

No. 74717-7-1  
(Appeal from King County Superior Court No. 09-2-32462-0SEA)

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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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/Plaintiffs Below,

v.

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

Appellants/Defendants Below.

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

This appeal follows a five-week jury trial that culminated in a verdict awarding only \$460,000 in total damages for the insurance bad faith and related claims brought by Plaintiffs Sarah Gosney, John Vose, and Pizza Time against Pizza Time's insurer, Fireman's Fund. Following the verdict, the trial court granted Fireman's Fund's ("FF") CR 50(a) motion on its judicial estoppel defense and struck these damages, but erroneously added *\$10.8 million* in damages that the jury refused to award. This decision is profoundly flawed in numerous separate and independent respects; most importantly the trial court abandoned its obligation to uphold and protect the jury's verdict, usurping the jury's province, all in violation of FF's constitutional rights and long-standing Washington law.

This case arises out of a Thurston County wrongful death case ("Thurston County Case"). There, the Welch plaintiffs—Gosney, as personal representative of the Estate of Jerry Welch—sued Pizza Time ("PT," Vose's corporation), and others—but did not sue Vose personally. Nonetheless, PT and Vose resolved the Welchs' claims in what the court called an "irregular" arbitration process. The court found, among other things: (1) Vose and PT—in a prior agreement with the Welchs—conceded the key liability defense by admitting to materially false evidence that was provided to the arbitrator; (2) in the same prior agreement, Vose admitted

to personal liability even though he was not sued; (3) unknown to the arbitrator, PT provided its privileged defense files to the Welchs before the arbitration; and (4) Vose and PT's lawyer did not call a single witness or ask a single question, and conceded key damages issues despite the availability of substantial evidence in their favor.

The result of this arbitration—a \$10.8 million award—was rejected by the jury as damages in this case. To be clear, while the court empowered the jury to award the \$10.8 million as damages on any of Plaintiffs' claims, the court expressly instructed the jury that if it found for Plaintiffs on one of the two bad faith claims—the one relating to the duty to defend or settle—its award “must” include, at a minimum, the \$10.8 million arbitration award. While the jury found *breach* of the duty to defend or settle, its verdict—which *does not* award these damages for any of the claims—establishes that the jury did *not* find for Plaintiffs on this particular bad faith claim. Given the evidence about the arbitration, it is easy to understand why.

Under the law and the jury instructions, the jury had at least four paths that allowed it not to award the \$10.8 million as damages even if Plaintiffs showed a breach of the duty to defend or settle: (1) if the jury found no proximate cause because FF rebutted the presumption of harm; (2) if the jury found FF had inadequate notice or opportunity to partici-

pate; (3) if the jury found FF proved fraud; or (4) if the jury found FF proved collusion. Although FF did not prevail on fraud or collusion (both of which required a showing by clear, cogent, and convincing evidence), the jury's verdict—refusing to award the \$10.8 million—demonstrates FF did prevail on one or both of the remaining two. There was substantial evidence supporting either; indeed, Plaintiffs do not contest that fact.

In the end, the special verdict form gave the jury at least six separate opportunities to hold FF liable for the \$10.8 million. Each time the jury's response was the same: the \$10.8 million was not among the damages the jury found to have been proximately caused by FF's conduct. The jury found FF liable for \$460,000 in damages only.

Plaintiffs did not move for judgment notwithstanding the verdict or seek to clarify it before the court discharged the jury. Plaintiffs instead filed a "presentation of judgment" that added \$10.8 million to the verdict.

Not only did Plaintiffs waive the right to challenge the jury's verdict when they failed to move for JNOV or seek clarification, the court failed to meet its duty under state and federal constitutional law and common law to uphold and enter judgment on the verdict if *any factual basis* exists to sustain it. If the jury's verdict required any interpretation or application, the court's charge was to read the jury's answers harmoniously, in light of the jury instructions, to support the result the jury wrote down.

If the court determined the verdict was insufficient or contradictory after discharge, the court could *only* order a new trial. Plaintiffs never denied that multiple evidence-based grounds supported the jury's rejection of the \$10.8 million amount, yet the court failed to engage in the required analysis. The court's flawed approach to the jury's verdict is reversible error.

Further, the court properly found in granting FF's CR 50(a) motion that Vose's failure to disclose his right to recover against FF in his bankruptcy barred recovering *all* damages the jury awarded. Yet, the court erred when it failed to track this finding to its logical and necessary conclusion. Aside from the issues of proximate cause and notice, Washington law and the jury instructions place the burden on Plaintiffs to prove that PT and Vose suffered *some* damage before they may recover "presumed damages" for bad faith failure to defend or settle. Here, as a matter of judicial estoppel, the court found that Vose's misrepresentations barred PT and Vose from doing so. In other words, not only did the jury find no proximate cause, inadequate notice to FF, and that Vose and PT waived FF's obligation to defend, the court held that PT and Vose could not claim damages on any claims as a matter of law. The judicial estoppel ruling too renders the court's addition of the \$10.8 million reversible error.

Finally, the court had to address FF's collateral estoppel defense when it erroneously rejected the jury's verdict. It also erroneously reject-

ed this defense, which even the court’s own post-verdict factual findings establish as a matter of law.<sup>1</sup> This Court should reverse and remand with instructions to enter judgment for FF based on the jury’s verdict and the trial court’s judicial estoppel order.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court ignored that Plaintiffs waived any argument that the verdict should have included the \$10.8 million when they failed to move for JNOV or timely seek clarification.

2. The trial court ignored its obligation to uphold the jury’s verdict as rendered if any substantial evidence existed allowing it to do so and added \$10.8 million in damages the jury rejected. The record contains substantial evidence that (a) FF never received adequate notice—a requirement before there can be “presumed damages” against a third party insurer—and (b) FF’s *breach* of the duty to defend or settle did not cause harm and thus this defend or settle bad faith *claim* was not established.

3. The trial court either (a) improperly revised the jury’s finding of *breach* of the duty of good faith to defend or settle and replaced it with a finding that Plaintiffs prevailed on their *claim* relating to the duty to defend or settle, which erroneously bypassed proximate cause and notice,

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<sup>1</sup> The facts also establish FF’s fraud or collusion defenses as a matter of law. Material false representations are a fraud on the court, and are fraud or collusion.

or (b) improperly determined that a finding of *breach* of the duty to defend or settle (rather than a finding of success on the *claim*) triggers an award of “presumed damages,” all contrary to its own jury instructions.

4. The trial court erroneously changed the jury’s verdict by its *sua sponte* conclusion that the jury’s answers were contradictory or confusing when they were not and when, even if they were, the only available remedies are to order a new trial or ask the jury to clarify.

5. The trial court erroneously added \$10.8 million to the jury verdict as “presumed damages” even though the court found Vose and PT judicially estopped from recovering *any* damages. As damages to Vose and PT are an essential element of all of Plaintiffs’ claims, including those for bad faith, the court erred when it failed to recognize its judicial estoppel ruling defeated all of Plaintiffs’ claims.

6. The trial court erred when it failed to conclude that a reasonableness hearing cannot be conflated with a merits arbitration.

7. The trial court erred when, based on its own post-verdict factual findings, it rejected FF’s collateral estoppel defense, failed to properly apply the collateral estoppel factors, and contradicted and disregarded the jury’s determination that FF had not received proper notice.

8. The trial court erred when, based on the uncontroverted evidence in the record (as confirmed by its post-verdict factual findings), it

failed to grant FF's CR 50(a) motion on fraud and collusion.

9. The trial court erred by rejecting FF's proposed instructions 42 and 43 on the definition and burden of proof for FF's collusion defense, and by instructing the jury on collusion in Instruction 11.

10. The trial court erred by instructing the jury on the definition and burden of proof on fraud in Instruction 10.

11. The trial court erred by instructing that a single WAC violation constitutes bad faith in Instruction 12.

12. The trial court erred by limiting FF's presentation of evidence at trial, preventing FF from questioning an essential witness to Plaintiffs' irregular arbitration, and limiting FF's direct examination of its expert witness on core issues in dispute.

13. The trial court erred by refusing to excuse a juror exposed during trial to out-of-court information concerning Plaintiffs' claims.

14. The trial court erred by awarding fees to PT and Vose, neither of which prevailed under the court's judicial estoppel order, by awarding fees for a different case, and by including a multiplier.

**B. Issues Pertaining to Assignments of Error**

1. Does a party waive argument to add damages unremunerated in a verdict if it fails to seek clarification or move for JNOV? (Error 1)

2. May a trial court modify a verdict after discharge where a

factual basis in the record supports the verdict as written? (Error 2)

3. May a trial court ignore a verdict form's plain language, which states only that plaintiffs proved "breach" of the duty of good faith to defend or settle, and substitute its conclusion that plaintiffs prevailed on the "claim" relating to the duty to defend or settle? (Error 3)

4. May a trial court apply law not contained in the jury instructions to change the verdict post hoc? (Error 3)

5. May a trial court "reconcile" supposedly confusing or contradictory special interrogatory answers after discharging the jury by adding millions to the verdict? (Error 4)

6. May bad faith plaintiffs recover "presumed damages" where the court finds plaintiffs are judicially estopped from recovering any damages and damages are an essential element of the claim? (Error 5)

7. May an insured and third party conflate a merits determination with a reasonableness hearing? (Error 6)

8. Did the trial court err in failing to conclude FF's collateral estoppel defense was established where the court's own factual findings demonstrate FF and Vose were not in privity, the arbitration was not actually litigated, and it would be unjust to bind FF? (Error 7)

9. Did the trial court err in substituting its judgment for jury's in considering FF's collateral estoppel defense? (Error 7)

10. Did the trial court err in failing to grant FF's CR 50(a) motion on fraud and collusion based on its own factual findings and other evidence? (Error 8)

11. Did the trial court's fraud or collusion instructions improperly restrict the definitions and increase FF's burden? (Errors 9, 10)

11. Did the trial court's instruction on proof of bad faith upon violations of the WAC contradict Washington law? (Error 11)

12. Did the trial court improperly limit FF's questioning of key lay and expert witnesses at trial? (Error 12)

13. Should the court have excused a juror exposed during trial to out of court information concerning Plaintiffs' claims? (Error 13)

14. Is a litigant entitled to (a) fees and costs where it did not prevail, (b) fees and costs associated with a separate case, or (c) an upward lodestar adjustment if counsel engaged in improper conduct? (Error 14)

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

#### **A. The Underlying Thurston County Case**

John Vose owns a franchisor entity named Pizza Time Holdings of Washington, which enters into franchise agreements with other companies to operate pizza delivery businesses under PT's name. *See* RP 1977:25–1978:5, 1990:7–11.<sup>2</sup> RER LLC, owned by Raymond and Ethan Shaefer,

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<sup>2</sup> The following citation abbreviations are used: “RP” for Record of Proceedings, “CP” for Clerk’s Papers, “App.” for the Appendix, and “TX” for the trial exhibits.

was one of these franchises. RP 2035:16–22. RER employed Angela Heller, a pizza delivery driver. RP 2141:7–9, 2146:9–18. It is undisputed that Heller was *not* a PT employee. TX 228 at 3.

On September 1, 2005, while driving intoxicated, Heller struck and killed Jerry Welch. TX 217. About a year later, Welch’s estate sued Heller, RER, the Shaefers, and PT (the franchisor entity Vose owned). *Id.* The complaint did not name Vose, nor did it contain allegations against him. *Id.*; RP 2150:8–15. PT held an insurance policy with FF under a former name, Pizza Time, Inc. (the “Policy”). TX 146 at CL908.

FF received notice of the Thurston County Case (and the accident) extremely late, a couple months before the scheduled trial date.<sup>3</sup> And, just days after FF first received notice, it also learned that a policy limits settlement offer from the Welchs was about to expire. TX 251.<sup>4</sup>

Despite the tardy notice, FF appointed counsel, Jackson & Wallace LLP, to defend PT and supported defense counsel’s plan to pursue a com-

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<sup>3</sup> Vose and PT never informed FF of the accident or the lawsuit. PT tendered its defense to RER under their franchise agreement—a tender RER conditionally accepted. TX 226. Robert Novasky, RER’s lawyer, reached out to PT’s insurance broker when he had difficulty getting in touch with Vose. CP 2472; TX 22. The broker alerted FF to the claim. TX 160 at CL1296.

<sup>4</sup> Paul Badaracco was FF’s primary claims handler on the case and faced significant hurdles in his investigation. For example, the names of the entities that were sued did not match the named insured on the Policy, so Badaracco was not even sure if a FF insured had been sued. TX 160 at CL1820–26. The broker informed Badaracco that there was no coverage for franchise operations because PT’s application was for a single store location only and represented that PT was “not part of a franchise.” TX 211 at 1; *see* TX 160 at CL1828. To make matters worse, Badaracco could not reach Vose for weeks. RP 3044:7–12. Accordingly, Badaracco noted at the time: “We are not in a position to eval[uate] coverage, liability, damages or any other factors.” TX 160 at CL1827.

plete defense based on the fact that Heller was an employee of the franchisee (RER), and under Washington law, the franchisor (PT) may not be liable at all. TX 302 at CL1766–67. According to FF’s expert, David Holmes, and Jackson & Wallace’s contemporaneous documents, this franchisor liability issue was “a very strong defense” for PT. RP 2236:25–2237:8; TX 71; *see also* RP 3755:1–19; RP 2359:21–2360:4 (testifying that fact that Heller was an RER employee, not a PT employee, was important to the franchisor defense); TX 209 at 11 (¶ M), 12 (¶ A), 13 (¶ B), 15 (¶ B), 26 (¶ I).<sup>5</sup>

Yet, Vose did not cooperate with Jackson & Wallace or the plan for his defense. The jury found that Vose and PT rejected that proffered defense, and waived PT’s right to a defense under the Policy. App. at 3.

In September 2008, unbeknownst to FF, Vose and PT settled the case with the Welchs using separate counsel, Howard Bundy. TX 66. The settlement did not, however, specify a final dollar amount. *Id.* at 5. Instead, the it contemplated either (a) negotiation to arrive at an agreed amount, followed by a reasonableness hearing (*i.e.* the conventional approach for a covenant judgment settlement) or (b) a private arbitration. *Id.*

As part of the settlement, Vose agreed to state that Heller was a PT

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<sup>5</sup> Vose testified his separate franchise attorneys at Montgomery Perdue advised him that PT would be “fine” under Washington franchise law; in other words, that the franchisor defense was strong. RP 2137:19–2138:5; *see also* RP 2045:5–18, 2199:14–19.

employee, even though he knew that to be false,<sup>6</sup> and agreed to become personally liable, even though he was not sued and it was beyond the deadline to add him as a party.<sup>7</sup> TX 66 at 2, 4–6. The false admission gutted the key liability defense and made the Welchs’ claims stronger in the eventual arbitration. RP 4098:5–14; *see also* RP 2262:12–2263:2, 2801:11–16. The agreement to personal liability allowed Plaintiffs to pursue emotional distress damages for Vose relating to the entry of a personal judgment against him that would not be available to PT as a corporation. RP 2157:14–2158:22, 2169:9–12, 4142:18–23. Vose admitted he agreed to say Heller was a PT employee even though he knew it was false at the instruction of his lawyer. RP 2154:15–2155:12, 2169:24–2170:1. The settlement also included an assignment of some of PT’s rights to recover against FF to the Welchs while reserving to Vose and PT the right to recover for their personal damages. TX 66 at 4. In October 2008, Bundy wrote to FF notifying it of the settlement and providing an Insurance Fair Claims Act (“IFCA”) notice. TX 301.<sup>8</sup>

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<sup>6</sup> RP 2147:23–2148:5, 2148:15–25; TX 225 (payroll records showing Heller was RER employee); TX 228 at 3 (discovery responses showing same).

<sup>7</sup> RP 2149:1–12, 2150:8–23, 2151:11–22, 2154:15–2155:12, 2815:3–18; TX 54; *see also* RP 4073:14–4076:7, 4139:9–22 (no basis for personal liability for Vose).

<sup>8</sup> The settlement concerned the interests of Welch’s minor step-children and is accordingly termed a “Minor Settlement.” On December 19, 2008, the court approved the adequacy of the settlement under SPR 98.16W. TX 77. FF received no notice of this proceeding. Such an order does *not* constitute an adjudication of reasonableness. *See Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512–13, 803 P.2d 1339 (1991). In Minor Settlement proceedings, the court considers whether a settlement is *sufficient* to satisfy the minor’s interests, but does not consider whether the settlement figure is exces-

In November 2009, Bundy sent a letter to Jackson & Wallace directing the firm to turn over its defense litigation file for PT to David Beninger, the attorney for the Welchs. RP 2862:14–2863:1. It is undisputed that Jackson & Wallace followed that instruction and delivered this litigation file to Beninger. CP 3071–72; RP 3783:5–3784:4.

**B. Gosney, Vose, and PT Sue FF**

In September 2009, without first finalizing the settlement’s amount, Plaintiff Gosney filed the complaint initiating this litigation in King County Superior Court. Dkt. 1. The complaint alleged that FF was liable for negligence, bad faith, breach of fiduciary duties, breach of contract, violations of the Consumer Protection Act (“CPA”), RCW 19.86 *et seq.*, and, violations of IFCA, RCW 48.30 *et seq.* CP 2230–37.

In November 2010, the lawsuit was stayed on FF’s motion so Plaintiffs could complete their settlement. CP 61, 141–42. Plaintiffs were ordered to: obtain a “[f]inal determination of damages ... by either a. stipulated amount approved as reasonable by the court, or b. final arbitration decision.” CP 142 (emphasis added).

**C. Vose Files for Bankruptcy Protection**

In April 2010, *after* the settlement and *during* the pendency of this case, Vose filed for Chapter 7 bankruptcy. TX 384; *see* RP 2158:23–

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sive or otherwise fair to all parties involved, as in a reasonableness hearing. *See Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 523–24, 901 P.2d 297 (1995).

2159:7, 2162:14–2163:2. He had to disclose his assets including any potential legal claims. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006). At that point, he was well aware of his potential recovery from FF in this litigation. RP 2166:15–2167:16, 2168:21–2169:12. Yet Vose did not disclose this or even list the case. TX 384, 385; RP 2165:10–2167:16, 2177:2–2178:8. He admitted he listed the value of his PT stock as zero because he did not want to give up the business to his creditors. RP 2174:6–20. His debts were discharged on July 21, 2010, but his false disclosures meant he wrongfully kept his right to recover for damages from FF and his PT stock. TX 401.

Despite his representations to the bankruptcy court, Plaintiffs advanced Vose’s claims at trial, seeking damages for emotional distress, personal attorneys’ fees, and injury to credit and reputation. *See* RP 2169:9–12. Vose admitted that both Bundy and Beninger were aware of his bankruptcy filing at the time. RP 2167:15–2168:14, 2941:15–2943:14.

**D. The Welchs, PT, and Vose Engage in an “Irregular” Arbitration, Without Providing Adequate Notice to FF**

**1. Plaintiffs Provide FF With Inadequate Notice**

After years of unexplained delay, in 2012, Gosney, Vose, and PT proceeded with an arbitration to finalize their settlement. TX 200. On or about September 17, 2012, Gosney sent a letter to FF’s outside counsel, John Bennett, declaring only that the arbitration (1) would take place on

November 1, 2012, and (2) would cover the “remaining issues.” *Id.* Bundy and Beninger arranged this date without consulting FF. TX 207 at 5.

On September 27, 2012, Bennett responded seeking information about the nature of the arbitration, including what issues were to be resolved, and requesting that Plaintiffs “provid[e] [FF] copies of all documents generated by Jackson & Wallace that were provided to plaintiffs.” TX 201. On October 4, 2012, having heard nothing back, Bennett reiterated FF’s request. TX 202. The next day, Beninger responded in a single sentence that the arbitration issues “are broad.” TX 203.

On October 9, 2012, Bennett answered: “As I am sure you understand, [FF] cannot reasonably participate in an arbitration when it does not know what will be arbitrated.” TX 204 (emphasis added). Paul Tenner (FF’s corporate counsel) and Jeff Tilden (FF’s expert) testified that FF faced a risk of being in bad faith if it participated in the arbitration. RP 3596:13–3597:10, 3959:14–3960:22.<sup>9</sup> FF offered to pay for a transcription, which Beninger rejected. TX 204–205; *see* App. 27 n.1.

On October 16, 2012, Bennett wrote back, stating: “The arbitration is not, in any event, an action against [FF]—that is, [FF] is not a defendant. The arbitration is also not a reasonableness hearing, and there

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<sup>9</sup> At trial, Plaintiffs’ expert, Richard Dykstra, conceded that FF would want to know the issues, that these were proper questions, and that an insurer must be careful if it intends to directly involve itself in a proceeding between its insured and the claimant. RP 979:5–14, 982:17–19, 985:6–7.

appears to be no basis for [FF] to intervene.” TX 206. Beninger did not respond or provide any notice that he and Bundy intended to arbitrate the reasonableness factors. Unbeknownst to FF, at the same time Bennett was asking that the issues be specified, Beninger and Bundy were discussing them (TX 207 at 3), and Bundy admitted he and Beninger worked together to come up with ideas for responding to FF (TX 204, TX 340, TX 205; RP 2893:20–22). Beninger provided a list of the issues to the arbitrator and to Bundy (TX 342 at 3–4), but no one gave this list to Bennett or FF.<sup>10</sup>

**2. Plaintiffs Engage in an “Irregular,” Non-Adversarial Arbitration**

Internal emails established that Bundy, the day before the arbitration, did not know when or where it was to take place and had to ask Beninger for that information. TX 343. On November 1, 2012, Plaintiffs conducted their arbitration. TX 200. After hearing the evidence on the arbitration, the court, in a post-verdict order, found that Plaintiffs’ actions were “troubling” and had the effect of conceding both key liability and damages issues.<sup>11</sup> The court listed the following as examples of the “more apparent” “irregularities” at the arbitration:

- “[Bundy] agreed that Ms. Heller (the driver who killed Mr. Welch)

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<sup>10</sup> See RP 3456:23–3463:15 (Bennett’s testimony on these letters); see also RP 995:1–20 (testimony of Plaintiffs’ expert Dykstra that Beninger and Bundy decided not to provide FF with the issues despite understanding that FF could not attend without knowing what they were).

