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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,

SCOTTSDALE INSURANCE COMPANY,

Intervenor / Appellant.

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BRIEF OF APPELLANT SCOTTSDALE INSURANCE COMPANY

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{EHG764819.DOC;400335.001620\ }

2010 MAR 22 PM 3:54



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## I. INTRODUCTION

This appeal addresses the reasonableness of a \$3 million covenant judgment, where a worker at Painless Steel pierced Plaintiff Lacey Filosa's tongue, bacteria in her own saliva invaded her lymph system, and these same bacteria caused a serious infection.<sup>1</sup>

The trial court abused its discretion when applying the nine *Chaussee/Glover* factors. While no one factor controls, *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) provides that the plaintiff must have a viable theory of liability. Moreover, the record is tainted with substantial evidence of bad faith, fraud, and collusion. As such, Scottsdale respectfully asks this Court to reverse and remand for a reasonableness determination consistent with the undisputed evidence.

## II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it deemed the settlement reasonable as to Painless Steel, where (a) Ms. Filosa offered no admissible evidence of causation; (b) she knew of the risk of infection; (c) a Hold Harmless Agreement bars all claims; (d) Ms. Filosa procured the settlement with knowing misrepresentations to Defendants; and (e) the Settling Parties engaged in collusive and bad faith efforts to affect the coverage action against Scottsdale.

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<sup>1</sup> As used herein, the term "Painless Steel" refers to Painless Steel - Everett, LLC. The term "the Burnses" refers to James Lee Burns and Mandy Burns. The term "Defendants" refers to Painless Steel and the Burnses. The term "the Settling Parties" refers to Ms. Filosa and Defendants. The term "Scottsdale" means Scottsdale Ins. Company. The term "the Subject Property" refers to the property at which Ms. Filosa's injury occurred.

2. The trial court abused its discretion when it deemed the settlement reasonable as to James Lee Burns, where (a) the facts noted in Assignment of Error No. 1 apply; (b) judicial estoppel bars any such claim; (c) Ms. Filosa did not identify a tortuous act by Mr. Burns; (d) Ms. Filosa asserted no failure to warn claim against Mr. Burns at the time of settlement; and (e) his alleged failure to warn was not a proximate cause of her injury.

3. The trial court abused its discretion when it deemed the settlement reasonable as to Mandy Burns, where (a) the facts noted in Assignment of Error No. 1 apply; and (b) Ms. Filosa identified no basis of liability against Ms. Burns.

### **III. STATEMENT OF THE CASE**

#### **A. Mr. Burns Segregated His Personal and Corporate Assets.**

James Lee Burns is an experienced businessman. (See CP 565, 567, 568.) He owns property in his personal capacity, and also holds ownership interests in multiple tattoo and piercing companies. (Id.) Mr. Burns segregated his personal and corporate property in an effort to limit his liability. (CP 566-67.) In the event of a large claim against one of his businesses, then, “the worst thing that would happen is that that location would need to basically turn over the keys.” (CP 567.)

In August 2001, Mr. Burns leased one unit in the Subject Property, and began operating Painless Steel - Everett, LLP (the “LLP”), a tattoo and body piercing business. (CP 321.) He later purchased the Subject

Property in his personal capacity, leasing one unit to the LLP and other units to different tenants. (CP 324; CP 568.)

In June 2005, Mr. Burns owned the LLP with his brother. (CP 567.) Although the partners discussed buying insurance for their tattoo and piercing operations, they determined it was too costly. (CP 567-68.) Thus, Mr. Burns made a “business decision” to rely upon the corporate form, intentionally leaving the LLP bare of insurance. (CP 568.)

Mr. Burns asked an insurance broker to obtain quotes for lessor’s risk in his personal capacity to protect himself as a landlord, not as the owner of a tattoo parlor. (CP 331.) His broker confirmed that the policy covered “liability associated with the building”; it did “not contemplate any of the operations [Mr. Burns] may being run [sic] from that building.” (*Id.*; CP 569; CP 571.)

Approximately one month after purchasing the Scottsdale policy, Mr. Burns incorporated Painless Steel - Everett, LLC (hereinafter “Painless Steel”). (CP 370; CP 566-67.) Mr. Burns executed a Member Operating Agreement, and kept records of regular member meetings. (CP 357, CP 373.)

As owner of the Subject Property, Mr. Burns leased commercial space to Painless Steel. (CP 333.) According to the Lease Agreement,

Painless Steel had an obligation to procure its own insurance. (CP 342.)

**B. Mandy Burns had No Interest in Painless Steel.**

It is undisputed that Mandy Burns never had an ownership interest in and never worked at Painless Steel. (CP 574.)

**C. Painless Steel Hired an Experienced Piercer.**

In or about January 2006, Painless Steel hired Taylor Doose to serve as a body piercer.<sup>2</sup> (CP 586.) It was his standard practice to advise each customer of the risks of infection: “I would explain to them . . . that it will cause . . . a laceration in the skin, which could cause problems such as infection.” (CP 589) (emphasis added.) In addition to verbal warnings, Mr. Doose provided written after-care instructions, which noted the possibility of infection. (CP 590; CP 414.)

Without exception, Mr. Doose always wore gloves, changing his gloves two to three times during each procedure.<sup>3</sup> (CP 590; CP 591.)

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<sup>2</sup> Mr. Doose was an experienced piercer, having spent five years in the business. He came with substantial training, including a year-long apprenticeship, college instruction on bloodborne pathogens, and study of safety practices. (CP 586-87.)

<sup>3</sup> Additionally, Mr. Doose utilized good sterilization practices. (CP 590; CP 465 (describing twenty (20) step procedure used when piercing, including use of gloves, sterilization of jewelry and needles in autoclave, and provision of after-care instructions.)

**D. After Signing a Hold Harmless Agreement, Ms. Filosa Received a Tongue Piercing at Painless Steel.**

On March 11, 2006, Ms. Filosa went to Painless Steel for her seventh body piercing, a tongue stud. (CP 595-96.) With five ear piercings and a belly-button ring, Ms. Filosa decided to get her tongue pierced because she “thought it was cool.” (CP 596.)

Ms. Filosa completed an intake form, acknowledging receipt of verbal and written “pre-service information” and agreeing to hold Painless Steel and Mr. Doose harmless from all claims arising out of her piercing:

I have been provided with pre-service information both in writing and verbally by my Tattoo Artist/Piercer. I . . . give full consent to the above described services. I agree . . . to hold Painless Steel Tattooing & Body Piercing and the below signed tattoo artist/piercer harmless from all damages, . . . cause[s] of action, . . . and all other costs and expenses which might arise from my decision to have any . . . piercing . . . by Painless Steel Tattooing & Body Piercing or their commissioned workers.

(CP 413) (emphasis added.) The written after-care instructions expressly discussed infection: “If signs of infection (prolonged soreness or pain, extensive redness and/or discolored secretion) occur, CONTACT YOUR PIERCER OR A PHYSICIAN to discuss your best options.” (CP 414.)

After Ms. Filosa signed the Hold Harmless Agreement, Mr. Doose inserted a metal barbell or “labret” into her tongue. (CP 598.) Later, Ms. Filosa returned for the insertion of a shorter labret. (CP 768.) The

Burnses had no personal involvement in Ms. Filosa's services, and were not present at Painless Steel on either date. (CP 571; CP 575.)

In late March 2006, Ms. Filosa began having "tooth pains." (CP 600; CP 654.) After visiting two dentists, she reported to the Emergency Room on March 30, 2006 and became very ill. (CP 514-16.) Ms. Filosa's treating physician, Dr. James Erhardt, concluded that bacteria in her saliva washed through the hole in her tongue, causing the infection. (CP 558.)

