DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES M. IRVIN, Plaintiff-Appellee, v. LEXINGTON INSURANCE COMPANY, a Delaware corporation, Defendant-Appellant.	)	1 CA-CV 09-0270 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-004273

The Honorable Thomas Dunevant, III, Retired Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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H A L L, Judge

¶1 This case arises out of Southern Union Company's failed bid to merge with Southwest Gas Corporation (Southwest Gas). When Southwest Gas chose to merge with One-Oklahoma, Inc. (ONEOK), Southern Union filed suit in the United States District Court alleging racketeering, tort, and contract claims against those entities, their officers, and James Irvin (Irvin), the then-Chairman of the Arizona Corporation Commission (the Commission).

¶2 The federal jury later returned a verdict against Irvin for compensatory and punitive damages, and the State exhausted its self-insured retention of $4 million about one month later. The State of Arizona and Lexington Insurance Co. (Lexington), the State's excess insurer, refused to provide Irvin with excess coverage to continue litigating the federal case.

¶3 Irvin then sued the State, Lexington, and another insurer in Maricopa County Superior Court for breach of contract and bad faith. After a seven-day trial, the superior court jury returned a verdict in Irvin's favor. Ultimately, the trial court entered a judgment awarding Irvin indemnity and bad faith damages following extensive post-trial briefing and argument. We affirm the judgment in all respects except for (1) the imposition of pre-judgment interest on attorneys' fees incurred

in a portion of the *Southern Union* litigation, and (2) the timing of accrual of pre-judgment interest on the bad faith damages.

FACTS AND PROCEDURAL BACKGROUND

¶4 The Commission regulates energy companies in Arizona and approves or disapproves of mergers of these companies. Ariz. Rev. Stat. (A.R.S.) § 40-285(D) (2001); *see generally* Ariz. Const. art. 15, §§ 4-5. The Commission is "empowered and authorized . . . to exercise not only legislative but the judicial, administrative, and executive functions of the government." *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 306, 138 P. 781, 786 (1914). Arizona law confers investigative authority, including taking evidence under oath, on each commissioner. Ariz. Const. art. 15, § 4; A.R.S. § 40-241(A) (2001).

¶5 Irvin was twice elected to the Commission. He held office from 1997 until September 22, 2003, and served as Commission Chairman between November 1997 and May 1999.

I. The Southwest Gas Merger

¶6 Southwest Gas is a Nevada-based utility that distributes natural gas to customers in Arizona, Nevada, and California. On December 14, 1998, Southwest Gas entered into a merger agreement with ONEOK, an Oklahoma utility distributing gas in Oklahoma and Texas. The agreement provided that

Southwest Gas would merge into ONEOK and Southwest Gas shareholders would receive $28.50 per share. It also contained a confidentiality clause, a stand-still agreement, and a $30 million termination fee if Southwest Gas did not complete the merger.

¶7 On February 1, 1999, Southern Union, a Texas-based utility, presented a merger offer to Southwest Gas for $32.00 per share. The Southwest Gas Board of Directors unanimously agreed on February 21, 1999 that Southern Union's offer was the superior proposal as defined in the merger agreement with ONEOK. *S. Union Co. v. Sw. Gas Corp.*, 415 F.3d 1001, 1004-05 (9th Cir. 2005). Southwest Gas and Southern Union signed a confidentiality and stand-still agreement that same day. Southern Union was unable to agree to some of Southwest Gas's terms, however, including payment of the $30 million termination fee.

¶8 Meanwhile, Irvin contacted Larry Brummett (Brummett), ONEOK's chairman, on February 12, 1999 and told Brummett that he did not want a bidding war. *S. Union,* 415 F.3d at 1005. Irvin and Jack D. Rose (Rose), a "Loaned Executive" and the Commission's former Executive Secretary, then became involved in drafting a letter to Southwest Gas for potential signature by the regulatory commission members of Arizona, California, and Nevada, from which merger approval was required.

¶9 Unbeknownst to the other members of the Commission, Irvin and Rose met with the California Public Utilities Commission (CPUC) members and staff in San Francisco on March 16, 1999. *S. Union*, 415 F.3d at 1007. They presented a draft letter criticizing a Southwest Gas-Southern Union merger, stating that Southern Union would need to finance it by issuing junk bonds, and asserting that Southern Union's debt ratio would become 80-20. *Id.* They urged the CPUC to send the letter to Southwest Gas. *Id.* At a March 25, 1999 meeting in Nevada, Rose and Irvin made a similar presentation to Kenneth Guinn (Guinn), Nevada's governor and the former chairman of Southwest Gas. *Id.* Guinn declined to sign. *Id.* Rose also told the Nevada Public Utilities Commission chair, Judy Sheldrew, that ONEOK was the superior candidate and urged her to persuade that commission to issue the letter to Southwest Gas. *Id.* Rose and Irvin failed to persuade other regulators to sign the letter, and Irvin ended up sending it with only his signature.

¶10 According to Southern Union, Irvin also told Southwest Gas Chief Executive Officer Michael Maffie and Chairman Thomas Hartley that he "thought it would be highly unlikely that Southern Union would be approved to do business in Arizona." Other trial evidence indicated that Southwest Gas considered Southern Union's financing plan unacceptable, Southern Union had

a poor reputation among customers and regulators, and the utility's business tactics were heavy-handed.