<sup>11</sup> App. at 29, 31. Vose attended the arbitration and adopted the lawyers’ factual presentation to the Arbitrator. RP 2086:23–2087:2.

was an employee of [PT] (the franchisor) when, in fact, Ms. Heller only worked for the franchisee,” thus conceding the key fact pertaining to the franchisor liability defense.<sup>12</sup>

- Bundy “failed to contest” key damages issues. “The corollary to that concession is that Mr. Bundy agreed that [FF] was liable for the total damage amount, with no discount afforded to Mr. Vose/[PT] for issues related to franchisor liability.”
- “Bundy failed to submit his own trial brief,” “failed to call a single witness to testify,” “failed to offer his own exhibits,” and “failed to call an expert in franchisor liability,” even though the evidence showed strong defenses to both liability and damages existed.
- “Prior to reaching an amount for damages and prior to the arbitration, Mr. Bundy . . . turned over the confidential Jackson Wallace attorney file to Mr. [Beninger] (at Mr. [Beninger]’s insistence).”
- “Bundy . . . provided Mr. [Beninger] with favorable case law prior to appearing before [the Arbitrator].”
- “[Bundy] was also silent to the fact that [FF] was listed in the caption of the arbitration brief (and other pleadings) as a party, when [FF] was not. Neither he nor Mr. [Beninger] made any effort to correct this error before [the Arbitrator].”
- “The hearing was truncated, lasting only a matter of hours.”

App. at 29.

Indeed, the record at trial was replete with further examples of

“troubling” “irregularities”:

- Bundy presented no experts even though Jackson & Wallace had at least two lined up for PT. RP 4059:6–14.
- Bundy failed to contest additional false statements of material fact in Beninger’s arbitration brief, e.g., that Vose was deeply involved in RER’s management and operations. RP 2974:18–2976:3.
- Beninger and Bundy withheld Bennett’s pre-arbitration letters from the arbitrator and agreed to provide only Beninger’s letters.

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<sup>12</sup> TX 342 at 1, 2, 7, 9 (Gosney’s arbitration brief stating Heller was a PT employee); RP 2805:18–2807:9 (Bundy testifying he reviewed Gosney’s brief and did not correct it); RP 4031:8–19 (evidence showing Heller was not a PT employee was withheld from the arbitrator).

RP 2851:2–2853:22.

- Bundy failed to contest key contentions of the Welchs’ expert testimony on damages, e.g., the calculation of lost income damages on the basis of an inflated life and work expectancy that ignored Welch’s serious medical conditions. TX 342 at Ex. 26; RP 4061:22–4066:9, 2900:11–2901:9.
- Bundy admitted that the focus of the arbitration was on pain and suffering of the Welch family—even though such evidence is inadmissible. RP 2794:5–22, 4079:23–4081:4.
- Bundy made virtually no changes to Beninger’s draft settlement agreement, reflecting no negotiation of its terms, and this information was not disclosed to the arbitrator. RP 3994:24–3995:1, 4008:10–4009:5.
- Beninger and Bundy presented no evidence to the arbitrator supporting Vose’s personal liability, yet they agreed on an award form that made Vose personally liable. RP 4073:14–4076:7.

Tilden testified that this conduct was as “as bad as [he has] seen” in 33 years. RP 3877:12–16.

The arbitration resulted in a \$10.8 million award. TX 92. It stated that this amount represented both (1) the full value of the damages and (2) the reasonable settlement value of the case. *Id.* In other words, the award contained *no discount* for risk as it would had the parties to the arbitration not falsely represented to the arbitrator that Heller was a PT employee, undercutting PT’s key liability defense. *See App.* at 29.

Additionally, the award contained a finding that proper notice had been provided to FF. TX 92. But Beninger and Bundy had only provided the arbitrator with Beninger’s letters (TX 342 at Ex. 31)—they withheld and did not disclose Bennett’s (TX 201, 202, 204, 206). RP 3982:12–3983:16. Beninger and Bundy also listed FF in the arbitration caption,

despite knowing that FF was not a party and otherwise injected insurance issues into the resolution of the underlying case. TX 342; *see* ER 411; WPI 2.13. They also did not inform the arbitrator that FF was not a party. RP 3991:6–18. (Once FF found a copy of the arbitration award on the Thurston County docket, the Thurston County Court agreed with FF that it should be stricken from the caption. TX 96.) In other words, because of the misleading caption and the withheld information, the arbitrator was all but told that FF, an insurer, was a proper party to the wrongful death action and could not be bothered to show up.

**E. In the Reinstated Litigation Against FF, Plaintiffs Strategically Restrict Discovery Concerning the Arbitration**

Following the arbitration, this litigation was reinstated. During a September 20, 2013 hearing, Beninger represented that, at the arbitration, “[e]verything was submitted and there was extreme advocacy.” RP 15:15–19 (or CP 726); *see also* RP 14:22–24 (“Every piece of evidence developed in the underlying advocacy case was submitted to the arbitrator . . .”). And, again, at a February 7, 2014 hearing, Beninger told the court the arbitration was “hotly contested.” CP 4106 at 18:8–10. Beninger made both statements before it became clear that FF would be permitted discovery on the arbitration from Beninger or Bundy.

FF eventually obtained Bundy’s deposition after Plaintiffs’ repeat-

ed efforts to resist it. *See* CP at 2217–21. However, Plaintiff Gosney obtained a protective order preventing FF from deposing Beninger. CP 853.<sup>13</sup> FF’s inability to cross-examine Beninger on his actions and statements impeded FF’s ability to present key defenses. For example, FF was denied the ability to cross-examine Beninger on the false statements included in his submission to the arbitrator, TX 342. *Supra* § III.D.2.

**F. The Parties Conduct a Trial on FF’s Handling of the PT Claim and Plaintiffs’ Conduct at the “Irregular” Arbitration**

**1. Plaintiffs Seek Damages, Including the \$10.8 Million Arbitration Award, For All Five Claims**

The parties engaged in a five-week jury trial before Judge Sean O’Donnell. Plaintiffs argued FF acted in bad faith in numerous respects, both relating to FF’s duties to defend and/or settle and as to numerous actions Plaintiffs alleged violated various procedural claims handling rules and regulations. *E.g.*, RP 4193:22–4195:22; CP 2235. Plaintiffs argued that FF’s actions and failures to act (1) breached the Policy, (2) breached its duty of good faith to its insured, PT, (3) was negligent, (4) violated the CPA, and (5) violated IFCA. They asked the jury to award the \$10.8 million as damages, plus interest, and Vose and PT’s other purported damag-

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<sup>13</sup> FF also sought discovery on the Welchs’ claimed damages. Plaintiff Gosney moved for a protective order to restrict this discovery. The court denied FF discovery into establishing a different reasonable settlement value for the case than the arbitration award. CP 2161–63. Plaintiffs successfully moved in limine on this issue to prevent FF from presenting evidence of a different reasonable settlement value and FF complied with that order at trial. CP 3163–3171, 4788–4803.

es as result of FF's conduct, including emotional distress, personal attorneys' fees, and injury to credit and reputation. *E.g.*, RP 4199:6–4200:24; App. at 23. Plaintiffs acknowledged their claims overlapped, and argued they were entitled to the \$10.8 million with respect to each claim. RP 51:1–5 (5/7/15, 1:00 pm).

**2. FF Moves For Judgment Pursuant to CR 50(a)**

At the close of Plaintiffs' case, FF moved for judgment as a matter of law. RP 3017:12–3021:15. First, it moved on fraud and collusion. *Id.* Second, it argued that—if the jury were to award the \$10.8 million—FF's collateral estoppel defense was established. *Id.* Third, it argued that—based on, among other things, Vose's admission that he could not identify any economic harm he suffered due to FF's conduct (RP 2179–2180; CP 5699–5700)—FF had not harmed Vose, which was an essential element of each claim. RP 3017:12–3021:15. And, fourth, it argued that Vose's failure to disclose his potential recovery against FF in his bankruptcy barred him from claiming to have suffered damages as a matter of judicial estoppel. *Id.* The court denied FF's motion on the first three grounds, but reserved ruling on judicial estoppel. RP 3035:24–3036:20, 3207:11–3208:3.

**G. The Court Instructs the Jury on the Claims and Defenses**

**1. The Court Instructs the Jury That FF is Bound to the \$10.8 Million Only If It Received All Required Notice**

Under the court's instructions, one path the jury had to decline to

award the \$10.8 million as damages was by concluding that FF did not receive adequate notice and an opportunity to participate with respect to the arbitration. Instruction 38, in language Plaintiffs provided, stated: “[a]n 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.” App. at 16; CP 3990. The instruction told the jury that this rule applied even if the jury found no fraud or collusion. App. at 16.

There was substantial evidence to support FF’s position on this issue. For instance, Jeff Tilden, FF’s expert, testified that FF did not have proper notice and, given the mix of issues involved in the arbitration, FF did not have an opportunity to intervene. RP 3959:8–3960:22, 4020:13–4021:9, 4089:17–4090:15; *see also* TX 200–06.

## **2. The Court Instructs the Jury on Plaintiffs’ Two Types of Bad Faith Claims**

Another path the jury had to reject the \$10.8 million was causation, which was a key issue FF argued at trial. RP 4203:19–22. Jury Instruction 53 explained the two distinct forms of bad faith claims under Washington law, each with different proof requirements relating to proximate cause: The type of bad faith claim that does not involve a breach of the

duty to defend or settle (“Ordinary Bad Faith Claim”);<sup>14</sup> and the type of bad faith claim that involves a bad faith failure to defend or settle (“D/S Bad Faith Claim”) and includes a rebuttable presumption of harm based on the amount of a properly established covenant judgment settlement. App. at 22. The court’s instruction advised that all insurance bad faith claims, like all torts, have three components: breach of a duty, causation, and damages. *Id.*

For the Ordinary Bad Faith Claim, which is addressed in the bottom part of Instruction 53, the court instructed the jury that Plaintiffs had to prove, *first*, there was a failure to act in good faith; *second*, the breach of good faith proximately caused PT and Vose injury; and, *third*, damages. *Id.* The burden always remains on the plaintiffs to prove proximately caused damages; there are no presumed damages. *Id.*

For Plaintiffs to prevail on the D/S Bad Faith Claim, which is addressed in the top part of Instruction 53, the jury had to find the same three elements, but the burdens were different. The court instructed the jury that, *first*, the burden was on Plaintiffs to show breach of the duty. *Id.* Then, *second*, the court explained on the issue of causation, the law creates a presumption of proximate cause—a presumption that FF has the

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<sup>14</sup> This would be something like responding to a communication in eleven days rather than ten days as required by the claims handling WACs.

right and burden to rebut. *Id.* (“You are bound by that presumption *unless you find that [FF’s] failure to act in good faith did not injure* Plaintiffs [PT] and Mr. Vose.” (emphasis added)); *see also* App. at 23–24 (“As to the duties to defend and/or settle, [FF] has the burden of proving that any act of failure to act in good faith did not injure harm, damage or prejudice the plaintiffs”). Finally, *third*, the court explained that the burden remained on Plaintiffs to show some harm. App. at 22.

Jury Instruction 54 required that if the jury found for Plaintiffs on the D/S Bad Faith *Claim* (i.e. Plaintiffs prevailed on all elements), then the \$10.8 million arbitration award must be included as damages:

If you find for the Plaintiffs on their *claim* that [FF] 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 [FF] on its affirmative defense that the settlement was the product of fraud or collusion. The judgment amount is \$10,800,289, plus interest.

App. at 23 (emphasis added).<sup>15</sup> As described below, the jury did not award the \$10.8 million for the D/S Bad Faith Claim (or any other claim), which means it found Plaintiffs did not prevail on that claim.

### **3. The Court Instructs the Jury on Certain FF Defenses**

#### **a. Waiver**

Jury Instruction 52 instructed the jury on FF’s waiver defense relating to its obligation to defend Vose and PT. App. at 21. There was sub-

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<sup>15</sup> The term *claim* was defined throughout the jury instructions to include breach, causation, and damages. *See* App. at 22; *see also* App. at 18.

stantial evidence that Vose and Bundy did not want FF to continue to defend. *E.g.*, TX 350 at 24 (1/13/09 entry); RP 3781:21–3782:11.

**b. Fraud or Collusion**

In Jury Instructions 54 and 9, the court directed the jury that it “must” award \$10.8 million as damages if it found for Plaintiffs on the D/S Bad Faith *Claim* (finding breach, causation, and harm), *unless* it found fraud or collusion by clear, cogent, and convincing evidence. App. at 23, 7; *see also* App. at 12, 16. This burden of proof differed from the parties’ burdens in establishing the other claims and defenses, all of which used a preponderance standard. *See* App. at 7.

Instruction 11 defined collusion as “secret cooperation for an illegal or dishonest purpose.” App. at 9. Jury Instruction 10 defined fraud using nine elements found in other, non-insurance bad faith contexts. App. at 8. Based on established case law, FF proposed an instruction that would have empowered the jury to infer fraud or collusion from other facts. CP 3896–97. The court erroneously rejected that instruction, as addressed in Section IV.J. App. at 8–9.

**H. FF Argues in Closing in Reliance on the Instructions**

FF repeatedly emphasized to the jury that Plaintiffs were overlooking the key issue of proximate cause with respect to their claimed damages, including the \$10.8 million, and that causation was “very important” in

this case. RP 4203:19–22; *see also id.* at 4202:24–4203:11. FF further argued from the instructions that Plaintiffs could not recover the \$10.8 million because they chose not to provide FF with adequate notice of a reasonableness hearing or opportunity to participate in it. RP 4207:12–4208:13. FF also argued that Vose and PT waived FF’s obligation to defend when they rejected Jackson & Wallace’s representation. RP 4208:14–4209:2.

As described below, the jury’s verdict rejecting the \$10.8 million shows that FF prevailed on these arguments. *Infra* § III.I. Plaintiffs have never argued that substantial evidence did not exist in FF’s favor on each of them. FF argued that its actions did not constitute bad faith and likewise argued its fraud and collusion defenses. RP 4201–4233, 4243–4293. The verdict form establishes the jury rejected these. App. at 2–3. Reserved for the court’s resolution were FF’s equitable defenses: specifically judicial estoppel and, in the event the jury awarded the \$10.8 million, collateral estoppel.

**I. The Jury Returns a Verdict, Refusing to Award the \$10.8 Million and Awarding \$460,000 to PT and Vose**

The court provided the jury with a special verdict form based on the parties’ input. RP 2:2–4 (5/7/15, 1:00 pm). In Question 4a (App. at 4), the jury awarded PT and Vose \$460,000 across all claims.

Based on this damages award, two things stand out. The jury did *not* find the \$10.8 million as damages proximately caused by FF for *any* of Plaintiffs' claims. And the jury rejected Plaintiffs' D/S Bad Faith Claim. The verdict form did not separately ask the jury whether Plaintiffs prevailed on their Ordinary Bad Faith or their D/S Bad Faith Claim. App. at 2. Rather, Instruction 53 addressed this issue: it instructed the jury that if it found for Plaintiffs on the D/S Bad Faith Claim, it was *required* to award \$10.8 million as bad faith damages. App. at 22. The jury did not write in those damages. App. at 4. Accordingly, the jury found against Plaintiffs on the D/S Bad Faith Claim. Close scrutiny of the verdict form confirms these conclusions.

**1. Question 1a**

Question 1a asked the jury, "Have the Plaintiffs proven all elements of *any or all* of their *claims* as to the Defendants?" and provided lines for the five types of claims. App. at 2 (emphasis added). Notably, with respect to the "Breach of Duty of Good Faith," this question did *not* break out the two bad faith claims (Ordinary Bad Faith Claim and D/S Bad Faith Claim), nor did Plaintiffs request such a question. *Id.* The jury returned its verdict with "yes" on all five lines under Question 1a. Based on this question alone and without reading the rest of the verdict, the jury's answer to just Question 1a does not answer which bad faith claim had

been found: the jury could have found for Plaintiffs on either the Ordinary Bad Faith Claim or the D/S Bad Faith Claim (or both). *Id.*

## **2. Question 1b**

Question 1b asked the jury to provide additional information concerning its finding of bad faith: “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. at 2 (emphasis added). In contrast with Question 1a, which asked the jury to state whether at least one bad faith *claim* had been proven, Question 1b asked the jury to specify only whether *breach* had been established with respect to the D/S Bad Faith Claim. *Id.* Question 1b does *not* ask the jury anything about the causation or damage elements of a D/S Bad Faith Claim. *Id.* Nor does Question 1b ask the ultimate question—*i.e.* whether Plaintiffs have prevailed on their *claim* for D/S Bad Faith. The jury returned a verdict of “Yes” on Question 1b, indicating that it found at least one breach of the duty to defend or settle. *Id.* Thus, Questions 1a and 1b taken in isolation only state that Plaintiffs had proven at least one *claim* of bad faith (either Ordinary or D/S), and had proven the *breach* element of the D/S Bad Faith Claim specifically.

## **3. Question 3**

Question 3 asked the jury “[h]ave the Defendants proven all elements of any or all of their defenses?” and provided spaces for fraud, col-

lusion, estoppel, and waiver. App. at 3. Although the jury found no fraud, collusion, or estoppel, it did find FF proved all elements of its waiver defense that Vose/PT intentionally gave up a known right under the Policy to have FF defend them. *Id.*; App. at 21.

**4. Question 4a**

Question 4a broadly asked the jury “[b]ased on the jury instructions, what amount of damages, if any, do you find were incurred by Plaintiffs John Vose and Pizza Time?” App. at 4. The question expressly referred to the instructions, which, as noted above, stated:

If you find for the plaintiffs on their *claim* that [FF] failed to act in good faith as to the duty to defend or settle [*i.e.* the D/S Bad Faith Claim], your verdict *must* include the amount of the judgment on the arbitration award [*i.e.*, the \$10.8 million].

App. at 23 (emphases added).

Paralleling Question 1a, Question 4a gave the jury a line to fill in damages for each of Plaintiffs’ claims, without distinguishing between the D/S Bad Faith claim and the Ordinary Bad Faith claim. App. at 4. After lengthy deliberation (CP 5282), the jury did not award the \$10.8 million as damages, despite five opportunities. Given the instructions, the jury’s answers to Question 4a show that it did not find for Plaintiffs on their D/S Bad Faith Claim but did find for Plaintiffs on their Ordinary Bad Faith Claim, awarding \$300,000 in damages for it:

	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

Plaintiffs never argued this finding is unsupported by substantial evidence.

### 5. Question 4b

Question 4b was necessary to determine how to allocate damages if the jury’s award was more than \$10.8 million. App. at 4. If, for example, the jury awarded \$11 million in total damages, Question 4b was necessary to know whether the jury intended (1) to award the \$10.8 million (which would go to Gosney) and \$200,000 in other damages (which would go Vose and PT under the settlement agreement, TX 66), or (2) to decline to award the \$10.8 million from the arbitration (nothing to Gosney) and award \$11 million in other damages (to Vose and PT). The verdict form therefore asked: “If you awarded damages in Question 4a, does the damages amount include the judgment?” App. at 4. The jury answered “No,” which—in light of the instruction that its verdict “must include” the judgment if it found for Plaintiffs on their D/S Bad Faith Claim—is consistent with the instructions and the jury’s answer to Question 4a.

**J. The Court Discharges the Jury, then Adds \$10.8 Million to Its Verdict and Denies FF’s Collateral Estoppel Defense**

After the court discharged the jury, it granted Plaintiffs’ motion prohibiting contact with it. CP 4997. Plaintiffs did not move for JNOV.<sup>16</sup> Instead, they filed a short presentation of judgment asserting that the jury’s response to Question 1b (concerning FF’s “breach” of the duty to defend or settle) required the court to add \$10.8 million in damages that the jury did not award—notwithstanding that no instruction told the jury that finding *breach* alone required it to award \$10.8 million. CP 5000.

The court’s analysis was brief. It stated that: “The jury found that [FF] breached its duty to act in good faith. It further found, after considering [FF’s] affirmative defenses, that [FF] failed to prove that the arbitration was the product of fraud or collusion.” App. at 26. The court then concluded: “the verdict here necessarily includes the arbitration award.” *Id.* (citing *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 765, 287 P.3d 551 (2012)). The court did not address the proximate cause or damage elements of the claim or the requirement of adequate notice and opportunity to intervene. App. 16, 22.

