No. 96029-1
Court of Appeals No. 74717-7-I

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 WASHINGTON,

Respondents,

v.

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

Petitioners.

PETITION FOR REVIEW

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I. INTRODUCTION

Nothing is more sacred in our system of justice than the deference and finality given a jury's verdict. But the Court of Appeals' 2-1 decision completely rewrote the verdict, imposing liability and millions in damages on a claim the jury rejected, using a rationale no party advanced, and—by its own admission—disregarded the key jury instruction in so doing. This represents a radical departure from both decisions of this Court and the Court of Appeals, and from article I, section 21 of the Washington Constitution, which cherishes the right to trial by jury as "inviolate." Review is warranted under all four RAP 13.4(b) considerations.

Additionally, the law refuses to bind a non-party to a judgment except in narrowly prescribed circumstances not present here. The Court of Appeals' opinion citing collateral estoppel as an alternative ground to impose liability splits from precedent and imperils fundamental notions of due process, warranting review under RAP 13.4(b)(1)–(4).

Finally, the Court should review the Court of Appeals' decision setting aside the trial court's discretionary application of judicial estoppel to prevent a plaintiff from benefitting from failing to disclose his assets in bankruptcy. This decision invaded the trial court's domain, contrary to precedent and the constitutional division of authority between the superior and appellate courts, meriting review under RAP 13.4(b)(1)–(4).

II. IDENTITY OF PETITIONERS

Petitioners are Fireman's Fund Insurance Company and The American Insurance Company (collectively, "FFIC").

III. CITATION TO COURT OF APPEALS DECISION

FFIC seeks review of the Court of Appeals, Division I, published decision filed May 31, 2018, attached in the Appendix ("App.").[1]

IV. ISSUES PRESENTED FOR REVIEW

1. Should the Court review the Court of Appeals' decision imposing liability and adding $10.8 million in damages on a claim the jury rejected, where (a) the jury's contrary verdict was consistent and substantial evidence supported it and (b) the Court of Appeals admittedly disregarded the key jury instruction and re-wrote a question on the verdict form, using a theory no party advanced in order to affirm?

2. Should the Court review the Court of Appeals' ruling that collateral estoppel provides an alternative basis for adding $10.8 million to the jury's verdict when, under the state and federal constitutions and settled precedent, collateral estoppel cannot apply?

3. Should the Court review the Court of Appeals' decision reversing the trial court's discretionary judicial estoppel ruling where the Court of Appeals substituted its judgment and factual findings for those of

[1] The Appendix also includes relevant jury instructions, the verdict form, and the relevant trial court orders. All emphasis is added unless otherwise noted.

the trial court contrary to precedent and constitutional requirements?

V. STATEMENT OF THE CASE

A. Thurston County Accident and Lawsuit

In 2005, a pizza franchise employee hit and killed another driver. The decedent's personal representative, Sarah Gosney, sued the driver, her employer, and the franchisor, Pizza Time, in Thurston County Superior Court. Pizza Time was owned by John Vose and insured by FFIC. RP 1977–78, 1990, 2032–34. Gosney did not sue Vose. Ex. 217; RP 2150.

FFIC appointed counsel to defend. Unbeknownst to FFIC, Vose and Pizza Time settled the case with Gosney using separate counsel. Ex. 66. They assigned to her any claims against FFIC, reserving for themselves damages for emotional distress, reputational harm, attorney's fees, or non-economic damages. *Id.* The parties agreed the total settlement amount would be determined by stipulation approved as reasonable by the trial court or by arbitration. *Id.* Until then, Vose and Pizza Time agreed to have a stipulated partial judgment for the insurance policy limits entered against them. *Id.* Based on this stipulation and without notice to FFIC, the court entered partial judgment in the amount of $2.5 million against Vose and Pizza Time and approved it as to the decedent's minor children.

B. Proceedings Against FFIC in King County Superior Court

Gosney, as assignee of Vose and Pizza Time, then sued FFIC in

King County alleging negligence, bad faith, breach of contract, and CPA and IFCA violations. CP 1–6. The case was stayed while Pizza Time, Vose, and Gosney separately completed their arbitration. CP 141–42. The arbitrator found Pizza Time and Vose liable, awarded $10.8 million in damages, and found that this amount represented the reasonable settlement value. Ex. 92. FFIC was not a party (Ex. 96), and the arbitrator did not consider whether FFIC acted in bad faith or damaged Vose or Pizza Time (Ex. 342 at 4). Without notifying FFIC (Ex. 345), Gosney obtained judgment on the $10.8 million award in Thurston County (Ex. 94).

The case against FFIC was tried in King County. Plaintiffs sought the $10.8 million as damages caused to Pizza Time and Vose for each claim (which would then go to Gosney) and additional damages for Vose and Pizza Time. RP 51 (5/7/15, 1:00 p.m.); RP 4198–4200; Ex. 66.

1. Plaintiffs Pursued Two Types of Bad Faith Claims

Plaintiffs pursued two different types of bad faith claims: a claim based on a breach of the duty to defend or settle and a claim based on breaches of various insurance rules and regulations. RP 4193–95; CP 2232–25. This was important because, while both types have the same elements—(1) breach, (2) causation, and (3) damages—the burdens differ.

For bad faith failure to defend or settle, Plaintiffs had the burden to prove breach, FFIC had the right to rebut a presumption of harm, with the

burden remaining on Plaintiffs to prove some harm. App. 77. Significantly, the jury was instructed that if Plaintiffs prevailed on this "*claim*"—all elements—"that [FFIC] failed to act in good faith as to [the] duty to defend or settle," the "*verdict must include*" the $10.8 million as damages unless the arbitration was the product of fraud or collusion. App. 78.

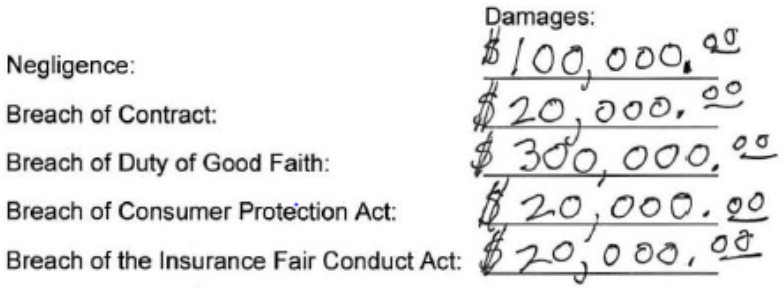
For the latter type of bad faith claim, Plaintiffs had the burden to prove each element. App. 77. There are no presumed damages. *Id.*

2. The Jury Refuses to Award the $10.8 Million

Question 1a on the verdict form asked whether Plaintiffs had proven all the elements of their "claims," including "Breach of the Duty of Good Faith." App. 65. But it did not distinguish between the duty to defend or settle bad faith claim and the other type of bad faith claim. Thus, a "Yes" could mean liability on either or both. *Id.* Question 1b, to which the jury answered "Yes," asked only whether the jury found the *element* of "breach of the duty to defend or settle," but did not ask about harm. *Id.*

There was no need to ask a separate question on whether the failure to defend or settle bad faith claim was established. Because of the court's Instruction that the jury "must" award the $10.8 million if that claim was established, the jury's answer to Questions 4a and b would identify whether that claim was established by whether the jury awarded $10.8 million. Question 4a asked what damages were incurred by Vose or

Pizza Time, which the jury answered as follows, awarding $460,000 total:



App. 67. To be clear, though Plaintiffs sought it for all claims, the jury did not find the $10.8 million to be damages for *any* claim. In Question 4b, the jury confirmed its verdict did not "include" the $10.8 million. *Id.*

The reason the verdict did not "include" the $10.8 million is because the jury rejected liability on the failure to defend or settle bad faith claim. App. 77–78. Given the jury's answer that Plaintiffs proved the breach element in Question 1b, the claim necessarily failed because FFIC proved its breach caused no harm. App. 77, 65. This is consistent with the jury's finding that Vose and Pizza Time waived FFIC's duty to defend. App. 66. The $300,000 award for "Breach of Duty of Good Faith" thus reflects a finding for Plaintiffs on their *other* bad faith claim that did not presume an award of $10.8 million. App. 65, 67, 77–78.

Substantial evidence supported the jury's finding that FFIC's breach of the duty to defend or settle did not harm Vose or Pizza Time, including that the arbitration award was not attributable to FFIC but to

Plaintiffs' decisions. This was an important theme of FFIC's defense. RP 4202–03. The jury heard testimony that Pizza Time had a very strong defense to the Thurston County lawsuit because the driver was not a Pizza Time employee, but rather the franchisee's employee. RP 2236–37, 2239–40, 2252–55. Yet Vose and Pizza Time agreed in the settlement[2] to say Pizza Time employed the driver (which Vose knew was false), and Vose admitted personal liability, even though he was never sued.[3] Vose and Pizza Time made the same misrepresentations to the arbitrator; provided Pizza Time's privileged defense files to Gosney without telling the arbitrator; and "failed to submit [their] own trial brief," "failed to call a single witness," and "failed to offer" any exhibits or call any experts. App. 84. This same evidence supported the jury's finding that Vose and Pizza Time waived their right to a defense from FFIC and, in fact, did not want FFIC to attend or defend the arbitration. App. 66.

3. Post-Verdict Proceedings

Plaintiffs did not seek clarification or move JNOV. After the court discharged the jury, they instead filed a presentation of judgment, asserting that the court was required to add $10.8 million in damages based only

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[2] The jury also had substantial evidence that FFIC was not defending under a reservation of rights so Vose and Pizza Time could not settle the case without FFIC's knowledge or consent (which they did) and that Plaintiffs failed to provide FFIC with the required adequate notice. Ex. 200–06, 301; App. 72, CP 4873.

[3] App. 84; Ex. 66 at 2, 4–6; RP 2149–51, 2154, 2815; Ex. 54; *see also* RP 4073–76, 4139 (no basis for personal liability for Vose).

on the jury's finding of the breach element in Question 1b. CP 5000.

The trial court rejected FFIC's arguments that the jury never awarded this amount, and even if it had, FFIC was not bound by the arbitration award. App. 80–98; *see* CP 5032. The court concluded a "conflict in the verdict form" must be "resolved" by adding millions to it to "reconcile[]" it with case law. App. 96. The court presumed the jury found for Plaintiffs on the failure to defend or settle bad faith claim even though that required the court to presume the jury ignored the Instruction that its "verdict must include" the $10.8 million in those circumstances. App. 78.

However, the trial court granted FFIC's preserved CR 50(a) motion, ruling that Vose and Pizza Time were judicially estopped from recovering damages based on Vose's failure to disclose anything about his potential recovery from FFIC to the bankruptcy court before obtaining a discharge while the King County case against FFIC was pending. App. 98–102. The court concluded that applying judicial estoppel was necessary to avoid a "fraud on the bankruptcy court." App. 101–02.

C. The Court of Appeals' Decision

The Court of Appeals affirmed the trial court's addition of the $10.8 million to the verdict in a 2-1 decision. The Court stated the verdict form did not call for the jury to include the $10.8 million, disregarding that Plaintiffs' counsel had repeatedly urged the jury to enter $10.8 million

as an award on the verdict form (*e.g.*, RP 4187–88) and confirmed to the trial court the parties' collective understanding that the jury was tasked with awarding the $10.8 million in Question 4a (RP 2–3 (5/7/15 PM Part I)). The Court held that "the language instructing the jury that its verdict 'must include' the underlying judgment was surplusage" because Gosney did not request an amount greater than the $10.8 million award. App. 23–24. The Court concluded the trial court had authority to "give legal effect" to the verdict by adding the $10.8 million. App. 27.

The Court then held that the addition of $10.8 million to the verdict could be affirmed on the independent basis of collateral estoppel, even though the arbitration litigated only Gosney's damages, while the issue at trial was whether FFIC had failed to defend or settle in bad faith and whether it damaged Pizza Time and Vose. App. 44. Finally, the Court reversed the trial court's judicial estoppel decision holding that the court failed to make adequate findings. App. 49–51. Yet, instead of remanding, it reached its own contrary factual findings and instructed the trial court to enter judgment in favor of Vose and Pizza Time. App. 52.

Judge Leach vigorously dissented. App. 57–63. He described how the jury's verdict was consistent and showed it did not intend to award the $10.8 million. He correctly and carefully analyzed the jury's verdict: "While no special verdict question asked the jury whether [FFIC] proved

that its breach of its duty to defend did not harm the plaintiffs, the jury's answers to the special verdict questions answer this question and show that the jury found this breach caused no harm to plaintiffs." App. 57. Because this breach caused no harm, "plaintiffs had not proved a breach of good faith *claim* based on a breach of the duty to defend and/or settle." App. 59. As Judge Leach noted, this is consistent with the jury's finding that Vose and PT waived and did not want FFIC to defend. App. 59, 66.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals Disregarded the Jury Verdict Contrary to Published Case Law and the Washington Constitution

It is unheard of for a trial court to add millions to a jury verdict contrary to its own instructions and the jury's actual decision. This Court should grant review under all RAP 13.4(b) factors because, in affirming that result, the Court of Appeals undermined the constitutional right to a jury, contrary to this Court's and the Court of Appeals' own case law. Allowing courts to void jury verdicts undermines the constitutional jury trial right that the framers preserved as "inviolate." Wash. Const. art. I, § 21.

This Court has long held that courts *must* presume the jury understood and followed all instructions. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). Courts also must "view the verdict in light of the instructions and the record." *Meenach v. Triple E Meats, Inc.*, 39 Wn. App. 635, 639, 694 P.2d 1125 (1985). A court may not "substitute its

conclusions for that of the jury." *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967). A court has a duty to enter judgment on the jury's verdict. *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia*, 177 Wn. App. 828, 866, 313 P.3d 431 (2013); *Marvik v. Winkelman*, 126 Wn. App. 655, 660, 109 P.3d 47 (2005). A party who fails to seek clarification from the jury waives a later claim that the jury's intent was different than what it wrote on the verdict. *Minger v. Reinhard Distrib. Co.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997).

Both the trial court's and the Court of Appeals' rulings upend this case law. RAP 13.4(b)(1)–(2). As the jury under *Diaz* is presumed to have understood and followed the instructions—including that *if* it found for Plaintiffs on their claim for bad faith failure to defend or settle, *then* its "verdict must include" the $10.8 million, App. 78—the court's task was to determine if there was any way to read the verdict consistent with the conclusion that the jury did *not* find for Plaintiffs on that claim. As Judge Leach described, all of the jury's answers are consistent with that conclusion. App. 57–63; *Sheldon v. Imhoff*, 198 Wash. 66, 68–69, 87 P.2d 103 (1939) (award of no damages for claim construed as defense verdict on that claim). Because the jury had substantial evidence to conclude that FFIC rebutted the presumption of harm—which was its right under the Instructions and was a key defense theme—the court had no authority to

change the jury's verdict. RP 4203; App. 77.

The Court of Appeals conceded its holding could not be squared with the Instructions. It *openly dismissed the key portion of Instruction 54*—an entire paragraph Plaintiffs drafted and repeatedly cited—dismissing as "surplusage" the language telling the jury that it "must include" the $10.8 million as damages if it found for Plaintiffs on the claim for failure to defend or settle. App. 23. Case law cited above prohibits courts from disregarding instructions in the guise of giving "legal effect" to the verdict. RAP 13.4(b)(1)–(2); *Meenach*, 39 Wn. App. at 639.

As Judge Leach explained (App. 61–63), the decision also disregarded the plain language of Question 1b—asking if the jury found the *breach element*—and re-wrote it to ask about "all elements" of the claim:

> Actual Language of Question 1b: "If you answered 'yes' to Question 1a as to Breach of Duty of Good Faith, did you find a breach of the duty to defend or settle?" App. 65.
>
> Court of Appeals: Question 1b "asked the jury to answer whether Plaintiffs had proved '*all* elements' of the tort of bad faith failure to defend or settle." App. 25.

Washington law cited above prohibits courts from rewriting verdict forms in the guise of giving legal effect to the verdict. RAP 13.4(b)(1)–(2).

In straining to affirm, the decision relies on the faulty notion that the jury was not asked to award the $10.8 million at all. App. 23–24. This conclusion defies Instructions 53 and 54 (*supra* at 4–5), and Instruction

37, which told the jury that recoverable damages included "the amount of the judgment entered against the insured," specifically referencing the $10.8 million (App. 71). Likewise, the verdict form did not exclude the $10.8 million: Question 4a provided the jury five opportunities to award it. App. 67. Plaintiffs urged the jury to award that amount in Question 4a:

- Gosney's counsel told the jury in closing to fill in the $10.8 million on Question 4a of the verdict form and that the only task of the court would be to calculate interest on it: "the judgment amount is $10.8 million. *That at a minimum must be filled in.*" RP 4187–88.
- He told the jury that "recoverable damages" included "the amount of the judgment entered against the insured [in] the underlying action," i.e., the $10.8 million. RP 49 (5/7/15 PM Part I).
- Vose's counsel urged the jury to "cover the judgment [i.e. $10.8 million]" on the verdict form. RP 4199 (citing App. 78).

Plaintiffs' counsel confirmed before closing that all understood the jury would decide whether to award the $10.8 million in Question 4: "The jury is going to indicate whether their award of damage[s] includes the judgment amount. If it does, the Court will then calculate interest following the verdict and before entry of judgment." RP 2–3 (5/7/15 PM Part I).[4]

Nonetheless, Plaintiffs presented a judgment with the $10.8 million added. CP 5000, 5007–09. This contradicted their own statements to the court and the jury, the Instructions, and their duty to seek clarification

[4] The opinion rests on a false premise that the jury found all elements of the claim for bad faith failure to defend or settle and proceeds to the faulty conclusion that the decision to award the $10.8 million was not within the jury's province. App. 21–27. Both are incorrect. As Plaintiffs' concessions show, the only thing the jury was not tasked to do is to reassess the amount—it could only award $10.8 million or not—and the only task reserved to the trial court was adding interest.

from the jury before discharge if they believed the jury had an unstated intent to include the $10.8 million. *Minger*, 87 Wn. App. 946; RAP 13.4(b)(2). Yet the Court of Appeals disregarded this too in affirming.[5]

The decision also conflicts with precedent on remedy. RAP 13.4(b)(1)–(2). Washington case law mandates that if a jury's answers conflict and cannot be reconciled as written with the instructions, a court lacks the power to resolve the conflict and the only relief available is further deliberations or a new trial. *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995). This law has stood for nearly a century: after discharge, "the authority of the court to amend or correct [a] verdict is limited strictly to matters of form or clerical error." *Beglinger v. Shield*, 164 Wash. 147, 153, 2 P.2d 681 (1931).[6] In adding $10.8 million to the verdict, the trial court believed it was "resolv[ing]" a "conflict in the verdict form." CP 5861. The Court of Appeals ignored this obvious error in conflict with nearly a century of case law. RAP 13.4(b)(1)–(2). Indeed, the

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[5] Not even Plaintiffs adopted the rationale the Court of Appeals relies on, which conflicts with a basic premise of insurance law: this case was not about the damages to Gosney from the underlying accident; instead, the $10.8 million was damages allegedly caused to Vose and PT that Gosney was to *collect* as an assignee. RP 579; *see also* App. 77 (instructing jury that damages at issue were those caused to PT and Vose). The premise of the decision that Question 4a needed to ask about damages to Gosney is erroneous.

[6] *See also Haney v. Cheatham*, 8 Wn.2d 310, 326, 111 P.2d 1003 (1941); *Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 515, 681 P.2d 233 (1984); *City Bond & Share v. Klement*, 165 Wash. 408, 410–12, 5 P.2d 523 (1931) (improper "invasion of the province of the jury" for a trial court to add to the jury's awarded damages); 4 Wash. Prac., Rules Prac. CR 59 (6th ed.) ("After the jury has been discharged … the court has *no authority to change the verdict.*... The court must enter judgment in accordance with the verdict, after which a party may move for a new trial if warranted.").

Court of Appeals' decision creates a conflict where none existed, forcing it to disregard Instruction 54, and then resolves the conflict it created. The decision here, if left standing, leaves long established precedent governing how courts analyze and review jury verdicts in disarray.

