FILED
SUPREME COURT
STATE OF WASHINGTON
6/30/2023 2:30 PM
BY ERIN L. LENNON
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 102044-9

Court of Appeals No. 56027-5-II

STARR INDEMNITY & LIABILITY COMPANY,

Intervenor-Petitioner,

v.

PC COLLECTIONS, LLC,

Defendant-Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Starr Indemnity & Liability Company ("Starr") fails to establish any basis for this Court's review under RAP 13.4.

Starr has not identified a single appellate decision with which the Court of Appeals' decision conflicts. Under firmly established Washington Supreme Court precedent, the Estate of Michael Cohen—through the Estate's own independent counsel—had a right to protect itself from excess liability by entering an $8 million covenant judgment with the Thomsen Plaintiffs after Starr wrongfully refused to contribute anything towards a settlement based on an unreasonable coverage position. That $8 million covenant judgment now serves as the presumptive measure of damages for Starr's tortious bad faith in a separate bad faith lawsuit; and if it is ultimately determined that Starr never acted in bad faith (as Starr maintains), then there will be no bad faith damages.

Further, the Court of Appeal's decision does not involve any issue of substantial public interest that has not already been addressed by this Court. For more than 30 years, this Court has repeatedly affirmed the substantial public interest in allowing policyholders to protect themselves against excess liability by entering covenant judgments when insurance companies wrongfully refuse to contribute anything towards settlements in bad faith. Additionally, the Court of Appeals' review of the Superior Court's detailed analysis of the *Chaussee* factors was based on the particular facts of this case and did not implicate any other case or substantial public interest.

Instead of addressing the applicable criteria for review, Starr rehashes the same substantive arguments that were properly rejected by both the Superior Court and the Court of Appeals. For reasons set forth herein, though, Respondent PC Collections, LLC ("PC Collections") respectfully requests the Court deny Starr's Petition for Review.

II. STATEMENT OF THE CASE

The Superior Court's unchallenged factual findings establish that the complex 243-page settlement agreement in this case was negotiated at arm's length after Starr wrongfully refused to contribute to a settlement based on an unreasonable coverage position and expressly authorized the parties to reach a settlement agreement without Starr's consent. CP 7063.

The Court of Appeals thoroughly reviewed the Superior Court record for an abuse of discretion, rejected Starr's arguments in a thorough opinion, and denied Starr's Motion for Reconsideration (including the arguments Starr improperly raised for the first time after oral argument in Starr's Statement of Additional Authorities).

Starr's Petition for Review continues to conflate the parties and misrepresent the Settlement Agreement's structure to advance a false narrative that has no basis in fact or law.[1]

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[1] For example, Starr continues to misrepresent that the Estate, PC Collections, and Loren Cohen are all the same. Pet. at 4, 9. The

A. The Pierce County Lawsuit

This case arises out of a mixed-use development project at the site of the former Asarco, Inc. smelter in Tacoma (the "Project"). Appx. A at 2.

On March 11, 2020, Thomsen Ruston, LLC, and Jess Thomsen, Inc. (collectively, the "Thomsen Plaintiffs") filed a lawsuit against the Point Ruston Defendants alleging various claims, including a breach of fiduciary duty claim against Michael Cohen (the "Pierce County Lawsuit").[2] CP 234–80.

B. The Federal Coverage Action

Starr provided insurance coverage to certain entities and managers involved in the Project, including Michael Cohen, the manager of Point Ruston LLC. Appx. A at 2.

Court of Appeals properly rejected this argument. Appx. A at 10 ("importantly, PC Collections is not the same entity as the Estate of Michael Cohen.").

[2] "Point Ruston Defendants" refers to the defendants named in the Pierce County Lawsuit with exception of JLW Point Ruston Investments, LLC, and Point Ruston Building 7, LLC.

On April 20, 2020, Starr agreed to defend the Point Ruston Defendants against the claims alleged in the Pierce County Lawsuit. CP 7061, ¶ 3.