¶11 In April 1999, Southwest Gas's board unanimously accepted ONEOK's offer. ONEOK later withdrew from the merger. *S. Union*, 415 F.3d at 1008.

II. Southern Union's Federal Suit Against Irvin

¶12 On July 19, 1999, Southern Union sued Irvin, Southwest Gas, ONEOK, and the corporations' respective officers in federal district court. Its claims against Irvin included RICO violations, tortious interference with business expectancy, and tortious interference with contractual relations, for which it sought $750,000,000.00, trebled. According to the complaint, Irvin improperly influenced the Southwest Gas board to reject Southern Union's offer by questioning whether Southern Union could receive regulatory approval for the merger.

¶13 The ensuing jury trial lasted nearly two months. *S. Union,* 415 F.3d at 1008. Irvin was the sole remaining defendant at the trial's conclusion, facing claims for tortious interference with contract and tortious interference with business expectancy. *Id.* at 1002.

¶14 Irvin's counsel argued that Irvin's position gave him investigative powers as well as judicial powers, and that there was no reason why he should not share his concerns about Southern Union with other regulators. Irvin considered Southern

Union an undesirable company in light of its capital structure and history. Based upon that company's past activities, Irvin was concerned that Southern Union would undercapitalize its operations and then pull out. Irvin maintained that he was entitled to speak to his counterparts in other affected states and attempt to develop a consensual approach; in the course of those contacts, Irvin expressed his views. Throughout the proceedings, Irvin maintained that he was never promised anything of value for his services.

¶15 In a verdict rendered on December 18, 2002, the jury awarded Southern Union $390,072.58 in compensatory damages and $60,000,000.00 in punitive damages. *See S. Union*, 415 F.3d at 1003. The awards allotted to Irvin 40 percent of liability for the contract claim and 20 percent of liability for the business relationship claim. *Id.* On January 9, 2003, Irvin moved for judgment notwithstanding the verdict, or in the alternative for a new trial or remittitur. *Id.* The district court denied the motions. *Id.*

¶16 In a 2-1 decision, the Ninth Circuit affirmed the compensatory damages award and found the punitive damages award constitutionally disproportionate. *S. Union*, 415 F.3d at 1003. On remand, the district court remitted the judgment to $4,000,000.00; the Ninth Circuit then vacated that remittitur, ordering that punitive damages be remitted to three times the

compensatory amount or that the judge order a new trial. *See S. Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009).

III. Irvin's Attempt to Secure Coverage

¶17 The State of Arizona retained counsel for Irvin and funded a defense for him during the district court trial pursuant to Arizona insurance law, A.R.S. § 41-621(A)(3) (2004).[1] The State was self-insured up to the first $4 million of a claim. It obtained excess insurance for claims exceeding $4 million; in this case, Lexington had contracted the first layer of excess coverage up to $25 million with a special excess liability policy (the Policy) in effect between June 30, 1996 and July 1, 2000. Although Lexington's policy was an indemnity policy rather than a defense policy, it reserved the right under the policy "to associate with the insured in the defense, appeal and control of any claim or suit arising out of any occurrence seeking damages in excess of the retained limit."

¶18 The State notified Lexington of the *Southern Union* litigation on April 19, 2000. Lexington noted a potential coverage issue and sent the file to storage.

¶19 The district court rejected a proposed jury instruction on whether Irvin was acting in the course and scope

[1] The State also provided Rose with a defense in the *Southern Union* litigation. Rose settled before the case went to the jury, and the State funded the settlement.

of employment. About a month later, Lexington retrieved its file and hired attorney Kyle Israel to evaluate coverage and attend the federal trial. Israel told Lexington in December of 2002 that the jury would not be deciding whether Irvin was acting in the course and scope of employment. Israel also informed Lexington in writing that Irvin had a strong defense on causation.

¶20 By January 2003, the State had spent more than $4 million on Irvin's defense. When Irvin turned to Lexington to supply excess coverage, Israel informed the State that the Policy did not cover Irvin:

> The Policy does not cover the compensatory or punitive damage awards against Commissioner Irvin because it only covers State employees for acts within the course and scope of their employment. Here, the jury found that Irvin engaged in conduct that constitutes misconduct outside his course and scope.
>
> Irvin was held liable because the jury found he *intentionally interfered* with Southern Union's contact and business expectancies, thereby acting *improperly* in so doing. As a matter of Arizona law, an employee does not act "improperly" when doing his or her job. Thus, "improper" conduct is mutually exclusive of course and scope. . . .

The State performed its own analysis and refused to fund Irvin's further defense costs.

¶21 Irvin then retained Greenberg Traurig and Kutak Rock to pursue post-trial motions and appeals. He incurred in excess

of $1 million in fees to obtain a reduction in punitive damages on appeal to the Ninth Circuit Court of Appeals, as well as a stay of execution. In separate decisions, one authored after Southern Union had accepted a remittitur to $4 million, the Ninth Circuit ruled that the district court committed an error in refusing to instruct on course and scope, albeit a harmless one, and found the punitive damages award unconstitutionally excessive. *See S. Union*, 563 F.3d at 791, 793; *S. Union*, 415 F.3d at 1009.