Honoring jury verdicts is of great public concern and importance. RAP 13.4(b)(4). The constitutional sanctity of jury verdicts, the obligations of parties to seek clarification before discharging the jury, and the limitations on a court's power to change jury verdicts are cornerstones of our court system and the Court of Appeals' decision presents many significant questions of law. RAP 13.4(b)(3). This Court should grant review.

B. The Court of Appeals' Application of Collateral Estoppel as an Alternative Ground for Affirmance Conflicts with Settled Precedent and the State and Federal Constitutions

Treating FFIC's collateral estoppel *defense* as an alternative basis for imposing liability for the $10.8 million conflicts with decisions of this Court and the Court of Appeals. RAP 13.4(b)(1)–(2). It undermines well-established case law on collateral estoppel and will promote the sort of "arbitrations" that the trial court found to be "irregular[]" and "troubling." RAP 13.4(b)(3)–(4); App. 84. The trial court's findings of just the "more apparent" "irregularities" are unchallenged on appeal. App. 84.

To begin, the Court of Appeals' decision rejected, in a footnote and without analysis, a key issue: that FFIC raised collateral estoppel as a

defense. The majority stated: "Collateral estoppel is not an affirmative defense." App. 42 n.27. This decision conflicts with the record and the law, including a prior opinion by the authoring judge. *Lemond v. State, Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (Dwyer, J.) ("Collateral estoppel is an affirmative defense.").[7] The decision then used FFIC's failure to prove a defense—something that would have been unnecessary to reach had the trial court not rejected the jury's verdict—as an alternative basis to impose liability on a claim that was not established.

The decision vastly expands the scope of collateral estoppel in conflict with existing precedent. RAP 13.4(b)(1)–(2).

- The issue in the arbitration was damage caused to Gosney by Vose and/or Pizza Time. The issue in this case was whether FFIC failed to defend or settle and, if so, whether harm was caused *to* Vose or Pizza Time. By relying on collateral estoppel as a separate ground to impose liability for the $10.8 million, the opinion conflicts with the collateral estoppel factor that the "issue decided in the prior adjudication" be "identical." *Thompson v. State, Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999).
- The opinion conflicts with case law establishing that the injustice factor is satisfied only if "'the parties to the earlier proceeding received a full and fair hearing on the issue in question.'" *Id.* at 795–96.[8] Given the trial court's factual findings, this factor cannot be satisfied consistent with prior case law. App. 84.[9]

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[7] Plaintiffs even conceded that this was FFIC's defense. Gosney Br. at 24. Plaintiffs never pled collateral estoppel and vigorously contested that the doctrine could ever apply. CP 392–94, 4021–24, 5375–87; RP 100, 129.

[8] *See also Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) ("Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue." (quotation marks omitted)); *Sage Group I, LLC v. Kotter*, 189 Wn. App. 1040 (2015) (Dwyer, J. joining) (same); *Lemond*, 143 Wn. App. at 803–04 ("Collateral estoppel prevents relitigation of an issue after the party estopped has full and fair opportunity to present its case." (quotation marks omitted)).

[9] The opinion failed to address that the trial court held the injustice factor satis-

- The opinion concludes that the arbitration was "actually litigated," which cannot be the case given the unchallenged factual findings the trial court made. App. 84; *McDaniels v. Carlson*, 108 Wn.2d 299, 305, 738 P.2d 254 (1987).
- Like the trial court, the opinion treated notice and opportunity to intervene as a collateral estoppel factor. App. 43. It is not. *Thompson*, 138 Wn.2d at 790.
- The opinion endorsed the trial's reliance on case law from reasonableness hearings—which use a different, lower standard—to analyze collateral estoppel. App. 44–45. This too conflicts with case law from this Court and the Court of Appeals establishing the actual factors. *Thompson*, 138 Wn.2d at 790.

No prior collateral estoppel decision has reached a result like the decision here. If it is permitted to stand, Washington case law will allow non-parties to be bound to arbitrations like the one here that included these "troubling" "irregularities": the party in privity presents no evidence (not even favorable evidence available to it); both sides withhold material information from the arbitrator; and both sides provide the arbitrator with material false facts. App. 84. This is an issue of substantial public interest under RAP 13.4(b)(4). Indeed, expanding collateral estoppel threatens the very core of due process principles in this country, presenting a significant legal question under RAP 13.4(b)(3). *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 310 (3d Cir. 2009) (limitations on collateral estoppel required by due process); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (same).

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fied because there was no evidence the *arbitrator* engaged in misconduct. App. 97, 43.

C. The Court of Appeals' Reversal of the Trial Court's Discretionary Judicial Estoppel Decision Disrupts the Constitutional Allocation of Power between the Trial and Appellate Courts and Undermines Bankruptcy Law

The Court of Appeals' treatment of judicial estoppel warrants review under all four RAP 13.4(b) factors.

First, the decision conflicts with settled precedent. RAP 13.4(b)(1)–(2). It holds that Vose had no duty to disclose this case against FFIC to the bankruptcy court (App. 50) contrary to the broad disclosure obligations set forth in case law. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006) (disclosure required for even contingent and unliquidated claims); *Miller v. Campbell*, 164 Wn.2d 529, 540, 192 P.3d 352 (2008) ("debtor must disclose all of his assets" and "all the debtor's *potential* claims or causes of action").[10] The opinion's requirement of detailed factual findings even on ancillary issues—such as the "precise nature and value of Vose's interest" (App. 50)—conflicts with case law, which has never required detailed factual findings. *Le Maine v. Seals*, 47 Wn.2d 259, 264, 287 P.2d 305 (1955) (findings "sufficient" if they "disclose what questions were decided, and the conclusions reached upon them"). The opinion misread *Arp v. Riley*, 192 Wn. App. 85, 366

[10] Vose understood the bankruptcy court required broad disclosure. RP 2164, 2166, 2172. Yet he concealed all facts of this litigation, whether as an *asset* (because of his retained right to damages), as a *liability* (because of the partial judgment and likely additional liability), or even as a *lawsuit*. RP 2166–67; Ex. 384.

P.3d 946 (2015), and in so doing improperly requires the proponent of judicial estoppel to prove the bankruptcy would have changed if disclosure was made. App. 51. This is not what *Arp* requires and conflicts with case law holding that there are no "inflexible prerequisites." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007) (trial court "may" consider additional facts); *Skinner v. Holgate*, 141 Wn. App. 840, 850, 173 P.3d 300 (2007).[11] Finally, the decision conflicts with precedent regarding the trial court's discretionary and factfinding authority. The majority relied on its own factual findings. For example, it concluded that Vose's damages occurred post-bankruptcy, even though substantial evidence supported a finding that they occurred before then,[12] in contravention of the constitutional authority of the trial court and the rule that "[f]ailure to make a finding is construed against the person in whose favor the finding would have been made." *City of Spokane v. Dep't of Labor & Indus.*, 34 Wn. App. 581, 589, 663 P.2d 843 (1983); *Stringfellow v. Stringfellow*, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960) ("Factual

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[11] In *Arp*, the trial court applied judicial estoppel on summary judgment because a debtor failed to disclose a claim arising from an accident that occurred after a bankruptcy confirmation order as the order required. But the confirmation order provided that those post-confirmation assets *belonged to the debtor*. The Court of Appeals reversed because the claim would have belonged to the debtor even if it had been disclosed. 192 Wn. App. at 99–101. That is not the situation here.

[12] *See, e.g.*, RP 2149, 2158, 2169, 1908–09; *see also Beeson v. Atl.-Richfield Co.*, 88 Wn.2d 499, 503, 563 P.2d 822 (1977) ("When a trial court has based its finding of fact on conflicting evidence and there is substantial evidence to support it, an appellate court will not substitute its judgment for that of the trial court ….").

disputes are to be resolved by the trial court. The Washington constitution, by art. IV, § 6, vests that power exclusively in the trial court.").

Further, review is also warranted under RAP 13.4(b)(3)–(4). The majority took it upon itself to hold that judicial estoppel did not apply rather than remanding. This fails to preserve the proper distribution of authority between the trial and appellate courts. The decision also disrupts and undermines bankruptcy law and the comity between state and federal courts as it conflicts with the broad duty of disclosure the bankruptcy code requires. 11 U.S.C. § 521(a) (requiring disclosure of "contingent" and "unliquidiated" "claims"). At the time of his bankruptcy, Vose admitted he understood this case had already been filed and he had a potential right to recover money from it, and chose not to disclose it. RP 2158, 2166–67, 2169, 2172; Exs. 66 at 5, 384, 385. The decision opens up an untenable and 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. This Court should review this issue of substantial public importance.

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VII. CONCLUSION

For all the above-stated reasons, this Court should grant review.

DATED THIS 29th day of June, 2018.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 29, 2018, that I caused a copy of the foregoing Petition for Review to be served electronically via the Washington State Appellate Courts' electronic filing Portal to:

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SARAH GOSNEY, as assignee and as Personal Representative of the Estate of Jerry Welch; JOHN VOSE, PIZZA TIME INC., and PIZZA TIME HOLDINGS OF WASHINGTON, INC., Respondents/Cross Appellants, v. FIREMAN'S FUND INSURANCE COMPANY and THE AMERICAN INSURANCE COMPANY, foreign insurance companies, Appellants/Cross Respondents.	DIVISION ONE No. 74717-7-I (consol. with No. 74812-2-I and No. 74813-1-I) PUBLISHED OPINION FILED: May 31, 2018

DWYER, J. — Following a five-week trial, the jury returned its special verdicts. After the jury was dismissed, it became apparent that the parties disagreed as to what exactly the jury had been asked and what its answers meant. The trial judge, based on his understanding of what he had asked the jury to decide, entered a significant judgment in favor of plaintiff Gosney. However, applying judicial estoppel, the judge declined to enter judgment on the jury's verdicts in favor of plaintiffs Vose and Pizza Time.

APPENDIX 1

Defendant Fireman's Fund appeals from the judgment entered against it and in favor of Gosney. Vose and Pizza Time cross-appeal from the trial court's denial of relief. For good measure, all parties seek relief from various other trial court rulings.

We reverse the trial court's judicial estoppel rulings. In all other respects, we affirm the various decisions of the trial court.

I

John Vose is the owner and sole shareholder of Pizza Time, Inc. and Pizza Time Holdings of Washington, Inc. (collectively PT). Vose owns and operates several corporate PT stores and also acts as a franchisor with 30 to 35 franchisees. As the franchisor, Vose personally prepared operational manuals for his franchises that were then incorporated into the franchise agreement by reference. These operational manuals purported to give Vose control over various aspects of franchisee employment procedures, including the right to terminate franchisee employees for any reason at any time.

Ethan Shaefer owned and operated a PT franchise store prior to and following Vose's acquisition of the PT franchise. Unbeknownst to Vose, one of Shaefer's pizza delivery drivers—Angela Heller—had a poor driving record and a criminal background. On September 1, 2005, Heller, who had been drinking on the job, drove her car across the center line while making a delivery. Heller caused a head-on collision and killed the driver of the other car, Jerry Welch. Vose visited Shaefer shortly after receiving word of the collision. Shaefer told Vose that he had called his attorneys and that he had insurance.

In September 2006, Jerry Welch's widow filed suit against PT in Thurston County. Sarah Gosney—Welch's daughter—was later substituted as the personal representative and plaintiff in the underlying action.[1] Vose's attorney informed him that, pursuant to the franchise agreement, Shaefer would have to indemnify and defend PT.

PT has had insurance through Fireman's Fund Insurance Company (Fireman's) since 2005. PT's insurance policy required Fireman's to indemnify it for up to $1.5 million pursuant to a "non-owned auto policy" and an additional $1 million pursuant to a "general liability policy."

Vose first informed Fireman's of the automobile collision and ongoing litigation on January 31, 2008. Gosney had extended an offer to PT and Shaefer to settle for policy limits. Trial was scheduled for April 21, 2008. Fireman's began investigating coverage and liability on February 8, 2008. On February 21, 2008, Gosney's counsel, David Beninger, wrote to Robert Novasky, counsel for both Vose and Shaefer, to notify Novasky that Gosney's offer to settle would remain open for only seven more days. Novasky forwarded this letter to Paul Badaracco, Fireman's primary claims handler assigned to the matter, for resolution.

On February 22, 2008, Badaracco wrote to Vose to acknowledge receipt of his claim. Badaracco noted that "[a]lthough this incident occurred on Sept 1, 2005 and the lawsuit was filed on Sept 14, 2006, Fireman's Fund's first notice of

[1] We refer to the Welch estate as "Gosney."

APPENDIX 3

this claim and ongoing litigation was . . . on Feb. 8, 2008, some two and a half years after the accident."

Novasky wrote to Badaracco again on February 28, 2008. Novasky stated that "[a]ll other defendants have tendered their policy limits, but plaintiff is demanding a 'global' settlement that requires the tender of all available policy limits." Novasky requested that Fireman's contact Beninger to confirm Fireman's position with regard to the demand.[2]

Fireman's appointed counsel John Matthews of Jackson & Wallace, LLP to defend PT. Matthews contacted Novasky to discuss the case and review court documents. Matthews then contacted Vose and received his approval to request a continuance of the trial date. Trial was rescheduled for December 29, 2008. Gosney withdrew the global settlement offer as a result of the continuance.[3]

On March 27, 2008, Badaracco wrote to Vose to inform him that PT's coverage for nonowned business automobile exposure covered up to $1.5 million[4] in losses and that the current claim "could result in damages in excess of

---

[2] Just one day prior to receiving this letter, Fireman's had internally concluded that it was not prejudiced by the late notice and that it had a duty to defend PT in the underlying action.

[3] Badaracco did not inform Vose that continuing the trial date would result in the withdrawal of the settlement offer. Gosney's expert witness testified:

> Well, this gets to the proposition that by continuing the case, you are rejecting the settlement offer. So at that point it's a choice. You have got to decide what you want to do. But the consequences of continuing means that the chances for [PT] and Mr. Vose to get settled within limits is going to be withdrawn. So my belief, my opinion, based on the Washington standards, are [that] they have to tell the insured and get the insured's choice. Do you want us to file for a continuance or do you want us to accept the settlement?
>
> . . . .
>
> . . . I'm not sure that Mr. Vose has any idea that the settlement was going to be withdrawn, if he files for the continuance. I didn't see anything where that was explained to him to say if we do this the settlement offer is gone, and we can't tell you whether it'll ever come back.

[4] As discussed herein, the policy actually provided a total of $2.5 million in coverage.

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. . . policy limits." Badaracco advised Vose to retain counsel to advise him "with respect to any potential excess exposure above the referenced limits."

Patricia Anderson, an attorney representing Gosney, later contacted Fireman's to request a copy of the PT insurance policy. On July 17, 2008, counsel for Fireman's sent Anderson a copy of the policy and confirmed that Fireman's "continues to reserve any and all rights and defenses that may now exist or that may arise in the future." Anderson then contacted Howard Bundy, corporate counsel for PT. Anderson told Bundy that Gosney was interested in reaching a settlement and was willing to discuss a settlement "involving an agreement or covenant not to execute against personal assets, in exchange for an assignment of the claims against the insurance company and a stipulated judgment."

Bundy, who had not represented Vose or PT on any matter related to the Gosney litigation, advised Vose to retain independent counsel. Vose then forwarded the settlement offer to attorney Matthews. Matthews asked Bundy to "please forward these emails and offers to the counsel that [PT] and/or John Vose hires to represent him personally on this coverage issue, as we cannot advise our client on coverage matters." Bundy then agreed to represent Vose in the Gosney litigation.

Settlement

Gosney and Vose reached a settlement on September 2, 2008.[5] The settlement offer required Vose and PT to assign to Gosney "all rights, privileges, claims, causes or chose of actions that they may have against their insurer," including any arising out of the "handling of the claims or suit related thereto, as well as arising out of the insurance contract, obligations, investigation, evaluation, negotiation, defense, settlement, indemnification . . . bad faith, negligence, malpractice, breach of contract, fiduciary breach, Consumer Protection Act[6] (CPA)], Insurance Fair Conduct Act[7] (IFCA)], punitive damages and/or otherwise." The settlement offer reserved to Vose and PT all elements of damages "for their personal emotional distress, personal attorneys' fees, personal damages to credit or reputation and other non-economic damages" arising from the assigned causes of action.

The settlement offer did not specify a dollar amount. Rather, it provided:

> Defendants do hereby stipulate and agree to having partial judgment entered against them for the full insurance limits to avoid any delay in executing, garnishing or collecting those offered assets. Plaintiffs agree to withhold formal entry of this partial judgment for fifteen (15) days to allow the insurers to pay all insurance proceeds to the Luvera Trust Account, in trust for the Welchs. Defendants are entitled to a credit, offset and partial satisfaction of any judgment for the amounts paid by their insurers.
>
> Further, the parties agree to have the full amount of the damages and/or judgments determined by stipulation approved as reasonable by the Court, or arbitration. The parties agree to use good faith efforts to reach a stipulated covenant judgment, contingent upon a reasonableness finding by the court. . . .

---

[5] Gosney and Shaefer apparently reached a separate settlement. The record before us does not disclose either the timing or terms of that settlement.

[6] Ch. 19.86 RCW.

[7] RCW 48.30.010-.015.

APPENDIX 6

The settlement offer further provided for a 12 percent interest rate accruing and compounding annually on the unpaid damages from the date of signing. Finally, the settlement offer contained a covenant not to execute or enforce the judgment against Vose or PT.

Gosney and Vose—on behalf of himself and on behalf of PT—signed the settlement agreement. Bundy then sent a copy of the settlement agreement to Fireman's along with a letter demanding the payment of policy limits and notice under the IFCA. Fireman's never responded to Bundy and never agreed to the settlement offer.

On December 19, 2008, Thurston County superior court Judge Gary Tabor entered judgment against Vose and PT for $2.5 million with interest accruing at 12 percent per annum from September 2, 2008. Judge Tabor also issued an order approving the settlement as reasonable as to Welch's minor children. Jackson & Wallace filed a notice of intent to withdraw effective January 29, 2009.

On September 1, 2009, Gosney filed suit against Fireman's and named PT and Vose as codefendants. The complaint alleged negligence, breach of the CPA, breach of the IFCA, breach of contract, and breach of the specific unfair claims and settlement practices regulation.[8] In its answer, Fireman's asserted the affirmative defenses of waiver and estoppel, contributory fault, and fraud or collusion in the settlement.

[8] WAC 284-30-330.

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Arbitration

On November 1, 2010, Fireman's moved to stay the action "until Plaintiffs and Defendant [PT] conduct and conclude their arbitration to determine the final value of the settlement in their underlying litigation." Fireman's argued that a stay was necessary because

> [Fireman's] cannot effectively defend itself in this lawsuit without resolution of the underlying settlement amount, which, if proven reasonable, will form the "presumptive measure of damages" in this lawsuit. [PT] claims it cannot provide [Fireman's] written discovery responses . . . without jeopardizing its position in the eventual arbitration of the settlement amount. This leaves [Fireman's] in a litigation quandary, precluding [Fireman's] ability to prepare for and receive a fair trial.

King County Superior Court Judge Laura Inveen granted Fireman's motion to stay on November 30, 2010. The stay was granted pending the final determination of damages by either "stipulated amount approved as reasonable by the court," or "final arbitration decision."

Gosney and Vose decided to enter arbitration. On September 17, 2012, Beninger notified John Bennett, outside counsel representing Fireman's, of the date and time of the arbitration. Arbitration was scheduled for November 1, 2012 before former King County Superior Court Judge Charles Burdell.

Beninger described the scope of the arbitration as "all remaining issues." Bennett responded to the notice asking what the "remaining issues" included. On October 4, 2012, Bennett again wrote to Beninger asking "what issues the parties intend to arbitrate." Bennett stated that "[t]ime is of the essence if Fireman's Fund is to make an informed decision whether to participate in the arbitration and to prepare to participate," and demanded that Beninger respond

by the following day. Beninger responded simply that "[t]he issues subject to arbitration are broad."

Bennett wrote to Beninger on October 9, 2012, declining to participate in the arbitration. Bennett explained,

> As I am sure you understand, Fireman's Fund cannot reasonably participate in an arbitration when it does not know what will be arbitrated. Your response that the issues to be arbitrated are "broad" does not provide the information Fireman's Fund needs to be able to participate in the arbitration.
>
> Also, Fireman's Fund is concerned that defendants have shared with plaintiff all confidential information relating to matters at issue in the arbitration, which would preclude any potential for a fair hearing of the matters in dispute. Your response ignores that concern.

