No. 96029-1

SUPREME COURT
OF THE STATE OF WASHINGTON

SARAH GOSNEY, as assignee and as the Personal Representative of the Estate of Jerry Welch; JOHN VOSE, PIZZA TIME INC., and PIZZA TIME HOLDINGS OF WA.,

Respondents,

v.

FIREMAN'S FUND INSURANCE CO., and THE AMERICAN INSURANCE CO,

Petitioners.

ANSWER TO PETITION FOR REVIEW OF RESPONDENT SARAH GOSNEY, as assignee and as Personal Representative of the Estate of Jerry Welch

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A. Introduction.

This Court has consistently held that a liability insurer that harms its insured by breaching its duty of good faith to defend, settle or indemnify is liable as a matter of law for a judgment entered against its insured, and can escape liability in excess of its policy limits only if it can establish that the judgment is the product of its insured's fraud or collusion. Petitioner Fireman's Fund raises no argument that the Court of Appeals' decision conflicts with these settled principles, but instead makes a fact-specific challenge to their application in the idiosyncratic posture of this case.

The jury found that respondents proved that Fireman's breached its good faith duty to defend and settle, caused its insureds $460,000 in additional damages, and that Fireman's failed to prove the underlying judgment was the product of fraud of collusion. The courts below properly determined the legal consequence of those unchallenged facts. The Court of Appeals gave legal effect to the jury's factual findings by affirming on two alternative independent grounds the trial court's conclusion that Fireman's was liable as a matter of law for the amount of a judgment imposed upon its insureds. This Court should deny review and award respondent Gosney her fees under *Olympic Steamship*.

B. Restatement of Issues.

The issues presented by Fireman's are more fairly restated as:

1. A jury found Fireman's breached its good faith duty to settle or defend and harmed its insureds. Was Fireman's liable as a matter of law for a judgment against its insureds that the jury also found was free of fraud or collusion, based on well-settled Washington law governing an insurer's duties?

2. Fireman's insisted that the trial court, and not the jury, determine whether Fireman's was bound by the judgment against its insureds based on an arbitration award confirmed and found reasonable in the underlying action, in which Fireman's deliberately chose not to participate. Is Fireman's collaterally estopped from challenging its insureds' liability and the amount of the judgment?

3. The insureds assigned all their claims against Fireman's to respondent Gosney in 2008, two years before Fireman's individual insured declared personal bankruptcy. Could Gosney be judicially estopped by her assignee's failure to disclose his assigned claims against Fireman's in a subsequent bankruptcy petition?

C. Restatement of the Case.

Respondent Sarah Gosney's father Jerry Welch was killed by a habitual drunk driver delivering pizzas for a franchise controlled by

co-respondents John Vose and his company Pizza Time, who had $2.5 million in liability coverage from petitioner Fireman's Fund. Fireman's, defending under a reservation of rights, refused to disclose its full policy limits, refused to settle, and failed to recognize that well-established vicarious liability principles exposed its insureds to joint and several liability to Gosney under Washington law. When Fireman's refused to pay its limits, Vose and Pizza Time settled with Gosney on the eve of trial, assigning their bad faith claims to Gosney and consenting to entry of a partial judgment for policy limits, the balance to be determined in arbitration, coupled with a contingent covenant not to execute.

After a 5-week trial, a jury found that Fireman's acted in bad faith, breached its contract, was negligent, violated the CPA and IFCA, causing injury to its insureds, and that the settlement and the judgment entered against Vose and Pizza Time in Gosney's favor following arbitration was free of fraud and collusion. At Fireman's insistence that these issues be resolved by the trial court, not the jury, the trial court found based on substantial evidence that Fireman's had notice of, but tactically chose not to attend, the arbitration establishing the reasonable amount of Gosney's damages, and was bound by the

resulting judgment against its insureds because Fireman's chose not to contest (and now concedes) its reasonableness.