¶22 Irvin filed this action in superior court not only against Lexington, but also against the State and TIG, the entity charged with providing additional coverage after Lexington. After the Ninth Circuit vacated the $60 million punitive damages award, Irvin dropped the claim against TIG and reached a $150,000.00 settlement with the State, resulting in those claims' dismissal.

¶23 Lexington and Irvin filed motions and a cross-motion for summary judgment on whether the Policy covered Irvin and whether collateral estoppel barred litigation. The trial court denied the motions, holding that the jury would determine whether Irvin intended to harm Southern Union.

¶24 Lexington and Irvin then spent seven days trying Irvin's indemnification and bad faith case to a Maricopa County jury. At the close of Irvin's case and later at the close of

the evidence, Lexington unsuccessfully moved for judgment as a matter of law. The trial court also rejected Lexington's supplemental motion for judgment as a matter of law.

¶25 The jury received specific interrogatories concerning whether: (1) Irvin was acting within the course and scope of his employment; (2) whether he intended to harm Southern Union; and (3) whether Irvin's conduct was substantially likely to cause Southern Union harm. The jury found in Irvin's favor on all three issues. The superior court accordingly determined that the Policy supplied Irvin with excess coverage.

¶26 The jury further found in favor of Irvin on the bad faith claim and awarded $537,511.00 in damages. This amount represented the capital gains tax Irvin had paid when forced to sell stock in his family business to obtain a stay of execution. The parties then briefed whether Irvin was entitled to recover the compensatory and punitive damages assessed against him in the *Southern Union* litigation. The trial court concluded that Irvin was entitled to indemnity, and its judgment includes: (1) compensatory and punitive damages awarded against Irvin in the *Southern Union* litigation; (2) taxable costs assessed against Irvin in *Southern Union*; and (3) attorneys' fees Irvin incurred during representation by Greenberg Traurig ($1,173,579.74) and Kutak Rock ($44,836.00) in the *Southern Union* litigation; and (4) $537,511.00 for bad faith. The superior court also awarded

Irvin state court expenses, including (1) $683,836.00 (the aggregate of two awards of $501,392.00 and $182,444.00) in attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003), (2) $7,638.00 for computerized research, and (3) taxable costs of $8,251.67.

¶27 Lexington unsuccessfully moved for a new trial and renewed its motion for judgment as a matter of law. This appeal from the judgment and the denial of a new trial followed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(B) and (F)(1) (2003).

DISCUSSION

I. The Law and the Jury's Determinations Support Indemnity Coverage Under the Policy.

¶28 Lexington's primary argument is that the trial court erroneously denied judgment as a matter of law based upon the absence of coverage for Irvin under the Policy. According to Lexington, the Policy does not require it to indemnify Irvin for: (1) expected and intended injuries; (2) damages not caused by an accident; and (3) persons not included as insureds. Moreover, Lexington maintains that the coverage findings are based upon facts inconsistent with the federal judgment. The interpretation of the Policy "is a question of law to be determined . . . independent of the findings of the trial

court." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982).

A. The "Expected and Intended Injuries" Language Does Not Bar Indemnity.

¶29 Pursuant to A.R.S. § 41-621(A) (2004), the Arizona Department of Insurance must obtain insurance against loss

> to the extent it is determined necessary and in the best interests of the state as provided in subsection F of this section, on the following:
>
> . . . .
>
> (3) . . . against liability for acts or omissions of any nature while acting in *authorized* governmental or proprietary capacities and in the course and scope of employment or *authorization* . . .

(emphasis added).

¶30 Lexington's Policy provides:

> The Company will indemnify the insured for ultimate net loss in excess of the retained limit hereinafter stated which insured shall become legally obligated to pay as damages because of
>
> 1. personal injury or
> 2. property damages or
> 3. public officials errors and omissions
>
> . . . .
>
> If a settlement made with the consent of the Company, or a judgment against the insured, exceeds the retained limit, the Company shall pay defense costs and interest accruing on a judgment after its entry and before the Company has paid or tendered or deposited in court that part of the judgment

> which does not exceed the limit of the Company's liability thereon.

¶31 The grant of coverage extends to "any regent, officer, professor, employee, volunteer or agent of the State of Arizona while acting within the course and scope of employment or authorization." Lexington contends that Irvin acted outside the course and scope of his employment by committing intentional torts, as determined by a federal jury, and therefore he is entitled to no indemnification under the Policy. We disagree.

¶32 In *State v. Schallock*, the Arizona Supreme Court explained the extent of "within the course and scope of employment" in the context of the defendant employee's right to indemnity under A.R.S. § 41-621. 189 Ariz. 250, 941 P.2d 1275 (1997). To qualify for indemnity, the employee had to be acting within the course and scope of employment or authorization. *Id.* at 255, 941 P.2d at 1280.

¶33 The *Schallock* court rejected the proposition that an employer is never vicariously liable for an intentional tort, stating: "We believe this sweeps much too broadly." *Id.* at 256, 941 P.2d at 1281. The issue "is not whether the tortious act itself is a transaction within the ordinary course of the business of the employer or within the scope of the employee's authority, but whether the service itself . . . was within the ordinary course of such business or within the scope of such

authority . . . ." *Id.* at 260, 941 P.2d at 1285 (citation omitted).

