NO. 96029-1

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 74717-7-1)

SARAH GOSNEY, as assignee and as the Personal Representative of the ESTATE OF JERRY L. WELCH; JOHN VOSE, PIZZA TIME INC. AND PIZZA TIME HOLDINGS OF WASHINGTON, a Washington corporation,

Respondents/Cross-Appellants,

vs.

FIREMAN'S FUND INSURANCE COMPANY and THE AMERICAN INSURANCE COMPANY, foreign insurance companies; and unknown JOHN DOES,

Appellants/Cross-Respondents.

RESPONDENTS JOHN VOSE, PIZZA TIME, INC., AND PIZZA TIME HOLDINGS OF WASHINGTON'S CORRECTED ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Fireman's Fund Insurance Company and American Insurance Company (collectively Fireman's Fund) seek review regarding a *single* issue relating to Respondents John Vose (Vose), Pizza Time, Inc., and Pizza Time Holdings of Washington, Inc. (together Pizza Time). That issue is judicial estoppel, which Fireman's Fund briefly addresses on pages 18-20 of its petition. Fireman's Fund asserted this defense at trial and had the burden to prove it. But as the Court of Appeals correctly ruled, Fireman's Fund failed to establish the defense in numerous respects. Because Fireman's Fund has not established legal or factual error or conflict with this Court's precedent, the Court should deny review as to the judicial estoppel issue so that Vose and Pizza Time can promptly recover the additional damages that the jury awarded in their favor.

II. RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals' decision reversing the trial court's judicial estoppel ruling on four separate and independent grounds conflicts with this Court's precedent or otherwise merits review under RAP 13.4(b).

III. RESTATEMENT OF THE CASE

This is an insurance action arising from an underlying wrongful death case in which a driver hired by a Pizza Time franchisee drank on the job and then passed out and crossed the center line during a pizza delivery,

causing a collision that killed 42-year-old Jerry Welch. At the time of the collision, Vose did not know about the driver's criminal history, driving record, or drinking problems, as he had not conducted a driving, criminal, or other background check as was his retained right. RP 2039. Because Vose was not aware of the rules governing retained or actual control that can result in franchisor liability, he did not believe that he or the Pizza Time franchisor could be liable for the accident. RP 2061-62.

Vose had obtained insurance from Fireman's Fund to protect himself and his business from potential claims arising out of such incidents. RP 2032; Exs. 1, 146. Vose testified that the reason he obtained that insurance, solicited by Fireman's Fund at a convention of pizza franchise operators, was simple: "protection." RP 2035. But after Fireman's Fund assumed control of the defense and determined its insureds were covered, it notified Vose and Pizza Time in late March 2008 that they risked "excess exposure" because the limits of liability protection were only $1.5 million,[1] and recommended they hire private counsel at their own expense to obtain protection from that excess exposure. Ex. 45.

On July 17, 2008, Fireman's Fund sent another letter advising Vose and Pizza Time that they still faced excess exposure and that Fireman's

[1]While the March 2008 notice acknowledged coverage of $1.5 million, Fireman's Fund conceded before trial that the policy provided $2.5 million in coverage. RP 902-03, 3614-15, 1453; Ex. 144 at FFIC008277; Ex. 146 at 20-21.

Fund was continuing to reserve all rights, and it attached its previous letter recommending they hire private counsel to protect themselves. Ex. 63. Shortly thereafter, the defense counsel appointed by Fireman's Fund notified Vose and Pizza Time that he could not represent or advise them personally with regard to settlement "offers" and "coverage matters," and thanked their personal attorney, Howard Bundy, for his assistance in helping "our clients" retain other counsel. Ex. 64.