**K. The Court Also Rejected FF’s Collateral Estoppel Defense**

Because the trial court rejected the jury’s verdict, the court had to

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<sup>16</sup> It is not surprising that Plaintiffs not only did not seek clarification from the jury but also took steps to prohibit contact—the jury’s intent not to award the \$10.8 million was clear; Plaintiffs knew that the jury did not intend to award them these damages.

address FF's collateral estoppel defense. (After the jury refused to award \$10.8 million, FF had asked the court to address the issue only for purposes of appeal. CP 5032.) Despite the factual findings discussed in Section III.D.2, the court found this admittedly "irregular" proceeding to be adversarial and failed to properly apply the collateral estoppel factors. App. at 26–33. For example:

- Even though it had previously stated that notice was not a collateral estoppel issue (RP 3850:1–9), the court substituted its judgment for the jury's on notice to FF, relying on inapplicable cases in the UIM context. *Compare* App. at 28 *with* App. at 16.
- The court likewise substituted its judgment for the jury's on whether FF had an adequate opportunity to participate. *Compare* App. at 32–33 *with* App. at 16.
- The court concluded that the arbitration was "actually litigated" for the purpose of collateral estoppel because the jury did not find fraud or collusion. App. at 30.

The court found that Plaintiffs "failed to offer any reasonable explanation" for their decision to "conflate[e]" the "arbitration hearing with a reasonableness determination." App. at 31 n.3. FF's witnesses testified that when these proceedings are working properly, the merits determination pits the underlying plaintiff against the underlying defendant/insured (which protects the non-party insurer), but in a reasonableness hearing, the underlying plaintiff and the underlying defendant/insured are aligned against the insurer. *See* RP 3587:18–3591:19, 3962:17–3963:10. The court credited this testimony, finding that when these functions are conflated they placed

FF in a “predicament,” but still determined (contrary to the jury’s finding) that FF had adequate notice and opportunity to participate. App. at 28, 32–33. The court’s order failed to analyze one of the collateral estoppel factors.

When FF raised these issues, the trial court’s amended order considered the previously-omitted “injustice” factor and concluded it was satisfied because there was no evidence that *the Arbitrator* engaged in conduct that “would have impacted the procedural fairness of the proceeding.” App. at 42. That is not the correct standard either.

**L. The Court Granted FF’s CR 50(a) Judicial Estoppel Motion, But Failed to Correct Its Earlier Erroneous Decisions**

FF moved for reconsideration of the court’s order. CP 5719–5735, 5746–5749, 5785–5794. In response, the court issued an amended order. App. at 35–47. It noted that “[t]he issue for the jury is to decide merely breach of that duty to defend and not whether damages flow from the breach.” App. at 40 n.1. That is not what the court instructed the jury in Instructions 53 and 54. App. 22–23. The court noted, in its view, “[t]he 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.” App. at 41. The court claimed that there was a “conflict in the verdict form” that it decided to “resolve[]” by adding the \$10.8 million

so the jury's verdict could be "reconcile[ed]" with additional case law. *Id.*

The court did not address the fact that there were two bad faith claims. Nor did the court's order carefully analyze the jury's answers in light of the instructions and the language of the verdict form. Nor did the court attempt to uphold the jury's verdict as written. Instead, the court's order presumes that the jury (1) found for Plaintiffs on their D/S Bad Faith Claim (including proximately caused damages), but (2) ignored the court's instruction that the verdict "must include" the \$10.8 million as damages in such circumstances (App. at 23).

Later in the same order, the court granted FF's CR 50(a) judicial estoppel argument in full and struck *all* of the jury's damages from Question 4a. *Id.* at 47. Yet the amended order failed to address the effect of this ruling on the court's decision to add the \$10.8 million the jury declined to award. In fact, setting aside the issues of proximate cause and notice, the judicial estoppel decision requires that all of the claims against FF fail as a matter of law and Plaintiffs could not recover the \$10.8 million (or any other amount) because all claims required some showing of damage. *See* App. 11, 17, 19–20, 22.

**M. The Trial Court Erroneously Awarded Fees and Costs**

The trial court awarded Plaintiffs \$2,890,155 in fees and costs. App. at 55. This included (1) Vose and PT's fees and costs, even though

the court’s judicial estoppel finding reduced their alleged damages to \$0, (2) fees incurred in the underlying arbitration, and (3) an upward multiplier of the lodestar calculation. CP 6264–67.

#### IV. ARGUMENT

##### A. Standard of Review

It is an abuse of discretion for a court to use an incorrect legal standard. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 8, 330 P.3d 168 (2014). Determining the appropriate legal standard and assessing whether the trial court applied it are both issues of law the appellate court reviews *de novo*. *Id.* at 13 (Madsen, C.J., concurring).

The legal effect of a jury verdict is reviewed *de novo* (*Estate of Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 866–67, 313 P.3d 431 (2013)), and factual issues committed to a jury are reviewed under a sufficiency of the evidence standard (*Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001)). “If there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury.” *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987). In conducting this analysis, the court “is to 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). The evidence at trial must

be “viewed in the light most favorable to the jury’s verdict.” *State v.*

*Curtiss*, 161 Wn. App. 673, 693, 250 P.3d 496 (2011).

**B. Plaintiffs’ Failure to Seek Clarification Waived Any Argument That the Verdict Meant Something Other Than What it Said**

After five weeks of trial and a full week of deliberations, there can be no dispute that the jury returned a verdict that did not include the \$10.8 million. App. at 4; *see* App. at 23. The jury had at least five separate opportunities in Question 4a to write in \$10.8 million as damages. App. at 4. It did not. *Id.* And it confirmed its verdict did not include those damages in Question 4b. *Id.*

If Plaintiffs truly believed the jury had an unstated intent to include the \$10.8 million, they not only would have sought clarification, they had an obligation to seek it. Their failure to raise this issue before the jury was discharged waives it and Plaintiffs are bound by the jury’s verdict as written. *Minger v. Reinhard Distrib. Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *see also* 4 Wash. Prac., Rules Practice CR 49 (6th ed.) (“If the inconsistency is not raised in a timely manner, the issue may be waived.”). Given that FF sought clarification from the jury on an unrelated issue (App. at 5), Plaintiffs were aware of the ability to seek clarification and chose not to do so.

**C. The Trial Court Abrogated its Obligation to Respect and Protect the Jury's Verdict**

The court ignored the jury's decision and its fundamental constitutional obligation to protect and uphold the jury's verdict. Instead, the court incorrectly concluded that the verdict needed to be "reconcil[ed]" with additional case law after the fact, to hold that the \$10.8 million the jury had refused to award should be added post-verdict. App. at 41.

This was error. The jury's verdict was not internally inconsistent; it conformed to the jury instructions and Washington law. Neither the instructions nor the law mandate a \$10.8 million award upon a finding of breach alone when the claim itself was not proved. Neither the court nor Plaintiffs even tried to harmonize the verdict as Washington law requires. Even if the instructions were wrong, Plaintiffs proposed the key language. Even were that not so, FF relied on the instructions to argue its case. Even if all that were not true, the court may not rewrite the jury's verdict: the only remedy is a new trial. Any one of these mandates reversal.

There are clear and well-established rules for interpreting and applying a jury's verdict. *First*, the court *must* presume that the jury understood and followed its instructions. *Diaz v. State*, 175 Wn.2d 457, 474,

285 P.3d 873 (2012).<sup>17</sup> *Second*, Washington courts must begin their evaluation “with the presumption that the verdict was correct” (*Herriman v. May*, 142 Wn. App. 226, 234–35, 174 P.3d 156 (2007)) and proceed with “a strong presumption of adequacy to the verdict” (*Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967)).

These precepts derive from the core constitutional principles of this State: Article 1, Section 21 of the Washington Constitution provides that “[t]he right of trial by jury shall remain inviolate.” This Section guarantees that parties have the right to have juries adjudicate legal claims, and it also “protects the jury’s role to determine damages.” *Sofie v. Fibre-board Corp.*, 112 Wn. 2d 636, 645–46, 771 P.2d 711 (1989). “To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.” *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 269, 840 P.2d 860 (1992) (quotation marks omitted); *see also Usher v. Leach*, 3 Wn. App. 344, 347, 474 P.2d 932 (1970) (“The issue of damages is peculiarly within the province of the jury.”). Accordingly, “[r]egardless of the court’s assessment of the damages, it may not, after a fair trial, substitute its conclusions for that of the jury on the amount of damages.” *Cox*,

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<sup>17</sup> *See also Carnation Co., Inc. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990); *Dormaier*, 177 Wn. App. at 867; *Raum v. City of Bellevue*, 171 Wn. App. 124, 148, 286 P.3d 695 (2012).

70 Wn. 2d at 176.

Thus, “[i]n reviewing a verdict, [the] court *must* try to reconcile the answers to special interrogatories.” *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995) (emphasis added). If special verdict answers conflict with each other, a court *must* attempt to harmonize them; where the answers are reconcilable, the trial court *must* enter judgment accordingly....” *Dormaier*, 177 Wn. App. at 866 (emphasis added). Indeed, even where the verdict “clearly suggests an error,” where “precise issues of fact,” such as the amount of damages, were submitted to the jury, the trial court must enter judgment on the jury’s written verdict. *Marvik v. Winkelman*, 126 Wn. App. 655, 660, 109 P.3d 47 (2005). A verdict finding breach of a duty but finding no proximately caused damages is not an inconsistent verdict “if there is evidence in the record to support a finding of [breach of a duty] but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant’s actions.” *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 927–28, 332 P.3d 1077 (2014), *review denied*, 182 Wn.2d 1021, 345 P.3d 785 (2015).

Only if the answers are so “patently inconsistent” that they “cannot be reconciled,” does the court then proceed to the next step.” *Alvarez*, 76 Wn. App. at 743. And even then, “[i]f the verdict contains contradictory answers to interrogatories making the jury’s resolution of the ultimate is-

sue impossible to determine, a court has *no choice but to grant a new trial*; [it] may not substitute its judgment for that which is within the province of the jury.” *Id.* (emphasis added). If there is an “irreconcilable inconsistency,” a court may not “substitute its judgment for that which is within the province of the jury. . . . the only proper recourse is to remand the cause for a new trial.” *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, 524 (1931) (improper “invasion of the province of the jury” for a trial court to add to the jury’s awarded damages).<sup>18</sup>

Neither Plaintiffs’ arguments nor the trial court’s orders comply with *any* of these established rules. In fact, neither Plaintiffs nor the trial court acknowledged, let alone conducted, the required analysis.

The jury’s answers to Question 4a, which asked it to list all damages incurred, did not list the \$10.8 million. App. at 4. Given the court’s instruction that the verdict “must” include that amount if the jury found for Plaintiffs on their D/S Bad Faith Claim (App. at 23), the *only proper conclusion* a court can reach in interpreting the verdict consistent with Washington law is that the jury did *not* find for Plaintiffs on their D/S Bad Faith Claim. Instead, the jury found for Plaintiffs, and awarded resulting dam-

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<sup>18</sup> Indeed, “where the issue is presented to the jurors and not decided by them, it is not within the province of the court to supply the omission and find the fact itself.” 14A Wash. Prac., Civ. Pro. § 32:22 (2d ed.). “[A] new trial [is . . .] the only recourse.” *Id.*

ages, only on their Ordinary Bad Faith Claim (which does not include a requirement to include the \$10.8 million). App. at 4, 23.

This conclusion is consistent with the jury's verdict form and the jury instructions. It is consistent with the jury's affirmative response to Question 1a, which asked if "all elements" of Plaintiffs' claims had been proven. (That question does not distinguish between the two bad faith claims, so a "yes" answer does not indicate which bad faith claim the jury found was established. App. at 2.) It is also consistent with the jury's affirmative response to Question 1b, which asks only whether Plaintiffs have established a "*breach*" of the duty to defend or settle, but does not ask whether "all elements" of that *claim* were established or whether any harm resulted from the breach the jury found. *Id.* If there is a breach that does not proximately cause harm, then the "*claim*" has not been established. App. at 22. It is likewise consistent with the jury's rejection of FF's fraud and collusion defenses. FF's burden of proving fraud or collusion was weightier than its burden to rebut the presumption of harm on a D/S Bad Faith Claim—as by showing that the \$10.8 million was attributable to factors other than FF's conduct (such as Vose accepting liability when he was not sued, firing his FF provided attorneys, and/or conceding to false facts at the arbitration). Therefore, the jury's failure to find fraud or collusion on a high standard does not prevent the jury from deciding

that FF's evidence on proximate cause was stronger than Plaintiffs', allowing FF to rebut the presumption of harm and the jury to determine the D/S Bad Faith *Claim* was not established. App. at 3; App. 7, 22–23.

Instruction 53 laid out for the jury what must be shown to establish both types of bad faith claims at issue here. App. at 22. For the Ordinary Bad Faith Claim, the court instructed the jury that Plaintiffs had to prove FF failed to act in good faith, that PT and Vose were damaged, and that FF proximately caused the damage. *Id.* For the Ordinary Bad Faith Claim there are no presumed damages and the burden is always on the Plaintiffs to prove damages. *Id.*

For the D/S Bad Faith Claim, the court instructed the jury that, if there was a breach, “the law presumes that Plaintiffs [PT] and Vose were injured and that the failure to act in good faith was the proximate cause of this injury.” *Id.* However, the instruction went on to say that, for the D/S Bad Faith Claim, the jury was “bound by that presumption *unless you find that [FF's] failure to act in good faith did not injure* Plaintiffs [PT] and Mr. Vose.” *Id.* (emphasis added). In other words, for the presumption of damages to be triggered and before Plaintiffs could prevail on the *claim*, the jury had to first find a breach of the duty to defend or settle *and* find proximately caused harm. The jury's decision not to include the \$10.8 million as damages when Instruction 54 was clear that it “must” do so if it

found for Plaintiffs on this claim establishes the jury found no proximately caused harm resulted from the breach identified in Question 1b. There is no other consistent reading of the jury's verdict.

This reading is further supported by long-standing Washington authority. A jury's finding of no damages on an issue implies that the claim (or the particular formulation of the claim) was not proven and its verdict was for the defendant. *See Sheldon v. Imhoff*, 198 Wash. 66, 68–69, 87 P.2d 103 (1939) (noting entry of no damages on a verdict form has been construed as a defense verdict even where there have been no “explanatory [jury] instructions” justifying this approach); *see also Meenach*, 39 Wn. App. at 638 (no damages entered on verdict form showed defense verdict).

The jury's verdict is supported by substantial evidence. Although FF need not establish the jury's actual rationale (*Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 292, 78 P.3d 177, 187 (2003)), it is sufficient if there is any scenario consistent with the evidence that supports the jury's answers to Questions 1a and b and its damages assessment in Questions 4a and b. *Dormaier*, 177 Wn. App. at 866. At trial, FF put on substantial evidence that there was no proximate cause for any alleged bad faith—including D/S Bad Faith. Indeed, Vose admitted as much on cross-examination. RP 2179–2180; CP 5699–5700. For example:

- The jury could have concluded that FF had an obligation to pro-

vide Vose/PT with a lawyer for the arbitration and that failing to do so breached the duty to defend. The jury could also have concluded that no harm resulted because Vose waived the obligation to defend, did not want a lawyer other than Bundy representing him and would not have accepted one, and fired Jackson & Wallace, instructing it to take no further action to defend him. App. at 3; TX 350 at 24 (1/13/09 entry); RP 3781:21–3782:11.

- The jury could have accepted Plaintiffs' argument that the brief period of time that one of the Jackson & Wallace lawyers was ill and the other lawyers had not yet stepped in breached the duty to defend, but the jury could have also concluded that no harm was caused, crediting Gordon Hauschild's testimony (RP 3844:20–3845:13), particularly given that Bundy and Vose agreed that Vose would not contact Jackson & Wallace during this period anyway (TX 207 at 7, 10/24/08 entry); TX 304 at 3.
- The jury could have concluded that FF should have offered something less than policy limits to settle the case early on, but that no harm resulted because Beninger would not have accepted the offer.

Plaintiffs do not argue that no paths existed. There are other possibilities, but as long as there is one, the court must uphold the verdict form as written. *Dormaier*, 177 Wn. App. at 866. Given that the burden of proof on causation was a preponderance (both for the claims where Plaintiffs had the burden or for the D/S Bad Faith Claim where FF had to rebut causation), the jury had substantial evidence to find that FF's evidence relating to causation was stronger than Plaintiffs'. *E.g.*, RP 3857:9–11, 3860:10–3864:1, 3870:7–3871:7 (expert testimony that Vose and PT suffered no economic harm).

It was for the jury to determine whether each particular type of bad faith claim caused damage. *Conrad*, 119 Wn. App. at 292. The jury returned a verdict that can be harmoniously read as described above. The

court was compelled to give effect to that harmonious reading. Its failure to do so was error and reflects a profound, impermissible, and indeed unconstitutional disrespect of the jury's role and verdict.

**D. The Trial Court's Revising the Jury's Verdict Cannot Be Justified Under Washington Law**

**1. A Trial Court May Not Change a Jury's Verdict After the Fact By Referring to Additional Law**

No authority permits the trial court to "reconcile" a jury's verdict with additional case law after discharge as the court did here. App. at 41. Washington law is the opposite. The jury instructions are the law of the case (*see State v. Perez-Cervantes*, 141 Wn.2d 468, 476 & n.1, 6 P.3d 1160 (2000)), and the jury is presumed to have followed them (*supra* § IV.C). If there is prejudicial error in the instructions after the jury is discharged, the only option is a new trial. *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 34, 244 P.3d 438 (2010). The court may not substitute its judgment for the jury's. *Alvarez*, 76 Wn. App. at 743.

The same is true of perceived errors in the verdict form. "[W]here the [verdict] answers are irreconcilable, the trial court *must* order further deliberations or a new trial." *Dormaier*, 177 Wn. App. at 866. "After a jury has been discharged, the authority of the court to amend or correct its verdict is limited strictly to matters of form or clerical error." *Beglinger v.*

*Shield*, 164 Wn. 147, 153, 2 P.2d 681 (1931).<sup>19</sup>

## **2. The Trial Court's Post-Verdict Analysis Violates the Accurate Jury Instructions**

The court's post-verdict manipulation of the jury verdict is also error because, setting aside the issue stated above, the court's post-verdict analysis departs from the correct statement of bad faith law it provided to the jury in the instructions.

They correctly stated that for bad faith claims not involving the duty to defend or settle, Plaintiffs had to prove breach, causation, and damages. App. at 22. For these claims, such as an insurer responding to a pertinent communication later than the time period specified in the WACs, a plaintiff bears the burden of proving each element of his claim as he would in a tort action; an insured or its assignee "*must prove actual harm and its 'damages are limited to the amounts it has incurred as a result of the bad faith . . . as well as general tort damages.'*" *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008) (quoting *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933 (1998)).<sup>20</sup> This burden is reflected in WPI 320.01, which

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<sup>19</sup> See also *Haney v. Cheatham*, 8 Wn.2d 310, 326, 111 P.2d 1003 (1941); 4 Wash. Prac., Rules Prac. CR 59 (6th ed.) ("After the jury has been discharged . . . the court has *no authority to change the verdict before entry of judgment*. The court must enter judgment in accordance with the verdict, after which a party may move for a new trial if warranted." (emphasis added)).

<sup>20</sup> See also Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 3:38 (2d ed.) ("An insurer's bad faith conduct does not give rise to liability unless that conduct actually causes harm to the insured. Bad faith in the air, so to speak, will not do.").

provides:

[Plaintiff] has the burden of proving each of the following propositions:

- (1) That [Insurer] failed to act in good faith in one of the ways claimed by [Plaintiff];
- (2) That [Plaintiff] was [injured] [damaged]; and
- (3) That [Insurer's] failure to act in good faith was a proximate cause of [Plaintiff's] [injury] [damage].

This WPI language was included in the bottom portion of Instruction 53, which dealt with the Ordinary Bad Faith Claim. App. at 22.

Similarly, the court's jury instructions correctly stated that for bad faith claims involving the duty to defend or settle, it is Plaintiffs' burden to prove breach and the existence of damages relating to that claim. App. at 22. However, the burden concerning causation shifts to FF to disprove a presumption of proximate causation. App. at 22–23. This exception to the general burdens of proof in other bad faith and tort actions was first recognized in *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499, 504 (1992), involving an alleged breach of the duty to defend. There, the Court held (1) “if the insured shows by a preponderance of the evidence the insurer acted in bad faith,” (2) then “there is a presumption of harm” but still “the insurer can rebut the presumption by showing by a preponderance of the evidence its acts did not harm or prejudice the insured.” *Id.*; *Mut. of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 920–21, 169 P.3d 1, 8 (2007) (duty to defend case). If the in-

insurer does not rebut the presumption of causation, (3) the burden shifts back to the plaintiff to demonstrate “a showing of harm.” *Butler*, 118 Wn.2d at 389;<sup>21</sup> *see id.* (holding “a showing of harm is an essential element of an action for bad faith handling of an insurance claim”); *id.* at 390 (rejecting “strict liability” formulation of bad faith that would disregard the requirement of proximately caused harm).

The Court in *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 49 P.3d 887 (2002), later developed the related concept of “presumed damages.” A settlement found reasonable in a properly noticed and conducted reasonableness hearing becomes “the presumptive measure of an insured’s harm” when the plaintiff proves his bad faith *claim*. 146 Wn.2d at 738; *Dan Paulson*, 161 Wn.2d at 919 (insurer may be liable for “presumed damages” where there is a “successful bad faith *claim*”) (emphasis added). Thus, under *Besel* and *Butler*, for a D/S Bad Faith claim, the plaintiff is only entitled to presumed damages in an amount held reasonable at a reasonableness hearing if: (1) the plaintiff proves (a) breach of the duty, (b) makes a showing of some harm, and (c) shows the insurer had adequate notice and opportunity to intervene in the reasonableness hearing; and (2) the insurer fails to rebut the presumption of harm.