¶34 The court explained that the indemnity statute's reference to "authorization" must apply "to vicarious liability found outside course and scope of employment." *Id.* at 261, 941 P.2d at 1286. Moreover, under common law principles, the master is vicariously liable when the servant purports to "act or speak on behalf of" the master and "was aided in accomplishing the tort by the existence of the agency relationship." *Id.* (citing Restatement (Second) of Torts § 219(2)(d) (1965)).

¶35 In sum, coverage exists under the statute for employees acting outside the course and scope if they are aided in accomplishing torts by the existence of their relationship with the State. Conduct also falls within the scope of employment "if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it." *McCloud v. State*, 217 Ariz. 82, 91, ¶ 29, 170 P.3d 691, 700 (App. 2007) (citation omitted).

¶36 Likewise, we have previously rejected a claim by the Pima County Adult Probation Department that course and scope coverage under A.R.S. § 41-621(A)(3) could not extend to probation officers who allowed a probationer to contact juveniles in violation of a superior court order. *State v. Pima*

County Adult Probation Dep't, 147 Ariz. 146, 149, 708 P.2d 1337, 1340 (App. 1985). We held that the officers were acting within the course and scope of their employment with the judicial department of the state and therefore were entitled to the rights and benefits of insurance under A.R.S. § 41-621. *Id.* at 149-50, 708 P.2d at 1340-41; *see also Ortiz v. Clinton*, 187 Ariz. 294, 299, 928 P.2d 718, 723 (App. 1996) (holding that even though the employee's conduct violated the employer's rules, it did not remove him from acting within the course and scope).

¶37 In light of these authorities, the issue is not whether Irvin was authorized to commit intentional torts. Rather, the relevant issues are: (1) whether Irvin was subject to the Commission's control, and (2) whether the act of investigating mergers was part of the Commission's business and the act of investigation was within Irvin's authority such that he was entitled to insurance coverage under A.R.S. § 41-621.

¶38 The evidence supports the jury's determination, in response to an interrogatory, that Irvin had acted within the course and scope of his employment. Irvin undertook his investigation, meetings, and communications concerning the merger not in a personal capacity, but rather in his capacity as Commission chair conducting its business. As Irvin points out, he could not have committed the interference with Southern Union's business expectancy and contract but for his office as

corporation commissioner. Accordingly, we affirm the finding that Irvin was acting within the course and scope of employment and authorization. *See Dube v. Desai*, 218 Ariz. 362, 366, ¶ 14, 186 P.3d 587, 591 (App. 2008) (holding that a state university employee's comments on a student's dissertation were in the scope of his employment because they were at least incidental to his employment and were motivated at least in part by a desire to serve the employer); c*f. J.D. Edwards & Co. v. Podany*, 168 F.3d 1020, 1022-25 (7th Cir. 1999) (finding that a consultant acted in the scope of his engagement when intentionally interfering with a contract).

¶39 Lexington argues that *Schallock* is inapplicable. It fails, however, to effectively distinguish that case. The Policy mirrors the statutory course and scope and authorization language by extending coverage for "any regent, officer, professor, employee, volunteer or agent of the State of Arizona while acting within the course and scope of employment or authorization."

B. Occurrence Coverage Exists even if Irvin's Actions Do Not Qualify as an "Accident."

¶40 Lexington also contends that the insuring clause requires that damage result from an accident, and therefore it had no duty under the Policy to provide coverage. It bases this argument on the "occurrence" definition as well as the public

official acts and omissions coverage, which must be "neither expected nor intended." We find that neither provision precludes coverage. Lexington's coverage for public officials errors and omissions is not limited to accidental, unexpected, or unintended injuries.

¶41 The "Special Excess Liability Policy For Public Entities" sets a retained limit of $4 million for "ultimate net loss as the result of any one occurrence because of personal injury or property damage, or public officials errors & omissions or any combination thereof, or [i]f greater, the Limits of Liability of underlying insurance." The Policy defines an "occurrence" as "an accident, or event" which includes "injurious exposure to conditions, which results, during the policy period, in personal injury, property damage, or public officials errors and omissions neither expected nor intended from the standpoint of the insured."

¶42 The Public Officials Errors and Omissions coverage, however, is defined to include "misfeasance" and "malfeasance":

> any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty including misfeasance, malfeasance or nonfeasance committed by any "insured" in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their duties as such.

¶43 The Arizona Supreme Court has defined "malfeasance" to mean "doing that which [a public] officer has no authority to do, and is positively wrong or unlawful." *Holmes v. Osborn*, 57 Ariz. 522, 540, 115 P.2d 775, 783 (1941); *see also Sims v. Moeur*, 41 Ariz. 486, 503-04, 19 P.2d 679, 685 (1933) (equating malfeasance with "[e]vil doing; ill conduct; the commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which the person ought not to do at all"). Importantly, the term has been used to describe particularly wrongful conduct by a public official. *See* A.R.S. § 38-311 (2001). Consequently, coverage for malfeasance includes coverage for intentional interference torts. *See Guaranty Nat'l Ins. Co. v. Int'l Ins. Co.*, 994 F.2d 1280, 1283-84 (7th Cir. 1993) (claims for intentional interference with an economic relationship and invasion of privacy were covered under the policy's wrongful act provision which extended to misfeasance, malfeasance, and nonfeasance).