As directed, Vose thereafter retained Bundy, who negotiated a Covenant Settlement Agreement to protect his clients. In the Covenant Settlement Agreement, signed by all on September 29, 2008, Vose and Pizza Time agreed "to pay, through their insurer(s), the full current limits of insurance coverage in *partial* satisfaction" of Gosney's claims and assign to Gosney all rights and claims against Fireman's Fund. Ex. 66 at 4 (emphasis added). In exchange for that consideration, Gosney agreed "not to enforce or execute upon any judgment" against Vose or Pizza Time. *Id.* at 6. The agreement assigned to Gosney all of Vose's rights and claims against Fireman's Fund (*id.* at 4), reserving to Vose and Pizza Time certain "elements of damages" that the parties recognized may "arise from the assigned causes of action" (*id.* at 5). As a result, while Vose did not retain any *claims* against Fireman's Fund, *if* Gosney recovered those specific

elements of damages on the claims assigned to her, she would be accountable to Vose and/or Pizza Time for a portion of them.

On October 8, 2008, after a September 29, 2008 discovery cutoff in the underlying litigation in which the attorney retained by Fireman's Fund for Vose and Pizza Time had not obtained a single expert report or deposed the plaintiff's experts, Bundy served on Fireman's Fund an Insurance Fair Conduct Act (IFCA) notice with the proposed settlement agreement and demand for payment of policy limits. Ex. 72. Fireman's Fund did not object or file a declaratory judgment action, nor did it negotiate or make any offer to settle even though a full release was still available. RP 2772. A few months later, in December 2008, the trial court approved the proposed covenant settlement and assignments as reasonable and entered "partial judgment" in the amount of $2.5 million in accordance with its reasonableness ruling. Ex. 78. Fireman's Fund did not object to or challenge this judgment.

In September 2009, Gosney brought the assigned claims against Fireman's Fund. Vose and Pizza Time were included as nominal defendants pursuant to the Covenant Settlement Agreement. Because Vose and Pizza Time had fully assigned their claims to Gosney and were not interested in anything but a settlement and protection from Fireman's Fund, Vose thought he had no further role in the case and that it was already

resolved as to him and Pizza Time. RP 2048, 2054, 2057, 2080-82, 2188-89.

In March 2010, Vose filed for personal bankruptcy for financial reasons unrelated to this litigation. Pizza Time did not seek or file for any bankruptcy protection. Vose did not list the Gosney wrongful death judgment against him, nor did he list any potential recovery he might get through the assigned claims. As he explained, he believed he was protected by virtue of the covenant and had no expectation of any recovery from Fireman's Fund:

> I just wanted it done. Gone, over with and settled. I just wanted it to be – protect my – I just wanted it done. I wanted Pizza Time to be out of it. I wanted those guys, the Welch's to be settled up, and I wanted this thing past and gone.

RP 2057. As a result, when Vose filed for bankruptcy, he "was not" thinking about the Welch Estate's claim against Fireman's Fund and therefore did not list that claim (which of course had been assigned to the Welch Estate) as an asset in his bankruptcy filing. RP 2180; Ex. 384. In July 2010, Vose obtained a personal bankruptcy discharge.

Contrary to Vose's belief, Fireman's Fund did not consider Vose's and Pizza Time's involvement in the matter "past and gone." Rather than pay its admitted liability limits to discharge the partial judgment that had been entered against its insureds, Fireman's Fund filed cross-claims against

them in this action, alleging breach of contract, fraud, and collusion. CP 53-59. Then, over Vose's objection, Fireman's Fund obtained a stay of this action to compel its insureds to submit to arbitration so that a full and final judgment would be entered against each of them in finalization of the Covenant Settlement Agreement. CP 141-42. Fireman's Fund then decided not to attend the arbitration to avoid "lending credibility" to it and because it believed that its "attendance and participation at the arbitration will increase the likelihood that we will be bound by this determination." Exs. 144-45. Other than obtaining an order to remove its name from the Thurston County caption on the judgment confirming the arbitration award, Fireman's Fund did not take further action regarding the arbitration, judicial reasonableness determination, or resulting judgment entered against its insureds.