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<sup>21</sup> In 2007, in *Dan Paulson*, the Supreme Court noted expressly that *Butler* applied only in the duty to defend or settle context. 161 Wn.2d at 924. The *Onvia* Court resolved that it would be improper to apply *Butler*’s burden-shifting framework to ordinary bad faith claims. 165 Wn.2d at 133.

In *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10–11, 206 P.3d 1255 (2009), this Court applied the *Butler* burden-shifting framework to a D/S Bad Faith claim and found that while Ledcor had proven breach of the duty to defend, the claim nonetheless failed because the insurer rebutted the presumption of harm. This Court reached a similar conclusion in *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005). The Court stated:

The Werlingers argue that there is a presumption of harm once an insured establishes that the insurer acted in bad faith. Although this is true, the presumption of harm is rebuttable. Clarendon established that there was no harm.... Because harm is an essential element of both a bad faith and CPA claim, and there is no evidence that the Warners suffered harm, the Werlingers cannot prevail as a matter of law.

*Id.* at 809–10. In that case, the insurer rebutted the presumption of harm by showing the insureds were “shielded from personal liability by their Chapter 7 bankruptcy status.” *Id.*

As the trial court correctly pointed out (CP 6285–87 at 2), the distinction between these two types of bad faith claims is reflected in the WPI: The Note on Use to WPI 320.01, which is the language for Ordinary Bad Faith claims, provides that “This instruction should be used for . . . certain third-party *claims* that do *not* involve the duty to defend, settle, or indemnify” (emphasis added). The trial court’s jury instructions correctly

adhere to the law governing a D/S Bad Faith Claim, as defined by *Butler*, *Dan Paulson*, *Ledcor*, *Werlinger*, and other similar cases.

Until the jury returned its verdict, Plaintiffs agreed that FF was entitled to rebut the presumption of harm and never said FF must prove fraud or collusion to defeat the presumption.<sup>22</sup> And, indeed, *Plaintiffs* proposed the language the court used in instructing on the rebuttable presumption.<sup>23</sup>

Yet when the jury returned a verdict finding a breach of the duty of good faith to defend or settle (App. at 2), but decided not to award the \$10.8 million (*id.* at 4) and thus necessarily ruling *against* Plaintiffs on their D/S Bad Faith claim, they reversed course. For the first time, they argued that all they had to show is *breach* of the duty of good faith and presumed damages follow—which can be defeated only by proving the separate defenses of fraud or collusion. CP 5573–74. Of course, the verdict form and instructions do not permit the jury to award the \$10.8 million based only on a finding of breach. App. at 22–23; App. at 2. This is not Washington law and such a rule would encourage this sort of arbitra-

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<sup>22</sup> Plaintiffs recognized the applicable law in pre-trial briefs. *E.g.* CP 401 n.7 (“The bad faith tort recognized in *Butler* clarified . . . a presumption of harm shifting the burden to the insurer to show no prejudice or harm”); CP 2528 (“There is also a presumption of harm that applies, shifting the burden to the insurer to prove that any failure to act in good faith did not injure, harm, damage or otherwise prejudice the insured assignor.”); *see also* RP 32:15–16 (9/20/13 Transcript) (Beninger arguing that once breach is proven, “[t]he burden will shift . . . to them to show that there was no harm whatsoever on anything they did”).

<sup>23</sup> CP 3979 (Plaintiffs proposing modified version of WPI 320.01.01). Plaintiffs did except to Instructions 53 and 54, but did so because they disagreed that Washington law recognized different burdens for Ordinary Bad Faith and D/S Bad Faith. CP 4922.

tion. Indeed it is patently contrary to *Butler*, *Dan Paulson*, *Ledcor*, *Werlinger*, and all other Washington cases on the topic. FF relied on these proper instructions. The court erred in adopting Plaintiffs' flawed view—especially post-verdict and in taking it upon itself to substitute its view for the jury's rather than acknowledging the only remedy is a new trial. *See* App. at 25–26, 36–41.

**E. The Trial Court's Adding Millions to the Jury's Verdict Rested on Damages the Court Eliminated**

The court's decision to add millions to the jury's verdict is irreconcilable with its own ruling on judicial estoppel. It was undisputed that Vose, under penalty of perjury, did not disclose this case or his claimed right to recover from FF during his 2010 bankruptcy. *Supra* § III.C. FF's CR 50(a) motion argued that Vose and PT were judicially estopped from claiming any damages. RP 3008:7–13; CP 5525–32; *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). The court agreed, and, after the verdict, in its amended order, the court struck *all* of the damages the jury awarded, but left in place the court's post-verdict addition of the \$10.8 million. App. at 47.

The court's reasoning on this issue disregards the consequences of its own finding and the law. The judicial estoppel determination must be understood to negate the jury's finding of harm, by reducing all damages

to zero. *Id.* Had the court decided the CR 50(a) motion at the time FF moved, the court would have had to dismiss all claims. The court would have had to instruct the jury that, as a matter of law, Vose and PT were barred from claiming any harm. Even setting aside the issues of proximate cause and/or notice, as each claim required that Vose and PT make some showing of harm—even the D/S Bad Faith Claim, *see Butler*, 118 Wn.2d at 389; *Werlinger*, 129 Wn. App. at 809–10; App. 11, 17, 19–20, 22—the judicial estoppel ruling bars all the claims. In other words, it is Plaintiffs’ and the trial court’s position that Plaintiffs should be awarded \$10.8 million in damages that the jury rejected even though (1) the jury found no proximate cause, inadequate notice, and that Vose waived the duty to defend, and (2) the court found no damages on any claim.

**F. Without Proper Notice, the \$10.8 Million Cannot Be Awarded**

The court’s decision to add millions to the verdict is also error because it ignores the jury’s finding on notice. Jury Instruction 38 allowed the jury to refuse to bind FF to the \$10.8 million if notice was not adequate or if FF did not have an adequate opportunity to intervene. App. at 16. The instructions made clear this rule applied even if the jury found no fraud or collusion. *Id.* The court’s post-verdict orders ignored that point.

This is a correct statement of the law. To bind an insurer, Washington law requires a settling insured to engage in a reasonableness hear-

ing to scrutinize the amount of a settlement. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012); *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 816, 156 P.3d 240 (2007). To be bound, an insurer must receive notice of the reasonableness hearing. RCW 4.22.060 (“five days’ written notice”). Such notice is a condition precedent to the legal benefits of a reasonableness hearing, including presumed damages.

“The importance of notice of the reasonableness hearing ... cannot be over-emphasized.” *Fraser v. Beutel*, 56 Wn. App. 725, 730, 785 P.2d 470 (1990). “Without such notice” the party who was not notified “is not bound by the determination of reasonableness.” *Id.* The *Fraser* court affirmed that requirement applies even if the non-attending party knew of the hearing in advance and still failed to attend or object. *Id.* at 732–33.<sup>24</sup>

There was ample evidence from which the jury could have concluded that FF did not have “adequate notice and an opportunity to intervene” and therefore should not be “bound by the findings, conclusions and judgment.” App. at 16. Beninger and Bundy decided to withhold from FF the list of issues to be decided and stayed silent in the face of Bennett’s

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<sup>24</sup> Plaintiffs’ and the trial court’s reliance on UIM cases is unavailing. App. at 27–28. No Washington case holds that cases in the UIM context apply outside of that context to abrogate the requirement that notice be provided to an insurer of a reasonableness hearing nor do so such cases or any case stand for the proposition that materially false evidence can be submitted to an arbitrator. RPC 3.3.

statement that the arbitration could not be a reasonableness hearing. TX 200–06. Tilden’s testimony and that of others confirmed that FF had neither proper notice nor an adequate opportunity to intervene. RP 3959:14–3960:22, 3970:20–3971:1; *see also supra* § III.D.1, G.1.

In light of Instruction 38 and substantial evidence that FF never received notice of any reasonableness hearing, the trial court could not have granted a JNOV even had Plaintiffs moved. *Cox*, 70 Wn.2d at 176–77.

**G. A Reasonableness Hearing Cannot Be Combined with an Arbitration on the Merits as a Matter of Law**

No Washington case holds that it is proper to conflate a reasonableness hearing with an arbitration on the merits—especially when an insurer is given no notice of the reasonableness hearing. FF’s expert, Jeff Tilden, explained that an insurer would be in an impossible situation in such a case. *Supra* § III.D.1, G.1. Indeed, the court agreed, finding this testimony credible, acknowledging that doing so placed FF in a “predicament,” and stating that Plaintiffs offered no good explanation for this decision. App. at 31 & n.3. The court’s decision to uphold this procedure—particularly given the jury’s verdict and the court’s own findings—and to reject FF’s earlier summary judgment motion on the issue (CP 152–66)—was error.<sup>25</sup> *See also* ER 411; WPI 2.13.

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<sup>25</sup> No Washington case stands for the proposition that an insurer that has not agreed to arbitration (or to the selection of an arbitrator) can be required to arbitrate the issue of reasonableness when the original case against its insured did not start in arbitra-

**H. Based on the Trial Court’s Findings, FF’s Collateral Estoppel Defense was Established as a Matter of Law**

In light of the trial court’s factual findings, the only proper conclusion was that FF’s collateral estoppel defense was established due to the “irregular” arbitration. *Supra* § III.D.2. The court’s need to address the defense was a result of its own error in ignoring and rejecting the jury’s verdict and its subsequent conclusion on collateral estoppel arose from its failure to apply the correct test. That was error.

There is no dispute regarding the proper collateral estoppel factors. Unless all the following factors were answered affirmatively, FF’s collateral estoppel defense was established:

- (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 (1987). Each element is required. *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 721–22, 346 P.3d 771 (2015). In applying the first two factors, Washington courts require that the underlying proceeding was actually adversarial and litigated: Collateral estoppel applies to “only those

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tion. Any such rule would contradict black letter law concerning non-mandatory arbitration. All non-mandatory arbitration in Washington is a creature of statute, RCW ch. 7.04A. Arbitration occurs only between parties who have agreed to submit to arbitration. *E.g.*, RCW 7.04A.070(1), -.090(1).

issues that have actually been litigated and determined.” *McDaniels*, 108 Wn.2d at 305.

Here, the evidence—including the court’s own factual findings—establish FF’s collateral estoppel defense as a matter of law. The court found that Plaintiffs provided material false evidence to the arbitrator. *Supra* § III.D.2. Indeed, it was done intentionally as a term of the Plaintiffs’ settlement agreement. *Supra* § III.A. Moreover, key damages evidence was never presented to the arbitrator. RP 2900:11–2901:9, 3689:6–11, 3691:18–20, 3692:21–3693:9, 3699:11–18, 4061:22–4066:9; TX 342 at Ex. 26. The court’s findings establish that Beninger’s representation to the court that the arbitration was “hotly contested” was false and that Bundy did not ask a single question, call a single witness, provide a trial brief, or object to anything. *Supra* § III.D.2. The whole proceeding lasted only a few “truncated” hours. *Id.* Before the arbitration, Bundy provided Beninger with Vose/PT’s privileged defense files and both lawyers failed to disclose this to the arbitrator. *Id.* The trial court’s reliance on the fact that the arbitrator did not participate in this conduct turns the injustice factor on its head. App. at 42. It is because the Plaintiffs withheld the true facts from the arbitrator that makes this conduct is so problematic. As a matter of law, FF’s collateral estoppel defense was established (and, indeed, RPC 3.3 is implicated), so even if the jury had awarded the \$10.8 million, the

court should have granted FF's CR 50(a) motion as to this defense.

The court's conclusion flows from the fact that, although it accurately stated the collateral estoppel test, it did not apply it. App. at 26–33. The court disregarded its own careful factual findings on relevant collateral estoppel questions of “procedural regularity” and whether the parties “had a full and fair hearing of the issues,” in favor of a different test that looks to the absence of fraud or collusion. *Id.*; *see also* RP 3850:1–9 (trial court acknowledging that notice was not a collateral estoppel issue). On these facts, the arbitration cannot bind FF.<sup>26</sup>

**I. The Trial Court Erred in Denying FF's CR 50(a) Motion on Fraud or Collusion**

There should be no doubt that providing the arbitrator with material, false information (for instance, that Heller was an employee of PT) on the key liability issue in the case (franchisor liability) that the parties know to be false constitutes fraud or collusion as a matter of law. The arbitration brief that Beninger submitted stated this repeatedly as fact. TX 342 at 1, 2, 7, 9. RPC 3.3 has no meaning if such conduct is rewarded. The court's denial of FF's CR 50(a) motion on its affirmative defenses of fraud

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<sup>26</sup> The court's analysis of FF's collateral estoppel defense relied, at least in part, upon the court's improper conclusion that the substantial injustice of applying the arbitration award against FF was “diminished” because FF did not attempt to prove at trial that the \$10.8 million amount was unreasonable. *Id.* at 33. But, at Plaintiffs' request, the court precluded FF from doing so both in discovery and at trial. CP 2161, 4788, 4805; *see also Bird*, 175 Wn.2d at 767–68. Accordingly, this “failure” cannot be used against FF particularly given that the jury did not even award the \$10.8 million as damages.

or collusion after Vose's and Bundy's admissions was error. Material false representations to the fact finder is a fraud on the court. *See In re Lovell*, 41 Wn.2d 457, 459, 250 P.2d 109 (1952).

**J. The Court's Collusion Instruction Was Error**

The court's collusion instruction does not adequately define the term. The court inappropriately rejected FF's proposed instruction which, citing the American Heritage Dictionary, defined collusion in terms of an "improper purpose." CP 3851. The court's instruction, which ties the definition to whether Plaintiffs' conduct was "illegal," App. at 9, both artificially constrains the definition of collusion and invites confusion as the jury was not otherwise instructed upon what types of agreements might qualify as "illegal."

The trial court also declined to give FF's proposed instruction number 43, which would have instructed the jury that collusion can be inferred from the attendant circumstances. CP 3897. This is a well-established principle accepted by many courts.<sup>27</sup> This instruction was essential because colluding parties rarely memorialize their agreement. Given the heightened proof requirement, the jury could reasonably conclude that collusion requires clear, direct evidence. This is incorrect and the

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<sup>27</sup> E.g., *MacLean Townhomes, LLC v. Charter Oak Fire Ins. Co.*, No. C06-1093BHS, 2008 WL 2811161 (2008); *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 706, 187 P.3d 306, 310 (2008); *see also* CP 3897 (collecting additional cites).

failure to give FF's instruction was prejudicial error.

**K. The Court Improperly Restricted FF's Presentation of Evidence at Trial**

**1. FF 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. RP 2169:19–2170:16. If judgment is not entered for FF, at a minimum, FF 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 FF's ability to present key defenses. This prejudice was exacerbated by the fact that both fraud and collusion, under the jury instructions, required FF to establish the speaker's intent. App. at 8–9. FF 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.<sup>28</sup> This prejudice was magnified by Beninger's appearance as the lead trial attorney for Plaintiffs during the five week trial.

**2. The Court Improperly Disallowed Key Testimony from FF's Expert Jeff Tilden**

FF's expert, Jeff Tilden, was prepared to offer testimony based on Vose's trial admissions that Plaintiffs inappropriately "manufactured" a claim against FF by agreeing to make Vose personally liable in the

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<sup>28</sup> Beninger was also a witness on other key issues and FF was prejudiced by being deprived of the opportunity to cross examine him on these issues as well.

Thurston County Case. *See, e.g.*, RP 3933:4–24. The court improperly forbid this inquiry, reasoning that Vose’s in-court admissions were not sufficiently different from his deposition, which was information in FF’s possession when it disclosed Tilden as an expert and he was deposed. RP 3940:7–11, 3941:19–22, 3942:1–3; *see* CP 4919–20. This ruling was improper twice over. *First*, Tilden was disclosed to opine on whether there was fraud or collusion in the settlement and arbitration. RP 3912:19–25. It is reversible error to exclude testimony on this disclosed issue without a showing of intentional violation of discovery rules. *See Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013). The trial court did not make (much less record) any such finding here. *Teter v. Deck*, 174 Wn.2d 207, 217, 274 P.3d 336 (2012) (findings must be recorded on the record). Tilden’s testimony was highly pertinent to FF’s fraud and collusion defenses. RP 3892:5–6 (describing Tilden as “our most important witness”). The court’s restriction of this testimony was reversible error.

*Second*, the court’s order ignores ER 703, which states that an expert may opine at trial on facts “made known to the expert at or before the hearing.” *See* RP 3937:5–8. Under this rule, experts may opine on trial testimony. *State v. McKeown*, 172 Wash. 563, 568, 20 P.2d 1114 (1933) (“proper” for “expert witnesses to express their opinions, based on the testimony of [opposing] witnesses”). The trial court acknowledged this, rul-

ing that experts were not subject to a courtroom exclusion order (RP 66:5–10), but then erroneously restricted Tilden from relying on Vose’s key admissions. This warrants a new trial. *Teter*, 174 Wn.2d at 220.

**L. The Court Improperly Instructed the Jury that a Single Violation of the WAC Constitutes Bad Faith**

Jury Instructions 12 and 24 erroneously directed the jury that liability should follow from a single violation of Washington’s regulatory requirements, which is an incorrect statement of Washington law.<sup>29</sup> App. 10, 13. The regulations provide that only a pattern of conduct is sufficient to establish evidence of unfair claims handling:

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). For example, where there is a series of communications between the insured and the insurer, a single failure to respond “is insufficient to demonstrate bad faith given the other communications of record.” *Newmont USA Ltd. v. Am. Home Assur. Co.*, 795

F.Supp.2d 1150, 1178 (E.D. Wash. 2011).

**M. The Trial Court Improperly Refused to Excuse a Juror Who Knew and Worked with John Vose’s Wife**

The court refused to excuse a juror who knew Vose’s wife and was exposed to her out-of-court reactions to the case *during trial*. RP 4238:1–

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<sup>29</sup> To the extent the WPI support this formulation, the WPI are incorrect.

4240:11; *see* CP 4919–20. The juror admitted exposure to Vose’s wife’s emotional state (she was very upset) (CP 4920) and emotional distress damages were a core element of Vose’s damages claim (RP 2169:9–12). The juror thus possessed improper information pertinent to finding harm on Plaintiffs’ claims, and it is reasonable to believe that this influenced the juror’s decision-making in the jury room. The trial court’s failure to excuse the juror is reversible error. *See State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) (juror’s possession of out-of-court information during deliberation requires a new trial if there is “a showing of reasonable grounds to believe that” a party “has been prejudiced”).

**N. The Court’s Award of Fees and Costs was Erroneous**

**1. Plaintiffs Vose and PT Did Not Prevail**

The trial court awarded Vose and PT their attorneys’ fees and costs. App. at 55. This was error: Neither is a prevailing party. For purposes of attorneys’ fee awards, the “‘prevailing party’ in a lawsuit is one who receives a judgment in his favor.” *Am. Fed. Sav. & Loan Ass’n of Tacoma v. McCaffrey*, 107 Wn.2d 181, 195, 728 P.2d 155 (1986).<sup>30</sup> “Washington law is clear on which party prevails when money damages are involved.” *Sardam v. Morford*, 51 Wn. App. 908, 911, 756 P.2d 174

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<sup>30</sup> The mere existence of statutory or equitable grounds for a fee award is not enough to justify such an award; the party requesting fees must have *prevailed*. *See Rawe v. Bosnar*, 167 Wn. App. 509, 513, 273 P.3d 488 (2012); RCW 48.30.015.

(1988). The court's judicial estoppel finding barred Vose and PT from recovering *any* damages. App. at 47. This is determinative. *McCaffrey*, 107 Wn.2d at 195.<sup>31</sup> The trial court should have rejected all PT's and Vose's fees and costs, including those of each of the involved firms.

**2. The Court Erroneously Ordered an Award of Fees from the Underlying Arbitration and Awarded Costs the Jury was Tasked with Deciding**

The trial court's order also included fees related to the arbitration and costs that were part of the jury's determination of damages. App. at 55 (excluding "costs" associated with arbitration); *see, e.g.*, CP 6178. This is error, again twice over. First, Plaintiffs Vose and PT's fees relating to the arbitration and expert costs were an element of damages that the jury was tasked with evaluating. App. at 4, 23 #4. The court struck these damages in its judicial estoppel ruling. App. at 47. Plaintiffs cannot resurrect these damages through a fee petition. Second, Washington law forbids any party from recovering fees from a separate proceeding through a fee petition: A lodestar amount is "flawed" if it incorporates fees from a separate action. *See McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 295, 951 P.2d 798 (1998).

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<sup>31</sup> The court's holding that Vose and PT defeated FF's claims against them does not change the analysis. FF prevailed on the major issue of judicial estoppel, thus neither side prevailed for the purpose of a fee award. *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996) (where "both parties prevail on major issues ... neither party is entitled to an attorney fee award").

### 3. The Court Erroneously Adjusted the Lodestar

The trial court applied a 1.25 multiplier to Plaintiffs' claimed fees. App. at 55. This upward adjustment was an abuse of discretion in light of the facts. "[A]djustments to the lodestar product are reserved for 'rare' occasions," *Berryman v. Metcalf*, 177 Wn. App. 644, 665, 312 P.3d 745 (2013). Beninger's misconduct drove this litigation in large part. As an attorney, he has a duty to not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a ... fraudulent act by the client ....