Bennett extended an offer to pay for a transcription of the arbitration. Beninger replied, "It seems like you are trying to generate reasons to avoid the arbitration, rather than participate in good faith. Please keep in mind that you moved the court and compelled the arbitration of all remaining issues." Beninger rejected the offer to pay for transcription of the arbitration. In response, Bennett asserted that Fireman's had no good faith duty to participate in the arbitration as Fireman's was not a defendant and the arbitration was not a reasonableness hearing.[9]

Following the arbitration, Judge Burdell valued Gosney's claim at $10,800,289. Judge Burdell found that PT and Vose were jointly liable for the damages, that there was no bad faith, collusion, or fraud between the settling

[9] Although Beninger declined to elaborate on the topics to be arbitrated in his correspondence with Bennett, Beninger did discuss the arbitration with Bundy. On October 29, 2012, Beninger provided a nonexclusive list of the arbitration topics to Judge Burdell. The topics included liability, total damages, contributory fault, fraud/collusion or bad faith, and the "reasonable amount of covenant judgment." Beninger did not provide Fireman's with this list.

APPENDIX 9

parties, and that the damages award was a reasonable covenant judgment amount. Judge Burdell further found that Fireman's had "notice and opportunity to participate, submit evidence and be heard." The award caption included Fireman's as a party.

The arbitration proceeding was unusual and is one of the most contentious subjects in this proceeding. King County Superior Court Judge Sean O'Donnell summarized some of the arbitration oddities:

> Mr. Vose admitted personal liability (pursuant to the settlement agreement) when he was not named in the lawsuit brought by Mr. Welch's estate. Prior to reaching an amount for damages and prior to the arbitration, Mr. Bundy . . . turned over the confidential Jackson Wallace attorney file to Mr. Benninger [sic] (at Mr. Benninger's [sic] insistence). Mr. Bundy and Plaintiffs' counsel discussed the issues to be arbitrated well in advance of the hearing, and Mr. Bundy even provided Mr. Benninger [sic] with favorable case law prior to appearing before Judge Burdell.
>
> At the arbitration hearing itself, Mr. Bundy failed to submit his own trial brief, he failed to call a single witness to testify, he failed to offer his own exhibits, he failed to call an expert in franchisor liability, and he agreed that Ms. Heller (the driver who killed Mr. Welch) was an employee of Pizza Time (the franchisor) when, in fact, Ms. Heller only worked for the franchisee. He also was silent to the fact that Fireman's Fund was listed in the caption of the arbitration brief (and other pleadings) as a party, when Fireman's Fund was not. Neither he nor Mr. Benninger [sic] made any effort to correct this error before Judge Burdell.
>
> Additionally, Mr. Bundy failed to contest the difference between the damages award and the reasonableness finding/amount entered by Judge Burdell. The corollary to that concession is that Mr. Bundy agreed that Fireman's was liable for the total damage amount, with no discount afforded to Mr. Vose/Pizza Time for issues related to franchisor liability. Finally, the hearing was truncated, lasting only a matter of hours.

On November 16, 2012, Thurston County Superior Court Judge Thomas McPhee determined that the arbitration award was reasonable and entered judgment against Vose and PT for $10,800,289 (hereinafter "underlying

judgment"). The judgment included pre- and postjudgment interest accruing at the rate of 12 percent compounded annually from September 2, 2008 until paid.[10] On April 12, 2013, Judge Tabor granted Fireman's motion to remove its name from the caption of the arbitration award. Judge Tabor granted the requested relief but wrote on the order, "Court makes clear this does not affect the award or goes to any of the merits or repercussions of the award."

On August 23, 2013, Fireman's moved for partial summary judgment in this action, asserting that "(1) as a matter of law Fireman's Fund is not bound by the arbitration award and judgment obtained against [Vose and PT] and that, therefore; (2) Plaintiffs' claim against Fireman's Fund for the amount of the arbitration award should be dismissed." King County Superior Court Judge Timothy Bradshaw denied the motion.

On November 26, 2013, Judge Bradshaw entered an order preventing Fireman's from deposing Beninger. On January 27, 2014, Judge Bradshaw entered an order "to preclude attempts to relitigate the underlying Thurston County wrongful death action, issues and judgment."

Trial

Judge O'Donnell presided over a five-week jury trial in April and May 2015. At the close of Plaintiffs'[11] case, Fireman's moved for judgment as a matter of law pursuant to CR 50(a). Fireman's argued that the covenant judgment was the result of fraud and collusion, that Fireman's had not harmed

[10] Judge McPhee noted that Fireman's was given notice of the arbitration and refused to participate. Fireman's is not listed as a party in the caption of the judgment.

[11] We refer to Gosney, Vose, and PT collectively as "Plaintiffs."

Vose, and that Vose was judicially estopped from recovering damages because of his failure to disclose his claim during a prior bankruptcy proceeding. The trial court denied Fireman's motion but reserved ruling on the issue of judicial estoppel.

The jury was asked to resolve five claims: negligence, breach of contract, breach of the CPA, breach of the IFCA, and breach of the duty of good faith. The jury was instructed on Fireman's affirmative defenses of fraud, collusion, excuse of performance by estoppel, and excuse of performance by waiver.

At trial, Plaintiffs argued various violations of the duty of good faith. The jury was instructed that an insurer "that refuses to defend in good faith voluntarily forfeits its ability to protect itself against a settlement in excess of policy limits unless the settlement or arbitration is the product of fraud or collusion." Instruction 22. The jury was further instructed:

> An insurance company will be bound by the findings, conclusions and judgment entered against their insured when it has adequate notice and an opportunity to intervene in the underlying action. The insurer is bound to what might, or should, have been litigated as well as to what was actually litigated. An insurer is not entitled to litigate factual questions that were resolved in the liability case by judgment or arm's length settlement.
>
> This instruction applies only in the absence of fraud or collusion.

Instruction 38.

> If you find that Fireman's failed to act in good faith by breaching its duty to defend and/or settle, then the law presumes that Plaintiffs Pizza Time and Mr. Vose were injured and that the failure to act in good faith was the proximate cause of this injury. You are bound by that presumption unless you find that Fireman's failure to act in good faith did not injure Plaintiffs Pizza Time and Mr. Vose.

Fireman's bears the burden of proof that any failure to act in good faith did not injure Plaintiffs Pizza Time and Mr. Vose.

Plaintiffs bear the burden of proving the amount of damages.

For all other claims that Fireman's failed to act in good faith, Plaintiffs have the burden of proving each of the following propositions:

(1) That Fireman's failed to act in good faith;

(2)That Plaintiff Pizza Time or Mr. Vose was damaged; and

(3)That Fireman's failure to act in good faith was a proximate cause of Plaintiff Pizza Time's or Mr. Vose's damages.

If you find from your consideration of all of the evidence that each of these propositions has not been proved, your verdict on the claim of failure to act in good faith should be for Fireman's. On the other hand, if each of these propositions has been proved, you must consider Fireman's affirmative defenses.

Instruction 53.

If your verdict is for the Plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith, then you must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately cause[d] by Fireman's Fund/American Insurance Company's failure to act in good faith.

If you find for the Plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith as to [the] duty to defend or settle, your verdict must include the amount of the judgment on the arbitration award, unless you further find for Fireman's Fund/American Insurance Company on its affirmative defense that the settlement was the product of fraud or collusion. The judgment amount is $10,800,289, plus interest.

Instruction 54.

The interrogatories on the special verdict form, and the jury's answers, were as follows:

QUESTION 1a: Plaintiffs' Claims

Have the Plaintiffs proven all elements of any or all of their claims as to the Defendants? (The elements of these claims are described in the accompanying Jury Instructions.)

ANSWER: (Check "yes" or "no")

Negligence	X Yes ____ No
Breach of Contract	X Yes ____ No
Breach of the Consumer Protection Act	X Yes ____ No
Breach of the Insurance Fair Conduct Act	X Yes ____ No
Breach of Duty of Good Faith	X Yes ____ No

QUESTION 1b

If you answered "yes" to Question 1a as to Breach of Duty of Good Faith, did you find a breach of the duty to defend or settle?

X Yes ____ No

QUESTION 2: Contributory Negligence

QUESTION 2A: Have the Defendants proven that Plaintiffs were contributorily negligent?

ANSWER (Check "yes" or "no")

____ Yes X No

. . . .

QUESTION 3: Defendants' Defenses

Have the Defendants proven all elements of any or all of their defenses? Answer each of the subparts below. (The elements of these claims and defenses are described in the accompanying Jury Instructions.)

ANSWER: (Check "yes" or "no")

Fraud	____ Yes X No
Collusion	____ Yes X No
Excuse of Performance by Estoppel	____ Yes X No
Excuse of Performance by Waiver	X Yes ____ No

QUESTION 4a: Damages

Based on the jury instructions, what amount of damages, if any, do you find were incurred by Plaintiffs John Vose and Pizza Time?

(INSTRUCTION No. 1: Do not duplicate damages across multiple claims.)

(INSTRUCTION No. 2: Do not reduce the damages for Negligence for any contributory negligence you may find in Question 2. The Court will determine that amount.)

	Damages:
Negligence:	$100,000.00
Breach of Contract:	$20,000.00
Breach of Duty of Good Faith:	$300,000.00
Breach of Consumer Protection Act:	$20,000.00
Breach of the Insurance Fair Conduct Act:	$20,000.00

Question 4b:

If you awarded damages in Question 4a, does the damages amount include the judgment?

_____ Yes _____X_____ No

SUPPLEMENTAL QUESTION:

Of the damages identified in the Verdict Form in Question 4a, what is the total dollar amount of damages incurred by Plaintiff John Vose, as opposed to those incurred by Pizza Time?

$240,000.00

Following receipt of the jury's verdict, the trial court discharged the jury and granted Plaintiffs' motion to prohibit contact with the jurors. Plaintiffs later filed a presentation of judgment, asserting that the amount that should be entered as the principal judgment amount, based on the jury's verdict, was

$11,260,289. In response, Fireman's argued that the jury did not award the amount of the underlying judgment and that, even assuming that it did, Fireman's was not bound by that judgment.

The trial court agreed with Plaintiffs as to the legal effect of the jury's verdict and entered judgment in favor of Plaintiffs.[12] The trial court awarded interest on the underlying judgment beginning from the date of entry of the arbitration award. The trial court also concluded that Fireman's was estopped from contesting the arbitration award. The trial court found that Fireman's had sufficient notice of the arbitration hearing, that the arbitration hearing was "actually litigated," and that Fireman's was in privity with Vose and PT at the time of the arbitration hearing.

Fireman's then filed a motion for reconsideration. The trial court reviewed the jury's special verdict and concluded:

> The jury here made a factual determination of plaintiffs' bad faith damages *other than* and *in addition* to the covenant judgment in the amount of $300,000.00. The jury accordingly found harm as a result of Fireman's . . . failure to act in good faith. But the

---

[12] Little time was spent addressing the jury's finding that Fireman's had established its defense of excuse of performance by waiver.

Plaintiffs argued to the trial judge that the "contractual concept of waiver of performance expressed in the court's instructions has no application to plaintiffs' statutory claims, nor to the tortious bad faith or negligence claims." Memo. in Supp. of Presentation of J. at 5. In response, Fireman's appeared to agree that the finding was not of significance: "[T]he waiver finding is not necessary, but it's certainly helpful. . . . I think the waiver finding may, may be pertinent, but it's certainly not necessary to uphold what the jury did and to uphold the specific amounts that they found, were the damages proximately caused by Fireman's conduct." In its order entering judgment in favor of Plaintiffs, the trial court addressed the jury's finding in a footnote:

> The jury found that Mr. Vose/Pizza Time waived Fireman's Fund duty to provide a defense. The jury made no mention of Fireman Fund's separate contractual duty to settle. Nor does the jury's waiver finding implicate Fireman Fund's independent statutory duty to settle (which the jury found Fireman's Fund breached). Indeed, Plaintiffs correctly point out that breach of Fireman's independent good faith duty to settle is grounded in tort and not contract law.

Fireman's has neither assigned error to the trial court's order with respect to the issue of waiver nor has it otherwise discussed the jury's finding in its briefing.

> plaintiffs' floor on damages had already been determined by entry of the Thurston County judgment (resulting from the arbitration/reasonableness hearing). . . . As a matter of law, the jury's apparent conflict in the verdict form (finding harm for the breach of duty of good faith but not writing in the amount) must be resolved to include the arbitration amount.

The trial court then addressed Fireman's judicial estoppel claim. Pursuant to CR 50(a), Fireman's had moved to bar Vose from collecting on the jury's damages award based on Vose's failure to disclose a potential claim against Fireman's during a prior bankruptcy proceeding. The trial court agreed with Fireman's and concluded that both Vose and PT were judicially estopped from recovering damages.

The trial court entered judgment in favor of Gosney and against Fireman's, awarding Gosney the amount of the underlying judgment and accrued interest totaling $15,612,624.34. The trial court additionally awarded Gosney attorney fees and costs totaling $2,484,542.50 and awarded Vose and PT attorney fees and costs totaling $405,612.50. The trial court's awards of attorney fees and costs included a lodestar multiplier of 1.25. Fireman's now appeals. Gosney, Vose, and PT cross-appeal.

II

"An insured may independently negotiate a settlement if the insurer refuses in bad faith to settle a claim. In such a case, the insurer is liable for the settlement to the extent the settlement is reasonable and paid in good faith." Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 736, 49 P.3d 887 (2002) (citing Evans v. Cont'l Cas. Co., 40 Wn.2d 614, 628, 245 P.2d 470 (1952)). Such a settlement agreement typically 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." Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 764-65, 287 P.3d 551 (2012) (citing Besel, 146 Wn.2d at 736-38). This type of settlement agreement is often referred to as a covenant judgment. Bird, 175 Wn.2d at 765.

"If the amount of the covenant judgment is deemed reasonable by a trial court, it becomes the presumptive measure of damages in a later bad faith action against the insurer." Bird, 175 Wn.2d at 765 (citing Besel, 146 Wn.2d at 738). The insured can recover from the insurer "the amount of a judgment rendered against the insured, even if the judgment exceeds contractual policy limits." Miller v. Kenny, 180 Wn. App. 772, 799, 325 P.3d 278 (2014). This is sometimes referred to as the "'judgment rule.'" Miller, 180 Wn. App. at 799 (quoting Besel, 146 Wn.2d at 735). "The 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)).

The propriety of this process has been considered and endorsed by our Supreme Court.

> Whether the insurer acts in bad faith by refusing to settle in good faith or by refusing to defend, the consequences to the insured are the same. The defense may be of greater benefit to the insured than the indemnity. The defense must be prompt and timely. An insurer refusing to defend exposes its insured to business failure and bankruptcy. An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims

> simply go away. To limit an insurer's liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured. We therefore hold that when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion.

Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wn.2d 751, 765-66, 58 P.3d 276 (2002).

Reasonableness determinations are equitable proceedings to which a jury trial right does not attach. Bird, 175 Wn.2d at 768 (citing RCW 4.22.060(1)). Indeed, RCW 4.22.060(1) unequivocally removes from the province of the jury a factual determination of whether the amount of a covenant judgment is reasonable. As our Supreme Court stated, "there is no factual determination to be made on damages in the later bad faith claim, at least not with respect to the covenant judgment." Bird, 175 Wn.2d at 772. Rather, the role of the jury is to "make a factual determination of an insured's bad faith damages *other than* and *in addition* to the covenant judgment." Miller, 180 Wn. App. at 801.

"An action for bad faith handling of an insurance claim sounds in tort." Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Harm is an essential element of any tort claim, including the bad faith handling of an insurance claim. Butler, 118 Wn.2d at 389 (citing Burnham v. Commercial Cas. Ins. Co., 10 Wn.2d 624, 627, 117 P.2d 644 (1941)). In cases in which an insurer acts in bad faith regarding its duty to defend or settle, a rebuttable presumption of harm arises. Butler, 118 Wn.2d at 390-91.

The nature of a bad faith claim against an insurer requires that an "'"almost impossible burden"'" of proof be placed on either the insured or the

insurer. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 921, 169 P.3d 1 2007 (quoting Butler, 118 Wn.2d at 390 (quoting ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 2.09, at 40-41 (2d ed. 1988))). "Either the insured will face the almost impossible burden of proving that '"he or she is demonstrably worse off because of"' the insurer's bad faith or the insurer will face the almost impossible burden of proving the reverse." Dan Paulson, 161 Wn.2d at 921 (quoting Butler, 188 Wn.2d at 930 (quoting WINDT, supra, § 2.09, at 40-41)). "As between the insured and the insurer, it is the insurer that controls whether it acts in good faith or bad. Therefore, it is the insurer that appropriately bears the burden of proof with respect to the consequences of that conduct." Dan Paulson, 161 Wn.2d at 921.

III

The primary question before us is whether the trial court erred by entering judgment in favor of Gosney in an amount that included the amount of the underlying judgment. Resolution of this complex matter requires a close inspection of the jury instructions and the answers on the special verdict form in light of the applicable law and the trial record.

We review de novo the legal effect of a verdict. Estate of Dormaier v. Columbia Basin Anesthesia, PLLC, 177 Wn. App. 828, 866, 313 P.3d 431 (2013). A special verdict asks the jury to return written findings on each issue of fact. CR 49(a). "Once a jury renders a verdict, the trial court must declare its legal effect." Dormaier, 177 Wn. App. at 866 (citing Dep't of Highways v. Evans

Engine & Equip. Co., 22 Wn. App. 202, 205-06, 589 P.2d 290 (1978)). The trial court should view the verdict in light of the jury instructions and trial evidence, construing the verdict to implement the jury's intent if consistent with the law. Dormaier, 177 Wn. App. at 866. If the special verdict answers conflict with one another, the trial court must attempt to harmonize them. If the special verdict answers are irreconcilable, the trial court must order further deliberations or a new trial. Dormaier, 177 Wn. App. at 866 (citing Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 136, 875 P.2d 621 (1994)).

A

Our first inquiry is whether the special verdict form provided the jury with an opportunity to award damages to Gosney. We conclude that, by its plain terms, it did not.

We begin our analysis with Question 4 of the special verdict form—damages. Question 4a asked the jury, "Based on the jury instructions, what amount of damages, if any, do you find were incurred by Plaintiffs John Vose and Pizza Time?" The jury was further instructed not to duplicate damages across multiple claims and not to reduce the damages for contributory negligence. The jury awarded Vose and PT $100,000 for negligence, $20,000 for breach of contract, $300,000 for breach of the duty of good faith, $20,000 for breach of the CPA, and $20,000 for breach of the IFCA. The jury was then asked to designate the amount of damages incurred by Vose, as opposed to those incurred by PT. The jury found that Vose incurred $240,000 in damages.

Question 4 plainly does not provide the jury with an opportunity to award damages to Gosney.[13] Indeed, Question 4 is unique among the questions presented to the jury in that it is the *only* question that—instead of referencing the "Plaintiffs"—asks specifically about Vose and PT while not mentioning Gosney. The other questions presented to the jury ask about "Plaintiffs" generally—a term that included Vose, PT, and Gosney.

But the jury would have understood that Gosney stood to recover damages in this suit. Beninger informed the jury on the first day of trial that Gosney was "what's called an assignee. . . . [S]he is here standing, basically standing in Pizza Time's shoes to pursue the claims, if any, that Pizza Time has against Fireman's." Fireman's argued to the jury that Bundy and Beninger had colluded to commit fraud—a claim that existed only because of the assignment. The jury heard extensive testimony from Bundy concerning the assignment and the preclusive effect the assignment had on Vose's ability to file a claim against Fireman's. The jury heard testimony concerning the assignment from Vose. The jury heard opinion testimony concerning this particular assignment, and assignments generally, from multiple expert witnesses. The jury was reminded of the assignment again during closing argument.

The parties' presentation of evidence and the jury instructions confirmed that Gosney was a "Plaintiff" as contemplated by other questions on the special verdict form. Instruction 30 identified Vose and PT as the first party claimants.