On June 9, 2020, however, Starr filed a declaratory judgment action seeking: (1) a declaration that Starr had no duty to defend the Point Ruston Defendants in connection with the Pierce County Lawsuit; and (2) reimbursement of all defense costs paid by Starr to defend the Point Ruston Defendants. CP 7061; Compl. for Declaratory. J. at 10, *Starr Indem. & Liab. Co. v. Point Ruston, LLC, et al.*, No. 3:20-cv-05539 (W.D. Wash. June 9, 2020) at Dkt. No. 1 (the "Federal Coverage Action").

C. Michael Cohen died in December 2020.

In December 2020, while the Pierce County Lawsuit and Federal Coverage Action were pending, Michael Cohen died of cancer. CP 4003. As the Superior Court expressly found, "Mr. Cohen's death severely hampered Defendants ability to defend against Plaintiffs' claims because he was the Manager responsible for a number of the disputed transactions and he was

no longer available to testify about the business reasons for his decisions." CP 7062.

D. Starr refused to contribute anything towards a settlement of the Pierce County Litigation.

Bitter and intense litigation continued for over a year in the Pierce County Lawsuit, exhausting $1.5 million in defense costs (which depleted Starr's eroding insurance policy limits). CP 7061–68; CP 7010–28. For a period of many months, more than a dozen sophisticated lawyers engaged in extensive settlement discussions, and counsel for the Point Ruston Defendants ultimately demanded that Starr contribute its remaining policy limits to fund a heavily negotiated settlement with the Thomsen Plaintiffs. CP 7010–28; CP 7062–63.

Starr (falsely) asserted that it had no duty to defend the Point Ruston Defendants; rejected the Point Ruston Defendants' demand; denied having any duty to contribute to a settlement; and expressly authorized Point Ruston Defendants to settle the

Pierce County Lawsuit without Starr's consent. CP 7019–21.[3] Starr neglects to disclose this fact to the Court.

E. The Settlement Agreement

After Starr refused to contribute to the settlement and expressly authorized the Point Ruston Defendants to settle the Pierce County Lawsuit without Starr's consent, the parties' lawyers spent hundreds of additional hours further negotiating the resolution of many complex and contested issues. CP 7012, ¶ 11. Those extensive negotiations culminated in the execution of a complex 243-page settlement agreement. CP 6745–6988 (the "Settlement Agreement").

The Settlement Agreement had many different financial and non-financial components. The financial components totaled more than $34.5 million, including: (1) a $26 million

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[3] The Federal District Court and Ninth Circuit both confirmed that Starr was wrong: Starr did have a duty to defend the Point Ruston Defendants. *Starr Indem. & Liab. Co. v. Point Ruston LLC,* No. C20-5539RSL, 2021 WL 3630511 (W.D. Wash. Aug. 17, 2021), *aff'd in part, vacated in part, rev'd in part*, No. 21-35702, 2022 WL 1769645 (9th Cir. 2022).

Confession of Judgment (*id*. § 2(o)); (2) an $8 million covenant judgment against the Estate for the Thomsen Plaintiffs' breach of fiduciary duty claim against Michael Cohen (CP 6746–52 at § 2(b));[4] and (3) a $500,000 payment to the Thomsen Plaintiffs (*id*. § 3).[5]

Because the Thomsen Plaintiffs were concerned about the Point Ruston Defendants' ability to satisfy the $26 million Confession of Judgment, the Thomsen Plaintiffs also agreed to grant a third party, LMC Ruston Capital (who was neither a party

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[4] Importantly, the covenant judgment was against the Estate only. The Thomsen Plaintiffs' breach of fiduciary duty claim was based on liability theories which collectively exceeded $30 million in damages based on alleged conduct by Michael Cohen. The Thomsen Plaintiffs voluntarily dismissed the breach of fiduciary duty claim against Loren Cohen with prejudice; and there was no evidence of any breach of fiduciary duty by Loren Cohen—Loren Cohen was not even the Manager of Point Ruston, LLC. Starr's accusations about Loren Cohen are entirely unsupported and plainly irresponsible.