RPC 3.3. Evidence at trial demonstrated that Beninger's conduct falls squarely within these prohibitions. *Supra* § III.D.2.<sup>32</sup> Further, putting aside how the arbitration was handled, the trial court *sua sponte* sanctioned counsel's discovery conduct in this action as "frankly appall[ing]." CP 6288–89, 4688. Accordingly, if anything, the facts here warrant a downward adjustment. *Cf. Eriks v. Denver*, 118 Wn.2d 451, 462–63, 824 P.2d 1207 (1992) (stating well-recognized "general principle that a breach of ethical duties may result in denial or disgorgement of fees ...").

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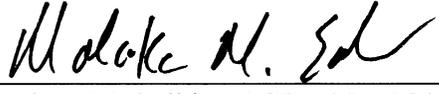
<sup>32</sup> Beninger's misconduct and his failure to follow the well-established procedure for ratifying a covenant judgment do not leave Plaintiff Gosney without remedy. She has claims against Beninger.

**V. CONCLUSION**

For the foregoing reasons, FF respectfully requests the Court of Appeals to reverse with instructions to enter judgment for FF based on the jury's verdict and the trial court's subsequent judicial estoppel order striking all damages. In the alternative, FF requests a new trial.

DATED this 22<sup>nd</sup> day of August, 2016.

McNAUL EBEL NAWROT & HELGREN  
PLLC

By:   
Robert M. Sulkin, WSBA No. 15425  
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Insurance Company

**DECLARATION OF SERVICE**

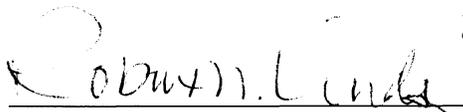
The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 22, 2016, I caused a copy of the foregoing Brief of Appellants to be served by electronic mail to:

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*Associated as Attorney for Plaintiffs*

DATED this 22<sup>nd</sup> day of August, 2016, at Seattle, Washington.

By:   
Robin M. Lindsey, Legal Assistant

2016 AUG 22 PM 3:13  
STATE OF WASHINGTON

No. 74717-7-I  
(Consol. with Nos. 74812-2-I and 74817-7-I)  
(Appeal from King County Superior Court No. 09-2-32462-0SEA)

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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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/Cross-Appellants,

v.

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

Appellants/Cross-Respondents.

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**APPENDIX TO BRIEF OF APPELLANTS**

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2016 AUG 22 PM 3:13  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

**APPENDIX**

Verdict Form, entered May 15, 2015  
[CP 4987–4991] ..... Appendix 1

Excerpts of the Court’s Instructions to the Jury,  
(9, 10, 11, 12, 18, 22, 24, 34, 37, 38, 43, 45, 46,  
52, 53, 54), dated May 7, 2015 [CP 4848–4909] ..... Appendix 6

Memorandum Opinion, entered July 31, 2015  
[CP 5703–5713] ..... Appendix 24

Amended Order on Motion for Reconsideration;  
Order on Judicial Estoppel, entered October 6,  
2015 [CP 5855–5867]..... Appendix 35

[Corrected] Judgment, entered March 16, 2016  
[CP 6121–6124] ..... Appendix 48

Order Supplementing Judgment for Attorney  
Fees and Expenses, entered April 26, 2016  
[CP 6264–6268]..... Appendix 52

Excerpts of key trial testimony of John Vose,  
April 22, 2016 ..... Appendix 57

**DECLARATION OF SERVICE**

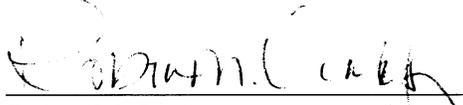
The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 22, 2016, 2016, I caused a copy of the foregoing Appendix to Brief of Appellants to be served by electronic mail to:

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*Associated as Attorney for Respondent/Cross-Appellant Gosney*

DATED this 22<sup>nd</sup> day of August, 2016, at Seattle, Washington.

By:   
Robin M. Lindsey, Legal Assistant

**FILED**  
KING COUNTY WASHINGTON

MAY 18 2015

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

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

**ORIGINAL**  
004987

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	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Breach of Contract	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Breach of the Consumer Protection Act	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Breach of the Insurance Fair Conduct Act	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	No
Breach of Duty of Good Faith	<input checked="" type="checkbox"/>	Yes	<input type="checkbox"/>	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?

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  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	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Collusion	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Excuse of Performance by Estoppel	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Excuse of Performance by Waiver	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> 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 McRellin

Presiding Juror

5/15/2015

Dated

004990

**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<sup>00</sup>

*(INSTRUCTION: Sign and date the form.)*

The foregoing represents the findings of the Jury.

*Mark McCalli*

Presiding Juror

*5/15/2015*

Dated

**FILED**  
KING COUNTY WASHINGTON

MAY 07 2015

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

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.

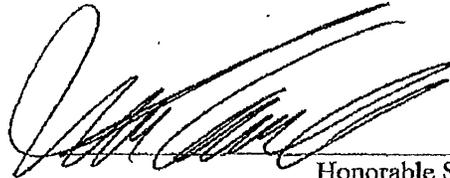
FIREMAN'S FUND INSURANCE  
COMPANY and THE AMERICAN  
INSURANCE COMPANY, foreign insurance  
companies,

Defendant.

No. 09-2-32462-0 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 7<sup>th</sup> day of May 2015.



Honorable Sean P. O'Donnell

**ORIGINAL**  
004648

INSTRUCTION NO. 1

A party who alleges estoppel, fraud or collusion has the burden of proving each of the elements of fraud or collusion <sup>or estoppel</sup> by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of estoppel, fraud or collusion. All other allegations of the respective parties must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

INSTRUCTION NO. 10

There are nine elements of fraud. They are:

- (1) Representation of an existing fact;
- (2) Materiality of the representation;
- (3) Falsity of the representation;
- (4) The speaker's knowledge of its falsity;
- (5) The speaker's intent that it be acted upon;
- (6) The receiver's ignorance of the falsity;
- (7) Receiver's reliance on the truth of the representation;
- (8) Receiver's right to rely upon it; and
- (9) Resulting damage.

INSTRUCTION NO. 11

"Collusion" means secret cooperation for an illegal or dishonest purpose.

004861

APPENDIX 9

INSTRUCTION NO. 12

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:

Misrepresenting pertinent facts or insurance policy provisions.

Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

Refusing to pay claims without conducting a reasonable investigation or without reasonable justification.

Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

Failing to promptly provide a reasonable explanation or justification of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

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. 20

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 NO. 24

For purposes of the Consumer Protection Act, 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.

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 Consumer Protection Act violation have been proved.

INSTRUCTION NO. 34

The relationship between client and attorney is a principal-agent relationship. The attorney acts as the agent of the client.

INSTRUCTION NO. 31

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. 43

There are multiple claims in this case. The instructions apply to all claims unless a specific instruction states that it applies only to a specific claim.

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. 50

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 caused 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

**FILED**  
KING COUNTY WASHINGTON

JUL 31 2015

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

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.

MEMORANDUM OPINION

1

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

005703

APPENDIX 24

1 Defendant Fireman's Fund asserts that judgment should not be entered to include the  
2 arbitration award of \$10,800.289.00 for two reasons. First, Fireman's Fund maintains that the  
3 jury did not write in the arbitration award on the verdict form in setting damages and to include  
4 it here would be contrary to the jury's verdict. Second, Fireman's Fund contends that it should  
5 not be bound by the arbitration award because it did not have adequate notice of the arbitration  
6 hearing, the issues at arbitration were not actually litigated, Fireman's was not in privity to  
7 plaintiffs Vose/Pizza Time at the time of arbitration, and entry of a judgment against it would be  
8 unjust.

9 Plaintiffs maintain that the jury's finding that Fireman's Fund failed to act in good faith  
10 on its duty to settle, and the jury's failure to find that the arbitration was the result of fraud or  
11 collusion, warrants entry of its proposed judgment. See, e.g., Bird v. Best Plumbing Grp., LLC,  
12 175 Wn.2d 756, 287 P.3d 551 (2012) (holding that an insurer will be bound by the judgment in  
13 an original action establishing negligence and liability unless the judgment was procured by  
14 fraud or collusion).

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

#### 18 1. JURY'S AWARD

19 The Court instructed the jury on the following:

20  
21 If you find for the plaintiffs on their claim that Fireman's Fund/American  
22 Insurance Company failed to act in good faith as to duty to defend or settle, your  
23 verdict must include the amount of the judgment on the arbitration award, unless  
24 you further find for Fireman's Fund/American Insurance Company on its  
affirmative defense that the settlement was the produce of fraud or collusion.

25 Instruction No. 54.

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

28 MEMORANDUM OPINION

29 2

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

005704

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

6 If the amount of the covenant judgment is deemed reasonable by a trial court, it  
7 becomes the presumptive measure of damages in a later bad faith action against  
8 the insurer. The insurer must still be found liable in the bad faith action and may  
9 rebut the presumptive measure by showing the settlement was the product of  
fraud or collusion.

10 Bird, 175 Wn.2d at 765 (citations omitted).

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

## 13 2. COLLATERAL ESTOPPEL

14 In order for collateral estoppel to apply, Plaintiffs must produce evidence  
15 allowing the following questions to be answered in the affirmative:  
16

17 (1) Was the issue decided in the prior adjudication identical with the one  
18 presented in the action in question? (2) Was there a final judgment on the merits?  
19 (3) Was the party against whom the plea is asserted a party or in privity with a  
20 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?

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

22 The Plaintiffs have produced sufficient evidence to prove the first two elements in a  
23 collateral estoppel analysis. The primary issues, from this Court's perspective, are whether  
24 Fireman's Fund had sufficient notice of the arbitration hearing and whether Fireman's Fund was  
25 in privity to Plaintiffs Pizza Time and John Vose.  
26  
27  
28

29 MEMORANDUM OPINION

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

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

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

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

22  
23 Receipt of a summons and complaint alerts a potential party there is a lawsuit  
24 afoot. It seems implausible that when Redland received the summons and  
25 complaint via the Lenzis' September 29 letter it made a reasoned decision to take  
26 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. . . .

27 <sup>1</sup> Fireman's Fund did offer to pay for a court reporter to attend the arbitration hearing, which Plaintiffs declined. It  
28 also protested to Plaintiffs' counsel, repeatedly, regarding the lack of information and the conflict the hearing  
29 presented to Fireman's Fund.  
MEMORANDUM OPINION

1  
2 Neither the *Finney-Fisher* rule nor ordinary notions of fair play and substantial  
3 justice dictate the Lenzis had any duty to Redland other than timely notifying  
4 Redland of the filing of the summons and complaint. Receipt of such pleadings is  
5 sufficient to put an alert and concerned party on notice that further proceedings in  
6 which it might have an interest may occur, and that in order to protect its  
7 interests, the interested party needs to act to assure receipt of subsequent  
8 pleadings.

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

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

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

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

20 ii. Was the Arbitration Hearing "Actually Litigated"?

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

29 MEMORANDUM OPINION

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Hon. Sean P. O'Donnell  
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005707

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

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

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

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

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

28 MEMORANDUM OPINION

Hon. Sean P. O'Donnell  
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1 nothing collusive or fraudulent about Mr. Benninger and Mr. Bundy's conduct at the  
2 arbitration/reasonableness hearing.

3 This Court certainly recognizes the difference between something being "actually  
4 litigated" and a lack of finding that there was collusive conduct. But Plaintiffs' reliance on the  
5 "judgment rule" for the proposition that what occurs at a hearing such as this cannot be  
6 unwound or un-rung, absent a finding of collusion or fraud, is correct. *See, e.g.*, Instruction No.  
7 38; Bird, 175 Wn.2d at 765. In other words, under Washington jurisprudence, the arbitration  
8 (no matter how peculiar) meets the test of being "actually litigated" for purposes of collateral  
9 estoppel analysis in the context of an insurance bad faith claim unless it "is the product of fraud  
10 or collusion." Bird, 175 Wn.2d at 765. There was no finding of fraud or collusion.

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

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

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

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

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

28 MEMORANDUM OPINION

29 7

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005709

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

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

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

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

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

24  
25 <sup>2</sup> The jury found that Mr. Vose/Pizza Time waived Fireman's Fund duty to provide a defense. The jury made no  
26 mention of Fireman Fund's separate contractual duty to settle. Nor does the jury's waiver finding implicate  
27 Fireman Fund's independent statutory duty to settle (which the jury found Fireman's Fund breached). Indeed,  
28 Plaintiffs correctly point out that breach of Fireman's independent good faith duty to settle is grounded in tort and  
29 not contract law.

<sup>3</sup> 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.

MEMORANDUM OPINION

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

4         On the other hand, Fireman's Fund would have an interest in contesting the  
5 reasonableness determination made by Judge Burdell. "Because a covenant not to execute  
6 raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability  
7 for settlement amounts is all the more important. A carrier is liable only for reasonable  
8 settlements that are paid in good faith." Bescl v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 738,  
9 49 P.3d 887, 891 (2002). Accordingly, plaintiffs must convince a judge of the reasonableness of  
10 the settlement amount before its presentation in accordance with a number of factors designed to  
11 analyze the reasonableness of the amount. See Chaussee v. Md. Cas. Co., 60 Wn. App. 504,  
12 512, 803 P.2d 1339, 1343 opinion modified on denial of reconsideration, 812 P.2d 487. It is at  
13 this stage that an insurer's interests may depart from the insured's.

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

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

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

29 MEMORANDUM OPINION

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

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

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

19 Accordingly, based on the principles outlined in the Gardner decision and Besel, as well  
20 as the underlying policy articulated in Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751,  
21 765, 58 P.3d 276, 284 (2002) (holding that once "a court determined the covenant judgment to  
22 be reasonable, it was presumptively reasonable and the burden shifted to the insurer to show that  
23 the settlement was the result of fraud or collusion"), Fireman's Fund is estopped from contesting  
24 the arbitration award.

#### 25 ORDER

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

29 MEMORANDUM OPINION

1 \$10,800,289.00 at 12% per annum, compounded annually from the date of entry of arbitration  
2 award before Thurston County Judge Tabor on November 16, 2012.<sup>4</sup>

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

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

7  
8 DATED this 31<sup>st</sup> day of July 2015.

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11 JUDGE SEAN P. O'DONNELL

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25 <sup>4</sup> The Court does not find that the judgment entered in 2008 was liquidated. The final amount had not been  
26 determined and it was therefore not possible to calculate the money owed with exactness. See Hansen v. Rothaus,  
27 107 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).

28 MEMORANDUM OPINION

**FILED**  
KING COUNTY WASHINGTON

OCT 06 2015

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

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.

ORDER ON MOTION FOR RECONSIDERATION;  
ORDER ON JUDICIAL ESTOPPEL

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Department 29  
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206-477-1501

005855

1 The second is whether the Court erred in its collateral estoppel analysis, particularly with  
2 respect to the issue whether imposing Judge Burdell's reasonableness determination would  
3 amount to an injustice to Fireman's Fund.  
4

5 The third and final issue (left unaddressed in the Court's prior order) is whether judicial  
6 estoppel prevents Fireman's Fund from being bound by the underlying judgment.  
7

8 All three issues are addressed below.

9 **I. DUTY OF GOOD FAITH**

10 Using plaintiff's proposed instructions, the Court informed the jury in two instances that  
11 it was bound by the presumption that Fireman's Fund injured plaintiffs Vose and Pizza Time  
12 for failing to act in good faith. See Instruction No. 53 and No. 54 ("You are bound [by the  
13 presumption of harm] unless you find that Fireman's failure to act in good faith did not injure  
14 Plaintiffs Pizza Time and Mr. Vose. No. 53; "As to the duties to defend and/or settle,  
15 Fireman's Fund/American Insurance Company has the burden of proving that any act of failure  
16 to act in good faith did not injure, harm, damage or prejudice the plaintiffs." No. 54).  
17

18 The jury was specifically asked, and it answered, the question of whether its award for  
19 damages for breach of duty of good faith included the underlying arbitration judgment. The  
20 jury answered "No." See Verdict Form.<sup>1</sup> Nevertheless, the jury specifically found as a result  
21 of Fireman Fund's breach of duty of good faith, plaintiffs were injured or harmed in the amount  
22 of \$300,000.00.  
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26 <sup>1</sup> This was essentially the same proposition that plaintiffs proposed in their verdict form: question 16a asked the jury  
27 to write in damages, excluding the judgment for breach of good faith; question 16b asked the jury to write in  
28 damages for breach of duty of good faith with no exclusions. To answer 16b consistent with plaintiffs request here,  
29 the jury would have been required to write in the judgment award.

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1 A claim of bad faith sounds in tort. Accordingly, "a showing of harm is an essential  
2 element of an action for bad faith handling of an insurance claim." Safeco Ins. Co. of Am. v.  
3 Butler, 118 Wn. 2d 383, 389, 823 P.2d 499, 503 (1992).  
4

5 But our courts presume harm if a plaintiff can show, as here, that the insurer acted in bad  
6 faith. "Any case in which the insurer actually acted in bad faith is an 'extreme  
7 case'... [t]herefore, we presume prejudice in any case in which the insurer acted in bad faith."  
8 Butler, 118 Wn. 2d at 391. In a case where a covenant judgment has been entered, and that  
9 amount has been determined reasonable, "the amount of [the] covenant judgment is the  
10 presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the  
11 covenant judgment is reasonable under the *Chaussee* criteria." Besel v. Viking Ins. Co. of  
12 Wisconsin, 146 Wn.2d 730, 738-39, 49 P.3d 887, 891-92 (2002)  
13  
14

15 Once a settlement amount is determined to be reasonable, the burden shifts to the insurer  
16 show the settlement was the product of fraud or collusion. Besel v. Viking Ins. Co. of  
17 Wisconsin, 146 Wn. 2d at 739. "If an insurer wrongfully refuses to defend [or settle], it has  
18 voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the  
19 settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to  
20 an insurer to breach its policy." Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn. 2d 751, 765-  
21 66, 58 P.3d 276, 284 (2002) (internal citations omitted) [Court's modification 'or settle'].  
22  
23

24 In a situation such as this, where a covenant judgment exists and that judgment has  
25 previously been determined to be reasonable, then the judgment amount becomes the  
26 presumptive measure of damages in a later bad faith action against the insurer.  
27

28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL

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APPENDIX 37

1 In Bird, our Supreme Court held that although a covenant judgment may exist, an insurer  
2 still must be found liable in the bad faith action *and it may rebut the presumptive measure by*  
3 *showing the settlement was the product of fraud or collusion.* Bird v. Best Plumbing Grp., LLC,  
4 175 Wn. 2d 756, 765, 287 P.3d 551, 555-56 (2012) (emphasis added). The Supreme Court in  
5 Bird did not address an insurer's ability to rebut whether failure to settle actually harmed  
6 plaintiff, when, as here, a judgment against the plaintiff had entered and been determined  
7 reasonable by another court. The Bird court specifically noted that "the [reasonableness]  
8 determination directly affects the amount of damages recoverable in subsequent tort cases...in  
9 the insurance setting, the presumptive amount is added to any other damages found by the jury."  
10 Bird v. Best Plumbing Grp., LLC, 175 Wn. 2d at 770.  
11

12  
13 The question then is whether Fireman's Fund can rebut this presumption of harm to  
14 Plaintiffs by showing that plaintiffs did not suffer injury or prejudice as a result of Fireman's  
15 breach of its good faith duty to defend or settle.  
16

17 "In an insurance bad faith case, the amount of a reasonable covenant judgment sets a  
18 floor, not a ceiling, on the damages a jury may award." Miller v. Kenny, 180 Wn. App. 772,  
19 782, 325 P.3d 278, 283-84 (2014). In other words, harm to the insured is worth *at least* the  
20 amount of the covenant judgment—not less. As noted above, in Bird, the Supreme Court  
21 confirmed this interpretation by explaining the presumptive amount is added to other damages  
22 found by the jury. Bird, 175 Wn.2d at 770 (emphasis added).<sup>1</sup>  
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26 <sup>1</sup> This premise has been emphasized in analogous settings by our State Supreme Court. For example, in the Kirk  
27 case, the court held that "[a]lthough a showing of harm is an essential element of an action for bad faith handling of  
28 an insurance claim, we imposed a rebuttable presumption of harm once the insured meets the burden of establishing  
29 bad faith. Butler, 118 Wn.2d at 389-90, 823 P.2d 499. In Butler, the court *broadly* stated, "we presume prejudice in  
ORDER ON MOTION FOR RECONSIDERATION;  
ORDER ON JUDICIAL ESTOPPEL 4

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1           Once a settlement amount is found reasonable, then “there is no factual determination to  
2 be made on damages in the later bad faith claim, *at least not with respect to the covenant*  
3 *judgment.*” Bird, 175 Wn.2d at 772 (emphasis added).<sup>1</sup> In other words, the reasonable  
4 settlement amount is the harm the plaintiff suffered (indeed, Vose/Pizza Time are responsible  
5 for the \$10.8 million settlement amount as a result of the judgment entered in Thurston County).  
6 The Miller court confirmed this analysis: “The holding of *Bird* is that a reasonableness hearing  
7 is an equitable procedure. The [*Bird*] court stated, ‘Here, there is no factual determination to be  
8 made on damages in the later bad faith claim, *at least not with respect to the covenant*  
9 *judgment.*’ Bird, 175 Wash.2d at 772, 287 P.3d 551 (emphasis added). This sentence indicates  
10 the way is open for a jury to make a factual determination of an insured’s bad faith damages  
11 *other than and in addition to the covenant judgment.*” Miller v. Kenny, 180 Wn. App. 772, 801,  
12 325 P.3d 278, 293 (2014) (emphasis in original).