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[13] That Question 4a was designed for the jury to, if it chose, award damages to Vose and PT is made clear by the language of Question 4b, which began, "If you awarded damages in Question 4a . . . ."

Instruction 31 identified Gosney as the assignee of rights, claims, and causes of action of Vose and PT. The jury was instructed that, as an assignee, Gosney "steps into the shoes of assignor and has the rights of the assignor." Instruction 54 told the jury that, if it found breach of the duty of good faith to defend or settle and did not find fraud or collusion, its award for the Plaintiffs "must include the amount of the judgment on the arbitration award." From the testimony, argument, and instructions of the court, the jury would have understood that it was Gosney who would recover on the underlying judgment.

Moreover, because the underlying judgment represented only the presumptive measure of damages—theoretically allowing Gosney to seek damages *in addition to* the amount of the underlying judgment—the instructions collectively signaled to the jury that it could be asked to determine damages due to Vose, PT, and Gosney. Bird, 175 Wn.2d at 765. Despite this, no question on the special verdict form gave the jury an opportunity to award damages to Gosney.

Notwithstanding all of this, given the manner in which the case was argued in closing argument by Gosney's counsel, the instructions and the special verdict form were not inconsistent. Rather, the language instructing the jury that its verdict "must include" the underlying judgment was surplusage. This is so because, when an assignee is seeking only an amount equal to the amount of a covenant judgment, no factual question on the amount of damages is presented to the jury. If the assignee establishes an entitlement to relief, the amount of the covenant judgment is due as a matter of law. Here, because Gosney did *not*, in

closing argument, seek an award greater than the amount of the underlying judgment, there was no requirement—constitutional or otherwise—that the jury be asked to set out the amount of damages due to Gosney. Gosney's omission from Question 4 of the special verdict form was proper. The answers to Question 4 do not signal that the jury rejected Gosney's claim.

The trial court did not err by so ruling.

B

Our next inquiry is whether the jury found that Plaintiffs had established every element of the tort of bad faith failure to defend or settle.[14,15] The trial court ruled that it had. We agree.

Question 1a asked the jury, "Have the Plaintiffs proven all elements of any or all of their claims as to the Defendants?" The jury answered "Yes" for breach of the duty of good faith. Question 1b asked the jury, "If you answered 'yes' to Question 1a as to Breach of Duty of Good Faith, did you find a breach of the duty to defend or settle?" The jury answered "Yes."

We begin by noting that the jury was not asked two separate and distinct questions but, rather, two interrelated questions. This understanding is supported by the trial court's decision to designate the questions as Question 1a and Question 1b, rather than Question 1 and Question 2. Question 1a

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[14] "The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation." Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385, 715 P.2d 1133 (1986) (citing Tyler v. Grange Ins. Ass'n, 3 Wn. App. 167, 173, 473 P.2d 193 (1970)). The source of that obligation is the same—the fiduciary relationship between the insurer and the insured. Tank, 105 Wn.2d at 385.

[15] Again, when a plaintiff proves all elements of the tort of bad faith failure to defend or settle and the defendant does not prove fraud or collusion, the plaintiff has established an entitlement to relief.

unequivocally asked the jury to find whether Plaintiffs had proved "*all* elements" of any or all of their claims. (Emphasis added.) The most natural way to understand Question 1b, therefore, is that it asked the jury to answer whether Plaintiffs had proved "*all* elements" of the tort of bad faith failure to defend or settle. The trial court's ruling is consistent with this understanding.

We therefore conclude that the jury's affirmative answer to Question 1b necessarily includes a finding of harm.

Fireman's argues to the contrary, asserting that Question 1b was designed to ask the jury only whether it had found a breach of the duty to defend or settle, not whether it had found all elements of the corresponding tort proved.[16] But Fireman's offers no explanation as to why the trial court would so inquire. Determining that the jury found breach alone proved would not have assisted the court. Such a finding would serve no purpose. On the other hand, a purpose was served by asking, in Question 1b, specifically about the tort of breach of duty to defend or settle, as opposed to the breach of the duty of good faith generally. As Instructions 53 and 54 make clear, different evidence was required to prove these different versions of the tort of breach of the duty of good faith.

Indeed, for the trial judge to have accepted Fireman's interpretation of Question 1b, the judge would have had to believe that, after a five-week trial during which the primary cause of action at issue was the claim that Fireman's committed the tort of bad faith breach of its duty to defend or settle, he nowhere

[16] Fireman's contends that it proved to the jury that no harm arose from its breach of the duty to defend or settle and that this explains the jury's decision to not include the amount of the underlying judgment in its award of damages.

asked the jury to declare whether it found that cause of action to have been proved. That is not a reasonable reading of the court's instructions and verdict form and it is unsurprising that the judge refused to adopt it.

Our understanding of Question 1a and 1b is further supported by other instructions to the jury. As discussed herein, harm is an essential element of the tort of bad faith. Butler, 118 Wn.2d at 389. Although the jury was not provided with an elements instruction pertaining to the tort of breach of the duty to defend or settle, the jury *was* appraised of the role that harm plays in proving the tort. Instruction 53 identified the element of harm as it pertains to both bad faith generally and bad faith failure to defend or settle. Harm was also identified as an essential element in the instructions pertaining to Plaintiffs' CPA and IFCA claims.

The jury found that Plaintiffs had proved all elements of the tort. This finding necessarily included a finding of harm.

C

Our next inquiry is whether the decision to award the underlying judgment amount was within the province of the jury. We answer in the negative.

The jury was properly instructed that Fireman's was liable for the entire amount of the underlying judgment if it breached its duty of good faith to defend or settle and failed to prove fraud or collusion in the settlement. As discussed herein, the jury found that Plaintiffs had proved all elements of the tort of bad faith failure to defend or settle—a finding that necessarily includes the element of

harm. The jury further found that Fireman's had failed to prove its affirmative defenses of fraud and collusion.

These factual findings are the necessary predicates to holding Fireman's liable for the underlying judgment. Whether the covenant judgment itself was reasonable was not a decision within the province of the jury. Bird, 175 Wn.2d at 768 (citing RCW 4.22.060(1)). Because Gosney did not request the jury to award damages in addition to the underlying judgment, the total amount of damages incurred by Gosney was likewise not a decision within the province of the jury. There were no other factual questions put to the jury pertaining to the underlying judgment.[17]

Accordingly, the decision to award the amount of the underlying judgment was not within the province of the jury.

The jury here was tasked with finding whether Plaintiffs had proved that Fireman's breached its duty of good faith to defend or settle and whether Fireman's had proved its affirmative defenses of fraud or collusion. After the jury made its findings, the trial court gave legal effect to the verdict.[18] There was no error.

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[17] We therefore reject Fireman's contention that it cannot be held liable for the underlying judgment because it did not receive adequate notice of the arbitration.

The special verdict form used in this matter was substantially similar to the verdict form proposed by Fireman's. Fireman's chose not to ask the jury to make a finding concerning notice, thus forfeiting an opportunity to receive an explicit finding on the question. All factual questions put before the jury inhere in the verdict. CR 49(a); Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 659, 935 P.2d 555 (1997). It was Fireman's obligation to seek the jury's answer to any particular question properly before it. We must assume that all such questions were subsumed within the various questions set forth in the special verdict form.

[18] The trial court's ruling was not an additur. An award of additur is made pursuant to RCW 4.76.030. That statute provides:

> If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the

IV

Having concluded that the trial court did not err by entering judgment in favor of Gosney in the principal amount of the underlying judgment, we turn to Fireman's remaining contentions. Fireman's assigns error to two of the jury instructions. Fireman's also contends that the trial court erred by restricting its presentation of evidence and by refusing to excuse a juror. Finally, Fireman's contends that the trial court erred by ruling that it was collaterally estopped from contesting the underlying judgment. Each contention is addressed in turn.

A

Fireman's contends that two of the court's jury instructions did not correctly state the law.

We review the adequacy of jury instructions de novo. Hall v. Sacred Heart Med. Ctr., 100 Wn. App. 53, 61, 995 P.2d 621 (2000). "Jury instructions are sufficient if they (1) allow each party to argue its theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law." City of Bellevue v. Raum, 171 Wn. App. 124, 142, 286 P.3d 695 (2012) (citing Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987)). "[A]n instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a

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amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict.

When a trial court employs an additur, the court alters the jury's verdict by increasing the amount awarded. Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156 (2007). In so doing, the trial court does not give effect to the verdict. Rather, it corrects the verdict (pursuant to statutory procedure and limitation).

Here, the trial judge gave effect to the jury's verdicts. The judge did not correct or alter the verdicts. In so doing, the judge did not employ an additur.

party." Cox v. Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Error is not prejudicial "unless it affects, or presumptively affects, the outcome of the trial." Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983).

1

Fireman's first contends that the trial court erred by rejecting its proposed instructions defining "collusion" and instead providing an instruction that did not, it asserts, adequately define the term.

Fireman's submitted two proposed jury instructions regarding collusion. The first proposed instruction defined collusion as "undisclosed cooperation or agreement among two or more people for an improper purpose," and further provided that collusion "may be inferred through the conduct of those involved." The second proposed instruction was lengthy and stated:

> What constitutes collusion will differ with each situation. Collusion may be inferred from the circumstances. Factors that could demonstrate collusion include but are not limited to: whether there was concealment; whether the settlement was fairly and honestly negotiated; failure of the settling insured to consider viable available defenses; the length or duration of the arbitration; parallel conduct of the parties at the arbitration; whether a party's investigation and discovery were sufficient for that party and the court to act intelligently at the arbitration; and whether witnesses were subjected to vigorous cross-examination calculated to undermine the testimony.

The trial court rejected Fireman's proposed instructions and instead gave an instruction that defined collusion as "secret cooperation for an illegal or

dishonest purpose."[19] The trial court provided the jury with a separate instruction regarding fraud.

On appeal, Fireman's contends that the trial court's instruction artificially constrains the definition of collusion and invites confusion about what types of agreements are "illegal." Fireman's also contends that, because the trial court did not instruct the jury that collusion could be inferred from attendant circumstances, the jury could have reasonably concluded that a finding of collusion required direct evidence.

Collusion is commonly defined as "[a]n agreement to defraud another or to do or obtain something forbidden by law," BLACK'S LAW DICTIONARY 321 (10th ed. 2014); and as a "secret agreement : secret cooperation for a fraudulent or deceitful purpose . . . : a secret agreement between two or more persons to defraud a person of his rights often by the forms of law." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 446 (2002).

Contrary to Fireman's assertions, nothing in the instruction given serves to constrain the definition of collusion or invite confusion about what constitutes an "illegal . . . purpose." The instruction is clear that collusion can be evidenced by secret cooperation for an "illegal *or* dishonest purpose," allowing Fireman's to argue to the jury that it could find collusion even *sans* illegal activity. (Emphasis added.) Neither do the instructions indicate that direct evidence of collusion is required. Instruction 9 properly instructs the jury that it must find collusion by

[19] The trial court also rejected Plaintiffs' proposed instruction defining collusion as "an agreement to defraud another or to do or obtain something forbidden by law."

clear, cogent, and convincing evidence. Instruction 2 properly instructs the jury that "[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case."

"The precise wording of the instructions is within the broad discretion of the court." Housel v. James, 141 Wn. App. 748, 758, 172 P.3d 712 (2007). The trial court did not abuse that discretion by offering a clear instruction that allowed each party to argue its theory of the case.

2

Fireman's also contends that the trial court erred by instructing the jury that a single violation of the Washington Administrative Code (WAC) constitutes bad faith.

Instruction 12 provides: "A violation, if any, of one or more of the following statutory or regulatory requirements is a breach of the duty of good faith, an unfair method of competition, an unfair or deceptive act or practice in the business of insurance, and a breach of the insurance contract." That instruction lists six unfair methods of competition and unfair or deceptive acts or practices found in WAC 284-30-330.

Instruction 24 provides: "For purposes of the [CPA], a breach of the duty of good faith or a single violation of a statute or regulation relating to the business of insurance is an unfair or deceptive act or practice. A single violation also affects the public interest." That instruction further provides: "If you find that a breach of the duty of good faith or a single violation of a statute or regulation

relating to the business of insurance has occurred, then you must find that the first three elements of a [CPA] violation have been proved."

Fireman's contends that a single violation of the WAC is insufficient to support a finding of bad faith. Fireman's relies on WAC 284-30-300 to support its contention. Pursuant to that regulation:

> The purpose of this regulation, WAC 284-30-300 through 284-30-400, is to define certain minimum standards which, *if violated with such frequency as to indicate a general business practice*, will be deemed to constitute unfair claims settlement practices.

WAC 284-30-300 (emphasis added).

Our Supreme Court previously rejected an argument similar to the one now pressed by Fireman's. See Indus. Indem. Co. of the Nw., Inc. v. Kallevig, 114 Wn.2d 907, 923-24, 792 P.2d 520 (1990). In that case, Industrial Indemnity argued that the trial court erred by instructing the jury that a single violation of WAC 284-30-330 constitutes an unfair trade practice. Kallevig, 114 Wn.2d at 921. Our Supreme Court disagreed.

> A violation of WAC 284-30-330 constitutes a violation of RCW 48.30.010(1),[20] which in turn constitutes a per se unfair trade practice . . . . This per se unfair trade practice may result in CPA liability if the remaining elements of the 5-part test for a CPA action under RCW 19.86.090 are established.
>
> . . . .
>
> The language of RCW 48.30.010 is plain and unambiguous. RCW 48.30.010 does not contain the frequency requirement set forth in WAC 284–30–300. RCW 48.30.010 prohibits insurers from engaging in any unfair trade practice. In other words, under RCW 48.30.010, a single violation of WAC 284-30-330 constitutes a statutorily proscribed unfair trade practice. Accordingly, an insured may establish a per se unfair trade practice under the CPA by

[20] RCW 48.30.010 prohibits insurers from engaging in unfair trade practices and permits the commissioner to promulgate regulations and define other acts and practices as unfair or deceptive.

> demonstrating a violation of RCW 48.30.010 based upon a single violation of WAC 284-30-330.

Kallevig, 114 Wn.2d at 923-24.

The jury instructions correctly stated the law.

B

Fireman's next contends that it was prevented from presenting its case because it was not permitted to "call Beninger."

> At trial, Vose testified that Bundy and Beninger drove the settlement and arbitration. . . . If judgment is not entered for [Fireman's], at a minimum, [Fireman's] is entitled to a new trial because denying it the right to cross-examine Beninger—given his pivotal role in the fraud and collusion and given that key trial exhibits were his own statements—impeded [Fireman's] ability to present key defenses. This prejudice was exacerbated by the fact that both fraud and collusion under the jury instructions, required [Fireman's] to establish the speaker's intent. . . . [Fireman's] was thus given an improperly burdensome task—to prove fraud or collusion by clear and convincing evidence without cross-examining the person who orchestrated the false statements. This prejudice was magnified by Beninger's appearance as the lead trial attorney for Plaintiffs during the five week trial.

Br. of Appellant at 58-59 (footnote omitted).

Fireman's complains that it was "not permitted to call Beninger" but does not identify or assign error to any court order prohibiting it from calling Beninger as a witness. Rather, the record reveals that Fireman's itself moved in limine to bar Plaintiffs from offering as evidence Beninger's knowledge and testimony concerning the facts at issue in this litigation: "In particular, the Court should direct Mr. Beninger to refrain from testifying as a fact witness at trial or offering verbal commentary that takes the form of testimony during voir dire, witness questioning, opening statements, and closing argument." Defendants' Omnibus

Motions in Limine at 5. The trial court granted Fireman's motion and Beninger did not testify at trial.

The trial court granted Fireman's the relief that it sought. Fireman's attempt to appeal from that relief is unavailing.

C

Fireman's next asserts that the trial court improperly restricted its presentation of evidence by limiting the scope of an expert witness's testimony.

We review a trial court's admission or rejection of expert testimony for an abuse of discretion. State v. Weaville, 162 Wn. App. 801, 824, 256 P.3d 426 (2011). Expert witness testimony is admissible to assist the trier of fact in understanding the evidence or in determining a fact in issue. ER 702. Generally, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." ER 703.

Fireman's retained an expert witness, attorney Jeff Tilden, to offer opinion testimony regarding the settlement and arbitration processes. Tilden was deposed on November 26, 2014. During his deposition, Tilden testified that he was concerned about the settlement and arbitration processes. However, Tilden opined that there was nothing wrong with the settlement agreement itself and that it was *not* the product of fraud or collusion.

Prior to trial, both Plaintiffs and Fireman's moved in limine for an order prohibiting the presentation of undisclosed expert opinions. The trial court granted the requests.

During trial, Tilden offered expert testimony that varied from his deposition testimony. Tilden testified:

> By agreement, Mr. Bundy rolled over in the arbitration proceeding and put up no testimony at all to speak of. By agreement it appears that Mr. Bundy and the plaintiff's lawyers manufactured the argument that Ms. Heller was an employee of Mr. Vose's corporation. By agreement, the parties volunteered Mr. Vose's as . . . a liable defendant, despite the fact he had one spectacular argument for defeating liability, and a second one I believe is very good. By agreement, they defrauded the bankruptcy court or stood by while it happened.

Plaintiffs interposed an objection, asserting that Tilden's testimony constituted an undisclosed expert opinion in violation of the court's order. Plaintiffs argued that Tilden's testimony as to the manufacturing of Vose's liability contradicted his deposition testimony that the settlement agreement was not the product of fraud.[21] Fireman's responded by arguing that Tilden's testimony was based on new information gleaned from Vose's trial testimony.

The trial court reviewed Vose's trial testimony and determined that it did not vary from his deposition testimony.[22] The trial court ruled that there was no substantial change in circumstances and, accordingly, Tilden could testify as to his concerns regarding the settlement process but could not opine that the settlement agreement itself was the product of fraud or collusion, as such testimony would constitute a previously undisclosed expert opinion and thus be a

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[21] Plaintiffs also objected to Tilden opining that Heller was not a PT employee and opining that Plaintiffs agreed to defraud the bankruptcy court. The trial court ultimately allowed Tilden to testify as to the Heller employment issue but prohibited Tilden from testifying as to the claim of bankruptcy fraud. On appeal, Fireman's has assigned error to only the trial court's ruling prohibiting Tilden from opining on fraud or collusion in the settlement agreement.

[22] Fireman's asserted to the trial judge that Vose testified at trial that "my lawyers told me I should commit fraud." The judge's review of the trial transcript revealed no such testimony.

violation of the order in limine. The trial court instructed the jury to ignore those parts of Tilden's testimony addressing the manufacturing of Vose's personal liability. Tilden then provided extensive testimony as to his qualms about the settlement and arbitration processes. Tilden testified that the settlement process "was a joint attempt to manufacture [a] bad faith claim down the road."

The trial court's ruling was not an abuse of discretion. Fireman's retained Tilden to opine on the settlement and arbitration processes. During his deposition testimony, Tilden opined that the settlement agreement was not the product of fraud. Tilden's trial testimony to the contrary constituted a previously undisclosed expert opinion. It was not based on information that was unknown at the time of the motion in limine. Accordingly, it constituted a violation of the trial court's previous order.

The trial court did not err by so ruling.

D

Fireman's next contends that the trial court erred by refusing to excuse a juror who worked with Vose's wife and was exposed to her out-of-court reactions to the case.

"Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and will not be reversed on appeal unless the court abused its discretion." Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003). The burden is on the party alleging juror misconduct to show that the misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967).

Following the submission of the case to the jury, one juror sent an e-mail to the bailiff:

> I wanted to let the judge know that a co-worker of mine mentioned in a group setting a few weeks ago that she was in a meeting with Kimberly Hill (Kim Vose) and she stated that Kimberly seemed distracted, out of it, and not productive. Due to the requirements to maintain confidentiality, I didn't respond and extricated myself from the conversation. . . .
>
> Because I do not work directly (nor does my colleague who made these comments) with Kimberly Hill, I do not have any idea how she normally presents herself in the work environment. . . . In fact, I have never worked directly with Kimberly or any of her colleagues on any official county matters. . . . I do not and have not socialized with Kimberly or any of her colleagues, or her direct manager.