[5] The nonfinancial components of the Settlement Agreement included: a contingent Receivership Order (*id*. § 2(o)); an assignment of certain rights, titles, and interest in various entities (*id*. § 2(c)–(j)); guaranty and indemnity agreements (*id*. § 2(l)); and restructured loans (*id*. § 2(n)).

to the Superior Court Lawsuit nor an insured under Starr's policy) the opportunity to purchase the Thomsen Plaintiffs' restructured loans and bad faith claims against Starr for $17 million (the "Option"). *Id.* § 4. If the Option was not exercised, the $26 million Confession of Judgment would have been entered, the Receivership Order (transferring control over the Project to a receiver) would have been entered, and the Thomsen Plaintiffs would have retained the bad faith claims against Starr. *Id.*

F. The Superior Court determined that the Stipulated Judgment was Reasonable.

Because the Settlement Agreement involved a covenant judgment against Michael Cohen, the Estate of Michel Cohen (the "Estate"), through the Estate's own independent counsel (*i.e.*, Stuart Morgan),[6] filed a motion on May 25, 2021, asking

[6] At the reasonableness hearing, the Estate's own independent counsel made clear that entry of the stipulated judgment was consistent with the goal of protecting the Estate and avoiding a worse outcome: "[M]y job really is to protect the estate, and that includes not only protection for beneficiaries of the estate but also protection of creditors to the estate to some degree . . .

the Superior Court to determine whether the $8 million stipulated judgment amount was fair and reasonable (the "Reasonableness Motion"). CP 6518–29.[7]

Starr filed a motion to intervene and sought to delay the reasonableness hearing, pending resolution of the cross motions for summary judgment in the Federal Coverage Action or to allow for unspecified discovery. CP 6642–80. No party opposed the motion to intervene, and Starr was permitted to present argument at the reasonableness hearing. VRP at 8, 33, 52–54.

After carefully reviewing previously filed pleadings and considering the briefs, arguments of the settling parties, and Starr's lengthy objections, the Superior Court determined that the $8 million stipulated judgment was fair and reasonable. VRP 57–

Otherwise, it could result in a very negative situation [] for everybody else who's involved. So the more that creditor claims like this can be resolved and move forward, the better off the estate is." VRP at 30.

[7] The Settlement Agreement was on record and expressly considered by the Superior Court. CP 6744–6988 (Settlement Agreement); CP 7059–70 (Reasonableness Order).

58; CP 7069, ¶ 27 (Appx. H at 11) (trial court finding that "No factor, alone or in combination with others, suggests the judgment amount is anything but reasonable."). The Superior Court also entered express findings, including the express finding that there was no evidence of bad faith, collusion, or fraud:

> *There is no evidence of bad faith, collusion, or fraud on behalf of the settling parties.* Defendants invited Starr to participate in settlement (indeed they demanded it), but Starr refused. Moreover, the other settling Defendants are contributing over $17,000,000 in cash to the settlement (over time) and are incurring additional indemnity obligations worth millions more. Furthermore, the settling parties are incurring the risk and expense associated with the coverage action. *A collusive settlement would have shifted the whole risk to the insurance company.* This factor shows the reasonableness of the proposed Stipulated Judgment. Moreover, the parties negotiated through counsel for hundreds of hours to resolve a number of complex issues, involving both covered and uncovered claims, as demonstrated by the Settlement Agreement itself.

CP 7068, ¶¶ 25 (emphasis added), 27 ("The Court further finds that the settlement was negotiated at arms-length, as evidenced

by the settlement agreement itself; and that there is no evidence of fraud of collusion between Plaintiffs and Defendants.").[8]

As a result, the $8 million stipulated judgment serves as the presumptive measure of damages for Starr's tortious bad faith refusal to settle.[9] *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738–39, 49 P.3d 887 (2002) ("We hold the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable under the *Chaussee* criteria.").