The Court of Appeals affirmed, reversing only the trial court's refusal to enter judgment on the jury's verdict for $460,000 in damages, over and above the covenant judgment, in favor of Vose and Pizza Time. Fireman's now asks this Court to ignore both the jury's special verdict and the trial court's findings, flouting the rule that this Court views all facts in the light most favorable to respondents. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The Court of Appeals' decision fairly sets out the facts. This answer to Fireman's petition corrects only the factual misrepresentations most relevant to the issues presented:

1. Substantial evidence supports the jury's verdict that Fireman's breached its good faith duty to defend, settle, and indemnify, to its insureds' injury.

Fireman's was the liability insurer of Pizza Time and its sole principal and shareholder John Vose under two policies providing a total of $2.5 million in coverage when respondent Gosney's father was killed by a Pizza Time delivery driver. (Op. 2) Vose had extensive control over Pizza Time's franchise operations and their employees. (Op. 2; RP 1812, 2018, 2025-29, 2663-64, 2686-87; Ex. 268) Gosney sued Pizza Time and its franchisee in Thurston County

Superior Court for her father's wrongful death. (Op. 3) The jury heard overwhelming evidence that Fireman's, acting under a reservation of rights even after it had concluded it was not prejudiced by its insureds' claimed late notice of the action, inadequately investigated and mounted an ineffective defense of its insureds, failed to disclose its policy limits, and failed to pay limits to settle Gosney's claims after liability and damages in excess of limits became clear and it could have protected its insureds by doing so. (Op. 3-5)

Critical to Fireman's challenge to its insureds' settlement of the underlying claims by their assignment of claims against Fireman's to Gosney is its contention that the jury could have found Fireman's did not defend under a reservation of rights. (Pet. 7, n.2) Fireman's witnesses characterized its reservation of rights as a "nonwaiver" letter (RP 1271; Ex 160 at 1747; Ex. 252,), but its own expert conceded (RP 4148-49) there is no such thing under Washington law (RP 687-88, 749), and Fireman's chose not to submit that issue to the jury. As the jury was told without exception, Fireman's reservation of rights allowed Fireman's insureds to protect themselves by independently settling with Gosney "without notice to or the consent of the insurer." (CP 4873; RP 752-53, 794, 801-02, 1671, 2494-96)

Ignoring the franchisor's extensive control over all franchise operations and RCW 4.22.070, Fireman's California-based adjuster erroneously concluded that its insureds could not be vicariously liable for a franchisee's negligence under Washington law, and that "there is no exposure for joint and several liability. Liability for all damages are several only." (Ex. 160 at 1772) Fireman's appointed "portfolio" defense counsel did very little to prepare for trial, neither taking or attending depositions nor authorizing experts to assist the defense. (RP 2566; Exs. 54, 350)

Fireman's conceded below, and it is undisputed on appeal, that its policies entitled Vose and Pizza Time to unlimited defense costs, $2.5 million in indemnity, and payment of pre- and post-judgment interest. (Op. 4, n.4; Ex. 146 at 0911-12; RP 902-03, 1453-54, 3614-15) However, Fireman's would not reveal its policy limits to Gosney, and initially told its insureds that they had only $1.5 million in coverage. (Op. 4; Ex. 45) When every other defendant had tendered policy limits in response to Gosney's demand for a global limits settlement, Fireman's refused to do so, offering Gosney nothing. (Op. 4; Ex. 30; RP 2057) Unprepared for trial, assigned defense counsel obtained Vose's consent to continue the trial date;

Fireman's did not tell its insureds that they thereby forfeited their opportunity for a policy limits settlement. (Op. 4, n.3; RP 2056)

Through the personal lawyer Fireman's advised Vose to retain after belatedly recognizing he faced exposure in excess of policy limits, Vose negotiated a settlement with Gosney, consenting to a policy limits partial judgment of $2.5 million, with the full amount of damages to be determined either by stipulation or arbitration. Gosney gave Fireman's insureds a covenant not to execute expressly conditioned on payment of policy limits. (Ex. 66) Contrary to Fireman's claims (Pet. 3), it was notified of the settlement (Ex. 72) but still refused to pay limits. (Op. 7; Ex. 160 at 1791-92) Thirteen years after Jerry Welch's death, Fireman's has still not paid its limits of $2.5 million on a claim it admits was covered by its policies (RP 1215), depriving Vose and Pizza Time of the protection provided by the settlement's conditional covenant not to execute.