Fireman's asked the trial court to excuse the juror. Fireman's was concerned that the juror had received information about Hill's emotional state that was not presented at trial and that Fireman's had no opportunity to cross-examine the individual who made the statements.[23]

The trial court determined that Hill heard the information third hand, did not respond, and terminated the conversation immediately. The trial court noted that the juror did not know the context of the information. The trial court determined that there were no grounds to disqualify the juror and, accordingly, denied Fireman's request.

The trial court's ruling was not an abuse of discretion. That the juror heard third hand information that Hill was "distracted, out of it, and not productive" was of no consequence. Such a disclosure establishes neither misconduct nor prejudice.

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[23] The juror had previously disclosed her association with Hill during voir dire.

E

Fireman's next contends that the trial court erred by ruling that it was bound by the underlying judgment. Fireman's asserts that the "judgment rule" does not apply because a reasonableness determination cannot be the product of an arbitration. Fireman's also asserts that it cannot be held liable for the underlying judgment pursuant to a theory of collateral estoppel. Each contention is addressed in turn.

1

As discussed herein, once the amount of a covenant judgment is deemed reasonable, it becomes the presumptive measure of damages in a later bad faith action against the insurer. Bird, 175 Wn.2d at 765 (citing Besel, 146 Wn.2d at 738). The "judgment rule" binds an insurer acting in bad faith to the judgment rendered against its insured, even if the judgment exceeds contractual policy limits. Miller, 180 Wn. App. at 799.

Fireman's contends that it cannot be held liable for the underlying judgment pursuant to the judgment rule. This is so, it asserts, because a reasonableness determination cannot be the product of an arbitration.

As a preliminary matter, we note that, despite its numerous blanket assertions that a reasonableness determination cannot be the product of an arbitration, Fireman's has devoted only four sentences and a single footnote of its 190 pages of appellate briefing to a discussion of the merits of its contention. Fireman's cites to no authority, save an e.g. citation to the Uniform Arbitration Act, in support of its averment.

Parties are required to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), remanded on other grounds, 132 Wn.2d 193, 937 P.2d 597 (1997). In addition, "'[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Fireman's briefing on its assertion does not meet these expectations.[24]

Reasonableness determinations are a product of RCW 4.22.060. The legislature's purpose in enacting the statute was to facilitate contribution actions between (and allocate financial responsibility among) tortfeasors. "That statute

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[24] We also note that Fireman's theory on appeal is different from the one it advanced in its motion for partial summary judgment. Fireman's argued therein that the judgment rule did not apply because Plaintiffs were not permitted to arbitrate the amount of a covenant judgment. According to Fireman's, the amount of the covenant judgment could only be determined through negotiation and settlement.

> Here, the settlement agreement provided that Plaintiffs . . . would attempt, within 30 days, to settle for a specific amount; but they never did. . . . There is therefore no settlement amount reached by negotiation and compromise. There is no settlement amount that could be evaluated under the [reasonableness] factors, and no negotiated amount as to which the test of collusion or fraud could be applied.
>
> Instead of a negotiated settlement amount, there is in this case an arbitration award determined in putative litigation. An arbitration award, determined on the merits, is not evaluated for reasonableness.

Fireman's Fund's Mot. for Partial Summ. J. at 12 (footnote omitted).

Contrary to Fireman's argument below, the settlement agreement explicitly provided for arbitration as a means of determining the final settlement amount. That fact, and the fact that Fireman's itself moved to stay the litigation until Plaintiffs could "conduct and conclude their arbitration to determine the final value of the settlement in their underlying litigation," may account for Fireman's assertion of a different argument on appeal.

was enacted as part of the tort reform act in 1981 to provide a means to allocate liability among joint tortfeasors. Originally under the statute, a trial court would determine whether a settlement amount between a tort victim and fewer than all tortfeasors was reasonable." Bird, 175 Wn.2d at 766 (citing Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 716, 658 P.2d 1230 (1983), abrogated by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988)). "If so, a nonsettling tortfeasor could offset that exact amount from a damages award at trial." Bird, 175 Wn.2d at 766. The Supreme Court adopted nine factors for trial courts to consider when making a reasonableness determination pursuant to RCW 4.22.060:

> "[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released."

Glover, 98 Wn.2d at 717 (alteration in original).

The legislature's purpose in enacting the reasonableness statute had nothing to do with covenant judgments. Indeed, when lawyers first invoked reasonableness hearings as a means of facilitating covenant judgments, there existed neither a legislative nor a Supreme Court pronouncement that such actions were authorized. Nevertheless, eventually, the application of RCW 4.22.060 reasonableness hearings to the approval of covenant judgments was explicitly endorsed by our Supreme Court. See Bird, 175 Wn.2d at 767. The purpose of a reasonableness hearing in this setting is to present a negotiated

settlement to a neutral party—typically a judge—to protect the insurer from excess judgments and fraud or collusion between the settling parties. Bird, 175 Wn.2d at 765-66. These are similar to the concerns arising in contribution actions that necessitated the statute's adoption.

Arbitrators are a neutral party absent a material interest in the outcome of arbitration or a substantial relationship with a party. RCW 7.04A.110(2). Herein, Judge Burdell was a neutral party who determined an appropriate settlement amount. Judge Burdell also considered the nine reasonableness factors and determined that the settlement amount was reasonable.[25] Judge McPhee explicitly confirmed both the amount awarded and the reasonableness finding.[26]

That, by agreement, Judge Burdell imposed the damages amount on the parties (as opposed to the parties agreeing on the amount) is a more arms-length proceeding than that involved in the typical covenant judgment scenario. Additionally, Judge O'Donnell allowed Fireman's to present evidence to the jury on its assertions as to lack of notice, lack of an opportunity to participate in the underlying litigation, and other matters that Fireman's believed pointed to fraud or collusion.

Fireman's does not attempt to evaluate the proceeding here employed. That this exact approach has never been explicitly sanctioned by the Supreme Court does not necessarily mean that the procedure discussed in Bird is the

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[25] Fireman's did not resist the entry of Judge McPhee's confirmation order nor did it appeal therefrom. The only relief it requested was the deletion of its name from the caption.

[26] The face of the arbitration award recites both "Plaintiffs' damages total: $10,800,289.00," and "A reasonable covenant judgment, considering all Bird/Besel factors, is $10,800,289.00."

exclusive appropriate procedure. On this briefing, we cannot make a reasoned decision on the question.

Neither does Fireman's address related questions. For instance, assuming that Fireman's argument has merit, was Fireman's required to raise the issue to the arbitrator? To the Thurston County superior court when it confirmed the arbitration award and reasonableness finding? To the King County superior court when Fireman's moved to compel the arbitration? Fireman's briefing does not acknowledge these questions, let alone analyze them. In addition, the law being as it is, we assume that other murky issues lie in wait, to be raised in a helpfully-briefed future case.

On this record, and on this briefing, Fireman's does not present a suitable opportunity for reasoned decision-making. Accordingly, its claim does not warrant appellate resolution. Palmer, 81 Wn. App. at 153.

Fireman's fails to establish that the judgment rule does not apply under these circumstances. It does not establish an entitlement to appellate relief.

2

As a corollary to its claim that the judgment rule was inapplicable, Fireman's asked the trial court to rule that it was also not bound to the underlying judgment by collateral estoppel. Fireman's contends that the trial court erred by ruling to the contrary.[27]

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[27] Fireman's characterized the issue of collateral estoppel as its "defense." See Br. of Appellant at 21, 54-57. In its reply brief, Fireman's characterizes collateral estoppel as its "affirmative defense" and asserts that an order denying an affirmative defense cannot serve as a basis to award damages. Reply Br. of Appellant at 96-98.

Collateral estoppel is not an affirmative defense. Fireman's argued to the trial court that the judgment rule did not apply to bind it to the underlying judgment and, as a result, the only way

"The purpose of the doctrine of collateral estoppel is to promote judicial economy by avoiding relitigation of the same issue, to afford the parties the assurance of finality of judicial determinations, and to prevent harassment of and inconvenience to litigants." Lemond v. Dep't of Licensing, 143 Wn. App. 797, 804, 180 P.3d 829 (2008) (citing Hanson v. City of Snohomish, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)). The proponent of the application of the doctrine has the burden of proving four elements:

> "(1) [T]he issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice."

Thompson v. Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999) (quoting Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998)).

Here, the trial court considered the four elements of collateral estoppel and found each element established. The trial court found that Fireman's had notice of the arbitration and an opportunity to intervene. The trial court found that the arbitration was "actually litigated." The trial court found that, at the arbitration, Vose's and PT's interests were in privity with Fireman's interests. Finally, in its order denying reconsideration, the trial court found that application of the doctrine would not work an injustice. Accordingly, the trial court ruled that Fireman's was collaterally estopped from contesting the underlying judgment.

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it could be held liable for the underlying judgment was pursuant to a theory of collateral estoppel. Fireman's asked the trial court to rule on the issue of collateral estoppel and the trial court did so. This was not error.

An appellate court can affirm a trial court judgment on any basis within the pleadings and proof. Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The trial court's ruling on collateral estoppel provides such an alternative basis for affirmance. Fireman's had notice of the arbitration and an opportunity to intervene, as determined first by Judge Burdell, then by Judge McPhee, and finally by Judge O'Donnell in his ruling on collateral estoppel. As Judge O'Donnell ruled, (1) Judge McPhee's order entering judgment against Vose and PT and in favor of Gosney constituted a final judgment on the merits, (2) the arbitration hearing was "actually litigated"—a determination supported by the jury's finding that no fraud or collusion occurred, and (3) Fireman's was in privity with Vose and PT because it owed both contractual and statutory duties to its insured.

Finally, application of the doctrine did not work an injustice on Fireman's. As the trial court ruled,

> Fireman's Fund—a sophisticated, national insurance company with highly competent in-house and outside counsel—evaluated whether it should attend the arbitration hearing after receiving notice that it would occur. Fireman's Fund had options available to it when presented with that information. It made a decision to avoid the hearing altogether.
>
> An insurer places itself in a most difficult posture when it has notice of settlement but then fails to take steps to sufficiently protect its interests.
>
> Given that backdrop, the Court cannot find that the procedural irregularities that occurred during the arbitration amounted to an injustice. Nor can this Court find that binding Fireman's Fund to the arbitration award would work an injustice. This is particularly true in the posture of an insurance case, when "so long as the carrier 'has notice and an opportunity to intervene in the underlying action against the tortfeasor,' it will be bound by the findings, conclusions, and judgment of the arbitral proceeding."

Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 274, 996 P.2d 603, 606 (2000).

Fireman's fails to establish an entitlement to appellate relief.[28]

V

We next address Gosney's cross-appeal. Gosney contends that the trial court erred by declining to award interest on the underlying judgment commencing on the date on which the settlement agreement was signed. We disagree.

Prejudgment interest is allowable "(1) when an amount claimed is 'liquidated' or (2) when the amount of an 'unliquidated' claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract." Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A claim is liquidated where "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." Prier, 74 Wn.2d at 32 (citing CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 54 (1935)).

Here, the settlement agreement provided for a 12 percent interest rate accruing and compounding annually on the unpaid damages from the date of signing, September 2, 2008. The settlement agreement further provided that "the

[28] Fireman's also contends that the trial court erred by not granting its CR 50(a) motion on its affirmative defenses of fraud and collusion. Although Fireman's assigns error to the trial court's ruling, its argument on appeal consists of a single paragraph disputing factual questions not at issue here. In any event, fraud and collusion were factual matters resolved by the jury, which heard extensive and conflicting testimony on the matters.

parties agree to have the full amount of the damages and/or judgments determined by stipulation approved as reasonable by the Court, or arbitration."

By the terms of the settlement agreement, the damages were unliquidated. See Hansen v. Rothaus, 107 Wn.2d 468, 477, 730 P.2d 662 (1986) ("Because reliance upon opinion and discretion is necessary in determining whether the amounts expended were reasonably necessary and reasonable in amount, medical expenses, here cure, are unliquidated."). It was not until Judge McPhee entered an order confirming the arbitration award as reasonable and entering judgment against Vose and PT for $10,800,289 that the exact amount due was determinable.

Gosney also contends that the terms of the insurance policy require that interest accrue from the date of the settlement agreement. The policy provides payment for "[a]ll interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within our Limit of Insurance." Because Fireman's has never paid its policy limits, Gosney asserts that interest on the $2.5 million partial judgment should accrue from the date of the settlement agreement. But the "entry of the judgment" did not occur until November 16, 2012—the terms of the policy do not contemplate prejudgment interest.

The trial court entered judgment with interest on the underlying judgment amount compounding annually as of November 16, 2012, the date of confirmation of the arbitration award by Judge Tabor. The trial court did not err by so doing.

VI

In their cross-appeals, Vose and PT contend that the trial court erred by ruling that they were judicially estopped from having judgment entered in their favor on the jury's verdicts. We agree.

A

We review an application of the doctrine of judicial estoppel for an abuse of discretion.[29] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007); Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 227, 108 P.3d 147 (2005); see Taylor v. Bell, 185 Wn. App. 270, 283 n.13, 340 P.3d 951 (2014) (reviewing a trial court's summary judgment decision based on judicial estoppel). A decision constitutes an abuse of discretion when it is manifestly unreasonable or based on untenable grounds or reasons. Kreidler v. Cascade Nat'l Ins. Co., 179 Wn. App. 851, 861, 321 P.3d 281 (2014).

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Fiorito, 112 Wn. App. 657, 664, 50 P.3d 298 (2002).

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" Arkison, 160 Wn.2d at 538 (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). "There

[29] The parties dispute the standard of review applicable to the trial court's order. Because the trial court granted Fireman's motion after the entry of the jury's verdict—and entered findings of fact after reviewing the entire record—we apply the abuse of discretion standard.

are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Judicial estoppel is intended to protect the integrity of the courts—it is not designed to protect litigants. Arp v. Riley, 192 Wn. App. 85, 91, 366 P.3d 946 (2015), review denied, 185 Wn.2d 1031 (2016).

A trial court's determination of whether to apply the judicial estoppel doctrine is guided by three core factors:

> (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Taylor, 185 Wn. App. at 282 (citing Anfinson, 174 Wn.2d at 861).

> As a general rule, if a debtor in a bankruptcy proceeding fails to report a cause of action and obtains a discharge or confirmation, a trial court may apply judicial estoppel to bar the action. This prevents a debtor from protecting the asset from creditors by representing to the bankruptcy court that no claim exists and then asserting in another court that the claim does exist. But "[a] party's nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit," especially where a party lacks knowledge or has no motive to conceal the claims.

Arp, 192 Wn. App. at 92-93 (footnotes omitted) (citing Ah Quin v. County of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013) quoting Miller v. Campbell, 137 Wn. App. 762, 771, 155 P.3d 154 (2007), aff'd on other grounds, 164 Wn.2d 529, 192 P.3d 352 (2008)).

B

Following entry of the jury's verdict, the trial court ruled that Vose was judicially estopped from recovering any damages in this matter:

> Plaintiff's attempt to distinguish a claim vs. reservation of damages in support of their proposition that Mr. Vose's failure to disclose the settlement agreement in the bankruptcy proceeding is of no moment. What is abundantly clear is that the bankruptcy petition required Mr. Vose to disclose equitable and future interests of *all* his assets and other personal property of any kind. Trial Ex. 384. His reservation of an ability to seek damages in the instant case falls under this broad category. Despite his awareness of this lawsuit and his reserved claim for damages, he failed to disclose them.
>
> All of the elements of judicial estoppel have been met here with respect to Mr. Vose's retention of his right to pursue damages. His position during this case is clearly inconsistent with his declaration during this bankruptcy proceeding. His recovery here surely creates the perception that he has misled the bankruptcy court. His ability to collect these funds will amount to a fraud on the bankruptcy court, as any funds he stands to collect from this award should flow to his creditors.

The trial court also ruled that, because Vose was the sole shareholder of PT, PT was likewise judicially estopped from recovering damages.

As a preliminary matter, we note that the trial court made no findings to support its conclusion that PT was judicially estopped from recovering on the jury's verdict. Vose declared personal bankruptcy in 2010. PT has never declared bankruptcy. The trial court made no findings of alter ego, comingling of assets, a failure to adhere to corporate formalities, or any other finding that could support a ruling extending judicial estoppel to PT. Rather, the trial court simply noted that Vose is the sole shareholder of PT. In this, the court erred.

In addition, the trial court failed to adequately consider the nature of the interest retained by Vose and whether disclosure of that interest would have changed the outcome of the bankruptcy.

The bankruptcy petition required Vose to list "contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." "At the commencement of bankruptcy, the debtor must disclose all of his assets to be included in the bankruptcy estate for the potential benefit of creditors." Miller v. Campbell, 164 Wn.2d 529, 540, 192 P.3d 352 (2008) (citing 11 U.S.C. § 521(a)(1)). "The bankruptcy estate includes all the debtor's potential claims or causes of action that existed at the time he or she filed for bankruptcy." Miller, 164 Wn.2d at 540 (citing 11 U.S.C. § 541(a)(1)).

Contrary to the trial court's conclusion, it was not proved that, at the time of the bankruptcy filing, Vose had any such asset, claim, or cause of action to disclose.

Initially, it is apparent from the language of the settlement agreement that Vose had no right or ability to personally institute a claim or lawsuit against Fireman's. Vose could not initiate a lawsuit against Fireman's himself and he could not compel Gosney to file such a suit. As a corollary, Vose could not prevent Gosney from filing suit against Fireman's nor could he control any of the claims that Gosney might decide to bring.

In addition, Fireman's presented no evidence whatsoever—and the trial court made no findings—as to the precise nature and value of Vose's interest. Pursuant to 11 U.S.C. § 541(a)(1), the bankruptcy estate is established at the

"commencement of a case," i.e., at the filing of the petition. A debtor's recovery for an act that occurs *after* the "commencement of a case" is not at issue. As the proponent of the judicial estoppel defense, Fireman's bore the burden of proving that, at the time that Vose filed for bankruptcy, he possessed some cognizable and valuable interest. But Fireman's offered no such proof. Rather, 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. Indeed, had Fireman's agreed to the terms of the settlement agreement and paid the policy limits, Gosney would have released all claims against Fireman's (with or without Vose's assent), leaving Vose with no damages to recover and no claim or cause of action to assert.

Finally, Fireman's presented no evidence that disclosure would have changed the outcome of the bankruptcy. Fireman's offered no evidence to prove that any creditor would have requested a plan amendment if Vose had disclosed his potential interest in a lawsuit. Fireman's offered no evidence that the bankruptcy court would have changed the relief that it imposed had Vose disclosed the potential interest. Such proof is necessary. Arp, 192 Wn. App. at 99-101. Thus, even assuming that Vose had *something* to disclose to the bankruptcy court, Fireman's failure to produce *any* evidence that disclosure would have changed the outcome of the bankruptcy proceedings precludes application of judicial estoppel.

C

Judicial estoppel does not exist to create a windfall for the proponent party. Arkison, 160 Wn.2d at 540 (quoting Bartley-Williams, 134 Wn. App. at 102). Rather, the doctrine is designed to protect the integrity of the judicial process. Arp, 192 Wn. App. at 100. Here, Fireman's offered insufficient evidence—and the trial court made insufficient findings—to support applying the doctrine of judicial estoppel to either Vose or PT. Vose's alleged failure to disclose an amorphous and possibly valueless interest to the bankruptcy court does not preclude him from recovering damages arising from the *postbankruptcy* filing bad faith conduct of the proponent party. Similarly, given that PT is a separate legal entity that *never* filed a bankruptcy petition, application of the doctrine to it was entirely unwarranted.

We reverse the trial court's order on judicial estoppel and remand for the entry of a judgment in favor of Vose and PT consistent with the jury's verdicts.[30]

VII

Finally, Fireman's contends that the trial court erred by awarding Vose and PT attorney fees and costs, including a lodestar multiplier of 1.25.[31]

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[30] Fireman's contends that the trial court erred by awarding Gosney the underlying judgment amount because, it avers, the court's ruling on judicial estoppel "must be understood to negate the jury's finding of harm, by reducing all damages to zero." Br. of Appellant at 51. Because harm is an essential element of the bad faith handling of an insurance claim, and because Plaintiffs cannot establish harm as a result of the court's judicial estoppel ruling, Fireman's reasons, it was error to award Gosney the underlying judgment amount.