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16           In this case, the jury responded in the affirmative to Question 1a that plaintiffs had  
17 proved *each* of the propositions put forward by plaintiffs regarding Fireman Fund’s breach of  
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22 any case in which the insurer acted in bad faith.” Butler, 118 Wash.2d at 391, 823 P.2d 499. The certified question  
23 [whether Butler applied under a policy of professional liability insurance if the insurer failed to provide a defense to  
24 the insured in bad faith] requires us to assume the insurer acted in bad faith; therefore, we *must* assume harm.” Kirk  
25 v. Mt. Airy Ins. Co., 134 Wash. 2d 558, 562, 951 P.2d 1124, 1127 (1998).

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<sup>1</sup> 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).

ORDER ON MOTION FOR RECONSIDERATION;  
ORDER ON JUDICIAL ESTOPPEL <sup>5</sup>

Hon. Sean P. O'Donnell  
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Seattle, WA 98104  
206-477-1501

005859

1 the duty of good faith. This necessarily includes a finding that Fireman's Fund breached its duty  
2 to defend or settle. See Instruction No. 53.<sup>1</sup>

3  
4 The jury then considered Fireman Fund's affirmative defenses and concluded that  
5 plaintiffs had not engaged in collusive conduct. Contrary to Fireman's assertion that this Court  
6 proscribed the jury from considering the reasonableness of the settlement hearing, Fireman's  
7 Fund's agreed that that issue was not an issue for trial.

8  
9 Importantly, the jury also found that Fireman Fund's breach of its good faith duty  
10 harmed the Vose/Pizza Time plaintiffs in the amount of \$300,000.00. The jury did not write in  
11 the settlement amount and answered "no" when queried whether the damages award included  
12 the arbitration award.

13  
14 The presumptive amount – the floor – here for plaintiffs' damages was the amount  
15 derived from plaintiffs' settlement agreement, the arbitration, and the judgment entered in  
16 Thurston County.

17  
18  
19 <sup>1</sup> The distinction between proving breach of a duty to defend or settle vs. proving the claim (including damages) of  
20 failure to act in good faith was implicitly addressed in Woo v. Fireman's Fund Ins. Co., 161 Wash. 2d 43, 54, 164  
21 P.3d 454, 459-60 (2007). There, the Supreme Court analyzed the duty to defend and held that "although the insurer  
22 must bear the expense of defending the insured, by doing so under a reservation of rights and seeking a declaratory  
23 judgment, the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending  
24 itself from a claim of breach." Woo v. Fireman's Fund Ins. Co., 161 Wash. 2d at 54. That last sentence is  
25 instructive. The Woo case recognized, as does Miller and Bird, that the issue of harm or damages arising from  
26 breach of an insurer's duty to defend or settle, when a reasonable covenant judgment has been entered, is not before  
27 the jury (unless the jury is asked to find fraud or collusion, as it was here). The issue for the jury is to decide  
28 merely breach of that duty to defend and not whether damages flow from the breach. Therefore, "when an insurer  
29 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).

ORDER ON MOTION FOR RECONSIDERATION;  
ORDER ON JUDICIAL ESTOPPEL

6

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

4 Accordingly, once a settlement amount is found reasonable, then "there is no factual  
5 determination to be made on damages in the later bad faith claim, at least not with respect to the  
6 covenant judgment." Bird, 175 Wn.2d at 772, 287 P.3d 551. In other words, the settlement is  
7 the harm the plaintiff suffered.  
8

9 The jury here made a factual determination of plaintiffs' bad faith damages *other than*  
10 *and in addition* to the covenant judgment in the amount of \$300,000.00. The jury accordingly  
11 found harm as a result of Fireman's Fund failure to act in good faith. But the plaintiffs' floor on  
12 damages had already been determined by entry of the Thurston County judgment (resulting from  
13 the arbitration/reasonableness hearing). Miller v. Kenny, 180 Wn. App. at 801. As a matter of  
14 law, the jury's apparent conflict in the verdict form (finding harm for the breach of duty of good  
15 faith but not writing in the amount) must be resolved to include the arbitration amount.  
16  
17

18 Reading the instructions and jury's verdict together, and reconciling that verdict with  
19 Woo, Bird, and Miller, the motion for reconsideration is DENIED.  
20

## 21 II. COLLATERAL ESTOPPEL

22 The Court has carefully considered Fireman Fund's Motion for Reconsideration with  
23 respect to the issue of collateral estoppel. Fireman's Fund is correct that the Court did not  
24 specifically address the fourth required factor in its analysis.  
25  
26

27  
28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL

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1 For this Court to find that Fireman's Fund is collaterally estopped from contesting the  
2 \$10.8 million arbitration award, it would have to find that binding Fireman's Fund to the  
3 arbitration result would work an "injustice."  
4

5 The injustice component of a collateral estoppel analysis is rooted in procedural  
6 unfairness. Thompson v. State, Dep't of Licensing, 138 Wn. 2d 783, 795, 982 P.2d 601, 608  
7 (1999).  
8

9 The injustice prong of the collateral estoppel doctrine calls for an examination  
10 primarily of procedural regularity...[W]here, as here, a party to the prior  
11 litigation had a full and fair hearing of the issues, and did not attempt to overturn  
12 an adverse outcome, collateral estoppel may apply, notwithstanding an erroneous  
13 result.  
14

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

16 There were, as the Court noted in its previous memorandum opinion, a number of  
17 procedural irregularities with respect to the arbitration hearing. But those irregularities, or  
18 imperfections, do not arise to an injustice.  
19

20 There is no evidence that the presiding judicial officer at the arbitration hearing ignored  
21 the law or engaged in other conduct that would have impacted the procedural fairness of the  
22 proceedings. The jury considered whether the plaintiffs' conduct at the hearing was collusive or  
23 fraudulent. It answered in the negative to both. In reaching that decision, it had the ability to  
24 analyze the conduct of all of the parties and had the benefit of defendant's expert testimony  
25 outlining defendant's position with respect to the irregularities presented.  
26  
27

28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL.

8

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1 As the Court has already noted, Fireman's Fund – a sophisticated, national insurance  
2 company with highly competent in-house and outside counsel – evaluated whether it should  
3 attend the arbitration hearing after receiving notice that it would occur. Fireman's Fund had  
4 options available to it when presented with that information. It made a decision to avoid the  
5 hearing altogether.  
6

7 An insurer places itself in a most difficult posture when it has notice of settlement but  
8 then fails to take steps to sufficiently protect its interests.  
9

10 Given that backdrop, the Court cannot find that the procedural irregularities that  
11 occurred during the arbitration amounted to an injustice. Nor can this Court find that binding  
12 Fireman's Fund to the arbitration award would work an injustice. This is particularly true in the  
13 posture of an insurance case, when "so long as the carrier 'has notice and an opportunity to  
14 intervene in the underlying action against the tortfeasor,' it will be bound by the findings,  
15 conclusions, and judgment of the arbitral proceeding." Lenzi v. Redland Ins. Co., 140 Wn.2d  
16 267, 274, 996 P.2d 603, 606 (2000).  
17  
18

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

### 21 III. JUDICIAL ESTOPPEL

22 Fireman's Fund moved this Court pursuant to CR 50 to bar plaintiffs Vose and Pizza  
23 Time from collecting on the jury's damages award under the theory of judicial estoppel.  
24 Specifically, Fireman's Fund maintains that plaintiff Vose failed to disclose his potential claim  
25  
26  
27

28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL 9

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

3  
4 Judicial estoppel is an equitable doctrine that precludes a party from gaining an  
5 advantage by asserting one position in a court proceeding and later seeking an advantage by  
6 taking a clearly inconsistent position.

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

11 Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224-25, 108 P.3d 147  
12 (2005).

13 When a debtor files a petition for bankruptcy, an estate is created. 11 U.S.C. § 541(a).

14 All legal or equitable interest in the debtor's property at the time of filing becomes the property  
15 of the bankruptcy estate unless it is subject to an exemption. 11 U.S.C. § 522(b)(1), § 541(a)(1).

16 A reservation to pursue damages in a lawsuit is not an enumerated exemption under the  
17 bankruptcy code.

18  
19 Judicial estoppel "may apply to parties who accrue legal claims, file for bankruptcy, fail  
20 to list the claims among their assets, and then attempt to pursue the claims after the bankruptcy  
21 discharge." Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). "The  
22 courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no  
23 claims exist and then subsequently to assert those claims for his own benefit in a separate  
24 proceeding." In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir.1999), quoting Rosenshein v.  
25 Kleban, 918 F.Supp. 98, 104 (S.D.N.Y.1996). 'By not disclosing the asset, the debtor keeps an  
26

27  
28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL

10

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APPENDIX 44

1 asset that may have created a dividend for the debtor's unsecured creditors.'" Ingram v.  
2 Thompson, 141 Wn. App. 287, 291, 169 P.3d 832, 834 (2007) *citing* Johnson v. Si-Cor, Inc.  
3 107 Wn.App. 902, 909, 28 P.3d 832 (2001).  
4

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

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

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

14  
15 As articulated by our State Supreme Court, three core factors guide a trial court's  
16 determination of whether to apply the judicial estoppel doctrine:

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

22 Arkison v. Ethan Allen, Inc., 160 Wn. 2d 535, 538-39, 160 P.3d 13, 15 (2007).  
23

24 The jury awarded Mr. Vose \$240,000.00 and Pizza Time \$220,000.00. In the settlement  
25 agreement with the Gosney family, Mr. Vose specifically reserved the right to damages for  
26 attorney fees, emotional distress, damage to his credit, damage to his reputation and other non-  
27

28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL

11

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1 economic damages. He maintains that all of these damages were assigned to the Gosney family  
2 under the terms of the settlement agreement, prior to the bankruptcy filing. Yet he reserved the  
3 right to pursue the damages enumerated above.  
4

5 Trial Exhibit 385 was Mr. Vose's personal bankruptcy petition, which he filed in 2010.  
6 He filed the current case in 2009. In the bankruptcy petition, Mr. Vose makes no mention of  
7 the Gosney settlement agreement or his potential recovery against Fireman's Fund. *See*,  
8 generally, Vose trial testimony, April 22, 2015. Under the bankruptcy petition, Mr. Vose was  
9 required to disclose whether he was involved in any law suit. 11 U.S.C. § 522(b)(1), §  
10 541(a)(1). He failed to disclose that information on the petition. Ex. 385.  
11

12 Plaintiffs attempt to distinguish a claim vs. reservation of damages in support of their  
13 proposition that Mr. Vose's failure to disclose the settlement agreement in the bankruptcy  
14 proceeding is of no moment.<sup>1</sup> What is abundantly clear is that the bankruptcy petition required  
15 Mr. Vose to disclose equitable and future interests of *all* his assets and other personal property  
16 of any kind. Trial Ex. 384. His reservation of an ability to seek damages in the instant case falls  
17 under this broad category. Despite his awareness of this lawsuit and his reserved claim for  
18 damages, he failed to disclose them.  
19  
20

21 All of the elements of judicial estoppel have been met here with respect to Mr. Vose's  
22 retention of his right to pursue damages. His position during this case is clearly inconsistent  
23  
24

25 <sup>1</sup> This issue was raised, but not resolved, in Miller v. Kenney, "The reservation by Kenny of his "claims for  
26 damages ... which arise from the assigned causes of action" was an unusual feature of the agreement, one we have  
27 not seen in similar cases." Miller v. Kenney, 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.

28 ORDER ON MOTION FOR RECONSIDERATION;  
29 ORDER ON JUDICIAL ESTOPPEL

12

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1 with his declaration during this bankruptcy proceeding. His recovery here surely creates the  
2 perception that he has misled the bankruptcy court. His ability to collect these funds will  
3 amount to a fraud on the bankruptcy court, as any funds he stands to collect from this award  
4 should flow to his creditors.  
5

6 Accordingly, the Court finds pursuant to CR 50(a)(1) that Mr. Vose and Pizza Time<sup>1</sup> are  
7 judicially estopped from recovering directly, or indirectly, any damages in this matter. This  
8 order does not impact plaintiff Gosney's ability to collect for damages for those claims not  
9 reserved by plaintiff Vose/Pizza Time.  
10

11 Within 14 days of this order, plaintiffs shall prepare an amended judgment consistent  
12 with the rulings above.  
13

14 DATED this 29<sup>th</sup> day of September 2015.

  
15  
16 JUDGE SEAN P. O'DONNELL  
17  
18  
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20  
21  
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23  
24  
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26  
27

28 <sup>1</sup> Mr. Vose is the sole shareholder of Pizza Time; they are for all intents one and the same.  
29 ORDER ON MOTION FOR RECONSIDERATION;  
ORDER ON JUDICIAL ESTOPPEL

The Honorable Sean O'Donnell

**FILED**  
KING COUNTY WASHINGTON

MAR 16 2016

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

NO. 09-2-32462-0 SEA

[PROPOSED]   
JUDGMENT

vs.

FIREMAN'S FUND INSURANCE  
COMPANY and THE AMERICAN  
INSURANCE COMPANY  
Defendants.

**I. JUDGMENT SUMMARY**

1. **JUDGMENT CREDITORS:** Sarah Gosney as Assignee and the Personal Representative of the Estate of Jerry Welch.
2. **ATTORNEYS FOR JUDGMENT CREDITOR:** David M. Beninger, Luvera Barnett, Brindley Beninger & Cunningham, 701 Fifth Ave. Suite 6700, Seattle, WA 98104.
3. **JUDGMENT DEBTORS:** Defendants Fireman's Fund Insurance Company and the American Insurance Company.
4. **ATTORNEYS FOR JUDGMENT DEBTORS:** Robert Sulkin and Malaika Eaton, McNaul Ebel Nawrot & Helgren.
5. **PRINCIPAL JUDGMENT AMOUNT:** \$10,800,289.00

JUDGMENT ON JURY VERDICT (B) - 1

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1 6. INTEREST OWED TO DATE OF JUDGMENT: \$4,812,335.34<sup>1</sup>

2 7. TOTAL CURRENT JUDGMENT: \$15,612,624.34

3 8. ATTORNEY FEES/COSTS/EXPENSES: \$ Subject to Supplemental Award

4 **II. JUDGMENT**

5 This matter was tried before the Honorable Sean O'Donnell and a jury of twelve (12)  
6 between April 6 and May 15, 2015. After deliberations, the jury reached a verdict finding that  
7 defendants Fireman's Fund Insurance and The American Insurance Company failed to act in  
8 good faith, breached the insurance contract, were negligent and violated the statutory Consumer  
9 Protection Act and Insurance Fair Conduct Act, causing harm and damages to plaintiffs. (Dkt  
10 699). The jury found that in addition to the underlying covenant judgment, plaintiffs were  
11 injured or harmed by defendants' failure to act in good, and by defendants other common law  
12 and statutory violations. The jury found the additional damages totaled \$240,000 for Plaintiff  
13 Vose and \$220,000 for Pizza Time. *Id.* The jury further found against defendants on their cross  
14 claims against Vose and Pizza Time and affirmative defenses of breach of contract, fraud,  
15 collusion, and against them on the defenses of estoppel and contributory negligence. *Id.*

16 Consistent with the law, jury's instructions, jury findings and Court's decision on  
17 collateral estoppel, the Court ordered that the principal judgment to be entered against these  
18 defendants includes the amount of the underlying Thurston County judgment on the  
19 arbitration/reasonableness hearing (\$10,800,289). (Dkts 735 and 757). The Court also ordered  
20 entry of interest from that judgment accruing at 12% compounded annually from November 16,  
21 2012 (\$4,812,335.34). (Dkts 735). The Court also found that Mr. Vose and the Pizza Time  
22 companies are judicially estopped from recovering directly, or indirectly, the damages awarded

23  
24 <sup>1</sup> The daily accrual rate on this interest amount is \$4,988.59, which shall be added to the principal judgment if  
entered after October 13, 2015.

JUDGMENT ON JURY VERDICT (B) - 2

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1 to them, while not impacting Plaintiff Gosney's ability to collect for damages for those claims  
2 not reserved to Mr. Vose/Pizza Time. *Id.*

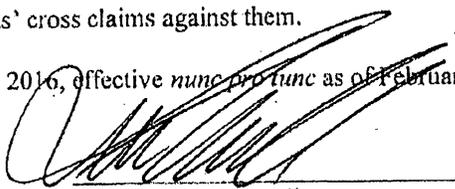
3 This judgment is entered in accordance with the law, the jury's verdict, and the Court's  
4 post-trial rulings. This judgment will be supplemented for attorney fees, costs, and expenses to  
5 be determined by the Court. RCW 4.64.030; CR 54 (d).

6 **III. ORDER**

7 1. JUDGMENT is entered in favor of Sarah Gosney and against Defendants  
8 Fireman's Fund Insurance and The American Insurance Co., in the principal amount of  
9 **\$15,612,624.34.**

10 2. JUDGMENT is entered in favor of John Vose, Pizza Time Inc. and Pizza Time  
11 Holdings of Washington on defendants' cross claims against them.

12 Dated this 16<sup>th</sup> day of March, 2016, effective *nunc pro tunc* as of February 8, 2016.

13  
14   
Hon. Sean O'Donnell

15 Presented by:

16 LUVERA LAW FIRM

17 /s/ David M. Beninger  
18 David M. Beninger, WSBA 18432  
19 Attorney for Plaintiff Gosney  
20 701 Fifth Avenue, Suite 6700  
Seattle, WA 98104  
Telephone: (206) 467-6090  
David@LuveraLawFirm.com

21 PETERSON, WAMPOLD,  
22 ROSATO, LUNA, KNOPP

23 /s/ Felix Gavi Luna  
24 Felix Gavi Luna, WSBA 27087  
Attorneys for Plaintiffs Vose/PTH  
Peterson Wampold Rosato Luna Knopp

JUDGMENT ON JURY VERDICT (B) - 3

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JUDGMENT ON JURY VERDICT (B) - 4

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The Honorable Sean O'Donnell

**FILED**  
KING COUNTY WASHINGTON

APR 27 2013

SUPERIOR COURT CLERK  
BY Rianne Rubright  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

vs.

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

NO. 09-2-32462-0 SEA

*[Proposed]*   
ORDER SUPPLEMENTING  
JUDGMENT FOR ATTORNEY FEES  
AND EXPENSES

This matter comes before the Court upon Plaintiffs' motion for supplemental judgment awarding reasonable attorneys' fees and expenses at the higher of the fees and costs incurred by defendants or under a lodestar with appropriate multiplier. The Court has reviewed the records, declarations, documents and briefing filed in support and opposition, and being familiar with this case having presided over the trial and post-trial matters, and being personally familiar with the nature of the case, the risks involved, the quality of the representation and the difficulties encountered by the Plaintiffs and their counsel successfully prevailing on their causes of action and defeating the cross-claims and defenses.