This and other substantial evidence supports the jury's verdict that Fireman's acted in bad faith, breached its contract, was negligent, violated the CPA and IFCA, causing harm to its insureds, and that its insureds' settlement was free of fraud and collusion. (Gosney Resp. Br. 4-16) Fireman's did not challenge the jury's liability findings on appeal, and does not challenge them now.

2. Substantial evidence supports the findings that the settlement between the insureds and Gosney was free of fraud and collusion, and that Fireman's made a strategic decision not to challenge the arbitration and judgment.

With notice to Fireman's, the settlement was deemed reasonable and approved as to Jerry Welch's minor survivors in Thurston County Superior Court. (Op. 7) Gosney then brought this action in King County Superior Court after Fireman's refused to pay her partial $2.5 million judgment against Vose and Pizza Time. Fireman's obtained a stay of this bad faith action, demanding arbitration of its insureds' ultimate liability to Gosney pursuant to the respondents' agreement, on the ground that Fireman's liability if it was in bad faith would be measured by the amount of Gosney's final judgment against its insureds. (Op. 8; CP 60-67) Gosney gave Fireman's six weeks' notice of arbitration before retired King County Superior Court Judge Charles Burdell. (Op. 8, 11, n.10) As the trial court found, Fireman's refused to participate, making a strategic decision to "avoid the arbitration hearing altogether" (CP 5711) in order "to avoid a situation where FFIC is held to the award due to its presence & participation in such a hearing." (Ex. 143)

Judge Burdell valued Gosney's claim at $10.8 million, and found no fraud or collusion in the settlement. (Op. 9-10; Ex. 92)

Thurston County Judge Tabor reduced the award to judgment, also finding it reasonable. (Op. 10-11; Ex. 94) Consistent with its strategy "to avoid participation," Fireman's intervened in Thurston County only to remove its name from the caption. In granting this relief, Judge Tabor warned Fireman's it would not be protected from the repercussions of the findings and judgment. (Op. 11; Ex. 96)

Fireman's has not challenged the reasonableness of the final judgment entered against its insureds in favor of Gosney. Substantial evidence supports the jury's verdict rejecting Fireman's claims of fraud or collusion, as well as the trial court's findings that Fireman's made a strategic decision not to challenge the judgment on the arbitration award. (Gosney Br. 17-21; CP 4988, 5861)

3. The trial court found based on substantial evidence that Fireman's was collaterally estopped from contesting the judgment against its insureds and entered judgment for Gosney on the jury's special verdict.

King County Superior Court Judge Sean O'Donnell presided over a five-week jury trial in which Gosney pursued her assigned claim to the $10.8 million judgment entered against Fireman's insureds. In pre-trial orders, unchallenged on appeal, the trial court prevented Fireman's from relitigating the amount of Gosney's damages. (CP 2161, 4807; RP 176-80, 1612-13, 1666) Vose and Pizza

Time sought additional damages for their harm – the emotional distress, damage to credit or reputation and other non-economic damages reserved to them under the settlement. (Op. 6; Ex. 66)

The jury by special verdict found that Fireman's was liable on each and every one of plaintiffs' claims – for breach of the duty of good faith, including specifically the duty to defend and/or settle, breach of contract, negligence, and violating both the Consumer Protection Act and the Insurance Fair Claims Act. The jury's special verdict also rejected Fireman's affirmative defenses, including fraud, collusion and comparative fault. The jury found Vose and Pizza Time waived their contractual right to a defense to assess the reasonable amount of Gosney's damages at the arbitration hearing (Op. 16; CP 4988-89), but not that they "did not want [Fireman's] to attend" the hearing, as Fireman's claims. (Pet. 7, n.12; CP 5710) This waiver of the contractual right to defend (but not of the duty to settle or indemnify) was the only finding favorable to Fireman's at trial.