Fireman's cites to no authority to support its assertion that the application of judicial estoppel against Vose or PT should somehow preclude Gosney, who bargained for and obtained an assignment of Vose's prebankrupcy claims and causes of action prior to Vose filing for bankruptcy, from recovering against Fireman's. In any event, because we reverse the trial court's order on judicial estoppel, we need not further address this contention.

[31] Fireman's has not assigned error to the trial court's award of attorney fees and costs to Gosney.

A

We review a trial court's award of attorney fees for an abuse of discretion. Miller, 180 Wn. App. at 820. Washington follows the American rule "that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity." McGreevy v. Or. Mut. Ins. Co., 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995). The CPA and IFCA both permit an award of attorney fees and costs to the prevailing party. RCW 19.86.090; RCW 48.30.015(3). The "prevailing party" in a lawsuit is the one who receives a judgment in his favor. Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey, 107 Wn.2d 181, 194-95, 728 P.2d 155 (1986).

Attorney fees and costs may also be awarded pursuant to Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991). Under Olympic Steamship, "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue." 117 Wn.2d at 53. "The equitable basis established in Olympic Steamship for attorney fee awards is limited to efforts necessary to establish coverage for claims against the insured and is based on the rights of the insured." Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 795-96, 189 P.3d 777 (2008).

Here, the trial court found that Plaintiffs were the prevailing parties on all causes of action, including the CPA, IFCA, bad faith, contract, and negligence.[32] The trial court found that the claims and defenses "involved a common core of facts, evidence, testimony and theories, in which the time devoted to discovery, pretrial motions and preparation, trial and post-trial matters of this intertwined action cannot be reasonably segregated." The trial court awarded Vose and PT attorney fees totaling $400,812.50 and costs totaling $4,800.00.

Vose and PT were the prevailing parties on all claims advanced against and by Fireman's. Accordingly, Vose and PT may recover attorney fees and costs associated with advancing the CPA and IFCA claims. RCW 19.86.090; RCW 48.30.015(3). Because the trial court found that these claims were intertwined with and inseparable from the other claims advanced by Vose and PT—a finding supported by the record—it did not err by declining to parse out the fees and costs associated with each individual claim. Miller, 180 Wn. App. at 823-24.

Fireman's also contends that the trial court erroneously awarded Vose and PT attorney fees associated with the arbitration. There is no indication in the record that the trial court awarded Vose and PT fees or costs associated with the underlying arbitration.[33] However, even if it did, we conclude that such an award

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[32] Fireman's first contends that the trial court's judicial estoppel rulings should have served as a basis to deny an attorney fee award to Vose and PT. Because we reverse that decision, we need not further discuss this theory.

[33] The only citation to the record that Fireman's provides concerns the trial court's award of costs to *Gosney*. The trial court noted that its award to Gosney "does not include costs associated with the underlying arbitration & reasonableness hearing." Contrary to Fireman's assertions, this does not establish that the trial court awarded Vose and PT costs associated with the underlying arbitration.

is tenable pursuant to Olympic Steamship. As discussed herein, Vose and PT assigned all claims and causes of action to Gosney in the settlement agreement. But before Gosney could step into the shoes of Vose and PT and pursue her claims against Fireman's, Plaintiffs were forced into an arbitration proceeding compelled by Fireman's. The fees and costs associated with this arbitration were thus necessary predicates for Vose and PT to receive the benefit of their insurance contract. Olympic S.S., 117 Wn.2d at 53.

There was no abuse of discretion.

B

Adjustments to the lodestar are reserved for rare occasions. Miller, 180 Wn. App. at 825. Although the lodestar presumptively represents a reasonable fee, "occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case." Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 542, 151 P.3d 976 (2007).

Here, the trial court found that a lodestar multiplier was warranted.

> A lodestar multiplier of 1.25 is appropriate given the contingent representation and risks this matter presented at the inception and throughout the nearly 7 years (or beyond) of non-payment, and due to the exceptional quality of representation provided to the plaintiffs by their counsel. Although the judgment is substantial, it has not been paid. Further, at the time of pursuing the claims, and accepting and defending the cross-claims, the risk of non-payment was significant.

The trial court's ruling was sound. Plaintiffs' attorneys have received no payment pursuant to the claims advanced against Fireman's during the many years that this complex litigation has stretched on, and have faced a high degree

of risk that they would never be paid at all. The trial court did not abuse its discretion by utilizing a modest lodestar multiplier.

We reverse the trial court's order on judicial estoppel, affirm in all other respects, and remand the matter to the trial court for any necessary proceedings consistent with this opinion.[34]

We concur:

COX, J.

[34] Gosney, Vose, and PT also request an award of appellate fees. Vose and PT are entitled to an award of appellate fees pursuant to the CPA. RCW 19.86.090; Ewing v. Glogowski, 198 Wn. App. 515, 526, 394 P.3d 418 (2017). Gosney is entitled to an award of appellate fees pursuant to Olympic Steamship, 117 Wn.2d at 53. Upon proper application, a commissioner of our court will enter an appropriate award.

LEACH, J. (dissenting) — I dissent because I disagree with the trial court's decision to add $10.8 million to the jury's verdict. While no special verdict question asked the jury whether Fireman's Fund Insurance Company proved that its breach of its duty to defend did not harm the plaintiffs, the jury's answers to the special verdict questions answer this question and show that the jury found this breach caused no harm to plaintiffs. For this reason, the trial court improperly added $10.8 million to the jury's damage award.

The following review of the jury instructions and the jury's answers to the special verdict form questions show that the jury followed the court's instructions and did not intend to award this amount because it affirmatively found that Fireman's breach of its duty to defend and/or settle did not harm plaintiffs Pizza Time Inc. and Pizza Time Holdings of Washington (collectively Pizza Time) or John Vose.

Plaintiffs presented evidence supporting several theories of Fireman's failure to act in good faith. In addition to its breach of its duty to defend and/or settle, plaintiffs presented evidence of Fireman's failure to timely respond to pertinent communications, failure to investigate, and failure to obtain its insured's consent before pursuing a trial continuance.

Special verdict question 1a asked the jury whether the plaintiffs had proved all elements of any or all of their claims. It also told the jury that the elements were described in the jury instructions. The jury answered yes for each of the plaintiffs' five claims, including breach of duty of good faith.

Special verdict question 1b asked whether the jury found a breach of the duty to defend or settle, to which the jury also answered yes. This had significance to the jury.

Instructions 17, 53, and 54 provided a different rule for determining damages for a breach of this duty than the rule for other breaches of the duty of good faith.

Instructions 17 and 53 each provided in part,

> If you find that Fireman's failed to act in good faith by breaching its duty to defend and/or settle, then the law presumes that Plaintiffs Pizza Time and Mr. Vose were injured and that the failure to act in good faith was the proximate cause of this injury. You are bound by that presumption unless you find that Fireman's failure to act in good faith did not injure Plaintiffs Pizza Time and Mr. Vose.

Instruction 54 provided in part,

> If you find for the Plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith as to duty to defend or settle, your verdict must include the amount of the judgment on the arbitration award, unless you further find for Fireman's Fund/American Insurance Company on its affirmative defense that the settlement was the product of fraud or collusion. The judgment amount is $10,800,289, plus interest.
>
> . . . .
>
> As to the duties to defend and/or settle, Fireman's Fund/American Insurance Company has the burden of proving that any act of [sic] failure to act in good faith did not injure harm, damage or prejudice the plaintiffs.

Instructions 17, 53, and 54 all direct the jury to treat a breach of the duty to defend and/or settle differently from other breaches of the duty of good faith when determining damages. This explains in part why the court included question 1b in the special verdict form.

In addition, the court instructed the jury about an affirmative defense to Fireman's breach of the duty to defend and/or settle. Instruction 52, about waiver, provided in part,

> In this case, Fireman's duty to provide a defense to Plaintiffs Pizza Time and Mr. Vose was excused if Fireman's has proved, by a

> preponderance of the evidence, that Plaintiffs Pizza Time and Mr. Vose waived their right to that performance under the contract.

Special verdict question 3[1] asked the jury whether the defendants had proved all elements of any or all of their defenses. The jury answered yes for the defense of waiver and no for all other defenses, including fraud and collusion. This means that the jury found that Pizza Time and Vose waived Fireman's duty to provide a defense. Instructions 17 and 53 defined the elements of the breach of good faith claim.[2] These instructions distinguished the failure to defend and/or settle from the other breach of good faith claims. The court told the jury it must presume that Fireman's breach of the duty to defend and/or settle harmed Pizza Time and Vose unless Fireman's proved this breach did not injure Pizza Time and Vose. For the other breach of good faith claims, the plaintiffs had to prove "[t]hat Plaintiff Pizza Time or Mr. Vose was damaged."

Because the jury found that Fireman's had proved that Pizza Time and Vose had waived Fireman's duty to defend and/or settle, the jury necessarily also found that Fireman's had proved that its breach of this duty did not harm Pizza Time or Vose. As a result, plaintiffs had not proved a breach of good faith claim based on a breach of the duty to defend and/or settle. The trial court and the majority both fail to account for the jury's waiver decision.

---

[1]Special verdict question 2 asked about contributory negligence. The jury found that the defendants had not proved the plaintiffs were contributorily negligent.

[2]These instructions are identical. Fireman's objected to the court giving the same instruction twice. The record does not disclose the trial court's reason for doing so.

Instruction 54 required the jury to include the judgment amount in its verdict if it found for the plaintiffs "on their claim that Fireman's Fund/American Insurance Company failed to act in good faith as to duty to defend."

Special verdict question 4a asked the jury what amount of damages it found that plaintiffs Vose and Pizza Time incurred. The jury answered,

	Damages:
Negligence:	$100,000.00
Breach of Contract:	$ 20,000.00
Breach of Duty of Good Faith:	$300,000.00
Breach of Consumer Protection Act:	$ 20,000.00
Breach of Insurance Fair Conduct Act:	$ 20,000.00

Special verdict question 4b asked the jury whether these damage amounts included the $10 million judgment. The jury answered no.

No special verdict question asked the jury whether Fireman's proved that its breach of its duty to defend and/or settle did not harm the plaintiffs. But the jury's answers to questions 1b, 3, 4a, and 4b, when viewed in the context of the instructions as a whole, answer this question. The jury found that Fireman's breached its duty to defend and/or settle (answer to 1b) but that Pizza Time and Vose waived performance of this duty (answer to 3). If the jury followed instructions 17 and 53, as we must presume they did, its decision not to include the judgment in its damage award for the breach of the duty of

good faith means two things. First, that the jury found this breach did not injure Pizza Time or Vose. And second, that some other breach of this duty did injure them.

The jury's answers to the special verdict questions are consistent with each other and demonstrate that the jury followed the court's instructions. Under these circumstances, the trial court did not have the authority to add $10.8 million to the jury's damage award.

The majority premises its contrary conclusion on a conflation of the jury's answer to special verdict question 1b. The majority relies in part on the structure of questions 1a and 1b for its analysis (answers included):

> **QUESTION 1a: Plaintiffs Claims**
>
> Have the Plaintiffs proven all elements of any or all of their claims as to the Defendants? (The elements of these claims are described in the accompanying Jury Instructions.)
>
> ANSWER: (Check "yes" or "no")
>
> | | |
> |---|---|
> | Negligence | _X_ Yes ___ No |
> | Breach of Contract | _X_ Yes ___ No |
> | Breach of Consumer Protection Act | _X_ Yes ___ No |
> | Breach of the Insurance Fair Conduct Act | _X_ Yes ___ No |
> | Breach of Duty of Good Faith | _X_ Yes ___ No |
>
> **Question 1b**
>
> If you answered "yes" to Question 1a as to Breach of Duty of Good Faith, did you find a breach of the duty to defend or settle?
>
> _X_ Yes ___ No

The majority incorrectly concludes that the jury's answer to question 1b means that the jury found that Fireman's breach of the duty to defend or settle harmed Pizza Time and Vose. I disagree.

The majority equates a finding of breach of a duty with a finding of all elements required to prove a claim of breach of Fireman's failure to act in good faith as to its duty to defend and/or settle, including the element of harm. To support its decision to ignore the plain language of question 1b, the majority offers a structural analysis: the two questions are designated 1a and 1b instead of 1 and 2. According to the majority, this means that they are "interrelated questions" rather than "separate and distinct questions" and question 1b thus really asks whether plaintiffs have proved all elements of a breach of the duty to defend and/or settle claim.

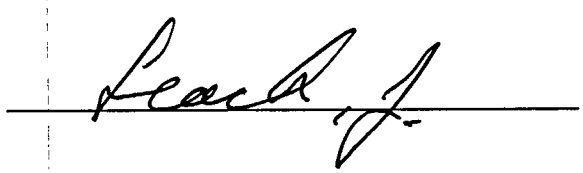
This analysis has at least two flaws. First, it ignores the well settled rule that the use of different words generally reflects an intent to have a different meaning. The court's use of the words "all elements" in question 1a and "breach" in question 1b would generally be understood to reflect different meanings. Notably, the trial court, in its memorandum opinion, did not say that it intended the meaning attributed to it by the majority. Second, it ignores the history of the special verdict form's drafting.

The court drafted the form given to the jury using the defendants' proposed verdict form. Questions 1, 2, and 3 of the defendants' proposed form mirrored questions 1a, 2, and 3 of the court's form. The court chose to insert a question between 1 and 2, so it renumbered question 1 as 1a and inserted a question 1b. It did the same thing when it

inserted question 4b, renumbering 4 as 4a.[3] This allowed the court to avoid renumbering the other questions and permitted the parties to discuss issues about these questions using the same number for the proposed verdict and the court's form. Unfortunately, the court's conferences with the parties about instructions were held after hours and off the record. So we have no additional information about the verdict form's history.

The majority also contends that it would not make sense for the court to ask whether it had found a breach of the duty to defend rather than whether it had found all elements of the corresponding tort proved. But the record provides multiple explanations. The parties contested whether the presumed injury rule described in instructions 17 and 53 and the presumed damage rule described in instruction 54 applied to all breaches of an insurance company's duty of good faith or just to a breach based on a failure to defend and/or settle. To preserve this issue for appeal, the court needed to make a record about which duty of good faith was breached and whether the jury's damage award included the amount of the judgement. This explains questions 1b and 4b, both inserted by the court into the defendants' proposed verdict form.

I agree with the majority's resolution of the remaining issues that it resolves.



[3] The court also modified defendants' proposed question 4 and omitted their proposed question 5.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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 WASHINGTON, a Washington corporation,

Plaintiff,

v.

FIREMAN'S FUND INSURANCE COMPANY and THE AMERICAN INSURANCE COMPANY, foreign insurance companies,

Defendant.

No. 09-2-32462-0 SEA

VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

QUESTION 1a: Plaintiffs' Claims

Have the Plaintiffs proven all elements of any or all of their claims as to the Defendants? (The elements of these claims are described in the accompanying Jury Instructions.)

ANSWER: (Check "yes" or "no")

Negligence	X Yes	____ No
Breach of Contract	X Yes	____ No
Breach of the Consumer Protection Act	X Yes	____ No
Breach of the Insurance Fair Conduct Act	X Yes	____ No
Breach of Duty of Good Faith	X Yes	____ No

QUESTION 1b

If you answered "yes" to Question 1a as to Breach of Duty of Good Faith, did you find a breach of the duty to defend or settle?

X Yes ____ No

(INSTRUCTION: If you answered "No" to all of the claims above, skip the remaining Questions, and sign and date this form. If you answered "Yes" to Negligence, regardless of your answers on the other claims, proceed to Question 2. If you answered "No" to Negligence and "Yes" to any or all of the other claims stated above, skip Question 2 and proceed to Question 3.)

QUESTION 2: Contributory Negligence

QUESTION 2A: Have the Defendants proven that Plaintiffs were contributorily negligent?

ANSWER (Check "yes" or "no")

_____ Yes __X__ No

(INSTRUCTION No. 1: If you answered "Yes," proceed to Question 2B. If you answered "No," skip Question 2B and proceed to Question 3.)

QUESTION 2B: What percentage of fault for negligence is attributable to the Plaintiffs' own contributory negligence?

ANSWER: (Percentage)

____

(INSTRUCTION No. 2: Proceed to Question 3.)

QUESTION 3: Defendants' Defenses

Have the Defendants proven all elements of any or all of their defenses? Answer each of the subparts below. (The elements of these claims and defenses are described in the accompanying Jury Instructions.)

ANSWER: (Check "yes" or "no")

Fraud	_____ Yes	__X__ No
Collusion	_____ Yes	__X__ No
Excuse of Performance by Estoppel	_____ Yes	__X__ No
Excuse of Performance by Waiver	__X__ Yes	_____ No

QUESTION 4a: Damages

Based on the jury instructions, what amount of damages, if any, do you find were incurred by Plaintiffs John Vose and Pizza Time?

(INSTRUCTION No. 1: Do not duplicate damages across multiple claims.)

(INSTRUCTION No. 2: Do not reduce the damages for Negligence for any contributory negligence you may find in Question 2. The Court will determine that amount.)

	Damages:
Negligence:	$100,000.00
Breach of Contract:	$20,000.00
Breach of Duty of Good Faith:	$300,000.00
Breach of Consumer Protection Act:	$20,000.00
Breach of the Insurance Fair Conduct Act:	$20,000.00

Question 4b:

If you awarded damages in Question 4a, does the damages amount include the judgement?

_____ Yes _____X_____ No

(INSTRUCTION No. 3: Sign and date the form.)

The foregoing represents the findings of the Jury.

Mark McLaughlin

Presiding Juror

5/15/2015

Dated

SUPPLEMENTAL QUESTION: in Question 4A.

Of the damages identified in the Verdict Form, what is the total dollar amount of damages incurred by Plaintiff John Vose, as opposed to those incurred by Pizza Time?

$ 240,000.00

(INSTRUCTION: Sign and date the form.)

The foregoing represents the findings of the Jury.

Mark McCullin

Presiding Juror

5/15/2015

Dated

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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 WASHINGTON, a Washington corporation, Plaintiff, v. FIREMAN'S FUND INSURANCE COMPANY and THE AMERICAN INSURANCE COMPANY, foreign insurance companies, Defendant.	No. 09-2-32462-0 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 7th day of May 2015.

Honorable Sean P. O'Donnell

INSTRUCTION NO. 18

The plaintiffs have the burden of proving each of the following propositions on the claim of breach of contract:

(1) That Fireman's Fund Insurance Company entered into an insurance contract with the Pizza Time parties;

(2) That Fireman's Fund breached the insurance contract;

(3) That plaintiffs, individually or as assignees, were damaged as a result of the breach of contract.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the Plaintiffs on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendants on this claim.

INSTRUCTION NO. 37

The general rule is that when an insurer breaches its contract, the insured must be put in as good a position as he would have been had the contract not been breached. Recoverable damages include, among other items, (1) the amount of expenses, including reasonable attorney fees, the insured incurred in defending the underlying action, and (2) the amount of the judgment entered against the insured in the underlying action, in the absence of fraud or collusion.

INSTRUCTION NO. 38

An insurance company will be bound by the findings, conclusions and judgment entered against their insured when it has adequate notice and an opportunity to intervene in the underlying action. The insurer is bound to what might, or should, have been litigated as well as to what was actually litigated. An insurer is not entitled to litigate factual questions that were resolved in the liability case by judgment or arm's length settlement.

This instruction applies only in the absence of fraud or collusion.

INSTRUCTION NO. 42

Plaintiffs have the burden of proving each of the following propositions:

(1) That Defendants acted, or failed to act, and that in so acting or failing to act, Defendants were negligent;

(2) That Plaintiff Pizza Time or Mr. Vose was injured;

(3) That the negligence of Defendants was a proximate cause of the injury to the Plaintiff Pizza Time or Mr. Vose.

The Defendants have the burden of proving both of the following propositions:

(1) Plaintiffs Pizza Time or Mr. Vose acted, or failed to act, and that in so acting or failing to act, Plaintiffs Pizza Time or Mr. Vose were negligent;

(2) That the negligence of Plaintiffs Pizza Time or Mr. Vose was a proximate cause of the Plaintiff Pizza Time's or Mr. Vose's own injuries and property damage and was therefore contributory negligence.

