

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

2019 SEP -8 PM 3:04  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
*[Handwritten signature]*

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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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**CORRECTED 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. App. 65:7–9, 69:9–18. 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.*; App. 73:8–15. 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 the 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, 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 Purdue advised him that PT would be “fine” under Washington franchise law; in other words, that the franchisor defense was strong. App. 63:19–64:5; *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. App. 78:14–79:22, 88:9–12; RP 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. App. 76:15–77:12, 88:24–89:1. 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> App. 70:23–71:5, 71:15–25; TX 225 (payroll records showing Heller was RER employee); TX 228 at 3 (discovery responses showing same).

<sup>7</sup> App. 72:1–8, 73:8–23, 74:11–22, 76:15–77:12; RP 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. CP 1–6. 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* App. 79:23–80:7,

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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).

81:14–82:2. 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. App. 85:15–86:16, 87:21–88:12. Yet Vose did not disclose this or even list the case. TX 384, 385; App. 84:10–86:16; RP 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. App. 90:6–20. 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* App. 88:9–12. Vose admitted that both Bundy and Beninger were aware of his bankruptcy filing at the time. App. 86:22–87:1; RP 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 4106:18:8–10. 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 54 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 23. 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 to 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**

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 eval-

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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).

uation “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*, 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 issue 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 inconsisten-

cy,” 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 damages, 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

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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.*

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. at 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 provide 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>

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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)).

## 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 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].

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<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.").

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 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 ele-

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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.

ment 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.

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 arbitration. 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

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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.

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 proxi-

mate 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 hearing 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 rea-

sonableness 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 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.

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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.

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.

**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 conclu-

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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 arbitration. 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).

sion 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 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 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 collat-

eral 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 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

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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.

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 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 settle-

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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).

ment and arbitration. App. at 88:19–89:16. 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 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

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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.

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, ruling 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 4238:1–4240:11; *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 (App. at 88:9–12).

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

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 (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

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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.

<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

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).

**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'

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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").

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 ...”).

## 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

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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.

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.

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**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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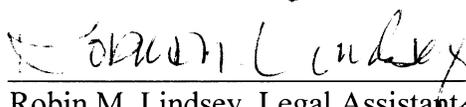
The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 8, 2016, I caused a copy of the foregoing **Corrected** Brief of Appellants to be served by electronic mail to:

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