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[8] Despite protestations on appeal, Starr did not object to the form of the Court's Order. VRP at 59–60.

[9] Starr repeatedly misstates that this case involves an attempt to "collect" upon the covenant judgment. Pet. at 23–24. As Starr's lack of legal citations suggest, though, parties do not "collect" upon stipulated judgments—stipulated judgments merely serve as the presumptive measure of damages for an insurance company's tortious bad faith (*e.g.*, wrongful refusal to contribute to a settlement based on an unreasonable coverage position) in a later bad faith lawsuit. *Id*. And if it is ultimately determined that the insurance company did not act in bad faith, then there will be no damages for the insurance company's tortious bad faith.

G. The Federal District Court confirmed Starr did have a duty to defend the Point Ruston Defendants.

Two months after the Superior Court's reasonableness determination, the Federal District Court ruled against Starr and in favor of the Point Ruston Defendants in the Federal Coverage Action. Specifically, the Federal District Court held that Starr's coverage position was unreasonable based on the language of the insurance policies, that Starr had a duty to defend the Point Ruston Defendants in connection with the Pierce County Lawsuit, and that Starr was not entitled to reimbursement of any defense costs. S*tarr Indem. & Liab. Co.*, 2021 WL 3630511 at *6, 8.

H. Four months after the reasonableness hearing, the Thomsen Plaintiffs sold and assigned the bad faith claims against Starr to PC Collections for $17 million.

Pursuant to the Settlement Agreement, the bad faith claims against Starr were assigned to the Thomsen Plaintiffs on May 21, 2021. VRP at 31 (Thomsen Plaintiffs' counsel confirmed that the bad faith claims against Starr belonged to the Thomsen Plaintiffs).

Pursuant to the $17 million Option in the Settlement Agreement, the Thomsen Plaintiffs then sold and assigned the bad faith claims against Starr to PC Collections (who was neither party to the Pierce County Lawsuit nor an insured under Starr's policy) on September 15, 2021—four months after the bad faith claims were originally assigned to the Thomsen Plaintiffs and three months after Reasonableness Hearing.

Contrary to Starr's false narrative, therefore, the bad faith claims against Starr were never "kicked back" the insured tortfeasor (*i.e.*, the Estate); and the bad faith claims against Starr were sold and assigned to PC Collections for substantial due consideration (*i.e.*, $17 million).[10]

I. The Court of Appeals affirmed the Superior Court's Reasonableness Determination.

Starr appealed the Pierce County Superior Court's reasonableness determination and continued to make same

[10] Thus, there was nothing "illusory" about the original assignment to the Thomsen Plaintiffs (as Starr suggests).

arguments it made to the Superior Court: *e.g.*, that the structure of Settlement Agreement was unreasonable, and that the covenant judgment unjustly enriched the insured tortfeasor. Appx. A at 3, 15.[11]

Following oral argument, Starr also submitted a Statement of Additional Authorities arguing, for the first time, that the Court should disregard the corporate form of PC Collections under a corporate veil piercing theory. Appx. A at 13 n.7 (declining to address Starr's corporate veil piercing theory because it was improperly raised for the first time on appeal).

The Court of Appeals properly rejected Starr's arguments and held the Superior Court did not abuse its discretion by

[11] Starr also argued on appeal that the trial court violated Starr's procedural due process rights. Appx. A at 3. Starr does not appear to renew these arguments in its Petition. In any event, these arguments were plainly without merit, as Starr was permitted to intervene in the case, submit briefing, and present argument at the reasonableness hearing. CP 7063–64 ¶¶ 13–14; VRP at 8, 33, 52–54.

determining that the stipulated judgment was fair and reasonable. Appx. A at 13, 15 (Opinion).