Fireman's Fund thereafter continued to harm its insureds. Prior to trial, Fireman's Fund compelled the deposition of Bundy, who had appeared to defend Vose and Pizza Time against Fireman's Fund's cross-claims seeking to void coverage. CP 547-48. Because Fireman's Fund made Bundy a witness on its cross-claims, Vose and Pizza Time were forced to hire new counsel to defend them in this action. Meanwhile, Fireman's Fund admitted there was coverage under the auto and general liability coverages with combined limits of $2.5 million (RP 902-03, 3614-15, 1453; Ex. 144

at FFIC008277; Ex. 146 at 20-21), but did not pay its limits and did *nothing* to satisfy the judgment against Vose and Pizza Time (RP 1215-16 (Q: "You are not denying coverage, but you have not offered a dime in seven years to compensate the Welch family; is that true?" A: "That's true. We haven't offered a dime.")).

Until these *post-bankruptcy* actions by Fireman's Fund, Vose "expected nothing" from Gosney's recovery on the assigned claims against Fireman's Fund. RP 2169. But by compelling an arbitration in which it failed to provide a defense and forcing Vose and Pizza Time to hire new counsel, Fireman's Fund greatly changed and increased the harm to Vose and Pizza Time. The judgment is final and much larger than the partial judgment for $2.5 million in limits. Pizza Time and Vose are not protected by a covenant not to execute, as Fireman's Fund refuses to pay the policy limits required for that protection under the settlement agreement. Vose currently prepares pizzas for schools in Issaquah and could lose the contract because "I have to disclose this kind of stuff. And it's just – it makes me look horrible." RP 2089. At trial, he testified that the post-petition claims, compelled arbitration, and unprotected judgment were "scary," "frustrating," and "infuriating." RP 2088.

After a five-week trial, the jury found that Fireman's Fund had breached the insurance contract, violated the Consumer Protection Act

(CPA) and IFCA, was negligent, and violated the duty of good faith, including the duty to defend or settle. CP 4988. The jury also rejected the accusations by Fireman's Fund that Vose and Pizza Time had breached the contract, committed fraud and collusion in the settlement process or the later arbitration, or even acted negligently. CP 4989. The jury assigned a value of $460,000 for the "additional" emotional distress, harm to credit, harm to reputation, personal attorney fees, and other non-economic harm suffered by Vose and Pizza Time. CP 4990. The jury was then directed to indicate specifically whether Vose or Pizza Time had suffered those damages, and it returned with a verdict award of $240,000 to Vose and $220,000 to Pizza Time. CP 4991.

But the trial court did not ultimately enter judgment against Fireman's Fund for these elements of damages. Near the end of the trial, Fireman's Fund asserted for the first time in an oral motion that Vose and Pizza Time should be judicially estopped from recovering damages because Vose did not disclose this potential recovery when he filed for personal bankruptcy protection in 2010. RP 3019-21. Vose and Pizza Time objected to this new defense as untimely. RP 3021-22, 3031; CP 4806. Although Fireman's Fund offered no excuse for raising the new defense late in trial, the trial court ruled in a post-trial order that Vose and Pizza Time were "judicially estopped from recovering … any damages in this matter"

because Vose did not disclose his potential recovery on the assigned claim in his personal bankruptcy filing. CP 5863-67. The trial court's final judgment, therefore, does not include these elements of damages. CP 6121-23.

As discussed below, the Court of Appeals reversed that ruling. App. 52. Fireman's Fund now seeks discretionary review.

IV. ARGUMENT

A. The Court Of Appeals Correctly Reversed The Trial Court's Judicial Estoppel Ruling On Four Separate And Independent Grounds.

