavroudis*, 86 Wn.App. at 28).

The “ungloved hand” theory also proved to be not viable.<sup>4</sup> Ms. Filosa’s own expert testified it “would be pure speculation to try to decide one way or the other whether or not Ms. Filosa’s infection stemmed from bacteria on a human hand versus in her own saliva.” (RP 39). Dr. Erhardt further admitted that there was “no direct evidence that Mr. Doose had those bacteria on his hands.” (CP 562). Thus, the “ungloved hand” theory could not support the proximate cause of Ms. Filosa’s injuries.

3. Third, after the ungloved hand theory proved unsustainable, Ms. Filosa’s shifted her theory of causation to allege that Mr. Burns drafted an inadequate warning.
  - a. Mr. Burns drafted a Hold Harmless Agreement, not a warning.

Mr. Burns drafted a Hold Harmless Agreement, that was not, and did not purport to be, a warning. (CP 395). Ms. Filosa agreed to “hold Painless Steel Tattooing and Body Piercing and the below signed tattoo artist/piercer harmless from all damages, actions, causes of action, claims judgments, costs of litigation, attorney fees, and all other costs and

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<sup>4</sup> Ms. Filosa’s friend, Jessica Ladd’s, declaration regarding an “ungloved hand” is irrelevant because this theory has been shown to be unsustainable. Scottsdale maintains that Ms. Ladd’s evidence was not known at the time of settlement, since Ms. Filosa had not identified Ms. Ladd as a witness. (CP 665, CP 668). The lack of identifying a pivotal witness in Ms. Filosa’s case goes to her lack of preparation of the suit and weighs against her in considering the reasonableness of the settlement. See *Chaussee*, 60 Wn.App. at 512; *Glover*, 98 Wn.2d at 717. Moreover, Mr. Doose’s testified that he always wore gloves. (CP 590).

expenses which might arise from my decision to have any...piercing.” (*Id.*). It was Taylor Doose’s, not Mr. Burns’s, responsibility to issue warnings to the customers. (CP 590). By signing the Hold Harmless, Ms. Filosa released Taylor Doose from the suit, which because he is the agent of Painless Steel, in turn releases Painless Steel, the principal. (*See* CP 395). *See Orwick v. Fox*, 65 Wn. App. 71, 88, 828 P.2d 12 (1992).

Ms. Filosa has continually shifted her position on whether Mr. Doose is an independent contractor or an employee of Painless Steel. In her complaint (CP 2225) and at the second reasonableness hearing, Ms. Filosa alleged that Mr. Doose was an employee. Now, she claims that Mr. Doose was an independent contractor. (*Resp’t Br.* at 36). Ms. Filosa has altered her position for the first time. The change of position regarding Mr. Doose’s status is further evidence of Ms. Filosa’s ever-shifting theories of liability and damages without being forthright with the court in which she is in about the positions she has previously asserted or explaining any reason for her change of position.

b. A general warning of infection is sufficient.

Ms. Filosa has not identified a single Washington case, or provided any factual or expert testimony supporting her theory that Painless Steel or Mr. Burns owed her a duty to specifically warn of a necrotizing infection when she testified that she knew of the general risk of an infection. As

discussed more thoroughly in Scottsdale’s opening brief, “[i]t is established law that a warning need not be given at all in instances where a danger is . . . known.” *Baughn v. Honda Motor Co., Ltd.*, 107 Wn.2d 127, 139, 727 P.2d 655 (1986) (emphasis added). “[W]hen a person is aware of a risk and chooses to disregard it” any warning serves no purpose. *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 839, 906 P.2d 336 (1995). Here, Ms. Filosa was aware of the risk - she had six other piercings (CP 597); “underst[oo]d when [she was] 18 years and getting [her] tongue pierced that there could be a risk of infection” (*Id.*); and, “would...have gone ahead and gotten [her] tongue pierced” if informed of a “1-in-10 chance of getting an infection.” (CP 603).<sup>5</sup> A warning to Ms. Filosa would have served no purpose. *See Anderson*, 79 Wn. App. at 839.<sup>6</sup>

Washington law did not require Painless Steel and the Burnses to inform Ms. Filosa “of every possible injury that could occur or of the mechanism that would cause injury” when she knew of the general risk of

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<sup>5</sup> Ms. Filosa later changed her testimony at the Second Reasonableness Hearing, claiming that she would not have proceeded with the piercing if she had known of the risk of a serious infection. (RP 201, 205-207). But, according to Washington law, Painless Steel was under no obligation to provide a more specified warning regarding a serious infection. *See Part I(C)(3)(b) supra*.

<sup>6</sup> Ms. Filosa’s claims regarding warnings also fail because there was an implied assumption of the risk by having her tongue pierced. (*See Appellant’s Opening Br.* at 29, n. 15).

piercing. *Anderson*, 79 Wn. App. at 840. Ms. Filosa's own testimony shows that she knew of the generalized risk of infection. (CP 597, 603).