**E. Ms. Filosa Understood the Risks of Infection.**

On June 18, 2007, Ms. Filosa filed suit against Painless Steel. (CP 400.) In the Complaint, Ms. Filosa contended that Painless Steel failed to warn her "of the chance of infections." (CP 402.)

But it is undisputed that Ms. Filosa knew of the risk of infection from her six prior piercings. (CP 602; RP 201; CP 597 (testifying that she "underst[ood] when [she was] 18 years and getting [her] tongue pierced that there could be a risk of infection".) Indeed, Ms. Filosa testified that she "would . . . have gone ahead and gotten [her] tongue pierced" even if warned of a "1-in-10 chance of getting an infection." (CP 603.)

**F. The Burnses Stated Under Oath that the Policy did not Cover Painless Steel's Business Operations.**

Upon learning of the claim, Mr. Burns informed Ms. Filosa that the policy did not cover Painless Steel's business operations: "[P]lease note

that the company did not buy insurance.” (CP 394.) Painless Steel’s verified interrogatory responses are in accord: “Painless Steel . . . does not have a liability insurance policy.”<sup>4</sup> (CP 411; CP 570.)

**G. Renouncing Any Intent to Pursue the Burnses in Their Personal Capacities, Ms. Filosa Moved to Add Them as “Sole Owners” of Painless Steel.**

Ms. Filosa moved for leave to name the Burnses as defendants, but repeatedly disavowed any intent to hold them personally liable:

Painless Steel . . . purposely operates bare of any insurance, so there is no liability insurance coverage for the business. . . . Therefore, I have added James Lee Burns and his spouse in their capacity as the sole owners of Painless Steel . . . , not as individuals subject to personal liability.

(CP 425-26 (emphasis added); CP 430; CP 445.) The commissioner allowed Ms. Filosa to amend her complaint, adding the Burnses “as sole owners of Painless Steel Everett LLC.”<sup>5</sup> (CP 448.)

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<sup>4</sup> Defense counsel Dylan Jackson echoed this sentiment: “I seriously doubt [Ms. Filosa will] take on Scottsdale as its position that it owes no duty to defend this lawsuit is pretty sound.” (CP 470 (emphasis added).)

<sup>5</sup> Despite their addition to the lawsuit, Mr. Jackson opined that Ms. Filosa probably could not recover against the Burnses’ personal assets:

. . . . [L]et’s say that Lacey collects a big jud[gment] from Painless Steel . . . 1.5 years down the road and essentially bankrupts that company or se[nds it] out of business. . . . [I]f Lacey prevails . . . the LLC, and not you and Lee, would be fil[ing for ba]nkruptcy. This is, of course, complicated if Ms. Filosa is ever able to collect a judgment against you and Lee PERS[ONAL]LY but right now she doesn’t have . . . the requisite requirements to pierce the veil of the LLC and go [against] both of you personally for debts of the LLC.

**H. Prior to Settlement, Counsel Valued This Matter Far Below \$3 Million.**

It is clear that the Settling Parties never contemplated a \$3 million settlement before March 2008. On May 2, 2007, Ms. Filosa demanded \$2 million or as little as \$500,000, if this represented policy limits:

My client demands a settlement of \$2,000,000, or your insurer's policy limits if...less than \$2,000,000....If Painless Steel has lesser insurance policy limits, such as \$1,000,000 or lower limits such as \$500,000 or less, my client will demand policy limits to settle her claim.

(CP 382 (emphasis omitted and added).) She later forwarded a demand directly to Scottsdale, offering to settle for policy limits of \$1 million.

(CP 468.) At no point did Ms. Filosa demand \$3 million, prior to execution of the Settlement Agreement.

Defense counsel's assessment fell within the same range. In a written evaluation to the Burnses, Mr. Jackson capped the likely damages as no more than \$1 million:

My current opinion, with the assumption that Ms. Filosa has permanent scarring that cannot be surgically revised, and assuming that Painless Steel...were found 100% liable for her injuries, is that this case likely has a value in the neighborhood of \$1,000,000.00.

That number may be reduced if a) the LLC can locate "Doose" and "Doose" has favorable testimony, [or] b) a physician backs our suspicions about the true cause of her throat infection....

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(CP 433) (emphasis added.) Notably, Ms. Filosa never produced evidence that the Burnses abused the corporate form. (CP 614.)

(CP 389 (emphasis added).) Mr. Jackson later obtained favorable evidence, including (1) identification of the Hold Harmless Agreement; and (2) location of Mr. Doose, whom he deemed “not only a favorable but helpful witness to our case.” (CP 466; CP 612.)

**I. Without Negotiating the Figure, the Settling Parties Entered Into a \$3 Million Settlement.**

Ms. Filosa approached the Burnses, proposing a \$3 million consent judgment. (CP 616-17.) Although they negotiated other terms, the Settling Parties never negotiated the \$3 million settlement figure. (*Id.*; CP 509.) At a later hearing, Mr. Jackson testified that he “didn’t really have any input in that number.” (RP 158.) Instead, he “was trying to get [his] clients out of this case without further potential . . . financial exposure to them regardless of the number.” (*Id.*) (emphasis added.)

Key to the pending appeal, the Settlement Agreement (1) identifies an “infected tongue stud” as the source of the infection; and (2) affirmatively states that “Defendants” have “\$1 million of insurance coverage through Scottsdale”:

3. **RECITATIONS:** The injuries sustained by Plaintiff Filosa . . . allegedly resulted from the purchase of an infected tongue stud (the “product”) . . . .

The Defendants purchased insurance from Scottsdale Insurance Company . . . to cover the type of loss

sustained by Plaintiff Filosa. . . . The Defendants have only \$1 million of insurance coverage through Scottsdale.

(CP 473-74) (some emphasis added).) In exchange for the release and covenant not to execute, the Burnses assigned select rights against Scottsdale. (CP 475.) They reserved claims for attorney fees, damages to credit and reputation, and other non-economic damages. (*Id.*) The Settling Parties signed the Settlement Agreement on March 17, 2008. (CP 478.)

**J. Ms. Filosa Omitted Key Evidence at the First Reasonableness Hearing.**

Ms. Filosa petitioned for a reasonableness determination. (CP 480.) At the April 11, 2008 hearing, the trial court questioned whether Ms. Filosa produced sufficient evidence of negligence. (CP 495 (“I haven’t seen much in terms of negligence or the cause of action against the defendants”).) The trial court also specifically inquired about causation: “[I]s 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.)

Ms. Filosa’s counsel stated that a contaminated labret caused the infection: “[I]t was the product that caused the infection. We have testimony from Dr. Erhardt that it was.” (CP 505.) The Settling Parties

then utilized this assertion as the basis for numerous written findings and conclusions presented to the trial court. (*See e.g.* CP 535.)

Additionally, the Settling Parties repeatedly informed the trial court that the Burnses' personal assets were at grave risk. (CP 506.) They made no mention of Ms. Filosa's representations to the commissioner, namely, that she did not intend to pursue the Burnses' personal assets. Nor had they completed any meaningful investigation of Defendants' financial resources.<sup>6</sup> (CP 507; CP 536.)

The Settling Parties also failed to mention the Hold Harmless Agreement, and instead represented that "[t]here was little, if any defense to be mounted as to the Defendants' liability in this matter." (CP 487.)

Based on the evidence then available, the trial court declared the settlement reasonable (the "First Reasonableness Orders"). (CP 532-41.)