The jury found that Fireman's insureds Vose and Pizza Time suffered an additional $460,000 in general and economic damages. Its verdict refutes Fireman's contention that the jury could have found that Fireman's sustained its burden to rebut the presumption that its breach of the duty of good faith did not harm its insureds. (Pet. 11)

Neither Fireman's proposed, nor the trial court's, special verdict form asked the jury whether Fireman's had notice or opportunity to intervene in the underlying action. (CP 4987-91, 6392-96) Accepting Fireman's argument that the court and not the jury should adjudicate any factual issues relating to collateral estoppel, the trial court also did not ask the jury to decide whether Fireman's had notice of the settlement, or its reasonableness. (CP 5707) After the jury had been discharged, the trial court found that Fireman's was bound by and precluded from challenging its liability for the underlying judgment because Fireman's had notice of the underlying litigation (including the arbitration), liability and damages were "actually litigated," that Fireman's was "in privity" with its insureds Vose/Pizza Time (CP 5703-13), and that Fireman's was liable to Gosney for the full judgment amount by virtue of the jury's verdict on the assigned claims. (CP 5712, 5863)

4. The Court of Appeals affirmed the judgment for Gosney on two independent grounds.

The Court of Appeals affirmed on two grounds. First, it held that the jury's findings that plaintiffs proved all elements of their claim for breach of its good faith duties to defend and settle established Fireman's liability for the judgment against its insureds. (Op. 27) While Judge Leach dissented from this portion of the Court

of Appeals decision, he joined in its unanimous holding that because Fireman's invited the trial court to find whether it was bound by the underlying judgment, the trial court's findings of fact established that Fireman's was collaterally estopped from challenging its liability for that judgment in subsequent proceedings. (Op. 44-45, 63)

Fireman's seeks review of both grounds for the Court of Appeals' affirmance of the trial court's judgment. Fireman's also seeks review of the Court of Appeals' reversal of the trial court's refusal to enter judgment in favor of Vose and Pizza Time based on Vose's failure to disclose his claims against Fireman's in a bankruptcy petition filed in 2010, two years after Vose and Pizza Time assigned their claims to Gosney.

D. Argument Why Review Should be Denied.

1. The Court of Appeals' affirmance of the trial court's judgment based on the jury's special verdict is wholly consistent with this Court's decisions.

The courts below did not "disregard" the jury's verdict, which was neither internally inconsistent nor inconsistent with the jury instructions. The Court of Appeals' decision affirming the trial court's judgment does not compromise Fireman's right to jury trial. To the contrary, the jury's special verdict established Fireman's liability for bad faith and its failure to prove fraud or collusion. The trial court

properly entered judgment based on the jury's unchallenged factual findings. CR 49(a); *Estate of Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866, 313 P.3d 431 (2013). (Op. 20) Fireman's contention that, having found Fireman's liable for its breach of its good faith duty to defend or settle, the jury could award something less than the full amount of the underlying judgment because Fireman's somehow "rebutted the presumption of harm" to its insureds (Pet. 11) ignores the law of Washington, the law of the case, the jury's verdict, and is contrary to the position that – until it did not prevail – Fireman's consistently took in this litigation.

There is no right to a jury trial on the measure of damages for an insurer's bad faith. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 773 ¶ 35, 287 P.3d 551 (2012). This Court has long held that an underlying judgment or reasonable settlement that is not the product of fraud or collusion quantifies the insured's harm for an insurer's breach of the duty of good faith. *See Bird*, 175 Wn.2d at 765, ¶ 16; *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738-39, 49 P.3d 887 (2002); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002). A prior adjudication establishing the reasonable amount of damages is the "presumptive measure of damages" and is binding on the insurer in a bad faith

action unless the insurer can establish that it is "the product of fraud or collusion." *Bird,* 175 Wn.2d at 765, ¶ 16.