Fireman's Fund wrongly claims, in the last few pages of its petition, that "[t]he Court of Appeals' treatment of judicial estoppel warrants review under all four RAP 13.4(b) factors." Pet. 18. As set forth below, the Court of Appeals' analysis is entirely consistent with settled precedent and therefore does not warrant review under RAP 13.4(b)(1)-(2). Nor did the Court of Appeals usurp the jury's or trial court's role as fact-finder as Fireman's Fund also claims. Pet. 20. The Court of Appeals correctly noted that Fireman's Fund offered *no evidence* to support *several* required elements of judicial estoppel. Thus, review of this unpublished decision is not warranted under RAP 13.4(b)(3)-(4) either.

The Court of Appeals' analysis is firmly grounded in established precedent. This Court explained in *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d

535, 538, 160 P.3d 13 (2007), that "three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine." Those factors are:

> (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 the first or the second 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.

Id. at 538-39 (internal quotation marks omitted). But as the Court further explained, "[t]hese factors are not an exhaustive formula and additional considerations may guide a court's decision." *Id.* at 539 (internal quotation marks omitted). Thus, for example, "[a]pplication of the doctrine may be inappropriate when a party's prior position was based on inadvertence or mistake." *Id*. (internal quotations omitted).

The Court of Appeals has addressed judicial estoppel in several cases that are consistent with the decision here. In *Arp v. Riley*, 192 Wn. App. 85, 99, 366 P.3d 946 (2015), the court recognized that "Arp's violation of a disclosure obligation does not, as the trial court appears to have decided, mean that judicial estoppel bars Arp's claim as a matter of law." To the contrary, there must be evidence that a creditor "would have considered requesting a plan amendment if [the debtor] had disclosed his claim in an

amended schedule" and that "the bankruptcy court would have changed the relief it granted." *Id.* at 100. In *Mercer Island School District v. Office of the Superintendent of Public Instruction*, 186 Wn. App. 939, 941 n.25, 347 P.3d 924 (2015), the court similarly rejected a judicial estoppel defense because "[i]n all likelihood, the Parents' prior position was a byproduct of inadvertence or mistake." And in *Haslett v. Planck*, 140 Wn. App. 660, 666-68, 166 P.3d 866 (2007), the court recognized that the Hasletts had taken inconsistent positions "by failing to list their now-asserted claim," but nevertheless reversed the trial court's judicial estoppel ruling based on the "contingent, unliquidated nature of the claim."

This Court recognized these same legal principles in *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (2007), *aff'd* 164 Wn.2d 529, 192 P.3d 352 (2008) (hereinafter "*Miller*"). The Court of Appeals in *Miller* declined to apply judicial estoppel based, in part, on the absence of knowledge of the undisclosed claims and noted that cases applying judicial estoppel typically involve "bad faith, deliberate assertion of inconsistent positions in order to gain advantage, or reckless disregard for the truth." 137 Wn. App. at 772 (footnotes and internal quotation marks omitted). This Court, too, recognized that "judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability." 164 Wn.2d at 544. Consistent with that purpose, this Court

allowed the bankruptcy trustee to pursue claims that the debtor had not disclosed when he previously filed for chapter 7 bankruptcy. *Id*.

Based on these legal principles, the Court of Appeals correctly reversed the trial court's judicial estoppel ruling for *four* reasons. First, the Court of Appeals correctly held that there is no legal or factual basis for finding that Pizza Time, which did not declare bankruptcy and took no position in the previous bankruptcy proceeding, is judicially estopped from recovering on the jury's verdict. App. 49. In *Arkison*, this Court recognized that judicial estoppel can "create a windfall for the party seeking to evoke judicial estoppel" and therefore refused to apply the doctrine to "separate identities." 160 Wn.2d at 540 (internal quotation marks omitted). The Court of Appeals' holding that judicial estoppel cannot apply to Pizza Time adheres to this precedent and presents no grounds for review.