**K. As the Burnses' Assignee, Ms. Filosa Filed Suit Against Scottsdale.**

On June 24, 2008, Ms. Filosa filed suit against Scottsdale, claiming that the First Reasonableness Orders set the presumptive measure of damages (the "Federal Action"). (CP 543.) Alleging that Scottsdale acted

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<sup>6</sup> 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.)

in bad faith, Ms. Filosa seeks treble damages, costs, and fees under the Insurance Fair Conduct Act, totaling more than \$9 million. (*Id.*)

**L. Scottsdale Moved to Vacate the First Reasonableness Orders, Premised Upon Counsels' Misrepresentations.**

On October 9, 2008, Scottsdale moved to intervene and to vacate the First Reasonableness Orders, citing misrepresentations regarding the Erhardt evidence and the Burnses' personal liability. The trial court denied these motions, and Scottsdale timely appealed. (CP 1324-37.)

With the appeal pending, Scottsdale deposed Dr. Erhardt in the Federal Action. (CP 557.) 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."<sup>7</sup> (CP 558.)

Based upon the newly discovered evidence, Scottsdale moved for relief from the First Reasonableness Orders on March 20, 2009. (CP 1193.) In a ruling from the bench, the trial court determined that the Ms. Filosa made knowing misrepresentations about causation:

. . . I was misled in terms of what the opinion of Dr. Erhardt was concerning the causation of this infection. Counsel

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<sup>7</sup> Dr. Erhardt confirmed that "at no time prior to April 11, 2007, did [Ms. Filosa's counsel] call and ask . . . whether or not the labret was infected." (CP 562.)

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 the 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.<sup>8</sup> (*Id.*) Ms. Filosa did not appeal.

**M. Hoping to Salvage the Settlement, Ms. Filosa Offered New Theories at the Second Reasonableness Hearing.**

Although not a basis for the settlement, Ms. Filosa pursued new liability theories during the second reasonableness proceedings.

1. Ms. Filosa Offered A New Theory of Causation, the "Ungloved Hand" Theory.

As noted, the trial court found that Ms. Filosa made knowing misrepresentations about the "contaminated labret" theory. (CP 578-81.)

Bound by this determination, Ms. Filosa next suggested that the infection arose from bacteria on Mr. Doose's ungloved hand. (CP 767-68; CP 771 (alleged witness Jessica Ladd testified that Mr. Doose did not

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<sup>8</sup> Given this ruling, Division I mandated the first appeal on September 4, 2009. (CP 196.)

wear gloves during the second piercing); (CP 762); *but see* CP 665, 668 (in response to interrogatories asking Ms. Filosa to identify any person “who was present during any portion of the tongue piercing at issue,” Ms. Filosa did not identify Ms. Ladd).)

But at the hearing, Dr. Erhardt testified that the “ungloved hand” theory was premised on nothing more than speculation:

Q. It is the fact then that 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?

A. Yes.

(RP 39) (emphasis added); *see also* RP 30; CP 562.) Like the first hearing, Dr. Erhardt provided plaintiff’s sole expert testimony on causation. Given his candid admission, then, there is no evidentiary basis for the “ungloved hand” theory.

Scottsdale’s expert Sharon Nachman, M.D. opined that the infection stemmed from *Prevotella* and *Peptostreptococcus*, bacteria living in Ms. Filosa’s mouth. (RP 220-21; RP 224; RP 226 (testifying that it was not “even possible that the infection came from Mr. Doose”).) Thus, Scottsdale presented the only competent evidence regarding causation, where Dr. Erhardt admitted that the “ungloved hand” theory was “pure speculation.” (RP 29.)

Additionally, the “ungloved hand” theory was newfound- at the time of settlement, Ms. Filosa had not produced any evidence regarding an ungloved hand. There is no mention of an ungloved hand in the Second Amended Complaint, fact or expert discovery, Settlement Agreement, initial moving papers, transcript of the first reasonableness hearing, or written findings of fact. (CP 451; CP 664; CP 613; CP 472; CP 480; CP 493; CP 532.) Indeed, defense counsel was entirely unaware of this theory at the time of settlement. (*See* RP 169; CP 613.) Instead, Ms. Filosa identified the labret as the source of her infection at every turn. (CP 381 (letter from Mr. Huss to Painless Steel) (“it is [Dr. Erhardt’s] medical opinion that [the] tongue ring caused the flesh eating bacteria infection”); CP 453 (Second Amended Complaint) (alleging that she “suffered a serious life threatening infection of ‘flesh eating bacteria’ as a result of the tongue ring barbells provided by Painless Steel”); CP 473 (Settlement Agreement) (“infected tongue stud...allegedly caused profound personally [sic] injuries to Plaintiff Filosa”); CP 505 (“[I]t was the product that caused the infection. We have testimony from Dr. Erhardt that it was”)).) In short, then, Ms. Filosa asked the trial court to evaluate reasonableness in light of a theory she had not pursued at the time of settlement.

2. Ms. Filosa Asserted a Failure to Warn Claim, Despite Her Awareness of the Risk of Infection.

Contrary to her representations in the Hold Harmless Agreement, Ms. Filosa claimed that she received no warnings about the risk of infection. (CP 599.) As discussed, however, Ms. Filosa knew of the risk of infection from her six prior piercings. (CP 596-97; CP 602-03; RP 201.)

Attempting to surmount this admission, Ms. Filosa switched gears, alleging that Painless Steel failed to warn of the severity of the risk. (CP 815.) In support of this assertion, local piercer Troy Amundson testified regarding the standard of care. (*See* RP 61.) Like Mr. Doose, Mr. Amundson simply warns of the risk of infection; he does not warn of the severity of the risk unless asked. (RP 86 (testifying that he warns customers “that there’s a risk of infection” but not “a risk of death,” unless “they ask”)); CP 608 (stating that he does not warn customers that infections may be “potentially life threatening”).) And because these bacteria live in everyone’s mouths, Dr. Erhardt’s patients are at risk of the same infection. But he does not warn of the severity of the risk, even when breaking the skin in his patient’s mouths. (RP 45-47.) Like Mr. Amundson and Mr. Doose, he warns of the possibility of infection alone. (RP 46 (“I do not go into more detail than that”).)

Thus, while Ms. Filosa claimed that Painless Steel and Mr. Burns had a duty to warn of the severity of the risk, she presented no expert testimony to support this allegation.

3. For the First Time, Ms. Filosa Claimed that Mr. Burns Incurred Liability for Failure to Warn of Infections in the Hold Harmless Agreement.

According to Ms. Filosa, Mr. Burns incurred personal liability because the Hold Harmless Agreement did not contain adequate warnings.

Like the “ungloved hand” theory, Ms. Filosa had not pursued this theory at the time of settlement. Defense counsel Dylan Jackson testified that this theory “was not discussed” prior to settlement. (RP 174.) Indeed, Ms. Filosa repeatedly informed the trial court that she did not seek to hold the Burnses personally liable, and did not intend to pursue their personal assets. (CP 425-26; CP 430; CP 445.) Further, there is no mention of this theory in her Second Amended Complaint, the Settlement Agreement, or the transcript of the first reasonableness hearing.<sup>9</sup> (CP 451; CP 472; CP 493.) In fact, Ms. Filosa omitted all discussion of the Hold Harmless Agreement during the first reasonableness proceedings, stating that “[t]here was little, if any defense to be mounted as to the Defendants’

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<sup>9</sup> During the first reasonableness hearing, Ms. Filosa used the Burnses’ alleged personal liability as a rationale for the settlement. (See CP 510.) She did not identify Mr. Burns’ authorship of the Hold Harmless Agreement as a basis for liability, however.

liability in this matter.” (CP 487.) And when Scottsdale informed the trial court of this omission, Ms. Filosa dismissed the document as irrelevant to the settlement’s reasonableness:

First of all, the “hold harmless” had no bearing on whether the settlement was reasonable....[T]he alleged “hold harmless”...does not affect the reasonableness of the settlement at the time the parties reached the settlement.

(CP 1044) (underline added, remainder in original.) Inexplicably, Ms. Filosa made a complete “about face” in the second reasonableness hearing. Contrary to her signed pleading, above, this document now forms the sole basis for personal liability against Mr. Burns. (CP 1044.)