Further, Ms. Filosa's own experts do not give a more specific warning to their clients or patients - Troy Amundson warns his piercing clients of infection, but does not warn of the possibility of a deadly infection (CP 608) and Dr. Erhardt warns of the possibility of infection alone, but not the severity of the risk. (RP 45-47). Mr. Amundson and Dr. Erhardt's practices are consistent with Washington law requiring only a generalized warning to be given.

c. Regardless, there is no evidence that Mr. Burns would be personally liable for failing to draft an adequate warning.

(1) Judicial estoppel precludes Ms. Filosa from suing Mr. Burns personally.

Ms. Filosa is judicially estopped from pursuing Mr. Burns in his personal capacity because she brought Mr. Burns into the suit "as the sole owner of Painless Steel-Everett, LLC." (*See* CP 4371; 4384-85).<sup>7</sup> The

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<sup>7</sup> Mrs. Burns faced no potential liability for Ms. Filosa's claims - there were no causes of action against her personally (CP 4331-37); and, she had no involvement in Painless Steel or Ms. Filosa's piercing. (CP 574). Nor were Mrs. Burns's community assets at risk - the Burns live in Montana, which is not a community property state. Painless Steel was the separate property of Mr. Burns. The community assets were also not at risk because Ms. Filosa brought suit against Mandy N. Burns "as the sole owner of Painless Steel LLC," not against the marital community of her and Mr. Burns. (CP 4331-37). Thus, Mrs. Burns's financial risk was limited because, even in the unlikely event of a judgment against Mr. Burns, the judgment would have been only as to Mr. Burns's assets.

caption on Ms. Filosa's Second Amended Complaint identifies "James Lee Burns and Mandy N. Burns, his spouse, as sole owners of Painless Steel-Everett LLC." (CP 4331). Ms. Filosa's counsel explained in a sworn declaration (CP 4371), and in the Motion for Leave to Amend Complaint signed under CR 11 (CP 4384-85), that the Burnses were being added since Mr. Burns's "insurance company has denied coverage because he is not named in the current Amended Complaint." (CP 4371; *see also* CP 4384).<sup>8</sup> Both counsel's declaration and the motion state that Ms. Filosa "added James Burns and his spouse in their capacity as the sole owners of Painless Steel Everett LLC, *not as individuals subject to personal liability.*" (CP 4371; 4385) (emphasis added). In Ms. Filosa's reply brief supporting her motion to amend, she represents that "adding the new owners [the Burnses] would not be futile, it seeks insurance coverage for plaintiff's damages." (CP 4341-42). She also distinguishes her addition of the Burnses and states that "because Plaintiff is bringing in James Lee Burns and Mandy N. Burns as sole owners of Painless Steel Everett LLC, not officers, there is no rule against bringing in the owners in there [sic] capacity as owners of the business (*Plaintiff is not suing them*

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<sup>8</sup> Ms. Filosa's counsel signed his declaration under the penalties of perjury and the motion under CR 11 requiring that an attorney certify that the information is true.

*individually). Plaintiff is not attempting to pierce the corporate veil to obtain personal assets.”* (CP 4342). (emphasis added).

Ms. Filosa’s amended her complaint to trigger insurance coverage for her claims. (CP 4342) (“Plaintiff is moving to amend to obtain premises liability coverage.”) (*see also* CP 4371, 4384). In her motion, reply, and Amended Complaint she represented that she was not suing the Burnses individually nor looking to obtain their personal assets. (*See* CP 4331, 4340-42, 4371, 4384-85). These assurances were part of what the trial court considered in granting her motion to amend. (CP 4338-39) (ordering the “complaint shall be amended to add James Lee Burns and Mandy N. Burns as sole owners of Painless Steel Everett LLC, as parties to the action” based on “the pleadings filed in this action,” including the “declaration of David B. Huss”).

(2) Ms. Filosa did not make a mistake or inadvertently assert contrary positions.

Further, Ms. Filosa’s contradictory position is not through inadvertence or mistake. (*See Resp’t Br.* at 29). She knew of the position taken in her counsel’s declaration (CP 4371); her motion to amend (CP 4384-85); and her reply brief. (CP 4340-42). Those statements supported her intention to trigger insurance coverage, not to attach personal liability to Mr. Burns. (CP 4342; 4371; 4384).

The cases cited by Ms. Filosa regarding mistake and inadvertence, do not support the present situation. In *Arkison v. Ethan Allen, Inc.* 160 Wn.2d 535, 539, 160 P.3d 13 (2007), the court found that a bankruptcy trustee was not estopped from taking a different position than debtor. The court did not rely on inadvertence or mistake in its holding. Here, not only is there not the unique relationship of the bankruptcy debtor and its trustee, but the same counsel who drafted the motion to amend and its supporting pleadings is still Ms. Filosa's counsel. In *McFarling v. Evaneski*, 141 Wn.App. 400, 404-05, 171 P.3d 497 (2007), the court held that a debtor in bankruptcy who failed to list all of its assets could have done so inadvertently by lacking knowledge and having no motive for their concealment. The lack of knowledge from listing an asset is very different than the lack of knowledge of a legal claim or factual basis for a legal claim, as Ms. Filosa claims in the present situation. The fact that Ms. Filosa did not know Mr. Burns drafted the Hold Harmless Agreement has nothing to do with her amending her complaint to only include him as the "sole owner of Painless Steel." And, in *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 950, 205 P.3d 111 (2009), the court found that a daughter who enjoined the sale of her deceased mother's house by her mother's husband, did not take any inconsistent positions as to the validity of the sales