In making the supplemental award, the Court has relied upon its extensive familiarity with this case, considered the lodestar requirements and factors set forth under RPC 1.5(a), including the time and labor required, the difficulty and novelty of the issues and questions

ORDER ON SUPPLEMENTING JUDGMENT RE:  
PLAINTIFFS' ATTORNEYS' FEES AND COSTS - 1

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1 involved, the skill required to perform the services, the length of this litigation, the delay in  
2 payment, the contingent nature of the representation of plaintiff, the reasonable and customary  
3 fees charged for the services performed, the discovery complexity and multiple motions,  
4 hearings and proceedings limiting other work, the experience, reputation and quality of  
5 representation, the amounts at issue and the outstanding results obtained, and the efforts to avoid  
6 any duplicative, unproductive or wasteful time, and acknowledging plaintiffs' motion to compel  
7 the amount of fees and costs incurred by defendants in a losing effort, all of which support the  
8 reasonableness and multiplier applied to the award of fees and costs for this action pending since  
9 2009. Now, therefore, The Court makes the following Findings of Fact and Orders based  
10 thereon:

11 **I. FINDINGS OF FACT:**

- 12 1. Attorney David Beninger's hourly rate of \$525 is reasonable;
- 13 2. Attorney Felix Luna's hourly rate of \$500 is reasonable;
- 14 3. Attorney Deborah Martin's hourly rate of \$400 is reasonable;
- 15 4. Attorney Patricia Anderson's hourly rate of \$350 (2012) is reasonable;
- 16 5. Attorney Howard Goodfriend's hourly rate of \$550 is reasonable;
- 17 6. Attorney Catherine Smith's hourly rate of \$550 is reasonable;
- 18 7. Attorney Ian Cairns hourly rate of \$350 is reasonable;
- 19 8. Paralegal Catherine Galfano's hourly rate of \$140 is reasonable;
- 20 ~~9. Paralegal Tara Freisen's hourly rate of \$125 is reasonable;~~ (X)
- 21 10. Attorneys Beninger, Martin, Anderson, Goodfriend, Smith and Luna are all senior  
22 attorneys practicing 20 years or more, with considerable experience and skill in the matters  
23 required in this case, and who are or have been partner-level in law firms. Their respective  
24

ORDER ON SUPPLEMENTING JUDGMENT RE:  
PLAINTIFFS' ATTORNEYS' FEES AND COSTS - 2

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1 hourly rates are commensurate with counsel practicing in the specialized area of insurance law  
2 and/or appellate practice in the Seattle market;

3 11. Plaintiffs were prevailing parties on all of their causes of action, which included  
4 IFCA, CPA, bad faith, contract and negligence. They also prevailed on the defendants' cross-  
5 claims. The claims and defenses involved a common core of facts, evidence, testimony and  
6 theories, in which the time devoted to discovery, pretrial motions and preparation, trial and  
7 post-trial matters of this intertwined action cannot be reasonably segregated ~~(which is one reason~~  
8 ~~this Court previously denied defendants' motion to bifurcate)~~;

9 12. Plaintiffs have been conservative in presentation of the attorney hours spent on this  
10 case, omitting requests for time spent on certain routine, reasonable and necessary matters such  
11 as phone calls, interoffice communications, developing theories and strategies, and have taken  
12 reasonable steps to avoid and reduce their request for fees that might involve duplicative, non-  
13 productive or wasteful matters;

14 13. This case required a high level of skill in the specialized area of insurance contract,  
15 coverage, bad faith, estoppel, assignments, IFCA and CPA, as well as a high level of skill in trial  
16 preparation and presentation. ~~Few law firms in the Puget Sound region are equipped to~~  
17 ~~successfully take these kinds of cases on a contingent fee basis on behalf of a client;~~

18 14. The hours awarded and summarized in the declarations of the attorneys and  
19 paralegals above, all of which are incorporated herein, are reasonable and necessarily incurred  
20 for the successful resolution on each of the interrelated causes of action, including but not limited  
21 to IFCA, CPA, contract and bad faith, for which reasonable attorney fees and/or expenses are  
22 allowed and awarded;

23 15. The expenses and costs set out in the declarations of Mr. Beninger and Mr. Luna  
24

ORDER ON SUPPLEMENTING JUDGMENT RE:  
PLAINTIFFS' ATTORNEYS' FEES AND COSTS - 3

LUVERA LAW FIRM  
ATTORNEYS AT LAW

6700 COLUMBIA CENTER • 701 FIFTH AVENUE  
SEATTLE, WASHINGTON 98104  
(206) 467-6090

1 are reasonable and necessarily incurred for the successful resolution of the bad faith, contract and  
2 other intertwined causes of action and cross-claims;

3 16. A lodestar multiplier of <sup>1.25</sup>~~1.5-2.0~~ is appropriate given the contingent representation  
4 and risks this matter presented at the inception and throughout the nearly 7 years (or beyond) of  
5 non-payment, and due to the exceptional quality of representation provided to the plaintiffs by  
6 their counsel. Although the judgment is substantial, it has not been paid. Further, at the time of  
7 pursuing the claims, and accepting and defending the cross-claims, the risk of non-payment was  
8 significant. In addition, the high quality of the representation warrants an upward adjustment or  
9 multiplier as set out above *(the Court having considered however, the high hourly*  
10 *rate already incorporated into the lodestar calculation).*  
Based upon the above factual findings, the Court enters the following:

11 **II. ORDER:**

12 1. Plaintiffs' motion to supplement judgment for an award of reasonable attorney's  
13 fees and expenses is GRANTED;

14 2. Plaintiffs are the prevailing parties on all intertwined causes of actions and  
15 defenses, including the IFCA, CPA, contract and bad faith, requiring the court to award  
16 reasonable fees and expenses;

17 3. Plaintiff Gosney is awarded reasonable attorney's fees of \$ 2,189,765.62 <sup>ⓐ</sup>

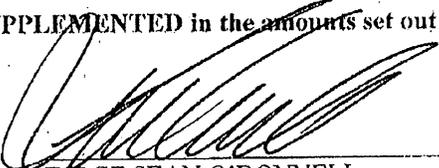
18 4. Plaintiff Vose & Pizza Time are awarded attorney fees of \$ 400,812.50;

19 5. Plaintiff Gosney is awarded costs of ~~\$324,076.88~~ 294,776.88 <sup>ⓑ</sup>

20 6. Plaintiff Vose & Pizza Time are awarded costs of \$4,800.00.

21 **III. JUDGMENT IS HEREBY SUPPLEMENTED** in the amounts set out above.

22 Dated this 26 day of April, 2016.

23   
24 JUDGE SEAN O'DONNELL

ORDER ON SUPPLEMENTING JUDGMENT RE:  
PLAINTIFFS' ATTORNEYS' FEES AND COSTS - 4

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(206) 467-6090

ⓐ This amount does not include time billed for Tara Friesen.

ⓑ This amount does not include costs associated with the underlying arbitration + reasonable expenses hearing

1 Presented by:

2 LUVERA LAW FIRM

3 /s/ David M. Beninger

4 David M. Beninger, WSBA 18432

5 Attorney for Plaintiff Gosney

6 701 Fifth Avenue, Suite 6700

7 Seattle, WA 98104

8 Telephone: (206) 467-6090

9 David@LuveraLawFirm.com

10 PETERSON, WAMPOLD,

11 ROSATO, LUNA, KNOPP

12 /s/ Felix Gavi Luna

13 Felix Gavi Luna, WSBA 27087

14 Attorneys for Plaintiffs Vose/PTH

15 Peterson Wampold Rosato Luna Knopp

16 1501 - 4th Avenue, Suite 2800

17 Seattle, WA 98101

18 Telephone: (206) 624-680-0

19 Luna@ppwrk.com

20 Copy received

21 MCNAUL EBEL NAWROT & HELGREN, PLLC

22 ROBERT M. SULKIN, WSBA 15425

23 MALAIKA M. EATON, WSBA 32837

24 Attorneys for Defendants FFIC/AIC

ORDER ON SUPPLEMENTING JUDGMENT RE:  
PLAINTIFFS' ATTORNEYS' FEES AND COSTS - 5

LUVERA LAW FIRM  
ATTORNEYS AT LAW

6700 COLUMBIA CENTER • 701 FIFTH AVENUE  
SEATTLE, WASHINGTON 98104  
(206) 467-6090

1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4 BARBARA J. WELCH, ) VERBATIM REPORT OF  
 individually, as assignee and ) THE PROCEEDINGS  
 5 as the Personal Representative ) CAUSE NO. 09-2-32462-0SEA  
 of the ESTATE of JERRY L. ) COA NO. 74717-7-I  
 6 WELCH, )  
 Plaintiffs, )  
 7 VERSUS )  
 THE AMERICAN INSURANCE COMPANY )  
 8 and FIREMAN'S FUND COMPANY, a )  
 foreign insurance company; )  
 9 PIZZA TIME HOLDINGS OF )  
 WASHINGTON, INC., )  
 10 (f/k/a Pizza Time, Inc.), a )  
 Washington corporation; JOHN )  
 11 VOSE; and unknown JOHN DOES, )  
 Defendants. )

12 -----

13 TRANSCRIPT

14 OF THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE BEFORE  
 15 THE HONORABLE SEAN P. O'DONNELL, SUPERIOR COURT JUDGE, ON  
 16 THE 22ND DAY OF APRIL, 2015, TRANSCRIBED BY KIMBERLY  
 17 GIRGUS, CERTIFIED COURT REPORTER.

18 APPEARANCES:

19 FOR THE PLAINTIFF GOSNEY:

20 DAVID BENINGER, ATTORNEY AT LAW

21 FOR THE PLAINTIFF PIZZA TIME/VOSE:

22 FELIX LUNA & HOWARD BUNDY, ATTORNEYS AT LAW

23 FOR THE DEFENDANTS FFIC & AIIC:

24 MALAIKA EATON & ROBERT SULKIN, ATTORNEYS AT LAW

25

1 THE COURT: All right. Mr. Beninger.

2 MR. BENINGER: No questions, your Honor.

3 THE COURT: Cross, Mr. Sulkin?

4

5

CROSS-EXAMINATION

6

7

EXAMINATION BY

8

MR. SULKIN:

9

Q. Good morning, Mr. Vose. Nice to see you again.

10

A. Good morning.

11

Q. You are aware, are you not, that Mr. Beninger supported  
12 the motion for continuance, did you know that?

13

A. I would -- I don't know. I have no idea. I didn't know  
14 that.

15

Q. In fact, did you know that Mr. Beninger said there should  
16 be a six month continuance in April, April 1st. He wrote  
17 that. Did you know that, sir?

18

A. No.

19

Q. Would you take a look at Exhibit 64, please.

20

MR. SULKIN: It's the second one. Could you pull that  
21 sentence right here. Mr. Navasky. Agreed. Do you see  
22 that?

23

EXAMINATION BY

24

MR. SULKIN:

25

Q. I take it, sir, that when you read that sentence, that

1           concerned you?

2   A.   Yes.

3   Q.   Did you know that that sentence is not true?

4   A.   No, I did not know that.

5   Q.   You never called Mr. Navasky to determine if, in fact, he

6        said that, did you, sir?

7   A.   Well, I would not have even thought to.

8   Q.   Yeah. You would have thought that Mr. Bundy would have

9        done that, right?

10  A.   I would -- well, how would I know it wasn't true?

11  Q.   Call Mr. Navasky and ask him. Did he really say that?

12  A.   Well, at the same time my other attorney Peggy Hughes was

13        working with Mr. Navasky. I would have --

14  Q.   Just asking whether you know.

15  A.   Okay. All right.

16  Q.   You talked about Ms. Hughes. I'm going to come back to

17        that. Ms. Hughes was your franchise attorney, correct?

18  A.   She was, yes.

19  Q.   Okay. And she had all the documents?

20  A.   Yes.

21  Q.   She had the manuals?

22  A.   Uh-huh.

23  Q.   I need a yes for the reporter.

24  A.   Yes. Sorry.

25  Q.   It's okay. The manuals. She had the franchise

1 agreement?

2 A. Uh-huh; yes. I'm sorry.

3 Q. And she had the handbook?

4 A. Yes.

5 Q. And she told you not to worry?

6 A. I don't think she ever said don't -- well, what do you  
7 mean not to worry about what?

8 Q. She told you you were protected. It's the notes I took.  
9 Isn't that what you said on direct?

10 A. Yes, I did.

11 Q. And I want to go back a little bit to orient it. You  
12 were at Godfather's, and what was your title there?

13 A. Senior direct manager.

14 Q. And you ran 50 restaurants?

15 A. 48.

16 Q. 48. Yeah, I got that, right?

17 A. Uh-huh.

18 Q. And you understand the business inside and out?

19 A. I understand it, yeah. I wouldn't say I understand it  
20 inside and out. But I understand quite a bit.

21 Q. Well, you have been doing it since '82, I think?

22 A. Uh-huh.

23 Q. 30 year veteran of the business?

24 A. Right.

25 Q. And you understand franchise issues? I'm not saying you

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

---

SARAH GOSNEY, as assignee and )  
 the personal representative )  
 of the Estate of Jerry Welsh; )  
 JOHN VOSE, PIZZA TIME INC. )  
 AND PIZZA TIME HOLDINGS OF )  
 WASHINGTON, ) KCSC No.  
 ) 09-2-32462-0 SEA  
 Plaintiffs(s) )  
 ) CAP No.  
 vs. ) 74717-7-I  
 )  
 FIREMAN'S FUND INSURANCE )  
 COMPANY and THE AMERICAN )  
 INSURANCE COMPANY, )  
 )  
 Defendants. )

---

April 22, 2015

Afternoon Session

BEFORE THE HONORABLE SEAN P. O'DONNELL

Janet R. Hoffman  
 Official Reporter  
 King County Superior Court  
 516 Third Avenue, C912  
 Seattle, WA 98104  
 206-477-1604

A P P E A R A N C E S

- 1 Q You did not call the Welches to give your  
2 condolences or any of that sort?
- 3 A No.
- 4 Q You didn't contact Fireman's Fund?
- 5 A No.
- 6 Q And is one reason you didn't contact Fireman's Fund  
7 because you didn't read the policy?
- 8 A I didn't think I was liable.
- 9 Q You didn't think you were liable because you were  
10 the franchisor?
- 11 A Yes.
- 12 Q We will get to that. Pizza Time was named in the  
13 lawsuit, correct?
- 14 A In 2006.
- 15 Q Yes. September of 2006.
- 16 A Right.
- 17 Q You did hire lawyers, Montgomery Purdue?
- 18 A Yes, they were my counsel. I didn't hire them just  
19 for this.
- 20 Q They were your agents. They were working for you?
- 21 A Yeah, right.
- 22 Q You did get into a billing dispute with them at  
23 some point, correct?
- 24 A Yes.
- 25 Q And you fired them?

- 1 Q In your view, -- let's go to the caption. RER was  
2 responsible, not you, correct?
- 3 A Correct.
- 4 Q And I now want to go to the franchise agreement  
5 which is Exhibit 209.
- 6 A Is this the same book?
- 7 Q Yes, it should be the same book. At this point in  
8 time, you had hired Montgomery Purdue, correct?
- 9 A What time is this?
- 10 Q After the lawsuit, I'm sorry.
- 11 A Montgomery Purdue was hired in 2001.
- 12 Q In relation to the lawsuit, they were the lawyers  
13 representing you in the lawsuit, right?
- 14 A Right.
- 15 Q They wrote the franchise agreement?
- 16 A Not this one.
- 17 Q They were, they were franchise experts, correct?
- 18 A Yes.
- 19 Q And you relied on Montgomery Purdue for franchise  
20 expertise, correct?
- 21 A Correct.
- 22 Q And they had -- Montgomery Purdue had all the  
23 documents, we saw that, correct?
- 24 A Correct.
- 25 Q They had the franchise agreement, handbook and the

1 manual?

2 A Right.

3 Q And based on what you were being told by  
4 Ms. Hughes, you thought you were fine?

5 A Right.

6 Q You have one franchise lawyer telling you are fine,  
7 and therefore, you don't contact the insurance  
8 company, correct?

9 A Right.

10 Q All right. Take a look at page 28 of the  
11 agreement. This is an agreement you signed right  
12 here, right there. And that's Mr. Shaefer's  
13 signature?

14 A That is not my signature, sorry.

15 Q That was not your signature?

16 A In '99 I was the vice president.

17 Q Okay. Whose signature is this?

18 A That has to be Ethan's because that is RER. The  
19 guy below is Paul Coates.

20 Q The person you bought the company from?

21 A Yes.

22 Q This was the operative agreement at the time?

23 A In '99, yes.

24 Q And when the accident occurred?

25 A Yes.

1 extent permitted by law in the state where the  
2 outlet is located for damage resulting from claims  
3 arising from use of motor vehicles -- go to the  
4 next page -- by franchise owner, its employees or  
5 agents?

6 A Right.

7 Q Ms. Heller was an employee of RER, not of you,  
8 correct?

9 A Uh-huh.

10 Q You believe that gave you protection, correct?

11 A Yes, uh-huh.

12 Q Let's take a look at page 13. Section 6 B, sir?

13 A I am right there. Uh-huh.

14 Q Will you pull up the whole section. It says here  
15 franchise owner is responsible, meaning RER, for  
16 loss or damage and contract liability to third  
17 persons originating in or in connection with the  
18 operation of the franchise Pizza Time outlet for  
19 all claims, damages, for damages to property or for  
20 injury, illness or death of persons directly or  
21 indirectly resulting therefrom?

22 A Yes.

23 Q You believed that gave you protection?

24 A Yes.

25 Q As Ms. Hughes. It goes on to say: Full extent

1 permitted, directors, employees, principals,  
2 servants, agents, shareholders, subsidiaries from  
3 and against all claims by or on behalf of any  
4 person including without limitation franchise owner  
5 for any loss, damage, injury or death sustained by  
6 any person or operation or any person or property  
7 directly, indirectly, arising out of this agreement  
8 whether in contract, tort or other claim, and/or  
9 arising out of the operation or occurring on the  
10 premises of the Pizza Time outlet?

11 A Yes.

12 Q Do you see that?

13 A Yes.

14 Q You believe that gave you protection?

15 A Yes.

16 Q As did Ms. Hughes, the franchise?

17 A Yes.

18 Q The understanding, this paragraph extends without  
19 limitation to any and all advice, supervision,  
20 manuals, inspections, recommendations and other  
21 information provided by the company under this  
22 agreement or otherwise. Do you see that?

23 A Yes, I do.

24 Q This was saying, even if there is a problem under  
25 the manual, you are covered, correct?

1 A Yes.

2 Q And Ms. Hughes, again, based on this provision, was  
3 giving you --

4 MR. LUNA: I object. Lack of foundation  
5 in reference to this particular --

6 THE COURT: As to Ms. Hughes. Sustained.

7 BY MR. SULKIN:

8 Q Ms. Hughes told you this gave you protection?

9 A She said I was protected.

10 Q At no time did Ms. Hughes say you weren't  
11 protected?

12 A Correct.

13 Q Take a look at page 26 paragraph I?

14 A Same franchise agreement?

15 Q Yes. Employees. Do you see this?

16 A Yes.

17 Q This was the deal that you had with RER?

18 A Right.

19 Q Company shall have no control over employees of  
20 franchise owner, including the terms and conditions  
21 of their employment. Is that right?

22 A Right.

23 Q You had no right of control under this agreement?

24 A That's what it says.

25 Q Over RER employees?

1 A That's what it says.

2 Q That is what you were relying on?

3 A Yes.

4 Q You couldn't tell Pizza Time -- I'm sorry, you  
5 couldn't tell RER employees what to do?

6 A As far as their scope of staying late or washing a  
7 dish, no.

8 Q You didn't set their schedule?

9 A No.

10 Q You didn't pay them?

11 A No.

12 Q In fact, you didn't know Ms. Heller's record,  
13 right?

14 A That's correct.

15 Q Because you weren't controlling the situation,  
16 right? You weren't looking into that?

17 A No, I wasn't.

18 Q You didn't know about her drinking because you  
19 weren't looking into that?

20 A I was never -- yeah. They never forwarded the MVR  
21 to me.

22 Q Go back to 342. I will see if I can get this. The  
23 franchise manual. 342, I am told to go to Welch  
24 00388. Do you have the exhibit number?

25 A I have a 343. I don't have a 342.

1 A Yeah. It has been a longtime since I have read  
2 this. Let me read it real quick. Okay. What is  
3 the question?

4 Q This document deals with the relationship between  
5 the employer and the employee?

6 A Right.

7 Q Now, let's go to Exhibit 18.

8 A Of the same?

9 Q Sir, you did not hire Ms. Heller, is that right?

10 A Correct.

11 Q You did not set her schedule?

12 A No.

13 Q You did not train her?

14 A No.

15 Q You did not pay her?

16 A No.

17 Q She was paid by RER?

18 A Yes.

19 Q And you signed the settlement agreement. Take a  
20 look at trial Exhibit 66. Page 7. There is a  
21 signed signature by you at some point, is that  
22 fair? Mr. Bundy?

23 A Yes.

24 Q That was --

25 A Both of them.

1 Q The agreement, the agreement refers to Vose, it  
2 means you, right?

3 A Right.

4 Q Refers to Pizza Time, it means your company, right?

5 A Uh-huh.

6 Q Let's take a look at page 2, line 18. It says  
7 trial is set for December 2008 to determine full  
8 amount of damage for which defendants will be 100  
9 percent liable which are expected to be  
10 substantially higher than the insurance company  
11 available limits to PTH Vose Pizza Time. That  
12 means all of you, correct?

13 A Yes.

14 Q Let's go to page 1 line 25. It says the parties is  
15 defendant Pizza Time. I think it skips to the  
16 third page, page two is the third page the way it  
17 is here. Pizza Time Holdings of Washington, a/k/a  
18 Pizza Time Inc., Pizza Time Inc. and John Vose,  
19 three of you, acknowledge and agree Pizza Time is a  
20 separate corporate entity. And it goes on, do you  
21 see that?

22 A Right, yeah.

23 Q You understood that under this agreement,  
24 settlement agreement where you signed it, you  
25 understood you were agreeing that Ms. Heller was a

1 Pizza Time employee, correct?

2 A Yes.

3 Q Even though you knew she was an RER employee,  
4 correct?

5 A Uh-huh.

6 Q So the agreement does not set forth accurately  
7 Ms. Heller's employment, does it sir?

8 A Well, way more complicated than that. At the time  
9 that I signed this agreement, I was told that I had  
10 a lot of liability, and that they could prove, and  
11 that is why I signed it.

12 Q So you signed something that said she was, for  
13 whatever reason, you said --

14 A To protect myself.

15 Q You signed something that said Ms. Heller was your  
16 employee, when she was RER employee because you had  
17 all this liability over you, is that right?

18 A The information I had at the time was that that was  
19 the best thing for me to do.

20 Q I understand you wouldn't have signed it if you  
21 didn't think it was the best thing for you to do.  
22 I am asking when you signed it, you said that  
23 Heller was your employee when she was not your  
24 employee, correct?

25 A Correct.

- 1 Q Okay. Sir, Pizza Time is a corporation?
- 2 A Right.
- 3 Q You are the sole shareholder of that corporation?
- 4 A Correct.
- 5 Q And you understood that one advantage to creating  
6 corporations is that you would not be personally  
7 liable for what the corporation did?
- 8 A Right.
- 9 Q And you claim you were under stress because of  
10 these judgments against you, the first one being in  
11 January 2009 for 2.5 million dollars, correct?
- 12 A Yes.
- 13 Q You can't sleep at night, things like that?
- 14 A It's pretty stressful. I mean it's a lot going on.
- 15 Q Let's take a look at Trial Exhibit 217, if we  
16 could. Pull the caption up. This is the complaint  
17 that was filed. You see that?
- 18 A Yes.
- 19 Q And Mr. Beninger sued a lot of people?
- 20 A Oh, yeah.
- 21 Q He sued Ms. Heller?
- 22 A Uh-huh.
- 23 Q Pizza Time Holdings of Washington Inc.
- 24 A Uh-huh.
- 25 Q I need a yes for the record?