#### 4. Damages and Valuation.

With undisputed special damages, the Settling Parties’ valuation was millions lower when they were actively litigating the case.

It is undisputed that Ms. Filosa incurred approximately \$450,000 in medical special damages. (See CP 526.) It is also undisputed that she presented no evidence of past or future wage loss, impairment of earning capacity, treatment for mental health counseling, or any other special damages. (See RP 175-76.)

Similarly, as discussed above, it is undisputed that (1) Ms. Filosa’s greatest demand was \$2 million, lowest demand was \$500,000, and last demand prior to settlement was \$1 million (CP 382; CP 468); and (2)

defense counsel valued this matter at \$1 million or less, given Mr. Doose's "favorable" testimony and existence of the exculpatory clause. (CP 389).<sup>10</sup>

**N. The Trial Court Deemed the Settlement Reasonable.**

On October 8, 2009, the trial court declared the \$3 million settlement reasonable.<sup>11</sup> (CP 152.) Scottsdale timely appealed. (CP 8.)

**IV. ARGUMENT**

**A. Overview Regarding Reasonableness Hearings.**

Under RCW 4.22.060, parties entering into a settlement agreement in matters involving joint tortfeasors may petition the superior court for a reasonableness determination. "There is a legitimate concern that claimants will enter into 'sweetheart' releases with certain favored parties." 1981 Senate Journal at 636. "To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was entered into." *Id.* at 636-37 (emphasis added.) "The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement." RCW 4.22.060(1).

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<sup>10</sup> *Cf.* RP 95, CP 781 (Ms. Filosa's experts opined that the settlement was reasonable *with* RP 252 (Scottsdale's expert deemed the reasonable settlement range between \$500,000 and \$750,000).

<sup>11</sup> Although the trial court entered an order, it did not enter findings of fact and conclusions of law. (CP 152.)

These same principles apply where an insurer denies coverage for the relevant claim. *Chaussee v. Mryld Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991). “When a settlement agreement includes a covenant not to execute, concerns arise as to whether the settlement amount is reasonable.” *Red Oaks Condo. Owners Ass’n v. Sundquist Hdgs, Inc.*, 128 Wn. App. 317, 322, 116 P.3d 404 (2005). “The insured may be persuaded to settle for an inflated amount in exchange for immunity from personal liability.” *Id.* “Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer’s liability for settlement amounts is all the more important.” *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). As such, “[a] carrier is liable only for reasonable settlements that are paid in good faith.” *Id.* If the consent judgment is reasonable, it becomes the presumptive measure of damages in a subsequent bad faith action. *Id.* at 738.

Washington courts evaluate a settlement’s reasonableness under the nine *Chaussee/Glover* factors: (1) the releasing person’s damages; (2) the merits of the releasing person’s liability theory; (3) the merits of the released person’s defense theory; (4) the released person’s relative faults; (5) the risks and expenses of continued litigation; (6) the released person’s ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the

extent of the releasing person's investigation and preparation of the case; and (9) the interests of the parties not being released. *Chaussee*, 60 Wn. App. at 512; *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *ovr'd on other grounds*, *Crown Con., Inc. v. Smiley*, 110 Wn.2d 695 (1988). "No single criterion controls and all nine are not necessarily relevant in all cases." *Water's Edge Homeowners Ass'n v. Water's Edge Assoc*, 152 Wn. App. 572, 216 P.3d 1110, 1118 (2009).

Washington courts evaluate a settlement's reasonableness "in light of the posture of the case at the time the settlement[] w[as] reached." *Mavroudis v. Pitts.-Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997); *Green v. City of Wenatchee*, 148 Wn. App. 351, 369, 199 P.3d 1029 (2009) (directing the trial court to "enter findings of fact reflecting its consideration of each relevant *Chaussee* factor based upon the facts and law at the time of the settlement") (emphasis added).

Should the trial court deem a settlement unreasonable, "RCW 4.22.060(2) requires the court to set a reasonable amount." *Meadow Valley Owrs Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 820, 156 P.3d 240 (2007). Appellate courts review the reasonableness determination for an abuse of discretion. *Waters Edge*, 206 P.3d at 1117.

“A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Id.*

**B. The Trial Court Abused its Discretion in Deeming the Settlement Reasonable.**

As seen through an examination of the nine *Chaussee/Glover* factors, the \$3 million consent judgment is manifestly unreasonable.

1. Ms. Filosa’s Damages.

It is undisputed that Ms. Filosa sustained a serious injury, as evidenced by her medical billings totaling approximately \$450,000. (*See* CP 526.) It is also undisputed that she offered no evidence of past or future wage loss, impairment of earning capacity, future medical expenses, or past or future mental health treatment. (RP 175-76.)

But as discussed below, the trial court abused its discretion when it failed to place these damages into context. *See Werlinger*, 126 Wn. App. at 351 (although plaintiff had a “very strong case against [defendant] on liability and damages,” the trial court reasonably concluded “these factors were not relevant in view of the fact that not a penny could ever be collected from [defendant] personally”).

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2. The Merits of Ms. Filosa's Claims and Defendants' Defenses.<sup>12</sup>

Ms. Filosa had no viable theory of liability at the time of settlement. In contrast, Defendants had strong, if not complete, defenses to liability, making the \$3 million settlement manifestly unreasonable.

When examining settlements, Washington courts determine whether the record contained sufficient evidence of liability. *Id.*; *see also Water's Edge*, 206 P.3d at 1119 (where a partial summary dismissal “effectively ‘gutted’” the homeowners’ claims, the trial court properly deemed an \$8.75 million settlement unreasonable).

*Werlinger* is instructive. 126 Wn. App. 342. There, Werlinger died in a motor vehicle accident caused by Warner. *Id.* at 344. The Werlingers sued the Warners for wrongful death, but the Warners received a discharge in bankruptcy court. *Id.* at 345. The parties later entered into a settlement agreement, wherein the Werlingers settled for \$5 million in exchange for a covenant not to execute. *Id.* at 345-46. The Werlingers then moved for a reasonableness determination. *Id.* at 346. The trial court deemed the settlement “inherently unreasonable” because Warners received a discharge in bankruptcy. *Id.* at 348. This Court agreed, holding that the \$5 million settlement was unreasonable because the

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<sup>12</sup> Given the interrelationship in the analysis, this brief examines these factors together.  
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Warners were not personally liable for the debt: “The court was well aware that Werlinger had a very strong case against Warner on liability and damages, but reasonably concluded these factors were not relevant in view of the fact that not a penny could ever be collected from Warner personally.” *Id.* at 351 (emphasis added). As such, the trial court properly limited the settlement to the \$25,000 previously tendered by the Warners’ insurer. *Id.* at 352.

The trial court abused its discretion in deeming the \$3 million settlement reasonable, where Ms. Filosa had no viable theory and where the Defendants had complete and/or substantial defenses.

*a. Ms. Filosa Offered No Competent Expert Testimony in Support of the “Ungloved Hand” Theory.*

After the trial court found that she made knowing misrepresentations on the “contaminated labret” theory, Ms. Filosa offered the newfound “ungloved hand” theory.<sup>13</sup> Regardless, the settlement is manifestly unreasonable, where (1) Ms. Filosa’s own expert deemed the

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<sup>13</sup> At the time of settlement, Ms. Filosa explicitly identified the labret as the source of her infection. The trial court erroneously evaluated reasonableness under the “ungloved hand” theory, where it was not a basis for the settlement. *Mavroudis*, 86 Wn. App. at 38, (courts must examine a settlement’s reasonableness “in light of the posture of the case at the time the settlement[] w[as] reached”). But this error is moot, where Dr. Erhardt testified that the “ungloved hand” theory is nothing more than speculation.