¶44 Thus, the coverage by its terms is both limited to events that are neither expected nor intended and extends to misfeasance and malfeasance, which are defined as intentional. The Policy's language purportedly covering misfeasance and malfeasance creates "an objective impression of coverage in the mind of a reasonable insured," and would be rendered "illusory" if the "expected nor intended" clause denied coverage to all

intentional acts. *Anderson v. Country Life Ins. Co.*, 180 Ariz. 625, 632, 634-35, 886 P.2d 1381, 1388, 1390-91 (App. 1994) (holding that such an approach "contravenes public policy"). Our interpretation of the exclusion must not "make a nullity" of the coverage or render the agreement "illusory in effect." *Ranger Ins. Co. v. Phillips*, 25 Ariz.App. 426, 433, 544 P.2d 250, 257 (1976). Accordingly, interpreting the policy as not including intentional conduct would effectively negate the Policy's coverage for misfeasance and malfeasance.

¶45 Moreover, we construe any ambiguity with respect to the Policy's "occurrence" language against Lexington. *See State Farm Mut. Auto. Ins. Co. v. Paynter*, 122 Ariz. 198, 204, 593 P.2d 948, 954 (App. 1979). Consequently, the "neither expected nor intended" language does not defeat coverage for Irvin's acts. *See City of Boise v. Planet Ins. Co.*, 878 P.2d 750, 756-57 (Idaho 1994) (construing the "malfeasance" and "neither expected nor intended" language to allow coverage when damage was not expected or intended, and finding coverage for a retaliatory discharge claim).

II. Collateral Estoppel Does Not Apply and Does Not Preclude Liability for Lexington.

¶46 Alternatively, Lexington contends that the federal court's judgment previously determined that Irvin acted outside the course and scope of his employment, and the trial court was collaterally estopped from finding otherwise. In addition, Lexington argues that the prior finding of intentional interference with contract inexorably leads to the conclusion that there was no "occurrence" as defined by the Policy.

A. Collateral Estoppel Requires Actual Litigation of the Issue.

¶47 The collateral estoppel doctrine provides that the determination of a litigated fact or issue which is essential to a valid and final judgment is conclusive between the parties or their privies in a subsequent claim involving the identical issue. Restatement (Second) of Judgments § 27 (1982); *see Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986) (declining to apply the collateral estoppel doctrine because there the contractor and the architect had not litigated the issue); *J.W. Hancock Enters., Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 410, 690 P.2d 119, 129 (App. 1984). In the insurer-insured context, collateral estoppel is predicated upon the assumed identity of interest between the parties to the indemnity contract. Restatement (Second) of Judgments §§ 57 cmt. a, 58(2); *see*

Farmers Ins. Co. v. Vagnozzi, 138 Ariz. 443, 448, 675 P.2d 703, 708 (1983) (suspending the rule of collateral estoppel based upon the adversity of interests and finding that the insurer was not collaterally estopped from asserting the policy exclusion for intentional acts).

¶48 Lexington's collateral estoppel argument is premised on an alleged finding by the federal jury that Irvin did not act within the course and scope of employment. As the Ninth Circuit found, however, the district court never instructed the *Southern Union* jury on the course and scope issue. Therefore, collateral estoppel did not bar the superior court from sending this issue to the jury. Arizona law requires actual litigation of the issue, meaning that it was submitted for determination and was in fact determined. *Chaney*, 148 Ariz. at 573, 716 P.3d at 30. That did not occur here. Therefore collateral estoppel did not preclude the jury's finding. *See id.*

¶49 The Ninth Circuit determined that course and scope was not litigated in the district court but surmised from the punitive damage award that Irvin would not have prevailed on that issue. That resolution has no preclusive effect here. *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (collateral estoppel does not apply if the issue was not fully litigated in the prior forum). Likewise, the Ninth Circuit's harmless error determination has no preclusive effect. *See Jack Faucett*

Assocs., Inc. v. Am. Tel. & Tel. Co., 744 F.2d 118, 128-29 (D.C. Cir. 1984); *see also Owens v. Treder*, 873 F.2d 604, 610-11 (2d Cir. 1989). We therefore have no need to address the parties' arguments with respect to *Manzanita Park, Inc. v. Insurance Co. of N. Am.*, 857 F.2d 549 (9th Cir. 1988).

B. The Determination of an "Occurrence" Under the Policy Is Consistent with the Federal Verdict.

¶50 Lexington alternatively argues that the federal jury verdict finding Irvin liable for intentional interference with contract establishes intentional conduct that is not covered under the "occurrence" definition in the Policy. Lexington claims that in order to have found Irvin liable for tortious interference, the federal jury must necessarily have found that Irvin "expected or intended" damage to Southern Union, thereby violating the "intentional acts" clause of the policy. Accordingly, it argues that collateral estoppel applies and renders the contrary state jury finding a nullity. We disagree.

¶51 Arizona defines the intentional interference with contract tort as:

> (1) existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3) intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly.