Second, the Court of Appeals also correctly concluded that Fireman's Fund had "not proved that, at the time of the bankruptcy filing, Vose had any such asset, claim, or cause of action to disclose." App. 50. In *Miller*, this Court held that "judicial estoppel can be used to prevent a party from pursuing a *claim* that he or she had an obligation to disclose in bankruptcy and failed to do so." 164 Wn.2d at 540. Here, as the Court of Appeals correctly ruled (App. 50), the Covenant Settlement Agreement with Gosney expressly provided that Vose and Pizza Time "assign to

Plaintiffs Welch *all rights, privileges, claims, causes or chose of action* that they may have against … Fireman's Fund" (Ex. 66 at 4). Because Vose and Pizza Time assigned all *claims* against Fireman's Fund, the Court of Appeals correctly concluded that Vose had no claim to disclose in bankruptcy and the trial court had no basis to apply judicial estoppel.

Third, the Court of Appeals also correctly concluded that Fireman's Fund had "presented no evidence whatsoever" regarding the "nature and value of Vose's interest." App. 50. The disclosure obligation in bankruptcy applies "as of the commencement of the case." 11 U.S.C. § 541(a)(1). Here, as the Court of Appeals concluded, "the record indicates that all of Vose's claimed personal damages originated *postbankruptcy*, when Fireman's refused to settle and refused to engage in arbitration." App. 51 (emphasis added). Accordingly, even if Vose had a "claim" against Fireman's Fund when he filed for bankruptcy protection (which he did not), there was no disclosure obligation because the harm, and any recovery by Vose for those harms, was unresolved or uncertain at best. As *Haslett* confirms (*see supra* at 11), judicial estoppel does not apply in such circumstances.

Fourth, the Court of Appeals also ruled that judicial estoppel does not apply here because "Fireman's presented no evidence that disclosure would have changed the outcome of the bankruptcy." App. 51. In *Arp*, the case cited by the Court of Appeals, the court held that for judicial estoppel

to apply, there must be evidence that a creditor would have considered requesting a plan amendment if the debtor had disclosed the claim at issue. 192 Wn. App. at 100. Yet as the Court of Appeals correctly ruled, there is "no evidence" that a creditor would have requested a plan amendment if Vose had disclosed his potential recovery when he filed for bankruptcy protection in 2010.

Nor is there any evidence that disclosure of Vose's potential recovery for future harms would have altered the course of the bankruptcy proceedings. Vose's debts were discharged in bankruptcy on July 21, 2010. CP 5566. As of that date, Gosney was suing Fireman's Fund, which had yet to file cross-claims against Vose and Pizza Time or inflict the additional harm described above (*supra* at 5-7). It is not surprising, therefore, that Fireman's Fund did not present any evidence that the bankruptcy proceedings would have progressed differently if Vose had disclosed this potential for recovery in his bankruptcy filing, especially in light of the liability facing him and Pizza Time if Fireman's Fund refused to pay the limits and ensure the covenant protection. In this respect as well, the Court of Appeals' analysis is both legally and factually sound.

B. Fireman's Fund Has Not Established – Nor Can It Establish – That The Court of Appeals' Decision Conflicts With This Court's Precedent Or Otherwise Merits Review.

While Fireman's Fund disputes the Court of Appeals' analysis, its arguments easily fail and do not, in any event, establish that review is warranted under RAP 13.4(b). Preliminarily, because the Court of Appeals' judicial estoppel decision is based on four *separate and independent* reasons, Fireman's Fund will not be entitled to vacatur of the jury verdict in favor of Vose and Pizza Time unless it establishes that the ruling conflicts with this Court's precedent and otherwise merits review as to *all four grounds* for decision. Yet at least as to the "first" ruling discussed above (regarding Pizza Time), Fireman's Fund does not even attempt to challenge the Court of Appeals' analysis. Instead, it presents a hodgepodge of complaints regarding the other grounds for decision – all of which lack merit.