“ungloved hand” theory “pure speculation”; and (2) the bacteria came from Ms. Filosa’s mouth, not a contaminated source.<sup>14</sup>

Evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). “Medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training.” *Berger v. Sonneland*, 144 Wn.2d 91, 111, 26 P.3d 257 (2001). Medical expert testimony must “at least be sufficiently definite to establish that the act, or failure to act, ‘probably’ or ‘more likely than not’ caused the subsequent injury.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 496, 183 P.3d 283 (2008).

Here, Dr. Erhardt admitted that the “ungloved hand” theory was “pure speculation”:

Q. It is the fact then that 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?

A. Yes.

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<sup>14</sup> To the extent Ms. Filosa offered evidence regarding the labret theory at the second hearing, there was no basis for said theory. (RP 42-43 (Dr. Erhardt testified that it was “[u]nlikely” that “the labret itself was contaminated”); RP 35 (he “had no evidence that the labret was contaminated with bacteria that actually caused the infection”).)

(RP 39) (emphasis added) (*see also* RP 41 (admitting that there was “no direct evidence that Mr. Doose had those bacteria on his hands”); CP 562.) Thus, there is no evidentiary basis for the “ungloved hand” theory.

Given Dr. Erhardt’s testimony, there is no evidence that the infection stemmed from a contaminated source, whether the labret, a hand, or otherwise. Instead, these bacteria came from Ms. Filosa’s own mouth. (RP 220-21 (Dr. Nachman testified that bacteria from Ms. Filosa’s mouth invaded the piercing and caused the infection); RP 226 (it was not “even possible that the infection came from Mr. Doose”).)

Without admissible evidence of causation, then, the \$3 million settlement is manifestly unreasonable.

*b. Ms. Filosa Cannot Establish Proximate Cause, Where it is Undisputed that She Knew of the Risk of Infection.*

Given her six prior piercings, Ms. Filosa testified that she knew of the risk of the infection. The trial court abused its discretion, where any alleged failure to warn was not the proximate cause of Ms. Filosa’s injury.

“It 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); *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 840, 906 P.2d 336 (1995) (one

need not “inform [a plaintiff] of every possible injury that could occur or of the mechanism that would cause injury” where the general risk is known”) (emphasis added).

Here, Ms. Filosa admitted that she knew the risk of infection from her six prior piercings. (CP 597 (testifying that she “underst[oo]d when [she was] 18 years and getting [her] tongue pierced that there could be a risk of infection”).) Indeed, Ms. Filosa testified that she “would . . . have gone ahead and gotten [her] tongue pierced” if informed of a “1-in-10 chance of getting an infection.” (CP 603.) As such, any purported failure to warn was not the proximate cause of her injuries.

And although Ms. Filosa claims that Defendants did not warn of “the risk of developing a necrotizing neck infection” (CP 808), her own experts do not make such warnings. Standard of care expert and local piercer Troy Amundson testified that he warns of the possibility of infection, but not the possibility of a deadly infection. (RP 86; CP 608.) Nor does Dr. Erhardt warn of the severity of the risk, even though his patients are susceptible to the same infection. (RP 45-47.) Instead, he warns of the possibility of infection alone. (RP 46.) As such, Ms. Filosa

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offered no evidence that Defendants had a duty to warn of the specific injury sustained.<sup>15</sup>

c. *Ms. Filosa is Judicially Estopped from Pursuing the Burnses in Their Personal Capacities.*

Judicial estoppel acts as a bar to the Burnses' personal liability.

“Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.” *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009). “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes . . . and to avoid inconsistency, duplicity, and . . . waste of time.” *McFarling v. Evaneski*, 141 Wn. App. 400, 403, 171 P.3d 497 (2007) (quotations omitted) (alterations in original).

Although not exhaustive, three “core” factors guide this doctrine:

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<sup>15</sup> Viewed through a different lens, Ms. Filosa's claim is barred by implied primary assumption of risk. 6 WASHINGTON PRACTICE: WPI 13.03, 160 (2005) (“Implied primary assumption of risk applies to those situations in which a person, by voluntarily choosing to encounter a known peril, impliedly consents to relieve the defendant of the duty to reasonably protect against that peril”) (emphasis added); *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1992) (“the basis of . . . implied primary assumption of risk was the plaintiff's consent to the negation of defendant's duty with regard to those risks assumed”; “Since implied primary assumption of the risk negates duty, it acts as a bar to recovery when the injury results from one of the risks assumed”) (emphasis in original). By “voluntarily choosing to encounter a known peril,” 6 WASHINGTON PRACTICE at 160, Ms. Filosa “consent[ed] to the negation of” Defendants' “duty with regard to” the risks of infection. *Scott*, 119 Wn.2d at 498.

(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either . . . court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Arkison v. Ethan Allan, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007)

(internal quotations and citations omitted) (emphasis added). “Because the doctrine of judicial estoppel is designed to protect courts,” *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 907, 28 P.3d 832 (2001), the doctrine may be applied “even if the two actions involve different parties,” *Id.* at 908, and even if there is no “proof of deliberate intent to mislead,” *McFarling*, 141 Wn. App. at 405.

Here, Ms. Filosa is judicially estopped from pursuing the Burnses in their personal capacities. When moving to file the Second Amended Complaint, Ms. Filosa assured the commissioner that she “added James Lee Burns and his spouse in their capacity as the sole owners of Painless Steel . . . not as individuals subject to personal liability.” (CP 426 (emphasis added); CP 430; CP 445.)

But in the second reasonableness proceeding, Ms. Filosa took a clearly inconsistent position, claiming that (1) Mr. Burns was personally liable for drafting the Hold Harmless Agreement; and (2) continued

litigation jeopardized the Burnses' personal assets. (See e.g. CP 815 (alleging that Mr. Burns was personally liable because he "negligently failed to warn" in the Hold Harmless Agreement); CP 817 ("Defendants' personal assets . . . are all at risk").) Ms. Filosa cannot promise the commissioner that she will not pursue the Burnses in their personal capacities and threaten to do so before a different judge.

Thus, no portion of the settlement was properly attributable to the Burnses, where judicial estoppel served as a complete defense to their personal liability. See *Werlinger*, 126 Wn. App. at 351.

*d. The Hold Harmless Agreement Represented a Strong Defense to Liability.*

The Hold Harmless effectively exculpated Defendants, creating a defense to liability.

To prevail, a plaintiff must prove that the defendant owed a duty of care. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). "There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself." *Wagenblast v. Odessa Sch. Dist.*, 110 Wn.2d 845, 848, 758 P.2d 968 (1988). In this vein, Washington courts recognize the rights of parties "to agree in advance that the defendant is under no obligation of care for the

benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligence.” *Id.*

Thus, the general rule is that exculpatory clauses are enforceable unless “(1) they violate public policy; (2) the negligent act falls greatly below the standard established by law for protection of others; or (3) they are inconspicuous.”<sup>16</sup> *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 445, 54 P.3d 161 (2002).

Here, the Hold Harmless Agreement exculpated Defendants from liability, and provided, in pertinent part:

I agree . . . to hold Painless Steel Tattooing & Body Piercing and the below signed tattoo artist/piercer harmless from all damages, . . . cause[s] of action, . . . and all other costs and expenses which might arise from my decision to have any . . . piercing . . . by Painless Steel Tattooing & Body Piercing or their commissioned workers.