Safeway Ins. Co. v. Guerrero, 210 Ariz. 5, 10, ¶ 14, 106 P.3d 1020, 1025 (2005). The gist of the claim is not intent to injure, but rather an unjustified interference with the plaintiff's contract rights and knowledge thereof. *See Snow v. W. Sav. & Loan Ass'n*, 152 Ariz. 27, 33, 730 P.2d 204, 211 (1986) ("The tort is intentional in the sense that [the defendant] must have intended to interfere with the [plaintiffs'] contract or have known that this result was substantially certain to be produced by its conduct."); *see generally Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 775 (S.D.N.Y. 1990) (holding that tortious interference with contract requires "not the intent to injure, but to interfere without justification with the plaintiff's contractual rights with knowledge thereof").[2] One may act improperly without subjectively intending harm. *See Mein ex rel. Mein v. Cook*, 219 Ariz. 96, 101, ¶¶ 23-25, 193 P.3d 790, 795 (App. 2008).[3]

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[2] Lexington misconstrues *Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 493, ¶ 73, 38 P.3d 12, 31 (2002). The court explained that the defendant must intend the result, but the result referred to was the inducement of the breach of contract. *Id*. at 494, ¶ 78, 38 P.3d at 32. The decision notes the bank's motive was to benefit itself, but does not require proof of an intent to cause harm to the union pension fund. *See id.* at 495, ¶ 86, 38 P.3d at 33.

[3] Lexington contends that this result is inconsistent with *Hartford Accident & Indemnity Co. v. Villasenor*, 21 Ariz.App. 206, 517 P.2d 1099 (1974). There, the employee was injured at work and the employer's Hartford insurance policy contained an exception for injuries incurred by employees performing their

¶52 We apply a seven factor analysis to determine the existence of the fifth element of the intentional interference tort; namely, that defendant "acted improperly":

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.

Safeway Ins., 207 Ariz. at 92, ¶ 43, 83 P.3d at 570 (citation omitted). But "[i]ll will on the part of the actor toward the person harmed is not an essential condition of liability." Restatement (Second) of Torts § 766 cmt. r (1979). Accordingly, the findings relevant to the intentional acts clause that the federal jury must have made to hold Irvin liable for tortious interference are: (1) that he intended to interfere with an existing contract, thus causing or inducing a breach, and (2) that he acted improperly under any combination of the factors listed above.

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jobs. *Id.* at 207-08, 517 P.2d at 1100-01. The appellate court concluded that an employer-employee relationship finding was essential to the underlying judgment and was conclusive on the claim's assignee. *Id.* at 209, 517 P.2d at 1102. The trial court's judgment here, however, is not inconsistent with any fact or issue actually tried to the federal jury.

¶53 We now turn to whether the federal jury's verdict precluded the state jury from finding that Irvin did not "expect or intend" damage to Southern Union, thereby violating the "intentional acts" clause of the policy. "Determining whether an insured acts intentionally for purposes of insurance law is different than for purposes of tort law because there is no presumption in insurance law that a person intends the ordinary consequences of his actions." *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 165 Ariz. 31, 35, 796 P.2d 463, 467 (1990) (quoting *Vagnozzi*, 138 Ariz. at 449, 675 P.2d at 709). In *Ohio Casualty Insurance Co. v. Henderson*, we stated that if an "act was intentional and there was either a subjective desire to cause some specific harm (intent) or substantial certainty (expectation) some significant harm would occur, the insured will not be heard to say that the exclusion does not apply because the injury was more severe or different from what was intended." 189 Ariz. 184, 191, 939 P.2d 1337, 1344 (1997). The two-prong examination from *Ohio Casualty* controls our analysis of an insured party's intent.

¶54 Under the first prong of the *Ohio Casualty* test, no finding necessary to the federal court's verdict took the events here outside the policy's definition of "occurrence." Notwithstanding Lexington's argument to the contrary, intent may be established for purposes of the underlying tort but not for

purpose of determining the existence of an occurrence for coverage purposes. *Fire Ins. Exch. v. Berray*, 143 Ariz. 361, 364, 694 P.2d 191, 194 (1984). A general intent for interference claim requires the intent to do the wrongful act itself, rather than intent to cause any specific harm.

¶55 *Ohio Casualty's* second prong, which presumes intent based the substantial certainty that harm would occur, is known as the *Steinmetz-Clark* presumption. *See Steinmetz v. Nat'l Am. Ins. Co.*, 121 Ariz. 268, 271, 589 P.2d 911, 914 (App. 1978) (holding that the intentional acts exclusion applies "if the injury results from the natural and probable consequences of the intentional act"); *Clark v. Allstate Ins. Co.*, 22 Ariz.App. 601, 602, 529 P.2d 1195, 1196 (1975) (holding that "the act of striking another in the face is one which we recognize as an act so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm" despite their claim that they did not subjectively intend the harm).