Fireman's Fund first asserts that the Court of Appeals' analysis is "contrary to the broad disclosure obligations set forth in case law" and "the bankruptcy code." Pet. 18, 20. In *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006), cited by Fireman's Fund, the court recognized that "a bankruptcy petitioner must disclose pre-petition *claims*, including contingent and unliquidated claims." *Id.* at 98 (emphasis added). The federal bankruptcy code similarly requires disclosure of contingent and

unliquidated "*claims.*" Pet. 20 (emphasis added). In *Miller*, which Fireman's Fund also cites, the court held that a debtor must disclose "potential *claims*." 164 Wn.2d at 540 (emphasis added). The Court of Appeals' analysis does not conflict with these authorities because Vose did not have any claims – contingent, unliquidated, or potential – having assigned all such claims to Gosney. Fireman's Fund, for its part, has not cited a single case applying judicial estoppel where, as here, a debtor does not disclose a claim that had been assigned to another party.

Next, Fireman's Fund complains that the Court of Appeals faulted the trial court for failing to make the requisite findings even though, according to Fireman's Fund, case law "has never required detailed factual findings." Pet. 18. That argument misses the mark. As the Court of Appeals noted, the trial court made "no findings" regarding Pizza Time and "no findings" regarding the alleged nature and value of Vose's interest. App. 49-50. Although cited by Fireman's Fund, *Le Maine v. Seals*, 47 Wn.2d 259, 263, 287 P.2d 305 (1955), confirms that while a trial court "is not obliged to make findings in regard to every item of evidence in a case," the court must "make ultimate findings of fact concerning all of the material issues." As the Court of Appeals correctly noted, the trial court here failed to make such findings.

Nor is there any reason to remand the issue for further proceedings, as Fireman's Fund contends. Pet. 19-20. The Court of Appeals ruled that judicial estoppel does not apply here because Fireman's Fund, which raised the defense at trial, presented "no evidence" regarding the nature and alleged value of Vose's interest, "no such proof" that Vose "possessed some cognizable and valuable interest," and "no evidence" that disclosure would have changed the outcome of the bankruptcy. App. 50-51. Having failed to offer evidence regarding critical elements of its judicial estoppel defense during the five-week trial, Fireman's Fund has no basis to argue that the Court of Appeals should have remanded the issue for further proceedings. *See State v. Davis*, 175 Wn.2d 287, 372, 290 P.3d 43 (2012) ("we see no evidence that racial discrimination pervades the imposition of capital punishment in Washington and, therefore, see no reason to remand this matter to the superior court for an evidentiary hearing that the petitioner did not seek"). As in *Davis*, there is no reason to remand this matter for an additional hearing that Fireman's Fund never requested.

The Court of Appeals also did not "misread" *Arp*. Fireman's Fund claims that nothing in *Arp* requires a proponent of judicial estoppel to show that disclosure would have changed the bankruptcy proceedings. Pet. 18-19. As discussed and quoted above (*supra* at 10-11), that is precisely what *Arp* holds. This Court has also recognized that the "core factors" for

application of judicial estoppel include "judicial acceptance" and "unfair advantage." *Arkison*, 160 Wn.2d at 538-39 (quoted on pages 9-10 above). These core factors necessarily require proof that disclosure would have changed the outcome of the bankruptcy. Other courts, in addition to *Arkison* and *Arp*, have similarly so held.[2] Here, as the Court of Appeals correctly stated, Fireman's Fund did not present any such evidence, which is fatal to its judicial estoppel defense. App. 51.

Fireman's Fund also asserts that the Court of Appeals' decision "opens up an untenable or unintended loophole, allowing debtors to assign away claims, reserve a right to damages for themselves, refuse to disclose those claims to the bankruptcy court, and leave Washington Courts without power to redress it." Pet. 20. There is no evidence that Vose assigned his claims against Fireman's Fund to somehow hide those claims from his creditors. Nor would such an argument make sense, as Vose assigned those claims to Gosney in 2008 (Ex. 66) and specifically testified that the purpose of the assignment was to "resolve the case" (RP 2082). Vose did not file for bankruptcy protection until 2010 – two years after he thought the