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<sup>16</sup> When examining the public policy prong, Washington courts evaluate the following factors: whether (1) the agreement concerns an endeavor of a type thought suitable for public regulation; (2) the party seeking to enforce the release is engaged in an important public service; (3) the party provides the service to any member of the public, or to any member falling within established standards; (4) the party seeking to invoke the release has control over the person or property of the party seeking the service; (5) due to the essential nature of the service, there is a decisive inequality of bargaining power between the parties; and (6) the release is a standardized adhesion contract. *Wagenblast*, 110 Wn.2d at 852-56. A plaintiff may establish the second prong through a showing of “[g]ross negligence, nuisance, or willful or wanton misconduct.” *Boyce v. West*, 71 Wn. App. 657, 663, 862 P.2d 592 (1993). Finally, Washington courts examine whether “the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed.” *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 341, 35 P.3d 383 (2001).

(CP 413) (emphasis added.) Ms. Filosa did not plead and otherwise argue that the exculpatory clause violated public policy, or that Defendants committed gross negligence. (See CP 451.) Further, Ms. Filosa testified that she “read” and “underst[oo]d the “release form,” and made no argument that she unwittingly signed this document. (CP 598.)

Ms. Filosa’s sole challenge to the Hold Harmless Agreement came from Mr. Stritmatter, lead counsel’s partner. He opined as follows:

It did not identify Painless Steel - Everett, LLC. I guess it purports to hold harmless an entity called Painless Steel Tattooing and Body Piercing. It did not cover Mr. and Mrs. Burns or Painless Steel - Everett, LLC.

(RP 100.) This analysis is unavailing, where Ms. Filosa argued that Mr. Doose was Painless Steel’s employee. (CP 472.) Absent a viable claim against Mr. Doose, the alleged agent, there was no viable claim against Painless Steel or its members, the alleged principals. *Orwick v. Fox*, 65 Wn. App. 71, 88, 828 P.2d 12 (1992) (trial court properly dismissed claims against employer under *respondeat superior* theory, where there was no remaining claim against employee). Because the Hold Harmless Agreement effectively exculpated Defendants from liability, the \$3 million settlement is manifestly unreasonable.

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e. *James Lee Burns is not Liable for Drafting the Hold Harmless Agreement.*

Even if judicial estoppel and/or the Hold Harmless Agreement did not bar claims against Mr. Burns, he is not personally liable for his authorship of the Hold Harmless Agreement.

It is black letter law that “members and managers of a limited liability company are not personally liable for the company’s debts, obligations, and liabilities.” *Chadwick Farms Owners Association v. FHC, LLC*, 166 Wn.2d 178, 200, 207 P.3d 1251 (2009); RCW 25.15.125(1). It is similarly black letter law that “an individual member [of a limited liability company] is personally liable for his or her own torts.”<sup>17</sup> *Id.*; RCW 25.15.125(2). But personal liability will not attach if the plaintiff has not identified a viable tort. *See Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 503, 90 P.3d 42 (2004) (the Washington Supreme Court affirmed the trial court’s involuntary dismissal of claims against the owners of a corporation, where plaintiff did not identify “a specific wrongdoing against the [owners]”); *see also Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 554, 599 P.2d //

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<sup>17</sup> Notably, Ms. Filosa did not “produce any evidence through documents or otherwise indicating that Mr. and Mrs. Burns had abused the corporate form.” (CP 614.)

1271 (1979) (plaintiff must establish that the “corporate officer participate[d] in wrongful conduct”) (emphasis added).

Here, Ms. Filosa did not identify any wrongful conduct by Mr. Burns. Ms. Filosa alleged that Mr. Burns incurred personal liability because he drafted the exculpatory clause and “negligently failed to warn.” (CP 815.) But Ms. Filosa offered no authority that (1) an individual member has a duty to warn separate and apart from that of the limited liability company; or (2) Mr. Burns somehow undertook a duty to warn when he drafted the Hold Harmless Agreement, a document written to exculpate himself and the business from liability. (*See e.g. id.* (citing no authority).) Furthermore, in signing the Hold Harmless Agreement, Ms. Filosa represented that she received “pre-service information . . . in writing”; the after-care instructions specifically reference the risk of infection. (CP 414.) And even if Ms. Filosa could state a claim for improper drafting of an exculpatory clause, any alleged failure to warn was not the proximate cause of her injury, where it is undisputed that she knew of the risk of infection at the time of her piercing. (*See e.g.* CP 597.)

Finally, Ms. Filosa had not pursued Mr. Burns in his personal capacity at the time of settlement. There is no discussion of Mr. Burns’ involvement in the Hold Harmless Agreement in the Second Amended

Complaint, the Settlement Agreement, or the transcript of the first reasonableness hearing. (See RP 174.) In fact, Ms. Filosa omitted all discussion of the Hold Harmless Agreement during the first reasonableness proceeding, representing that “[t]here was little, if any defense to be mounted as to the Defendants’ liability in this matter.” (CP 487.) And when Scottsdale challenged this omission, Ms. Filosa informed the trial court that “the alleged ‘hold harmless’ cannot and does not affect the reasonableness of the settlement at the time the parties reached the settlement.” (CP 1044) (emphasis in original.) Indeed, in closing arguments, Ms. Filosa’s attorney admitted that “[t]he fact that Mr. Burns personally drafted the form was not even known to the plaintiffs when we entered into the settlement agreement.” (RP 288.) Ms. Filosa cannot now justify the settlement with this liability theory.

### 3. Relative Fault of the Released Parties.

The trial court abused its discretion when it failed to apportion liability pursuant to the undisputed evidence.

“[T]he *Glover* factors reflect the tort concept of comparative fault.” *Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 704, 187 P.3d 306 (2008). A settlement agreement should “accurately represent[] the liability of the parties.” *Id.* at 706. Under

*Glover*, then, the “relative fault of a party” is one of the factors considered when analyzing a settlement’s reasonableness. 98 Wn.2d at 717. Where appropriate, the trial court may apportion liability to each settling entity. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 383, 89 P.3d 265 (2004) (holding that the trial court properly ruled “that a jury might find [subcontractor] 20 to 40 percent at fault”).

Like the procedure approved in *Howard*, this Court should remand for an apportionment of liability between Mr. Burns, Ms. Burns, Painless Steel, and Ms. Filosa. In an apparent effort to gain advantage in the coverage action, the Settlement Agreements lumps all “Defendants” together. (*See* CP 473.) But Ms. Filosa asserts different theories of liability as to each defendant. (*See* CP 806.) Indeed, she asserts no liability theory whatsoever against Ms. Burns. (*Id.*) Furthermore, the Burnses have complete defenses to liability under the judicial estoppel doctrine and/or the Hold Harmless Agreement. (*See* Sections IV.B.2.c-d.) Because they have no personal liability for the debt, it is manifestly unreasonable to allocate any liability to the Burnses. Finally, Ms. Filosa has some fault, where she knew of the risk of infection and yet signed a Hold Harmless Agreement, negating the duty of care. (RP 259.)

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4. Risks and Expenses of Continued Litigation.

While the expenses are generally a “wash,” Ms. Filosa faced considerable risk of summary dismissal.<sup>18</sup> The “risk and cost of proceeding to trial . . . [are] two factors which may serve to reduce the amount of a settlement.” *Chaussee*, 60 Wn. App. at 514. It is undisputed that all parties would have incurred expenses moving forward. (RP 103 (Ms. Filosa’s expert estimated costs of \$100,000); CP 501-02 (defense counsel estimated costs of \$60,000 to \$65,000).)

But any reasonable settlement value must reflect the strong possibility of summary dismissal on any one of the following bases: (1) Ms. Filosa had no evidence of causation; (2) she had no evidence to hold the Burnses personally liable; and (3) the Hold Harmless Agreement precluded her claims.<sup>19</sup> The \$3 million settlement is premised on untenable grounds and reasons, given the risk of summary dismissal.

5. The Released Parties’ Ability to Pay.

The trial court abused its discretion, where it is undisputed that Defendants had no ability to pay the \$3 million settlement.<sup>20</sup> As discussed

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<sup>18</sup> Other factors warrant greater weight in this analysis. *See e.g.* Sections IV.B.2 and IV.B.6.