¶56 The *Steinmetz-Clark* presumption applies "if the insured's claim that he did not intend or expect the injury 'flies in the face of all reason, common sense and experience.'" *Western Agric. Ins. Co. v. Brown*, 195 Ariz. 45, 47, 985 P.2d 530, 532 (App. 1998) (quoting *Ohio Cas. Ins.*, 189 Ariz. at 191, 939 P.2d at 1344). When this presumption applies, it is

conclusive. *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 358, 694 P.2d 181, 188 (1984). But "if the insured can show facts which might establish that he acted with privilege . . . or under claim of right recognized by law . . . , he will be permitted to explain his subjective intent, and it will be for the fact finder to determine whether he had an underlying purpose to injure." *Id.*

¶57 This exception to the *Steinmetz-Clark* presumption permits an insured to prevent the coverage limitation arising from the substantial certainty of injury by providing facts indicating a privilege or justification. *Id.* When the tort coverage in question involves intentional acts that may cause injury, it is "particularly appropriate" to inquire into the insured's subjective intent if facts "indicate that the insured was provoked, privileged, or justified in acting." *Phoenix Control Sys.*, 165 Ariz. at 36, 796 P.2d at 468. We must construe such clauses narrowly "so that the exclusion for intentional acts does not totally eliminate the coverage for intentional torts." *Id.* "The question must be . . . whether the insured intentionally acted wrongfully or whether his intentional act unintentionally resulted in wrongful conduct." *Id.*

¶58 The Arizona Supreme Court has examined a scenario similar to this case. In *Phoenix Control Systems,* an insured

sought to obtain coverage in a copyright infringement suit arising from its use of another company's computer software. 165 Ariz. at 32-33, 796 P.2d at 464-65. The insured argued that although copyright infringement is an intentional tort, it was not expected or intended in their case because the insured mistakenly thought the software was in the public domain, enabling it to lawfully obtain the software for sale to a third party. *Id.* at 35, 796 P.2d at 467. The court agreed, reasoning that given the insured's erroneous belief that it could obtain the software lawfully, a court could not conclude as a matter of law that insured's act "was part of a conscious business decision to act wrongfully." *Id.* at 37, 796 P.2d at 469.

¶59 Similarly, we conclude that collateral estoppel did not compel the state jury to apply the *Steinmetz-Clark* presumption because the federal jury could have found that Irvin's conduct was based on the erroneous belief that his acts were justified within his powers as commissioner. Admittedly, by finding Irvin liable for tortious interference, the jury must have found that he acted "improperly" under the seven-factor test in ¶ 52, *supra*. But, similar to *Phoenix Control Systems*, the jury could have determined that Irvin acted improperly by exceeding his powers as commissioner even if he was unaware that he was doing so when he committed the intentional acts. This is consistent with the state jury's later finding that Irvin did

not expect or intend the harm, and therefore was not excluded from coverage. Accordingly, we conclude that the prior federal judgment did not preclude the state jury's verdict.

III. Lexington Was Not Entitled to a New Trial on the Bad Faith Claim.

A. Evidence Supports the Superior Court Jury's Verdict.

¶60 Lexington also argues that the jury's verdict finding that it acted in bad faith toward Irvin was wrong as a matter of law, or at least warrants a new trial. This court reviews the denial of a motion for judgment as a matter of law de novo. *Acuna v. Kroack*, 212 Ariz. 104, 110, ¶ 23, 128 P.3d 221, 227 (App. 2006). We reverse the denial of a motion for new trial only if it indicates a "manifest abuse of discretion" given the evidence and the circumstances of the case. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). Finally, we review the evidence and all reasonable inferences from it in the light most favorable to sustaining the judgment. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 202, ¶ 2, 119 P.3d 467, 469 (App. 2005).

¶61 A claim of bad faith raises the factual issue of whether an insurer behaved reasonably under the circumstances. *Farmers Ins. Co. of Ariz. v. Young*, 195 Ariz. 22, 28, ¶ 20, 985 P.2d 507, 513 (App. 1998). To establish bad faith on the part of the insurer, the insured must show "the absence of a

reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Montoya Lopez v. Allstate Ins. Co.*, 282 F. Supp. 2d 1095, 1100 (D. Ariz. 2003) (citation omitted). An insurer incurs liability when it lacks a founded belief that the policy allows its conduct. *Rawlings v. Apodaca*, 151 Ariz. 149, 160, 726 P.2d 565, 576 (1986). A founded belief is absent when an insurer knows its position is groundless or fails to undertake an investigation adequate to determine whether its position is tenable. *Id.* An insurer owes and cannot delegate its duty of good faith to another party, including an attorney. *See* ¶ 73, *infra*.

¶62 Irvin argues that Lexington's bad faith activity dates back to April 2000. At that time, Lexington received a copy of Southern Union's complaint seeking damages of $750 million (to be trebled). An expert witness testified that a reasonable insurer would know that the $4 million self-insured retention would be exceeded and would act to protect its insured's interests by reviewing the potential exposure and conducting a full investigation. Instead, Lexington responded by sending a form letter to the State's risk manager stating that a coverage issue might exist but supplying no specifics.

¶63 According to Irvin, Lexington's failure to investigate or communicate with Irvin until after the federal district court

verdict constituted bad faith. We disagree. As the excess insurer, Lexington did not have an obligation to act until the primary coverage was exhausted, which Irvin contends occurred on January 3, 2003. *See Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 256, ¶ 18, 63 P.3d 282, 287 (2003) (until the primary insurer reaches its policy limit, the excess insurer has no duty "to evaluate a settlement offer, to participate in the defense, or to act at all"); *Regal Homes, Inc. v. CNA Ins.*, 217 Ariz. 159, 167-68, ¶ 34, 171 P.3d 610, 618-19 (App. 2007) (same).