The trial court's instructions, particularly its damages instruction (CP 4904), adhered to these established principles. If the jury found that Fireman's breached its duty to defend or settle, the jury was instructed of the attendant legal consequences: Fireman's liability to Gosney "*must* include the amount of the judgment on the arbitration award" unless the jury found "the settlement was the product of fraud or collusion." (CP 4904, 4872; *see* CP 4887-88) (emphasis added)

It is therefore not at all surprising that the jury affirmed in its special verdict that the damages it awarded to Vose and Pizza Time did not "include the judgment." (CP 4990) As the Court of Appeals recognized (and as Fireman's had argued in the trial court), the reasonable amount of the underlying judgment was not a factual issue that the jury was asked to resolve, and "the jury was given no opportunity to award damages to Gosney." (Op. 23; RP 177) Contrary to Fireman's argument (Pet. 6), the jury was not asked whether or not Gosney, as assignee, *should* receive an award of the judgment on the arbitration award, or any portion of it, but only whether the additional damages it *had* awarded to Fireman's insureds included the amount

of that award. (CP 4990) Fireman's in the Court of Appeals conceded that the jury was asked this question only to ensure that there was no double recovery by Vose and Pizza Time in the event the jury found that Fireman's caused its insureds damages that exceeded the amount of the judgment on the arbitration award. (App. Br. 30)

The jury found that plaintiffs proved *all* elements of *all* of their claims, including Fireman's breach of the duty to defend or settle, and separately found that its insureds Vose and Pizza Time suffered $460,000 in additional harm. (CP 4990) Given that special verdict, the judgment, and the Court of Appeals' decision affirming it, are wholly consistent with CR 49(a), compelled by this Court's bad faith jurisprudence, and raise no grounds for review.

2. The Court of Appeals' alternative ground based on the trial court's collateral estoppel findings, invited by Fireman's, is wholly consistent with this Court's decisions.

Fireman's repeatedly waived any right to have the jury decide whether it was bound by the judgment entered against its insureds following arbitration, instead affirmatively asking that the trial court resolve whether it should be bound by that judgment as a matter of "collateral estoppel." (CP 5032) Fireman's cannot complain that the trial court took it up on its invitation and found against it as a matter of fact, or that the Court of Appeals unanimously affirmed the judgment

on this independent ground based on established law. The trial court's findings that Fireman's, with notice, deliberately refused to intervene in the underlying action are a separate and independent basis to affirm Fireman's liability for the judgment on the arbitration award, making superfluous Fireman's allegations that the trial court disregarded the jury's special verdict.

Washington courts have held for over a century that *even in the absence of bad faith,* an insurer "is bound by the judgment in the original action establishing negligence and liability unless the judgment was procured by collusion or fraud." *O'Toole v. Empire Motors,* 181 Wash. 130, 138, 42 P.2d 10 (1935) (liability insurer was liable for and could not attack judgment when it had notice of underlying action and withdrew its defense); *Henry v. Flynn*, 36 Wash. 553, 560, 79 P. 42 (1905). As a liability insurer, Fireman's was "directly interested" in the underlying action, and is bound to the judgment entered in that action following its refusal to directly intervene. *Kibler v. Maryland Cas. Co.,* 74 Wash. 159, 163, 132 P. 878 (1913). "[A]n insurer will be bound by the 'findings, conclusions and judgment' entered in the action against the tortfeasor when it has notice and an opportunity to intervene in the underlying action," even in the absence of bad faith. *Mutual of*

Enumclaw Ins. Co. v. T & G Constr., Inc., 165 Wn.2d 255, 263, ¶ 11, 265-66, ¶ 18, 199 P.3d 376 (2008) (quoting cases).