INSTRUCTION NO. 45

Plaintiffs claim that Defendants have violated the Washington Insurance Fair Conduct Act. To prove this claim, Plaintiffs have the burden of proving each of the following propositions:

(1) That Defendants unreasonably denied payment of benefits or a claim for coverage;

(2) That Plaintiff Pizza Time or Mr. Vose were damaged; and

(3) That Defendants' act or practice was a proximate cause of Plaintiff Pizza Time's or Mr. Vose's damage.

If you find from your consideration of all of the evidence that each of these propositions has not been proved, your verdict on the claim of failure to act in good faith should be for Defendants. On the other hand, if each of these propositions has been proved, you must consider Defendants' affirmative defenses.

INSTRUCTION NO. 46

Plaintiffs claim that Defendants have violated the Washington Consumer Protection Act. To prove this claim, Plaintiffs have the burden of proving each of the following propositions by preponderance of the evidence:

(1) That Defendants engaged in an unfair or deceptive act or practice;

(2) That the act or practice occurred in the conduct of Defendants' trade or commerce;

(3) That the act or practice affects the public interest;

(4) That Plaintiff Pizza Time or Mr. Vose were injured in either their business or their property, and

(5) That Defendants' act or practice was a proximate cause of Plaintiff Pizza Time's or Mr. Vose's injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for Plaintiffs on this claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Defendants on this claim.

INSTRUCTION NO. 52

Either party to a contract may waive the right to require performance of the other. A waiver is the intentional giving up of a known right.

A party asserting that its performance is excused on the ground of waiver has the burden of proving that the other party intended to give up its contractual right to that performance after knowing all of the relevant facts.

A right may be waived in either of two ways. A party may directly state an intent to waive a contractual right, or a party may imply such an intent through his or her statements or conduct. An implied waiver, however, may be based only on unequivocal, rather than doubtful or ambiguous, statements or conduct.

In this case, Fireman's duty to provide a defense to Plaintiffs Pizza Time and Mr. Vose was excused if Fireman's has proved, by a preponderance of the evidence, that Plaintiffs Pizza Time and Mr. Vose waived their right to that performance under the contract.

INSTRUCTION NO. 53

If you find that Fireman's failed to act in good faith by breaching its duty to defend and/or settle, then the law presumes that Plaintiff s Pizza Time and Mr. Vose were injured and that the failure to act in good faith was the proximate cause of this injury. You are bound by that presumption unless you find that Fireman's failure to act in good faith did not injure Plaintiff s Pizza Time and Mr. Vose.

Fireman's bears the burden of proof that any failure to act in good faith did not injure Plaintiffs Pizza Time and Mr. Vose.

Plaintiffs bear the burden of proving the amount of damages.

For all other claims that Fireman's failed to act in good faith, Plaintiffs have the burden of proving each of the following propositions:

(1) That Fireman's failed to act in good faith;

(2) That Plaintiff Pizza Time or Mr. Vose was damaged; and

(3) That Fireman's failure to act in good faith was a proximate cause of Plaintiff Pizza Time's or Mr. Vose's damages.

If you find from your consideration of all of the evidence that each of these propositions has not been proved, your verdict on the claim of failure to act in good faith should be for Fireman's. On the other hand, if each of these propositions has been proved, you must consider Fireman's affirmative defenses.

INSTRUCTION NO. 54

It is the duty of the Court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs on their claim for negligence then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of Fireman's Fund/American Insurance Company.

The burden of proving damages for negligence rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element of damages has been proved by a preponderance of the evidence.

If your verdict is for the Plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith, then you must determine the amount of money that will reasonably and fairly compensate the plaintiffs for such damages as you find were proximately causes by Fireman's Fund/American Insurance Company's failure to act in good faith.

If you find for the Plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith as to duty to defend or settle, your verdict must include the amount of the judgment on the arbitration award, unless you further find for Fireman's Fund/American Insurance Company on its affirmative defense that the settlement was the product of fraud or collusion. The judgment amount is $10,800,289, plus interest.

In addition, you should consider the following past and future elements of damages:

1. Emotional distress or anxiety suffered by Mr. Vose;
2. Lost or diminished assets or property including value of money;
3. Lost control of the case or settlement;
4. Reasonable value of expert or other costs or reasonable attorney fees incurred for the private counsel retained by Mr. Vose and the Pizza Time companies;
5. Damage to credit, credit rating or credit worthiness, including costs to investigate or monitor credit;
6. Effects on driving or business insurance or insurability;

As to the duties to defend and/or settle, Fireman's Fund/American Insurance Company has the burden of proving that any act of failure to act in good faith did not injure harm, damage

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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.,

Plaintiffs,

v.

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

Defendants.

Case No. 09-2-32462-0 SEA

MEMORANDUM OPINION

This matter comes before the Court on Plaintiffs' motion to enter judgment on their behalf, in light of the jury's determination that Defendant Fireman's Fund breached its insurance contract and violated statutory obligations it had both under Washington's Consumer Protection Act (CPA) and Insurance Fair Conduct Act (IFCA).

The Court is well aware of the evidence produced at trial and the procedural posture of this case. Some facts will be necessary to recite in support of the Court's decision. It is unnecessary, however, for a full account of what occurred at trial to be recounted here. However, those facts that are elicited below should be considered findings by this Court for purposes of any appeal.

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King County Superior Court
Department 29
516 Third Avenue
Seattle, WA 98104
206-477-1501

Defendant Fireman's Fund asserts that judgment should not be entered to include the arbitration award of $10,800 289.00 for two reasons. First, Fireman's Fund maintains that the jury did not write in the arbitration award on the verdict form in setting damages and to include it here would be contrary to the jury's verdict. Second, Fireman's Fund contends that it should not be bound by the arbitration award because it did not have adequate notice of the arbitration hearing, the issues at arbitration were not actually litigated, Fireman's was not in privity to plaintiffs Vose/Pizza Time at the time of arbitration, and entry of a judgment against it would be unjust.

Plaintiffs maintain that the jury's finding that Fireman's Fund failed to act in good faith on its duty to settle, and the jury's failure to find that the arbitration was the result of fraud or collusion, warrants entry of its proposed judgment. See, e.g., Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 287 P.3d 551 (2012) (holding that an insurer will be bound by the judgment in an original action establishing negligence and liability unless the judgment was procured by fraud or collusion).

In response to defendants' assertions, Plaintiffs further maintain that Fireman's Fund is estopped from contesting the arbitration award as it had proper notice of the hearing, failed to intervene, and is, therefore, bound by the award and reasonableness determination.

1. JURY'S AWARD

The Court instructed the jury on the following:

> If you find for the plaintiffs on their claim that Fireman's Fund/American Insurance Company failed to act in good faith as to duty to defend or settle, your verdict must include the amount of the judgment on the arbitration award, unless you further find for Fireman's Fund/American Insurance Company on its affirmative defense that the settlement was the produce of fraud or collusion.

Instruction No. 54.

The Court addressed the issue of presumption of injury in Instruction No. 53, by instructing that the jury was bound by the presumption of injury unless it found that

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Fireman's Fund's failure to act in good faith did not injure Plaintiffs Vose/Pizza Time. The jury found that Fireman's Fund breached its duty to act in good faith. It further found, after considering Fireman Fund's affirmative defenses, that Fireman's Fund failed to prove that the arbitration was the product of fraud or collusion. *See* Verdict Form, Question 3.

> If the amount of the covenant judgment is deemed reasonable by a trial court, it becomes the presumptive measure of damages in a later bad faith action against the insurer. The insurer must still 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 (citations omitted).

The jury did not find the settlement was the product of fraud or collusion. Under Bird, the verdict here necessarily includes the arbitration award.

2. COLLATERAL ESTOPPEL

In order for collateral estoppel to apply, Plaintiffs must produce evidence allowing the following questions to be answered in the affirmative:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

McDaniels v. Carlson, 108 Wn.2d 299, 303, 738 P.2d 254, 257 (1987)

The Plaintiffs have produced sufficient evidence to prove the first two elements in a collateral estoppel analysis. The primary issues, from this Court's perspective, are whether Fireman's Fund had sufficient notice of the arbitration hearing and whether Fireman's Fund was in privity to Plaintiffs Pizza Time and John Vose.

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i. Did Fireman's have notice of the arbitration hearing?

The back and forth dispute between the lawyers prior to the arbitration hearing is well documented. Via cover letter on September 17, 2012, Plaintiffs informed Fireman's Fund outside counsel that an arbitration would occur on November 1, 2012. The letter presented Fireman's Fund with a minimum of information. It told Fireman's Fund when and where the hearing was to occur and before which arbitrator. When queried by Fireman's Fund counsel about the issues remaining to be resolved at arbitration, Plaintiffs' counsel elected to provide an entirely unhelpful response: the issues were merely "broad."

On that response (as well as its concern that it would be potentially taking a position inconsistent with its own insured at the arbitration), Fireman's Fund pursued no further action.[1] *It did not attend the arbitration and it did not send notice to the arbitrator of its objections or* concerns.

With respect to proper notice, Washington Courts have held that "where an insurer has notice of an action and is afforded the opportunity to participate in it, the insurance company is bound by the judgment against its insured on the question of liability regardless of whether it participates." Finney v. Farmers Ins. Co., 21 Wn. App. 601, 617, 586 P.2d 519, 530 (1978) aff'd, 92 Wn.2d 748, 600 P.2d 1272 (1979), holding modified by Glover for Cobb v. Tacoma Gen. Hosp., 98 Wn.2d 708, 658 P.2d 1230 (1983). In Lenzi v. Redland Ins. Co., our Supreme Court reviewed whether an insurer would be bound by a default judgment when the insurer merely had been served with the summons and complaint. The insurer argued that that was not adequate notice. The Court rejected the insurer's position:

> Receipt of a summons and complaint alerts a potential party there is a lawsuit afoot. It seems implausible that when Redland received the summons and complaint via the Lenzis' September 29 letter it made a reasoned decision to take no action until the Lenzis served Davis. Redland simply decided it wanted no part of the Lenzi-Davis litigation at all and so advised the Lenzis. . . .

[1] Fireman's Fund did offer to pay for a court reporter to attend the arbitration hearing, which Plaintiffs declined. It also protested to Plaintiffs' counsel, repeatedly, regarding the lack of information and the conflict the hearing presented to Fireman's Fund.

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> Neither the *Finney-Fisher* rule nor ordinary notions of fair play and substantial justice dictate the Lenzis had any duty to Redland other than timely notifying Redland of the filing of the summons and complaint. Receipt of such pleadings is sufficient to put an alert and concerned party on notice that further proceedings in which it might have an interest may occur, and that in order to protect its interests, the interested party needs to act to assure receipt of subsequent pleadings.

Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 276, 996 P.2d 603, 607 (2000).

Fireman's Fund did not attend the arbitration, nor did it communicate any of its concerns to the arbitrator. The arbitration proceeded without it being present.

Lenzi affirms the proposition that only minimum notice of a pending action (here, the arbitration) is sufficient to bind a potentially implicated party should that party fail to take steps to protect its interests after receiving said notice. Plaintiffs provided Fireman's Fund with the bare minimum of information. It had notice of the time and place of the arbitration, as well as the arbitrator's identity.

In accordance with Lenzi, the Court accordingly finds that Mr. Benninger's letter to Mr. Bennett advising him of the time and location of the arbitration hearing is sufficient to give Fireman's Fund notice and opportunity to intervene.

ii. Was the Arbitration Hearing "Actually Litigated"?

To establish that Fireman's Fund and Mr. Vose/Pizza Time were in privity at the time of arbitration, Plaintiffs must demonstrate that the issues between the parties were actually litigated. The term "actually litigated" has significant meaning. "[C]ollateral estoppel precludes only those issues that have actually been litigated and determined." McDaniels, 108 Wn.2d at 305. Where, for example, an earlier judgment has been entered upon stipulated findings of fact and embodying a settlement of the parties, courts have refused to apply collateral estoppel against persons not actually participating in the stipulations. *See* Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 833 (1985).

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Fireman's Fund points out that there are uncontroverted facts concerning the arbitration hearing which suggest that the matter at hand (the amount of damages and Mr. Vose/Pizza Time's liability) was not actually litigated and that instead, Mr. Bundy, on behalf of Mr. Vose/Pizza Time, simply acceded to all of the plaintiffs' demands.

It is true that there were a number of irregularities both before and at the hearing. The more apparent ones are recounted here, without any particular order of significance. Mr. Vose admitted personal liability (pursuant to the settlement agreement) when he was not named in the lawsuit brought by Mr. Welch's estate. Prior to reaching an amount for damages and prior to the arbitration, Mr. Bundy (counsel for Mr. Vose/Pizza Time) turned over the confidential *Jackson Wallace attorney file to Mr. Benninger (at Mr. Benninger's insistence).* Mr. Bundy and Plaintiffs' counsel discussed the issues to be arbitrated well in advance of the hearing, and Mr. Bundy even provided Mr. Benninger with favorable case law prior to appearing before Judge Burdell.

At the arbitration hearing itself, Mr. Bundy failed to submit his own trial brief, he failed to call a single witness to testify, he failed to offer his own exhibits, he failed to call an expert in franchisor liability, and he agreed that Ms. Heller (the driver who killed Mr. Welch) was an employee of Pizza Time (the franchisor) when, in fact, Ms. Heller only worked for the franchisee. He also was silent to the fact that Fireman's Fund was listed in the caption of the arbitration brief (and other pleadings) as a party, when Fireman's Fund was not. Neither he nor Mr. Benninger made any effort to correct this error before Judge Burdell.

Additionally, Mr. Bundy failed to contest the difference between the damages award and the reasonableness finding/amount entered by Judge Burdell. The corollary to that concession is that Mr. Bundy agreed that Fireman's was liable for the total damage amount, with no discount afforded to Mr. Vose/Pizza Time for issues related to franchisor liability. Finally, the hearing was truncated, lasting only a matter of hours.

The jury heard <u>all</u> of this information. It evaluated the evidence, the witnesses' credibility, and the thoughtful arguments of counsel. It nevertheless concluded that there was

nothing collusive or fraudulent about Mr. Benninger and Mr. Bundy's conduct at the arbitration/reasonableness hearing.

This Court certainly recognizes the difference between something being "actually litigated" and a lack of finding that there was collusive conduct. But Plaintiffs' reliance on the "judgment rule" for the proposition that what occurs at a hearing such as this cannot be unwound or un-rung, absent a finding of collusion or fraud, is correct. *See, e.g.*, Instruction No. 38; Bird, 175 Wn.2d at 765. In other words, under Washington jurisprudence, the arbitration (no matter how peculiar) meets the test of being "actually litigated" for purposes of collateral estoppel analysis in the context of an insurance bad faith claim unless it "is the product of fraud or collusion." Bird, 175 Wn.2d at 765. There was no finding of fraud or collusion.

The jury's finding additionally supports the conclusion that the facts before Judge Burdell were not mere stipulations. Mr. Bundy's performance at the arbitration could certainly be described as lackluster. But the jury's conclusion allows this Court to find that there was not a complete acquiescence by Mr. Vose/Pizza Time to Plaintiffs' version of events.

This Court is compelled to follow the state Supreme Court's guidance on this topic and therefore holds that for purposes of this collateral estoppel analysis, the arbitration was "actually litigated."

iii. Were Mr. Vose/Pizza Time Interests Aligned with Fireman's Fund's at the Arbitration Hearing?

The next step in the Court's analysis is to determine whether Mr. Vose/Pizza Time's interests were in privity with Fireman Fund's interests at the time of the arbitration before Judge Burdell. "Privity" is the "connection or relationship between two parties, each having a legally recognized interest in the same subject matter." Black's Law Dictionary 1394 (10th ed.2014). In other words, were Fireman Fund's interests sufficiently aligned with Mr. Vose/Pizza Time's at the time of arbitration?

Fireman's Fund has acknowledged that its contract with Mr. Vose/Pizza Time was still in effect at the time of this trial. The parties were therefore in contractual privity when

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arbitration occurred.[2] But Fireman's Fund is correct to note that contractual privity does not amount to per se privity for purposes of a collateral estoppel analysis. *See, e.g.*, 28 Am. Jur. 2d Estoppel and Waiver § 119 (2012) (those in privity are "persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of an actual contract between them").

The circumstances at arbitration, including the terms and structure of the settlement agreement, are troubling.[3] For example, although Mr. Vose assigned his rights to recover from Fireman' Fund for claims of bad faith, breach of contract, and the like to the Welch family, he retained an interest in the outcome of the trial by specifically reserving the right to pursue an emotional damages claim.

The covenant judgment did not include a final number for damages. It instead contemplated a procedure by which the parties would agree to that number or proceed to arbitration. The settlement agreement also resulted in the arbitration hearing being combined with a reasonableness hearing before the same judicial officer at the same time.

Not only were those two distinct actions blended into one, so were the procedures leading up to them. As noted above, before the arbitration, Mr. Bundy demanded that the confidential Jackson Wallace attorney files for Mr. Vose and Pizza Time be turned over to plaintiffs' counsel. Mr. Bundy complied. This was done without notice to Judge Burdell.

The conflation of the two hearings, had Fireman's Fund participated substantively, would have placed Fireman's Fund in a predicament. On the one hand, it could not undercut its insureds' position for purposes of the arbitration or risk a bad faith claim against it. *See* Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc., 161 Wn.2d 903, 922-23, 169 P.3d 1, 11-12 (2007) ("MOE's bad faith conduct interfered in DPCI's final hearing preparation, *interjected*

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[2] The jury found that Mr. Vose/Pizza Time waived Fireman's Fund duty to provide a defense. The jury made no mention of Fireman Fund's separate contractual duty to settle. Nor does the jury's waiver finding implicate Fireman Fund's independent statutory duty to settle (which the jury found Fireman's Fund breached). Indeed, Plaintiffs correctly point out that breach of Fireman's independent good faith duty to settle is grounded in tort and not contract law.

[3] The Court finds Jeff Tilden's testimony on this point persuasive. Plaintiffs have failed to offer any reasonable explanation (or benefit) to the purpose of conflating its arbitration hearing with a reasonableness determination.

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insurance coverage issues into the arbitration, and created uncertainty concerning potential prejudicing of the arbitrator and the effect of MOE's interference on the confirmability of the arbitration award.") (emphasis added).

On the other hand, Fireman's Fund would have an interest in contesting the reasonableness determination made by Judge Burdell. "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. A carrier is liable only for reasonable settlements that are paid in good faith." Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 738, 49 P.3d 887, 891 (2002). Accordingly, plaintiffs must convince a judge of the reasonableness of the settlement amount before its presentation in accordance with a number of factors designed to analyze the reasonableness of the amount. *See* Chaussee v. Md. Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339, 1343 opinion modified on denial of reconsideration, 812 P.2d 487. It is at this stage that an insurer's interests may depart from the insured's.

That had the potential to be the case here, had Fireman's Fund appeared.

But that is not the end of the analysis. Fireman's Fund chose to avoid the arbitration hearing altogether. This decision was clear from the internal communications presented at trial showing that Fireman Fund lawyers and executives evaluated whether to attend and elected not to. There were options available to Fireman's Fund had it attended (for starters, it could have alerted Judge Burdel to the procedural irregularities about which it now complains – including the very conundrum it would have faced – without running afoul of its defense of Mr. Vose/Pizza Time). In other words, the hearing itself would not automatically cause Fireman's Fund to trigger a bad faith claim against it merely by appearing. Indeed, it could have taken steps far short of writing the arbitrator in an ex parte fashion or sending a subpoena for his records. See Dan Paulson Const., Inc., 161 Wn.2d 903. But instead, after careful consideration, Fireman's Fund made a knowing and voluntary decision not to appear.

Fireman's Fund's posture at the time of the arbitration hearing was roughly similar to those outlined in the case of Bacon v. Gardner, 38 Wn.2d 299, 229 P.2d 523 (1951). There, a dispute arose over the conveyance of real property between two religious organizations. In

ruling for plaintiffs, our Supreme Court held that when the membership of a non-party association and its board of trustees had full knowledge of the pendency of an action and had an opportunity to intervene in the litigation, had they desired to do so, the non-party association and its board of trustees were estopped by the judgment as fully as if they had been nominal parties because they failed to intervene. *Id.* at 313. *See also* Besel, 146 Wn.2d at 739 (holding that insurance carrier would be bound to amount determined at reasonableness hearing when insurer's attorneys were notified of the reasonableness hearing and afforded ample opportunity to respond).