1 A Yes.

2 Q Ethan T. Shaefer?

3 A Uh-huh.

4 Q Raymond T. Shaefer, correct?

5 A Yes.

6 Q And unknown John Does?

7 A Right.

8 Q You were not sued. All right?

9 A Yes.

10 Q In fact, you aren't even mentioned in the  
11 complaint, are you, sir?

12 A No.

13 Q In fact, Mr. Beninger never amended the complaint  
14 to add you, correct?

15 A Yes.

16 Q The claims that were being made were against your  
17 company, not you personally, correct?

18 A Well, according to that complaint, yes.

19 Q No allegations that you personally did anything  
20 wrong, correct?

21 A On that complaint, yes.

22 Q It is the only complaint?

23 A All right.

24 Q No allegation you did anything personally wrong?

25 A I am misunderstanding, but yes.

- 1 Q Let's take a look at Trial Exhibit 264. This is an  
2 e-mail from Mr. Matthews to you March 20th, 2008.
- 3 A Uh-huh.
- 4 Q He writes, John, as we discussed earlier, we  
5 believe there is a need to request a continuance of  
6 the trial date from April 21, 2008. Do you see  
7 that?
- 8 A Yes, I do.
- 9 Q Do you see your signature there?
- 10 A Yep, yes.
- 11 Q And you sign it John Vose, president of Pizza Time  
12 Holdings of Washington Inc., do you see that?
- 13 A Yes.
- 14 Q Because you knew you weren't personally liable?
- 15 A Yes, at that time.
- 16 Q The fact is that Mr. Bundy and Mr. Beninger made a  
17 deal, Exhibit 66, isn't that correct. Settlement  
18 agreement?
- 19 A Settlement? Yeah.
- 20 Q And in that deal, you agreed to become personally  
21 liable, isn't that right, sir?
- 22 A A little more to it than that, but yes.
- 23 Q Let's take a look at Exhibit 66 paragraph 4, page  
24 4, paragraph 4A. It says terms and conditions of  
25 settlement agreement between the parties is as

1 follows: John Vose, Pizza Time Holdings of  
2 Washington, Pizza Time agree to pay, do you see  
3 that? It goes on?

4 A Yes.

5 Q You were agreeing to pay when you weren't even  
6 sued, fair enough?

7 A Okay, yes.

8 Q And at the time, you were not -- you are not a  
9 rich man?

10 A No.

11 Q You couldn't afford to pay that?

12 A No.

13 Q Okay. In fact, you agreed that the court would  
14 enter a judgment against you personally for the  
15 money, did you not, sir?

16 A Well, I don't understand.

17 Q You agreed the court would enter a personal  
18 judgment against you even though you were never  
19 sued?

20 A Where does it say I agree there is a personal  
21 judgment.

22 Q Let's take a look at Trial Exhibit 313.

23 A Okay.

24 Q This is an e-mail. Will you pull it up. From  
25 Mr. Bundy December 9th of '08 and Mr. Beninger. It

1           paid?

2           A     Uh-huh.

3           Q     We need a yes?

4           A     Yes.

5           Q     12-9-08 review proposed judgment, sign and send to  
6           Beninger, e-mail and on paper, with coverage, do  
7           you see that?

8           A     Yes.

9           Q     You knew that was happening?

10          A     I did to protect myself and my family and everybody  
11          else to get me finished with this thing, get it  
12          over with. There is were a lot of future potential  
13          issues that were going to pop-up and I felt it was  
14          the best way to deal with it.

15          Q     So we will just orient ourselves to the next  
16          subject. The settlement agreement gave the Welch  
17          family a personal judgment against you, you  
18          understood that?

19          A     Yes.

20          Q     Something they were not suing for, correct?

21          A     I guess, yeah.

22          Q     Something they were not entitled to since you  
23          didn't do anything wrong?

24                         MR. LUNA: I object, calls for a legal  
25                         conclusion from this witness.

1 THE COURT: Overruled.

2 A I did what my attorneys, what they counseled me to  
3 do. That's it.

4 BY MR. SULKIN:

5 Q Something they were not entitled to since you did  
6 nothing wrong?

7 A I felt I had a lot of exposure.

8 Q The question is very simple. They got a judgment  
9 for something that they were not entitled to since  
10 they didn't sue you and you personally did nothing  
11 wrong?

12 A Okay.

13 Q Let's take a look at Trial Exhibit 64, please. 66.  
14 Whatever the right number is. I want 64. I was  
15 right. The e-mail July 22nd, do you see that?  
16 That was interesting. I read this carefully. This  
17 is the e-mail Ms. Anderson sent to Mr. Bundy,  
18 subject Mr. Vose July 22nd, '08. Do you see that?

19 A Yes.

20 Q You read that pretty carefully, did you not?

21 A Oh, yeah.

22 Q Take a look at the bottom paragraph, the operative  
23 paragraph. This is the e-mail where they are  
24 offering the deal, right?

25 A Right. Not to me but to Mr. Bundy.

1 BY MR. SULKIN:

2 Q It says, in further consideration, defendants John  
3 Vose, Pizza Time Holdings, agree to cooperate with  
4 and assign to Plaintiffs Welch all rights,  
5 privileges, claims, causes or chose of actions they  
6 may have against their insurer Fireman's Fund  
7 and/or affiliated companies and their agents. Do  
8 you see that?

9 A Yes.

10 Q This assignment includes but is not limited to all  
11 defendants' privileges, protection and claims and  
12 goes on.

13 A Yes.

14 Q You kept something, didn't you, sir? Let's take a  
15 look at page 5 paragraph 4C. Reservation?

16 A Yes.

17 Q Defendants hereby reserve to themselves, that's  
18 you?

19 A Yes.

20 Q All elements of damage for their personal emotional  
21 distress, personal attorney's fees, personal  
22 damages, credit reputation and noneconomic damages,  
23 do you see that?

24 A Yes.

25 Q And this is why we are here today, correct?

- 1 A Yes.
- 2 Q And you understood that Ms. Welch and her family  
3 had the obligation to bring this claim for you?
- 4 A Yes.
- 5 Q So let's get this right. You agree to a personal  
6 judgment against you and they didn't have a right  
7 to, they didn't sue for it?
- 8 A Yes.
- 9 Q You had no money so they couldn't get any money  
10 from you for it?
- 11 A Right.
- 12 Q Correct? You get to sue for pain and suffering  
13 because of that?
- 14 A Well -- okay.
- 15 Q Am I right?
- 16 A That was the farthest thing from my mind, but yes.  
17 I guess if you put it like that.
- 18 Q You claim this judgment that was taken in January  
19 of '09 that we just saw --
- 20 A Yes
- 21 Q -- caused you lots of problems.
- 22 A It is was pretty stressful, yes.
- 23 Q Pretty stressful. Sir, you declared bankruptcy?
- 24 A Yes, I did.
- 25 Q Just a few months after that judgment?

1 A Yes. Actually it was a year, I think.

2 Q The reason you claimed personal bankruptcy was to  
3 get rid of personal debts that had accumulated?

4 A Yes.

5 Q Including a judgment that Mr. Mathison had taken  
6 against you for about \$89,000?

7 A Yes.

8 THE CLERK: Defendant's Exhibit 384 has  
9 been marked for identification.

10 EXHIBIT(S) MARKED: 384.

11 BY MR. SULKIN:

12 Q This is the bankruptcy papers you filed, correct?

13 A Yes.

14 MR. SULKIN: I offer Exhibit 384.

15 MR. LUNA: I ask you reserve ruling so we  
16 may make some arguments outside the presence  
17 of the jury about the contents. I don't mind  
18 him using it with the witness to ask  
19 questions.

20 THE COURT: Sustained at this point.

21 MR. SULKIN: I can use this with him?

22 THE COURT: No, I am going -- we will  
23 break here in about three minutes. You need  
24 to address this now?

25 MR. SULKIN: Your Honor, this is an

1 have?

2 MR. SULKIN: A lot. This document? A  
3 lot.

4 THE COURT: Bring them back in for five  
5 minutes.

6 MR. SULKIN: That is fine.

7 THE COURT: Bring the jury back in.

8 (Jury in the Jury Box)

9 THE COURT: Thank you. Don't worry, you  
10 will get your break. We are going to go a few  
11 more minutes. Mr. Sulkin.

12 By the way, Exhibit 384 is admitted.

13 BY MR. SULKIN:

14 Q Mr. Vose, this is your filing in United States  
15 Bankruptcy Court?

16 A Yes.

17 Q You signed this near penalty of perjury?

18 A Yes.

19 Q So did your wife?

20 A Right.

21 Q And it was submitted on April 13th, 2010?

22 A Uh-huh.

23 Q Am I correct?

24 A Right.

25 Q And the purpose of this was to relieve yourself of

1 debt, personal debt?

2 A Right.

3 Q And among the things that you have to do, if we  
4 could pull -- this was Chapter 7, pull page 3.  
5 Certification. I'm sorry, you were there. The  
6 previous page. Page 4 of 37. Right there. That's  
7 the certification you gave to the court, you and  
8 your wife?

9 A Yes.

10 Q And again page 7 of, bottom of page 37. Right  
11 there. First line it says, I declare under penalty  
12 of perjury that the information provided in this  
13 petition is true and correct. Do you see that?

14 A Yes.

15 Q You signed under penalty of perjury?

16 A Right.

17 Q And hired a lawyer for the bankruptcy to handle it  
18 with you?

19 A Yes.

20 Q Mr. Jeffrey Wells?

21 A Correct.

22 Q You understood the bankruptcy court was relying on  
23 you --

24 A Right.

25 Q -- to be truthful?

1 A Uh-huh.

2 Q Yes?

3 A Yes.

4 Q To be complete, is that right?

5 A Yes.

6 Q The bankruptcy filing you were asked to list all  
7 your debts?

8 A Correct.

9 Q Important to be complete there because you wanted  
10 to get rid of your debts, right?

11 A Yes.

12 Q You didn't want to miss any. Let's take a look at  
13 page 5. You list chapter 7?

14 A Right.

15 Q Third box in the middle?

16 A Yes, I see it.

17 Q Let's go to page 17 of 37. Top line schedule D  
18 right there. Lists creditors holdings secured  
19 claims, do you see that?

20 A Yes.

21 Q These are people that have a security interest.  
22 You list GMAC?

23 A Right.

24 Q Wells Fargo?

25 A Uh-huh.

1 Q GMAC on your home?

2 A Right.

3 Q And Wells Fargo. Correct?

4 A Yes.

5 Q Let's go to the next page. Creditors holding  
6 unsecured priority claims. Do you see that?

7 A Yes.

8 Q You checked none, right?

9 A Right.

10 Q Let's go to the next page. Page 19 of 37. These  
11 are the creditors holding unsecured nonpriority  
12 claims?

13 A Right.

14 Q This is your chance to get out of everything?

15 A Uh-huh.

16 Q And you list creditors you want to get rid of.  
17 Ahlers an Cressman, a thousand dollars?

18 A Uh-huh.

19 Q Correct?

20 A Yes.

21 Q American Express \$3,000?

22 A Right.

23 Q Let's go to the next page. Chase Bank, even  
24 Mr. Bundy. Go to the next page. In fact, you list  
25 Mr. Coates, you owed him \$990 thousand, that is the

1           guy you bought the business from? You list  
2           Mr. Mathison, he is the one with the judgment  
3           against you for \$89,000.

4           A     Yes.

5           Q     You list 18 unsecured creditors?

6           A     Yes.

7           Q     You don't list this one, do you?

8           A     I don't think I owed it at the time.

9           Q     You didn't list a judgment for 2.5 million dollars  
10          did you?

11          A     I did not because I didn't think -- I thought it  
12          was done.

13          Q     The judgment wasn't done?

14          A     Obviously not.

15          Q     You wanted that judgment. In fact, sir, if we take  
16          a look. You can only, with that judgment -- you  
17          can declare personal, can you declare, make a claim  
18          that you are making in this court today? Let's  
19          take a look at page 2937. Box 4. You were asked  
20          to list the lawsuits you were involved in, do you  
21          see that?

22          A     Yes.

23          Q     You list Dawn food products?

24          A     Yes.

25          Q     You list Richard Mathison vs. John Vose?

1 A Uh-huh.

2 Q But you don't list this one?

3 A Yes.

4 Q Because you knew, sir --

5 A No, I didn't.

6 Q -- that if the bankruptcy trustee knew that you  
7 could get money from this lawsuit, the money would  
8 go to your creditors?

9 A No. There wasn't -- no.

10 Q You didn't tell the truth on this form, did you?

11 A I didn't, I didn't think I owed it. I would have,  
12 I would have disclosed it.

13 Q You were asked to list all suits and administrative  
14 proceedings, all. Not the ones you think you owe  
15 money on?

16 A I understand, I understand that.

17 Q All. And you didn't list this case?

18 A I did not list this case because I didn't think it  
19 was pertinent to this -- it was out of my scope at  
20 that time. It was a very stressful time. I wasn't

21 --

22 Q Out of your scope. In fact, Mr. Bundy looked at  
23 this, didn't he, sir? You sent this filing to  
24 Mr. Bundy and he looked at it and he told you not  
25 to correct it, isn't that true?

1 A He never said a word.

2 Q And the reason you sent it to Mr. Bundy is because  
3 he understood what was going on? Am I right?

4 A I didn't send it to Mr. Bundy for that purpose to  
5 analyze it. I sent it to him because I was writing  
6 part of his debt on there. I didn't sent it to  
7 him. Somebody sent it to him.

8 MR. SULKIN: This is a good time for a  
9 break.

10 THE COURT: Leave your notepads on your  
11 chase. We will be back in 15 minutes. Do not  
12 discuss the case. Do not do any independent  
13 research on the case.

14 (Jury Leaves the Jury Box).

15 (Brief Recess.)

16 (Jury in the Jury Box)

17 THE COURT: Mr. Vose, you remain under  
18 oath. Mr. Sulkin you may resume cross-  
19 examination.

20 BY MR. SULKIN:

21 Q Mr. Vose, judgment was taken against you on 12-18,  
22 12-19-08, Trial Exhibit 78. Would you show that.  
23 Get the date also, please. You testified the  
24 stress you were under from this judgment and then  
25 you told me it wasn't so bad. On 4-13-10 you filed

1 your bankruptcy petition under oath?

2 A Yes.

3 Q If we -- by this time, this lawsuit had been  
4 filed?

5 A Yes.

6 Q Where you were seeking damages for emotional  
7 distress, right?

8 A When was that lawsuit filed you said?

9 Q This lawsuit was filed in '09 and you were seeking  
10 for emotional distress. Ms. Welch was pushing this  
11 for you, correct?

12 A Correct.

13 Q Emotional distress from this judgment that you  
14 agreed to in the settlement agreement, right?

15 A I didn't want anything from Fireman's Fund. I just  
16 wanted it settled and gone. I didn't ask for  
17 anything from Fireman's Fund. I just wanted  
18 it settled and gone.

19 Q I understand. We are looking at the terms of what  
20 it took to get it settled and gone. I want to be  
21 clear. It is your testimony that you were not  
22 involved in these discussions, correct?

23 A Correct.

24 Q It was the lawyers, Mr. Bundy Mr. Beninger cut this  
25 deal, right?

1 A Yes. They told me -- yeah. I knew about it, yes.

2 Q You knew about the deal. But the specifics of the  
3 deal they cut, right?

4 A Yes.

5 Q And it was brought to you to sign?

6 A Yes.

7 Q They were lawyers, not you?

8 A Correct.

9 Q Mr. Bundy was representing you?

10 A Yes.

11 Q He was your agent?

12 A Yes.

13 Q You trusted Mr. Bundy to protect you?

14 A Yes, I did.

15 Q Okay. To do the right thing?

16 A Yes.

17 Q Let's take a look at -- Trial Exhibit 384. The  
18 bottom of page 1337. Let's not pull that out. It  
19 asks here, can you pull this line up here, this  
20 column up. Is that possible?

21 MR. SULKIN: I don't want to address the  
22 jury directly. I want to make sure this isn't  
23 in any of their way. If the court could ask  
24 if this is in their way.

25 THE COURT: Are you able, if anyone can't

1 A Yes.

2 Q That is Pizza Time?

3 A Correct.

4 Q That is monthly, correct?

5 A Well, yeah, average.

6 Q And so Pizza Time stock had some value if it was  
7 making money?

8 A That is how I made my living, yes.

9 Q It had value. Let's take a look at page 13. This  
10 was value of personal property. Do you see that.  
11 The first line. That second line. You listed what  
12 it was, you listed value in your checking and  
13 savings?

14 A Yes.

15 Q Let's go to line 13. You listed Pizza Time stock  
16 and you put the value of that at zero?

17 A Right.

18 Q Even though it was making money. You didn't want  
19 to lose it?

20 A Yeah. There was no way I wanted to lose it, yes.

21 Q I want to come back now to page 26 of 37.  
22 Declaration concerning debtor's schedule, do you  
23 see that? And this follows all the schedules we  
24 looked at. It says, I declare under penalty of  
25 perjury that I have read the foregoing summary and

1 schedules consisting of 16 sheets and they are true  
2 and correct to the best of my knowledge and  
3 information, do you see that?

4 A Yes.

5 Q It was signed by you on April 13th, 2010, correct?

6 A Yes.

7 Q Let's go to page 29 of 37. Looked at this quickly  
8 before the break. It asks you to list all suits  
9 and administrative proceedings to which debtor is a  
10 party. You were still a party by this time. You  
11 didn't list, is that correct?

12 A Yes.

13 Q Go to page 31 of 37, please. Right here. It says  
14 name of business, Pizza Time Holdings, Inc? do you  
15 see that?

16 A Yes.

17 Q Right above right there. Pizza franchisor, do you  
18 see that? Nature of business Pizza franchisor?

19 A Yes.

20 Q There you put franchisor, but on the application,  
21 for whatever reason, it got missed, correct?

22 A Correct.

23 Q Again, page 32 of 37. Bottom. You again signed  
24 under penalty of perjury, is that right?

25 A Correct.

1 Q Take a look at Trial Exhibit 207, please.

2 MR. LUNA: What is the number?

3 MR. SULKIN: 207.

4 Q Page 1019, entry 4-21-10. Do you see that? This

5 is Mr. Bundy's billings. Do you see that?

6 A Yes.

7 Q 4-21 he billed you for his time, did he not?

8 A Yes.

9 Q Six tenths of an hour. He billed you for 42

10 minutes of work to review your bankruptcy notice

11 and he e-mailed it to Mr. Beninger, correct?

12 A It looks like it, yes.

13 Q At the time they are supposed to be adversaries

14 Mr. Bundy is e-mailing your bankruptcy filings to

15 Mr. Beninger?

16 A Okay.

17 Q You had a chance, you did file an amended filing,

18 did you not, sir?

19 A Are you talking about bankruptcy?

20 Q Yes. Do you recall that?

21 A Yes.

22 THE CLERK: Defendant's Exhibit 385 has

23 been marked for identification.

24 EXHIBIT(S) MARKED: Defendant's Exhibit

25 385.

1 Q You didn't amend any of the other things we looked  
2 at, did you, sir?

3 A No.

4 Q Right?

5 A Right.

6 Q Mr. Bundy didn't ask you to do it. Mr. Beninger  
7 didn't ask to you do it?

8 A Nope.

9 Q There has been some testimony about what  
10 Mr. Badaracco knew. You didn't call Mr. Badaracco  
11 and tell him about this bankruptcy filing, did you,  
12 sir?

13 A No.

14 Q You didn't call Mr. Gibson and tell him, did you,  
15 sir?

16 A No.

17 Q In fact, sir, you can't tell me anything that Paul  
18 Badaracco should have done that he didn't do that  
19 you were complaining about that caused you harm,  
20 isn't that right?

21 MR. LUNA: Objection, motion in limine,  
22 lay opinion on this issue.

23 THE COURT: Overruled.

24 BY MR. SULKIN:

25 A He could have told me I could have settled it.

1 Q Isn't it true at the arbitration Mr. Bundy did not  
2 put on a single witness?

3 A That's true, yes.

4 Q Didn't put in an arbitration brief?

5 A I wouldn't know about that.

6 Q Didn't ask a single question?

7 A He talked to the Judge. I don't know what he did.  
8 He talked to him. I don't know if it was questions  
9 or statements. But he had conversations.

10 Q Didn't see any declarations he put in?

11 A I don't know.

12 Q Mr. Beninger talked to you about the arbitration  
13 that Fireman's Fund forced you into. That was the  
14 arbitration you agreed to the settlement agreement,  
15 right?

16 A The same one, yes.

17 Q Fireman's Fund was not a party to that agreement,  
18 were we, sir? Right?

19 A I don't --

20 Q You testified on --

21 MR. SULKIN: That is all I have.

22 THE COURT: All right. Ladies and  
23 gentlemen, as I told you with other witnesses  
24 now that the lawyers have finished their  
25 questioning of Mr. Vose, you will have to