In reaching its decision, the Court of Appeals cited well-established Washington law governing covenant judgments. For example, the Court of Appeals cited the three typical features of a covenant judgment: "'[T]he typical settlement agreement involves three features: (1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff's covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured's coverage and bad faith claims against the insurer.'" Appx. A at 14 (quoting *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764–65, 287 P.3d 551 (2012)). The Court of Appeals also acknowledged that the covenant judgment against the Estate contained all three typical features: (1) the stipulated judgment in § 2(b) of the Settlement Agreement; (2) the assignment of rights to the Thomsen Plaintiffs in § 2(b)(i) of the Settlement Agreement; and (3) the covenant not to execute in § 2(b)(ii) of the Settlement

Agreement. Appx. A at 8. Starr continues to turn a blind eye to those express provisions of the Settlement Agreement.[12]

J. The Court of Appeals denied Starr's Motion for Reconsideration.

Starr subsequently filed a Motion for Reconsideration, which continued to mischaracterize the facts, and additionally mischaracterized the Court of Appeals' opinion. *See* Appx. C; Appx. D at 6–8 (listing Starr's misrepresentations); *id.* at 22–23 (pointing out that a statement Starr asked the Court to strike as having "no basis in the record" was supported by the trial court's unchallenged findings, which were verities on appeal). The panel denied Starr's Motion for Reconsideration. Appx. E.

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[12] Starr argues that the Estate's assignment to the Thomsen Plaintiffs was "meaningless" because the Settlement Agreement contained an allocation provision to account for any potential settlement from Starr prior to September 15, 2021. As the Court of Appeals confirmed, though, that allocation provision was reasonably designed to compensate the other Point Ruston Defendants for their ongoing litigation costs, including those in the Federal Court Action. Further, Starr's argument is a red herring because there was no settlement with Starr prior to September 15, 2021.

III. ARGUMENT IN RESPONSE TO PETITION

This case involved a very case-specific analysis of the *Chaussee* factors pursuant to decades of Washington Supreme Court precedent establishing that policyholders (such as the Estate) have the right to protect themselves from excess liability by entering covenant judgments when insurance companies (such as Starr) wrongfully refuse to contribute to settlements based on unreasonable coverage positions. The decisions of the Superior Court and the Court of Appeals in this case do not conflict with any decision of this Court or the Court of Appeals. Nor do they implicate any issue of substantial public interest that this Court has not already addressed. Accordingly, Starr has failed to demonstrate any basis for review under RAP 13.4 and Starr's Petition for Review should be denied.

A. Starr fails to identify a conflict with prior decisions of this Court of the Court of Appeals warranting review under RAP 13.4(b)(1) & (2).

This case does not warrant review under RAP 13.4(b)(1) or (2) because the Court of Appeals' decision is entirely

consistent with Washington Supreme Court and Court of Appeals precedent. Washington law allows policyholders (*e.g.*, the Estate) to protect themselves from excess liability by entering covenant judgments when insurance companies (*e.g.*, Starr) refuse to settle claims in bad faith. *See Bird*, 175 Wn.2d at 761. Similarly, Washington law allows parties (*e.g.*, Thomsen Plaintiffs) to sell and assign their claims (*e.g.*, the bad faith claims against Starr) to third parties (*e.g.*, PC Collections) for due consideration (*e.g.*, $17 million). *See Int'l Com. Collectors, Inc. v. Mazel Co., Inc.*, 48 Wn. App. 712, 716-17, 740 P.2d 363 (1987) (contractual rights can be assigned); *Cooper v. Runnels*, 48 Wn.2d 108, 109, 291 P.2d 657 (1955) (tort claims can be assigned); *see also* RCW 4.20.046.

Starr argues that the Court of Appeals' decision is contrary to precedent from the Washington Supreme Court and Court of Appeals, but Starr fails to identify a single appellate decision with which the Court of Appeals' decision conflicts. Bare invocations of RAP 13.4(b)(1) and (2) do not warrant this

Court's review. And a general discussion of the "adversarial process" and evolution of covenant judgments in Washington—without identifying any specific conflict—similarly provides no basis for this Court's review.