Here, Fireman's Fund was in even closer proximity to the association in the Gardner case. It had a contract with Mr. Vose/Pizza Time and additional statutory duties owed to him. Despite it being aware of its contract and the arbitration hearing, it elected to not to participate.

Finally, the alleged harm caused by the reasonableness determination in conjunction with the arbitration was the damages amount itself. It should be noted that Fireman's Fund has not contested the reasonableness of the amount of damages determined at arbitration. Its contention has been that it should not be bound by *any* number due to lack of privity between it and Mr. Vose/Pizza Time and the failure of Mr. Bundy to actually litigate the issues at arbitration. It does *not* suggest that the number that Judge Burdell determined was unreasonable. The harm cause by conflating the two procedures is diminished.

Accordingly, based on the principles outlined in the Gardner decision and Besel, as well as the underlying policy articulated in Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 765, 58 P.3d 276, 284 (2002) (holding that once "a court determined the covenant judgment to be reasonable, it was presumptively reasonable and the burden shifted to the insurer to show that the settlement was the result of fraud or collusion"), Fireman's Fund is estopped from contesting the arbitration award.

ORDER

For the reasons outlined above, the Court will enter judgment in favor of Plaintiffs. The principal judgment amount is $11,260,289.00 (which includes the arbitration award and additional damages determined by the jury. Interest on the principal arbitration amount of

$10,800,289.00 at 12% per annum, compounded annually from the date of entry of arbitration award before Thurston County Judge Tabor on November 16, 2012.[4]

Attorneys' fees, costs, expenses and or other damages will be determined at a later date by the Court.

Plaintiffs shall prepare a revised judgment within 14 days in accordance with the Court's ruling above.

DATED this 31st day of July 2015.

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[4] The Court does not find that the judgment entered in 2008 was liquidated. The final amount had not been determined and it was therefore not possible to calculate the money owed with exactness. *See* Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)("a defendant should not be required...to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to plaintiff).

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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.,

Plaintiffs,

v.

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

Defendants.

Case No. 09-2-32462-0 SEA

AMENDED ORDER ON MOTION FOR RECONSIDERATION; ORDER ON JUDICIAL ESTOPPEL

This matter comes before the Court on Fireman Fund's Motion for Reconsideration of the Court's July 31st, 2015 order.

There are three primary issues presented. The first is whether the Court erred in deciding that the $10.8 million arbitration award was as a floor to plaintiffs' damages, resulting from Fireman Fund's failure to act in good faith by breaching its duty to defend or settle.

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The second is whether the Court erred in its collateral estoppel analysis, particularly with respect to the issue whether imposing Judge Burdell's reasonableness determination would amount to an injustice to Fireman's Fund.

The third and final issue (left unaddressed in the Court's prior order) is whether judicial estoppel prevents Fireman's Fund from being bound by the underlying judgment.

All three issues are addressed below.

I. DUTY OF GOOD FAITH

Using plaintiff's proposed instructions, the Court informed the jury in two instances that it was bound by the presumption that Fireman's Fund injured plaintiffs Vose and Pizza Time for failing to act in good faith. See Instruction No. 53 and No. 54 ("You are bound [by the presumption of harm] unless you find that Fireman's failure to act in good faith did not injure Plaintiffs Pizza Time and Mr. Vose. No. 53; "As to the duties to defend and/or settle, Fireman's Fund/American Insurance Company has the burden of proving that any act of failure to act in good faith did not injure, harm, damage or prejudice the plaintiffs." No. 54).

The jury was specifically asked, and it answered, the question of whether its award for damages for breach of duty of good faith included the underlying arbitration judgment. The jury answered "No." See Verdict Form.[1] Nevertheless, the jury specifically found as a result of Fireman Fund's breach of duty of good faith, plaintiffs were injured or harmed in the amount of $300,000.00.

[1] This was essentially the same proposition that plaintiffs proposed in their verdict form: question 16a asked the jury to write in damages, excluding the judgment for breach of good faith; question 16b asked the jury to write in damages for breach of duty of good faith with no exclusions. To answer 16b consistent with plaintiffs request here, the jury would have been required to write in the judgment award.

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A claim of bad faith sounds in tort. Accordingly, "a showing of harm is an essential element of an action for bad faith handling of an insurance claim." Safeco Ins. Co. of Am. v. Butler, 118 Wn. 2d 383, 389, 823 P.2d 499, 503 (1992).

But our courts presume harm if a plaintiff can show, as here, that the insurer acted in bad faith. "Any case in which the insurer actually acted in bad faith is an 'extreme case'…[t]herefore, we presume prejudice in any case in which the insurer acted in bad faith." Butler, 118 Wn. 2d at 391. In a case where a covenant judgment has been entered, and that amount has been determined reasonable, "the amount of [the] 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." Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 738-39, 49 P.3d 887, 891-92 (2002)

Once a settlement amount is determined to be reasonable, the burden shifts to the insurer show the settlement was the product of fraud or collusion. Besel v. Viking Ins. Co. of Wisconsin, 146 Wn. 2d at 739. "If an insurer wrongfully refuses to defend [or settle], it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy." Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn. 2d 751, 765-66, 58 P.3d 276, 284 (2002) (internal citations omitted) [Court's modification 'or settle'].

In a situation such as this, where a covenant judgment exists and that judgment has previously been determined to be reasonable, then the judgment amount becomes the presumptive measure of damages in a later bad faith action against the insurer.

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In Bird, our Supreme Court held that although a covenant judgment may exist, an insurer still must be found liable in the bad faith action *and it may rebut the presumptive measure by showing the settlement was the product of fraud or collusion.* Bird v. Best Plumbing Grp., LLC, 175 Wn. 2d 756, 765, 287 P.3d 551, 555-56 (2012) (emphasis added). The Supreme Court in Bird did not address an insurer's ability to rebut whether failure to settle actually harmed plaintiff, when, as here, a judgment against the plaintiff had entered and been determined reasonable by another court. The Bird court specifically noted that "the [reasonableness] determination directly affects the amount of damages recoverable in subsequent tort cases…in the insurance setting, the presumptive amount is added to any other damages found by the jury." Bird v. Best Plumbing Grp., LLC, 175 Wn. 2d at 770.

The question then is whether Fireman's Fund can rebut this presumption of harm to Plaintiffs by showing that plaintiffs did not suffer injury or prejudice as a result of Fireman's breach of its good faith duty to defend or settle.

"In an insurance bad faith case, the amount of a reasonable covenant judgment sets a floor, not a ceiling, on the damages a jury may award." Miller v. Kenny, 180 Wn. App. 772, 782, 325 P.3d 278, 283-84 (2014). In other words, harm to the insured is worth *at least* the amount of the covenant judgment—not less. As noted above, in Bird, the Supreme Court confirmed this interpretation by explaining the presumptive amount is added to other damages found by the jury. Bird, 175 Wn.2d at 770 (emphasis added).[1]

[1] This premise has been emphasized in analogous settings by our State Supreme Court. For example, in the Kirk case, the court held that "[a]lthough a showing of harm is an essential element of an action for bad faith handling of an insurance claim, we imposed a rebuttable presumption of harm once the insured meets the burden of establishing bad faith. Butler, 118 Wn.2d at 389–90, 823 P.2d 499. In Butler, the court *broadly* stated, "we presume prejudice in

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Once a settlement amount is found reasonable, then "there is no factual determination to be made on damages in the later bad faith claim, *at least not with respect to the covenant judgment.*" Bird, 175 Wn.2d at 772 (emphasis added).[1] In other words, the reasonable settlement amount is the harm the plaintiff suffered (indeed, Vose/Pizza Time are responsible for the $10.8 million settlement amount as a result of the judgment entered in Thurston County). The Miller court confirmed this analysis: "The holding of *Bird* is that a reasonableness hearing is an equitable procedure. The [Bird] court stated, 'Here, there is no factual determination to be made on damages in the later bad faith claim, *at least not with respect to the covenant judgment.*' Bird, 175 Wash.2d at 772, 287 P.3d 551 (emphasis added). This sentence indicates the way is open for a jury to make a factual determination of an insured's bad faith damages *other than* and *in addition* to the covenant judgment." Miller v. Kenny, 180 Wn. App. 772, 801, 325 P.3d 278, 293 (2014) (emphasis in original).

In this case, the jury responded in the affirmative to Question 1a that plaintiffs had proved *each* of the propositions put forward by plaintiffs regarding Fireman Fund's breach of

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any case in which the insurer acted in bad faith." Butler, 118 Wash.2d at 391, 823 P.2d 499. The certified question [whether Butler applied under a policy of professional liability insurance if the insurer failed to provide a defense to the insured in bad faith] requires us to assume the insurer acted in bad faith; therefore, we *must* assume harm." Kirk v. Mt. Airy Ins. Co., 134 Wash. 2d 558, 562, 951 P.2d 1124, 1127 (1998).

[1] Unigard Ins. Co. v. Mut. Of Enumclaw Ins. Co., cited by defendant, is distinguishable. In Unigard, there was no covenant judgment and there was no reasonableness determination, as there was here. "Because Engelmann and Newmarket did not settle on an amount that Engelmann suffered in damages, the determination of damages was a task for the jury. The jury was instructed to award all damages contemplated by the settlement agreement unless the agreement was the product of fraud or collusion." Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co., 160 Wn. App. 912, 923, 250 P.3d 121, 128 (2011).

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the duty of good faith. This necessarily includes a finding that Fireman's Fund breached its duty to defend or settle. See Instruction No. 53.[1]

The jury then considered Fireman Fund's affirmative defenses and concluded that plaintiffs had not engaged in collusive conduct. Contrary to Fireman's assertion that this Court proscribed the jury from considering the reasonableness of the settlement hearing, Fireman's Fund's agreed that that issue was not an issue for trial.

Importantly, the jury also found that Fireman Fund's breach of its good faith duty harmed the Vose/Pizza Time plaintiffs in the amount of $300,000.00. The jury did not write in the settlement amount and answered "no" when queried whether the damages award included the arbitration award.

The presumptive amount – the floor – here for plaintiffs' damages was the amount derived from plaintiffs' settlement agreement, the arbitration, and the judgment entered in Thurston County.

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[1] The distinction between proving breach of a duty to defend or settle vs. proving the claim (including damages) of failure to act in good faith was implicitly addressed in Woo v. Fireman's Fund Ins. Co., 161 Wash. 2d 43, 54, 164 P.3d 454, 459-60 (2007). There, the Supreme Court analyzed the duty to defend and held that "although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself *from a claim of breach*." Woo v. Fireman's Fund Ins. Co., 161 Wash. 2d at 54. That last sentence is instructive. The Woo case recognized, as does Miller and Bird, that the issue of harm or damages arising from breach of an insurer's duty to defend or settle, when a reasonable covenant judgment has been entered, is not before the jury (unless the jury is asked to find fraud or collusion, as it was here). The issue for the jury is to decide merely breach of that duty to defend and not whether damages flow from the breach. Therefore, "when an insurer wrongfully refuses to defend [or settle], it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion." Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn. 2d 751, 765-66, 58 P.3d 276, 284 (2002) (Court's modification).

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That *amount* has not been contested by Fireman's Fund at any of the various steps this case has taken over the last seven years (the process arriving at that amount, on the other hand, is hotly contested).

Accordingly, once a settlement amount is found reasonable, then "there is no factual determination to be made on damages in the later bad faith claim, at least not with respect to the covenant judgment." Bird, 175 Wn.2d at 772, 287 P.3d 551. In other words, the settlement is the harm the plaintiff suffered.

The jury here made a factual determination of plaintiffs' bad faith damages *other than* and *in addition* to the covenant judgment in the amount of $300,000.00. The jury accordingly found harm as a result of Fireman's Fund failure to act in good faith. But the plaintiffs' floor on damages had already been determined by entry of the Thurston County judgment (resulting from the arbitration/reasonableness hearing). Miller v. Kenny, 180 Wn. App. at 801. As a matter of law, the jury's apparent conflict in the verdict form (finding harm for the breach of duty of good faith but not writing in the amount) must be resolved to include the arbitration amount.

Reading the instructions and jury's verdict together, and reconciling that verdict with Woo, Bird, and Miller, the motion for reconsideration is DENIED.

II. COLLATERAL ESTOPPEL

The Court has carefully considered Fireman Fund's Motion for Reconsideration with respect to the issue of collateral estoppel. Fireman's Fund is correct that the Court did not specifically address the fourth required factor in its analysis.

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For this Court to find that Fireman's Fund is collaterally estopped from contesting the $10.8 million arbitration award, it would have to find that binding Fireman's Fund to the arbitration result would work an "injustice."

The injustice component of a collateral estoppel analysis is rooted in procedural unfairness. Thompson v. State, Dep't of Licensing, 138 Wn. 2d 783, 795, 982 P.2d 601, 608 (1999).

> The injustice prong of the collateral estoppel doctrine calls from an examination primarily of procedural regularity…[W]here, as here, a party to the prior litigation had a full and fair hearing of the issues, and did not attempt to overturn an adverse outcome, collateral estoppel may apply, notwithstanding an erroneous result.

Thompson v. State, Dep't of Licensing, 138 Wash. 2d 783, 799-800, 982 P.2d 601, 610 (1999)

There were, as the Court noted in its previous memorandum opinion, a number of procedural irregularities with respect to the arbitration hearing. But those irregularities, or imperfections, do not arise to an injustice.

There is no evidence that the presiding judicial officer at the arbitration hearing ignored the law or engaged in other conduct that would have impacted the procedural fairness of the proceedings. The jury considered whether the plaintiffs' conduct at the hearing was collusive or fraudulent. It answered in the negative to both. In reaching that decision, it had the ability to analyze the conduct of all of the parties and had the benefit of defendant's expert testimony outlining defendant's position with respect to the irregularities presented.

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As the Court has already noted, Fireman's Fund – a sophisticated, national insurance company with highly competent in-house and outside counsel – evaluated whether it should attend the arbitration hearing after receiving notice that it would occur. Fireman's Fund had options available to it when presented with that information. It made a decision to avoid the hearing altogether.

An insurer places itself in a most difficult posture when it has notice of settlement but then fails to take steps to sufficiently protect its interests.

Given that backdrop, the Court cannot find that the procedural irregularities that occurred during the arbitration amounted to an injustice. Nor can this Court find that binding Fireman's Fund to the arbitration award would work an injustice. This is particularly true in the posture of an insurance case, when "so long as the carrier 'has notice and an opportunity to intervene in the underlying action against the tortfeasor,' it will be bound by the findings, conclusions, and judgment of the arbitral proceeding." Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 274, 996 P.2d 603, 606 (2000).

Accordingly, Fireman Fund's Motion for Reconsideration on the issue of collateral estoppel is DENIED.

III. JUDICIAL ESTOPPEL

Fireman's Fund moved this Court pursuant to CR 50 to bar plaintiffs Vose and Pizza Time from collecting on the jury's damages award under the theory of judicial estoppel. Specifically, Fireman's Fund maintains that plaintiff Vose failed to disclose his potential claim

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(and specifically, his reservation to seek damages) to the bankruptcy court. It asserts recovery is therefore prohibited as he has taken inconsistent positions in these proceedings.

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

> The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and ... waste of time.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005).

When a debtor files a petition for bankruptcy, an estate is created. 11 U.S.C. § 541(a). All legal or equitable interest in the debtor's property at the time of filing becomes the property of the bankruptcy estate unless it is subject to an exemption. 11 U.S.C. § 522(b)(1), § 541(a)(1). A reservation to pursue damages in a lawsuit is not an enumerated exemption under the bankruptcy code.

Judicial estoppel "may apply to parties who accrue legal claims, file for bankruptcy, fail to list the claims among their assets, and then attempt to pursue the claims after the bankruptcy discharge." Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). "'The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding.' In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir.1999), *quoting* Rosenshein v. Kleban, 918 F.Supp. 98, 104 (S.D.N.Y.1996). 'By not disclosing the asset, the debtor keeps an

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asset that may have created a dividend for the debtor's unsecured creditors.'" Ingram v. Thompson, 141 Wn. App. 287, 291, 169 P.3d 832, 834 (2007) *citing* Johnson v. Si–Cor, Inc., 107 Wn.App. 902, 909, 28 P.3d 832 (2001).

A debtor must disclose all possible causes of action, "even if the likelihood of success is unknown." Cunningham, 126 Wn.App. at 230. Potential lawsuits must be disclosed to the bankruptcy trustee:

> The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed.

Miller v. Campbell, 137 Wn. App. 762, 771, 155 P.3d 154, 159 (2007) *citing* In re Coastal Plains, Inc., 179 F.3d 197, 206 (5th Cir.1999).

As articulated by our State Supreme Court, three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine:

> (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.

Arkison v. Ethan Allen, Inc., 160 Wn. 2d 535, 538-39, 160 P.3d 13, 15 (2007).

The jury awarded Mr. Vose $240,000.00 and Pizza Time $220,000.00. In the settlement agreement with the Gosney family, Mr. Vose specifically reserved the right to damages for attorney fees, emotional distress, damage to his credit, damage to his reputation and other non-

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economic damages. He maintains that all of these damages were assigned to the Gosney family under the terms of the settlement agreement, prior to the bankruptcy filing. Yet he reserved the right to pursue the damages enumerated above.

Trial Exhibit 385 was Mr. Vose's personal bankruptcy petition, which he filed in 2010. He filed the current case in 2009. In the bankruptcy petition, Mr. Vose makes no mention of the Gosney settlement agreement or his potential recovery against Fireman's Fund. *See*, generally, Vose trial testimony, April 22, 2015. Under the bankruptcy petition, Mr. Vose was required to disclose whether he was involved in any law suit. 11 U.S.C. § 522(b)(1), § 541(a)(1). He failed to disclose that information on the petition. Ex. 385.

Plaintiffs attempt to distinguish a claim vs. reservation of damages in support of their proposition that Mr. Vose's failure to disclose the settlement agreement in the bankruptcy proceeding is of no moment.[1] What is abundantly clear is that the bankruptcy petition required Mr. Vose to disclose equitable and future interests of *all* his assets and other personal property of any kind. Trial Ex. 384. His reservation of an ability to seek damages in the instant case falls under this broad category. Despite his awareness of this lawsuit and his reserved claim for damages, he failed to disclose them.

All of the elements of judicial estoppel have been met here with respect to Mr. Vose's retention of his right to pursue damages. His position during this case is clearly inconsistent

[1] This issue was raised, but not resolved, in Miller v. Kenney, "The reservation by Kenny of his "claims for damages ... which arise from the assigned causes of action" was an unusual feature of the agreement, one we have not seen in similar cases." Miller v. Kenny, 180 Wn. App. 772, 795, 325 P.3d 278, 290 (2014). The Court did not address this splitting or reservation of rights in the context of a bankruptcy proceeding.

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with his declaration during this bankruptcy proceeding. His recovery here surely creates the perception that he has misled the bankruptcy court. His ability to collect these funds will amount to a fraud on the bankruptcy court, as any funds he stands to collect from this award should flow to his creditors.

Accordingly, the Court finds pursuant to CR 50(a)(1) that Mr. Vose and Pizza Time[1] are judicially estopped from recovering directly, or indirectly, any damages in this matter. This order does not impact plaintiff Gosney's ability to collect for damages for those claims not reserved by plaintiff Vose/Pizza Time.

Within 14 days of this order, plaintiffs shall prepare an amended judgment consistent with the rulings above.

DATED this 29th day of September 2015.

JUDGE SEAN P. O'DONNELL

[1] Mr. Vose is the sole shareholder of Pizza Time; they are for all intents one and the same.

Hon. Sean P. O'Donnell
King County Superior Court
Department 29
516 Third Avenue
Seattle, WA 98104
206-477-1501

MCNAUL EBEL NAWROT & HELGREN PLLC

June 29, 2018 - 1:30 PM

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Appellate Court Case Title:	Sarah Gosney, et al., Res/Cross-Apps. v. Fireman's Fund Ins. Co., et al., Apps/Cross-Res.
Superior Court Case Number:	09-2-32462-0

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