<sup>19</sup> Even if Ms. Filosa survived summary judgment, she faced a very real risk of a defense verdict at trial.

<sup>20</sup> Like Section IV.B.4 above, this factor warrants less weight.

above, a settlement is unreasonable when “not a penny could ever be collected” from defendants. *Werlinger*, 126 Wn. App. at 351.

Here, Ms. Filosa admits that she could have collected very little money from Defendants. (CP 817.) Mr. Burns maintained proper records, and relied upon the corporate form. (CP 357-79.) If someone presented a “large claim” against Painless Steel, “the worst thing that would happen is that that location would need to basically turn over the keys.” (CP 567.) But Mr. Burns estimated Painless Steel’s net worth as approximately \$75,000, plus goodwill. (CP 570.) Thus, even if Painless Steel liquidated assets in bankruptcy, it could have offered Ms. Filosa only \$75,000, a mere two and one-half percent of the \$3 million consent judgment.

The Burnses’ personal assets should not come into play, as they were not sued in their personal capacity and had complete defenses to liability. (*See* Sections IV.B.2.c-d, above.) Regardless, Mr. Jackson estimated that if the Burnses “sold every last thing they had and they did not have a business or a livelihood anymore” their personal assets were approximately \$800,000. (CP 618; CP 413.) Thus, even with liquidating the combined assets of Painless Steel and the Burnses, the Defendants could not have paid even one-third of the \$3 million settlement. Because

the settlement agreement does not accurately reflect the Defendants' ability to pay, the trial court abused its discretion.

6. Evidence of the Settling Parties' Bad Faith, Collusion, and Fraud.

The \$3 million settlement is manifestly unreasonable, given the pervasive bad faith, collusion, and fraud found throughout this litigation.

A recent case provides guidance. *Water's Edge*, 216 P.3d 1110. There, the homeowners association ("HOA") sued Associates and KPS for failure to disclose the true condition of the property. *Id.* at 1113-1114. These parties entered into a settlement agreement and covenant not to execute for \$8.75 million, and petitioned the trial court for a reasonableness determination. *Id.* at 1114. The defendants' insurance provider, Farmers, intervened, arguing that the \$8.75 settlement was unreasonable. *Id.* The trial court set the reasonable figure at \$400,000, based, in large part, on evidence of bad faith, collusion, and fraud. *Id.* at 1117, 1122. On appeal, the HOA claimed that Farmers had the burden of proof on the bad faith, fraud, and collusion issues. *Id.* at 1122. The Court of Appeals disagreed:

[T]he parties seeking the reasonableness determination presumably bear the burden of establishing reasonableness. ...[T]he *Chaussee* factor is merely whether there is any evidence of bad faith, collusion, or fraud....Nor does any "evidence of bad faith, collusion, or fraud" appear to

invoke the typical standard for proof of fraud, which must be proved by evidence that is clear, cogent, and convincing. The burden here was...on the HOA to prove its settlement was reasonable.

*Id.* at 1122-1123 (emphasis added) (internal citations and quotations omitted). The Court of Appeals continued, holding that the trial court properly found evidence of fraud, bad faith, and collusion:

The trial court was clearly bothered by the overall structure of the settlement here; that of a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor.

*Id.* at 1123.<sup>21</sup> Here, the facts are markedly similar, as the record is replete with evidence of fraud, collusion, and bad faith.

*a. Ms. Filosa Procured the Settlement With Fraudulent Misrepresentations On Causation.*

The trial court found that Ms. Filosa made knowing misrepresentations about the “contaminated labret” theory, holding that counsel knew that Dr. Erhardt did not support this theory but made affirmative assertions to the contrary. (CP 578-81.) Ms. Filosa is now bound by this ruling, as she did not appeal.

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<sup>21</sup> See also *Continental Casualty Co. v. Westerfield*, 961 F.Supp. 1502, 1505 (D.N.M.1997) (applying analogous New Mexico law) (“Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer”) (“They have in common unfairness to the insurer, which is probably the bottom line in cases in which collusion is found”) (quotation omitted).

But these misrepresentations formed the basis of liability in the settlement. Ms. Filosa did not simply defraud the trial court. When procuring the settlement, Ms. Filosa defrauded Defendants, espousing a liability theory she knew to be false. (CP 473 (Settlement Agreement) (the “infected tongue stud...allegedly caused profound personally [sic] injuries to Plaintiff Filosa”); CP 381 (letter from Mr. Huss to Painless Steel) (“it is [Dr. Erhardt’s] medical opinion that [the] tongue ring caused the flesh eating bacteria infection”); CP 453 (Second Amended Complaint) (Ms. Filosa “suffered a serious life threatening infection of ‘flesh eating bacteria’ as a result of the tongue ring barbells”).)

Because Ms. Filosa procured the settlement by fraud upon the Defendants, the \$3 million settlement figure is premised on untenable grounds and reasons.

*b. The Settling Parties Engaged in Collusion.*

In facts paralleling those of *Water’s Edge*, 216 P.3d 1110, the settlement process contained evidence of collusion, such that the \$3 million sum is manifestly unreasonable.

There are a number of collusive aspects of the settlement. First, the Settling Parties realigned their interests, becoming joint venturers when the Burnses retained claims against Scottsdale. (See CP 475

(retaining rights for attorney fees and non-economic damages). As explained by Justice Talmadge, the Settling Parties had “a joint interest in setting up the case for the opportunity to get at the insurance carrier in a coverage case.” (RP 254.) *Cf. Water’s Edge*, 206 P.3d at 1123 (the settlement was “a joint effort to create, in a nonadversarial atmosphere, resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor”); *id.* (“the parties appeared to have a joint venture type relationship in which the HOA agreed to kick back some of the proceeds from any recovery from Farmers or White’s firm”). Second, the parties agreed to be bound by the trial court’s determination, even if it entered judgment for a different sum. (CP 474.) *Cf. Water’s Edge*, 206 P.3d at 1123 (“Beal insisted that the settlement be binding, regardless of the trial court’s reasonableness determination”). Next, the parties ceased their adversarial roles when Mr. Jackson testified in support of the settlement’s reasonableness. (*See* RP 144.) *Cf. Water’s Edge*, 206 P.3d at 1123 (“Beal agreed to testify to the reasonableness of the amount”). Finally, as discussed in more detail below, the Settling Parties did not negotiate the settlement figure, even though it represented a three-fold increase over Ms. Filosa’s last demand. *Water’s Edge*, 206 P.3d at 1123 (“neither

Associates or KPS had any reason to care what dollar amount they agreed to, so long as they could sell it to the trial court as reasonable”).

*c. The Settling Parties Engaged in Bad Faith.*

*i. Defendants had “No Input” in the Settlement Figure.*

Although millions higher than counsels’ assessed settlement value, the Settling Parties did not negotiate the settlement figure.

Washington courts often examine counsels’ evaluation of the settlement value when conducting the reasonableness analysis. *See e.g. Water’s Edge*, 206 P.3d at 1119 (where intervenor challenged an \$8.75 million settlement agreement, the trial court properly considered attorney’s memorandum to his clients, in which he estimated the likely settlement value as between \$250,000 and \$350,000).