This Court prohibits an insurer from relitigating liability and damages to "avoid[] inconsistent judgments, delay, additional expense, and the creation of a perverse incentive for carriers to wait until liability and damages had been established before deciding whether it is cost-effective to intervene." *T&G Constr.*, 165 Wn.2d at 263, ¶ 11. Like Fireman's, the liability insurer in *T&G Construction* had failed to participate in negotiations leading to a settlement of the underlying action. 165 Wn.2d at 261, ¶ 6, 262, ¶ 10. This Court rejected the insurer's argument that because its insured had unadjudicated defenses to liability, the insurer had no obligation to pay a reasonable judgment entered against its insured following settlement. "What the insured is legally obligated to pay is the exact issue to be determined in the liability suit" that was resolved by the judicially-approved settlement. *T&G Constr.*, 165 Wn.2d at 263, ¶ 12; *see also Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 274, 996 P.2d 603 (2000) (insurer with notice may not relitigate judgment entered following arbitration).

Fireman's successfully argued to the trial court that an arbitrator, not the jury in this case, must decide the amount of the underlying judgment against its insureds. (CP 60-61) It then

successfully argued that the trial court, not the jury, must decide whether Fireman's was bound by that underlying judgment. (CP 3825, 4939-40, 5032; RP 3849) The courts below independently rejected Fireman's fact-bound collateral estoppel "defenses" – that a conflict of interest and collusion between Gosney and Vose/Pizza Time destroyed contractual "privity" and that the issues of liability and damages were not "actually litigated and determined" in arbitration. (CP 5703-13, 5863; Op. 42-45)

Fireman's now asserts that because it raised collateral estoppel as a "defense," the trial court could not rely on preclusion principles to bind it to the judgment against its insureds. (Pet. 15-16) But Fireman's argument proves too much; by asking the trial court to find that it should *not* be bound, Fireman's necessarily recognized that it *was* bound if the trial court found each element of collateral estoppel, as the court did as a matter of fact following trial.

In affirming the trial court's determination, in findings solicited by Fireman's, that Fireman's was collaterally estopped from challenging its indemnity obligation to Vose and Pizza Time and that the "harm . . . was the amount of damages" assessed against its insureds following arbitration (CP 5712), the Court of Appeals followed well-established law holding an insurer that breaches its

duties of good faith is liable for a reasonable judgment entered against its insured. *Safeco Ins. Co. of America v. Butler,* 118 Wn.2d 383, 399, 823 P.2d 499 (1992) (judgment against insured "constitutes a real harm" even if coupled with a covenant not to execute). Given the trial court's findings, the unanimous Court of Appeals' decision provides an independent and alternative basis for affirming the trial court's judgment and raises no grounds for further review.

3. Gosney could not be judicially estopped from pursuing claims against Fireman's that were assigned to Gosney for valuable consideration long before Vose filed for bankruptcy.

The courts below correctly held that the *Vose* bankruptcy had no effect of Fireman's liability on claims assigned to Gosney, including recovery of the underlying judgment amount. (CP 5867; Op. 52, n.30) The judicial estoppel doctrine could not apply to Gosney, who was the real party in interest after receiving a complete assignment of Vose's and Pizza Time's claims, including their claims for bad faith, in 2008, long before Vose declared personal bankruptcy in 2010. (Ex. 66) Gosney never took any position in bankruptcy, let alone inconsistent positions, and Vose did not and could not have misled the bankruptcy court by failing to disclose a claim he had assigned to Gosney and over which he retained no control at the time of his bankruptcy in 2010. Gosney joins in Vose

and Pizza Time's arguments why the Court of Appeals' reversal of the trial court's refusal to enter judgment on the jury's verdict for Fireman's insureds does not warrant further review.

4. This Court should award respondent her fees for answering the petition.

Fireman's did not challenge the award of fees to Gosney below. (Op. 52, n. 31) As in the trial court and in the Court of Appeals (Op. 56, n. 34), respondent Gosney is entitled to her fees in answering the petition for review under *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991); RAP 18.1(j).

E. Conclusion.

This Court should deny review and award respondent Gosney her fees incurred in answering the petition for review.

DATED this 29th day of August, 2018.

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DECLARATION OF SERVICE

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

That on August 29, 2018, I arranged for service of the foregoing Answer to Petition for Review of Respondent Sarah Gosney, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 29th day of August, 2018.

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August 29, 2018 - 2:17 PM

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