[2] *See Haslett*, 140 Wn. App. at 667-68 (reversing trial court's judicial estoppel ruling based on defendant's failure to establish "that the Hasletts' nondisclosure had any such effect, given the contingent, unliquidated nature of the claim"); *Moreno v. Autozone, Inc.*, C05-04432 MJJ, 2007 WL 1063433, at *7 (N.D. Cal. Apr. 9, 2007) ("While it is undisputed that Moreno did not disclose the present claims, the value of those claims is uncertain, and the effect, if any, that disclosure would have had on the course of the bankruptcy proceedings is purely speculative.").

assigned claims had been resolved. Ex. 384. Moreover, even if Vose had a claim against Fireman's Fund, that claim arose out of the emotional distress that Vose experienced as a result of being exposed to a non-covered claim in excess of $10 million. That exposure did not occur until late 2012 – two years *after* Vose filed for bankruptcy protection. On this record, any "loophole" concerns are entirely unfounded.

For similar reasons, Fireman's Fund has it backwards when it contends that Vose "admitted" at trial that he had a potential right of recovery and "chose not to disclose it." Pet. 20. The *unrebutted* evidence is that Vose did not disclose this case in the bankruptcy proceeding because he "thought it was done." RP 2082. And despite a *lengthy* cross-examination by defense counsel that focused largely on Vose's bankruptcy filings, the jury expressly found that Fireman's Fund had *not* proven its fraud, collusion, and estoppel defenses. CP 4989. Fireman's Fund, in contrast, breached its insurance contract, committed bad faith, and acted unfairly, deceptively, and contrary to the public interest. CP 4988-89. Significantly, Fireman's Fund has not challenged the jury's breach of contract, IFCA, and CPA findings on appeal, nor has it challenged the amount of the jury's damages awards in favor of Vose and Pizza Time. This Court has recognized that judicial estoppel is an "equitable doctrine" and that the doctrine does not protect "the interest of a defendant attempting to

avoid liability." *Arkison*, 160 Wn.2d at 538; *Miller*, 164 Wn.2d at 544. Applying these equitable principles here, Fireman's Fund should not benefit at the expense of the *same parties* that were harmed by its misconduct. For this reason too, the Court should deny review.[3]

V. CONCLUSION AND FEE REQUEST

For the above reasons, the Court should deny review and award Vose and Pizza Time their attorney fees incurred in answering the Petition for Review under *Olympic Steamship* and RAP 18.1(j).

DATED: August 27, 2018.

PETERSON | WAMPOLD | ROSATO | FELDMAN | LUNA

Leonard J. Feldman

[3] While the Court of Appeals did not specifically address this equitable bar to asserting a judicial estoppel defense, it is and remains an additional reason to set aside the trial court's judicial estoppel ruling. *See Income Investors v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940) ("Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy."). There are also two other grounds for reversing the trial court's judicial estoppel ruling: (1) Fireman's Fund waived its judicial estoppel defense by asserting it for the first time near the end of the trial; and (2) even if Vose was required to disclose in bankruptcy a potential recovery of specified damages from Fireman's Fund, his failure to do so was, *at most*, a byproduct of inadvertence or mistake. These *additional reasons* to reverse the trial court's judicial estoppel ruling are addressed at length in Vose and Pizza Time's merits briefs in the Court of Appeals. *See* Opening Br. at 15-17 (waiver), 17-19 & 23-25 (inadvertence or mistake); Reply Br. at 4-7 (waiver) & 10-16 (inadvertence or mistake). They are also additional reasons why this Court should deny review.

CERTIFICATE OF SERVICE

I certify that on the date shown below, a copy of this document was sent as stated below.

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SIGNED in Seattle, Washington this 27th day of August, 2018.

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August 27, 2018 - 2:00 PM

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Appellate Court Case Title:	Sarah Gosney, et al. v. Fireman's Fund Insurance Company, et al.
Superior Court Case Number:	09-2-32462-0

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