The Court of Appeals' decision does not conflict with any precedent from this Court or the Court of Appeals, and Starr's disdain for the firmly established right of policyholders to protect themselves from excess liability by entering covenant judgments when insurance companies wrongfully refuse to contribute to settlements does not serve as a basis for review under RAP 13.4(b)(1) or (2).

B. Starr fails to identify any issue of substantial public interest warranting review under RAP 13.4(b)(4).

Similarly, the Court of Appeals' decision does not warrant review under RAP 13.4(b)(4) because it does not involve any issue of substantial public importance that has not already been addressed by this Court.

For more than 30 years, this Court has repeatedly affirmed the substantial public interest in allowing policyholders (such as the Estate) to protect themselves against excess judgments by entering covenant judgments when insurance companies (such as Starr) wrongfully refuse to contribute anything towards settlements in bad faith. Additionally, the Court of Appeals' decision was very case-specific: it involved a review of the Superior Court's detailed analysis of the *Chaussee* factors based on the specific provisions of the Settlement Agreement and facts of this case. The Court of Appeals' decision did not implicate any other case or any substantial public interest.

Lofty comments about "the integrity of our state's system of justice and an affordable, efficient insurance market" do not serve as a basis for review. Further, Starr fails to recognize how "the integrity of our state's system of justice" is protected by the very process established by this Court: the existence of bad faith, fraud, or collusion is one of the nine factors trial courts must consider in making reasonableness determinations. *Bird*, 175

Wn.2d at 766. Here, the Superior Court expressly found there was no evidence of bad faith, collusion, or fraud. Appx. H at 10; CP 7068. And, as confirmed by the Court of Appeals, that ruling was not an abuse of its discretion. Appx. A.

The Court of Appeals' application of well-settled law concerning covenant judgements to the specific facts of this case does not implicate any other case or concern any issue of substantial public interest. Starr's Petition for Review should be denied accordingly.[13]

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[13] PC Collections objects to Starr's inclusion of Appendix K (an unpublished decision from the Court of Appeals affirming the Superior Court's ruling disallowing any family member to serve as the Personal Representative of the Estate). RAP 13.4(c)(9) requires "[a]n appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review." Here, only Appendices A, B, and E are permitted by RAP 13.4(c)(9); *Ochoa Ag Unlimited, L.L.C. v. Delanoy*, 128 Wn. App. 165, 172, 114 P.3d 692 (2005). Further, the court expressly stated there was no finding of any misconduct by Loren Cohen. Appx. K at 5. Starr's ongoing attempt to cast Loren Cohen in a negative light is procedurally improper and substantively void.

IV. CONCLUSION

Starr bet heavily on an unreasonable coverage position and lost. Accordingly, Starr now seeks to avoid bad faith liability by challenging the covenant judgment in the settlement Starr expressly authorized the Point Ruston Defendants to enter and which now serves as the presumptive measure of damages in the bad faith lawsuit.[14]

For reasons set forth herein, PC Collections respectfully requests that the Court deny Starr's Petition because it fails to state a basis for this Court's review.

I certify that this response complies with the length limits permitted by RAP 18.17. This response is 3,942 words (excluding the portions exempted by RAP 18.17).

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[14] Notably, "[t]he insurer still must be found liable in the bad faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion." *Bird*, 175 Wn.2d at 765 (citing *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 264, 199 P.3d 376 (2008)).

Respectfully submitted this 30th day of June, 2023.

/s/ Jason R. Donovan

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DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on June 30, 2023, I caused to be served this document as follows:

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DATED this 30th day of June, 2023, at Seattle, Washington.

/s/ Sandra D. Lonon
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FOSTER GARVEY P.C.

June 30, 2023 - 2:30 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,044-9
Appellate Court Case Title:	Thomsen Ruston, LLC, et al. v. Point Ruston, LLC, et al.
Superior Court Case Number:	20-2-05437-8

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