Here, the Settling Parties both estimated a reasonable settlement value of \$1 million or less before settlement. On or about May 2, 2007, Ms. Filosa issued a demand to Defendants for \$2 million, “or lower limits such as \$500,000 or less.” (CP 382.) She later sent a direct demand to Scottsdale for \$1 million. (CP 468.) Notably, Ms. Filosa never even demanded \$3 million. The settlement figure is \$1 million higher than Ms. Filosa’s largest demand, and \$2 million greater than her last demand. (*Id.*)

Stated in a letter to his clients, Mr. Jackson's evaluation was in accord. He estimated the matter's value "in the neighborhood" of \$1 million, assuming that Ms. Filosa's scars were permanent and that the trier of fact found Painless Steel "100% liable." (CP 389.) But Mr. Jackson's assessment was a ceiling, not a floor. He told his clients that this "number may be reduced if a) the LLC can locate 'Doose and 'Doose' has favorable testimony, b) a physician backs our suspicions about the true cause of her throat infection." (*Id.*) He then located Mr. Doose, who provided information about his piercing and sterilization techniques. (CP 465.) Feasibly, then, this figure decreased as discovery progressed.

Despite their valuation, the Settling Parties agreed to a consent judgment for \$3 million. **But the Settling Parties never even negotiated this figure.** (RP 158 (stating that he "was trying to get [his] clients out of this case without further potential...financial exposure to them regardless of the number") (emphasis added); CP 617; RP 253.) This lack of negotiation reflects the Burnses' willingness to settle at any cost, and Ms. Filosa's desire to recover greater damages in the coverage action.

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ii. Attempts to Affect the Insurance Coverage and Harm Scottsdale's Interests.

Rather than an arms-length negotiation, the Settling Parties' interests were aligned on the coverage issues.

Mr. Burns' testimony is unequivocal- he did not procure insurance for Painless Steel's operations. (CP 568 (he made the "business decision" to leave Painless Steel bare of insurance); CP 571 (he procured coverage in his personal capacity for the building itself, not the tattoo and piercing services operating therein); CP 394 ("please note that the company did not buy insurance"); CP 411 ("Painless Steel - Everett, LLC does not have a liability insurance policy"); CP 342 ("The Landlord will not provide any insurance coverage for Tenant"); CP 470 ("[Scottsdale's] position that it owes no duty to defend this lawsuit is pretty sound").)

Despite this clear testimony, the Settling Parties made representations in the Settlement Agreement to "set up" a bad faith claim. The Settlement Agreement expressly states that "Defendants purchased insurance from Scottsdale . . . to cover the type of loss sustained by Plaintiff Filosa." (CP 473 (emphasis added).) Flatly contradicted by the record, this language represents a bad faith attempt to affect the insurance

coverage analysis. The trial court abused its discretion, when it failed to give proper weight to such improprieties.

iii. Changing Theories of Liability.

With her ever-shifting theories of liability and causation, Ms. Filosa engaged in a bad faith effort to salvage the settlement. As discussed in Sections IV.B.2.a, and .e, this includes, but is not limited to (1) Ms. Filosa's switch from the "contaminated labret" theory to the "ungloved hand" theory after the trial court found that she engaged in knowing misrepresentations; and (2) her claim against Mr. Burns in his personal capacity, even though she previously informed the trial court that the Hold Harmless Agreement did "not affect the reasonableness of the settlement at the time the parties reached the settlement." (CP 1044) (emphasis omitted.)

In sum, the \$3 million settlement is manifestly unreasonable, where (1) it is premised upon Ms. Filosa's knowing misrepresentations to the Defendants; and (2) it reflects collusive and bad faith efforts by the Settling Parties to manipulate a future coverage action against Scottsdale.

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7. Extent of the Releasing Party's Investigation and Preparation of the Case.

Despite Ms. Filosa's contention that she "thoroughly investigated and prepared this case with regard to both liability and damages," she completed a cursory investigation.<sup>22</sup> (CP 818.)

In the second proceeding, Ms. Filosa relied heavily on *Howard*, 121 Wn. App. 372, where the parties had obtained the following discovery, *inter alia*: (1) evaluations by neuropsychological experts; (2) reports from plaintiff's treating physician outlining her injuries and future medical needs; (3) life care plans; (4) reports from economists; (5) a letter from defendant's accountant stating that it was unable to pay a judgment; (6) various depositions; and (7) declarations from witnesses. *Id.* at 381.

Here, Ms. Filosa's preparation pales in comparison. Neither party took a single deposition. (CP 554.) This includes Ms. Filosa's deposition, even though Mr. Jackson indicated that his case evaluation could have decreased if Ms. Filosa had comparative fault. (CP 616.) Furthermore, Ms. Filosa had not identified, retained, or otherwise prepared the expert testimony necessary to establish liability and damages, other than Dr. Erhardt. (*See* CP 614.) And Ms. Filosa had not identified Jessica Ladd,

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<sup>22</sup> Again, this factor carries less weight in the pending reasonableness analysis.

who she now claims is a pivotal eyewitness supporting the new “ungloved hand” theory. (CP 665, CP 668.)

The trial court abused its discretion in deeming the settlement reasonable, where Ms. Filosa had not “worked up” her case.

8. Interests of the Parties not Being Released.

When examining the interests of those parties not being released, Washington courts analyze the interests of an insurer: “Because, the sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit, [the insurer] has a significant interest in the settlement agreement.” *Heights*, 145 Wn. App. at 706 (quotations omitted) (first alteration in original); *see also Werlinger*, 126 Wn. App. at 351 (“the interest of the insurer, as a third party affected by the settlement, was another *Glover* factor weighing against a determination that the amount was reasonable”).

Here, Scottsdale has a substantial interest in the reasonableness of the Settlement Agreement. Utilizing the \$3 million First Reasonableness Orders as the presumptive measure of damages, Ms. Filosa filed suit against Scottsdale as the Burnses’ assignee. (CP 543.) Even though the Burnses and their attorney did not believe that the Policy covered this loss, Ms. Filosa contends that Scottsdale acted in bad faith when it denied

coverage. (See CP 470.) Ms. Filosa now seeks at least **\$9 million in damages** under the Washington Insurance Fair Conduct Act. Although Mr. Burns acknowledged that Scottsdale insured the Subject Property, but not Painless Steel's business operations, Ms. Filosa now seeks to hold Scottsdale liable for the entirety of the settlement. The trial court abused its discretion in deeming the settlement reasonable, given Scottsdale's vested interest in this action.<sup>23</sup>

## V. **CONCLUSION**

Ms. Filosa procured the first \$3 million consent judgment through knowing misrepresentations upon the Court. She then sought to justify this figure with new theories of liability and causation.

The trial court abused its discretion, where (1) Ms. Filosa offered no competent evidence of causation; (2) she cannot prevail on the failure to warn claim, where she subjectively knew of the risk of infection; (3) judicial estoppel acts as a complete bar as to the Burns personal liability; (4) the Hold Harmless Agreement exculpated Defendants from liability; (5) Ms. Filosa cannot maintain a failure to warn claim against Mr. Burns;

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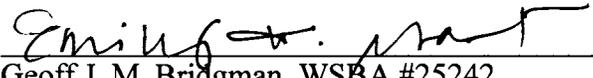
<sup>23</sup> Mr. Doose also has an interest in the reasonableness determination. Although identified as a party to this lawsuit, he was never served. (CP 459.) Yet the Settling Parties assign him blame for a \$3 million tort and seek to enter a judgment without his knowledge or consent.

(6) she asserted no claims against Ms. Burns; and (7) the settlement is tainted by bad faith, collusion, and fraud.

Accordingly, Scottsdale respectfully asks this Court to reverse and remand for a rebalancing of the *Chaussee/Glover* factors in light of the undisputed evidence. Further, Scottsdale respectfully asks this Court to direct the trial court to apportion liability (if any) between Ms. Filosa, Painless Steel, Mr. Burns, and Ms. Burns.

RESPECTFULLY SUBMITTED this 22nd day of March, 2010.

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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.

SCOTTSDALE INSURANCE COMPANY,

Intervenor/Appellant

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CERTIFICATE OF SERVICE

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that I served a copy of the Brief of Appellant Scottsdale Insurance Company on March 22, 2010 via Legal Messenger and email as follows:

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