contract she enjoined. Ms. Filosa asserted inconsistent positions regarding Mr. Burns's personal liability by making affirmative representations that she was not seeking personal liability against him, and now is seeking exactly that. (CP 4371, 4385).<sup>9</sup> Simply put, there was no mistake or inadvertence in Ms. Filosa's assertion of contrary positions, thus, judicial estoppel applies and prevents Ms. Filosa from pursuing Mr. Burns in his personal capacity.

- d. Even if the Hold Harmless Agreement is a warning and Ms. Filosa is not judicially estopped from pursuing Mr. Burns personally, Washington law does not support any personal liability for Mr. Burns's alleged failure to draft adequate warnings for Painless Steel.

Even if the Hold Harmless Agreement is found to constitute a "warning," Mr. Burns is not *personally* liable for his actions on behalf of the LLC. Ms. Filosa cites to no law supporting her contention that Mr. Burns would be personally liable, rather than Painless Steel being liable for his actions. (*See Resp't Br.* at 25). In *Chadwick Farms Owners Assn. v. FHC LLC*, 166 Wn.2d 178, 200, 207 P.2d 1251 (2009), the court found a member of a limited liability company was personally liable for failing to properly wind-up the LLC's affairs under RCW 25.15.300, not

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<sup>9</sup> Ms. Filosa also did not move to amend her complaint or discovery responses to reflect any intention to pursue Mr. Burns personally.

under RCW 25.15.125(2). To the contrary, corporate officers are usually protected from personal liability for the acts of the corporation. *Consulting Overseas Mgmt. v. Shtikel*, 105 Wn.App. 80, 84, 18 P.3d 1144 (2001). The same principles that apply to liability of corporate officers apply to the liability of members of an LLC. *See* RCW 25.15.060.<sup>10</sup> The “liability of an officer of a corporation for his own tort committed within the scope of his official duties is the same as the liability for tort of any other agent or servant.” *Overseas Mgmt.*, 105 Wn.App. at 84, *citing* *Dodson v. Economy Equipment Co., Inc.*, 188 Wn. 340, 343, 62 P.2d 708 (1936). And, absent specific exceptions, such as an officer’s knowing conversion of property, fraud or intentional misuse of the corporate structure, a corporate officer should be dismissed from a tort lawsuit against the corporation. *Id.*, 105 Wn.App. at 84 In drafting the Hold Harmless Agreement, Mr. Burns was undoubtedly acting within the scope of his official duties, and therefore, Painless Steel would be liable for his torts - not Mr. Burns personally. Under RCW 25.15.125(1):

the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the

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<sup>10</sup> “Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances...the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil...” RCW 25.15.160.

limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of a limited liability company.

Thus, to obtain access to Mr. Burns's personal assets, Ms. Filosa would have need to show that she intended to "pierce the corporate veil." To pierce the corporate veil, "a plaintiff would have to show that the limited liability company form was used to violate or evade a duty and that the limited liability company form must be disregarded to prevent loss to an innocent party." *Chadwick Farms*, 166 Wn.2d at 200. Ms. Filosa represented to the court, in her moving papers to amend her complaint, that she was "**not attempting to pierce the corporate veil to obtain personal assets.**" (CP 4342) (emphasis added). She cannot now be allowed to assert a contrary position.

Moreover, Mr. Doose testified that it was his standard practice to advise each customer as to the risk of infection. (CP 589). Ms. Filosa and Ms. Ladd claim that he did not. (CP 766-67; 834). If Mr. Doose did not give a warning, Painless Steel would be responsible for that failure, but not the members of the LLC personally.

## II. CONCLUSION

The trial court abused its discretion in determining the parties' \$3 million settlement to be reasonable when the evidence clearly

demonstrates that Ms. Filosa has not presented a cognizable, supportable theory of causation or liability against Painless Steel or the Burnses. Ms. Filosa's misrepresentation of her expert's testimony not only effected the court's basis for establishing causation at the first reasonableness hearing, but undermined the entire basis on which the parties settled. Her subsequent liability theories proved to be equally without legal or factual basis. Without being able to establish a cogent theory of causation, the reasonableness of Ms. Filosa's settlement must be greatly diminished.

Scottsdale respectfully requests that this court reverse and remand for a rebalancing of the *Glover/Chaussee* factors in light of the undisputed evidence, and direct the trial court for an apportioning of liability amongst the potentially liable parties.

RESPECTFULLY SUBMITTED this 21st day of May, 2010.

Respectfully submitted,

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**DECLARATION OF SERVICE**

I hereby declare that I sent a copy of the document on which this declaration appears via fax/mail/messenger service to MOORE/HUSS/JACKSON By

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

Executed at Seattle, WA on MAY 21/10

Signed by: Carole Henry