¶64 But Lexington's actions beginning in January 2003 support the state jury's bad-faith verdict when viewed in the light most favorable to Irvin. Lexington's senior claims manager Sarah Preston approved a January 10, 2003 denial letter prepared by Israel, who was retained by Lexington to conduct a post-verdict coverage analysis. In doing so, Lexington adopted Israel's position, stated in the letter, that any insured who commits an intentional act that is improper is necessarily acting outside the course and scope of employment. Israel's denial letter failed to mention the *Schallock* and *Pima County Adult Probation* opinions.

¶65 Lexington's denial of coverage under the course and scope policy language supports the jury's conclusion that it was objectively unreasonable because the denial was directly contrary to stated Arizona law. As we explained in Part I-A,

supra, the holding in *Schallock* precluded Lexington's conclusion that an employee had no right to indemnity for an intentional tort under A.R.S. § 41-621. *Id.* at 256, 941 P.2d at 1281. Likewise, in *State v. Pima County Adult Probation Department*, we rejected the proposition that course and scope coverage under A.R.S. § 41-621(A)(3) could not extend to probation officers who violated a superior court order. 147 Ariz. at 149, 708 P.2d at 1340. By failing to consider these clearly applicable precedents, Lexington took an unfounded position. *See Rawlings*, 151 Ariz. at 160, 726 P.2d at 576; *Filasky v. Preferred Risk Mut. Ins. Co.*, 152 Ariz. 591, 597, 734 P.2d 76, 82 (1987) (holding that insurer's adoption of a "groundless position" on whether policy covered insured's loss supported jury's verdict that insurer breached its duty of good faith); *cf. Wolfinger v. Cheche*, 206 Ariz. 504, 517, ¶ 57, 80 P.3d 783, 796 (App. 2003) (citing Ariz. R. Civ. P. 11(a)) (observing that reasonableness in the context of a wrongful institution of civil proceedings claim is whether attorney makes a "reasonable argument to extend, modify, or reverse the controlling law").

¶66 Additionally, even after Irvin's counsel, Brian Schulman, brought the *Schallock* and *Pima County* precedents to Israel's attention in a March 13, 2003 letter challenging Lexington's position, Lexington did not change its policy determination. Israel responded to Schulman's letter with a May

9, 2003 letter distinguishing the cases Schulman cited based solely on factual distinctions of dubious significance. For example, Israel argued that *Schallock* was inapposite because "it involved supervisor-subordinate sexual harassment, not tortious interference with contract." But the letter offered no explanation for how this difference in the underlying facts rendered *Schallock*'s analysis inapplicable to Irvin's situation. Similarly, Israel attempted to distinguish *Pima County Adult Probation* on the basis that the probation officers "disobey[ed] express orders from the employer." But the case actually held that probation officers were covered under A.R.S. § 41-621 for intentional acts while acting under the state's control and conducting the state's business. *Pima County Adult Probation*, 147 Ariz. at 149-50, 708 P.2d at 1340-41. In any event, it is clear that a reasonable interpretation of both *Schallock* and *Pima County Adult Probation* should have led Lexington to reverse its determination to deny coverage.

¶67 Instead, Israel and Lexington relied on *Wallace v. Casa Grande Union High School*, 184 Ariz. 419, 909 P.2d 486 (App. 1995), which Israel claimed "stands for the proposition that an employee that acts within the course and scope does not act 'improperly.'" We disagree. The portion of the holding in *Wallace* that Israel relies on actually stands for the rather straightforward proposition that a supervisor who, acting within

the course and scope of his employment, recommends that his employer take adverse action against an employee is not liable for intentional interference with contractual relations unless the supervisor acted improperly. 184 Ariz. at 428, 909 P.2d at 495. *Wallace* provides no support for the converse proposition for which Israel cited it, to wit: that an employee who acts improperly, and may therefore be liable for intentional interference, is necessarily acting outside the course and scope of his employment.

¶68 Given Lexington's course of conduct, there was sufficient evidence to permit a reasonable jury to determine that Lexington's basis for denying coverage was not reasonable and that Lexington knew or recklessly disregarded the lack of a reasonable basis for its coverage decision. Accordingly, we conclude that the trial court did not err by submitting the bad faith issue to the jury.

¶69 Nor are we persuaded by Lexington's contention that its coverage determination did not cause Irvin's damages because it owed only a duty to indemnify, and not to defend, when it made the bad-faith determination. Lexington claims that it "could properly reserve its rights to deny any obligation to indemnify Irvin," thereby requiring Irvin to fund his own defense and later seek indemnification. But Lexington's act of bad faith *was* its decision to deny coverage based on an

unreasonable legal position. The policy provided that "no defense costs shall be incurred on behalf of [Lexington] without the written consent of the Company . . . ." By ignoring warnings that its position was plainly incorrect, Lexington effectively denied Irvin consent for any subsequent costs associated with his ongoing defense, thereby compelling him to pursue his defense by using the resources available to him. Given Lexington's right to control the costs of Irvin's defense, a jury could have reasonably found that it acted in bad faith by denying coverage. Accordingly, we decline to reverse the bad faith findings and award.

B. The Trial Court Did Not Erroneously Refuse to Instruct on the Advice of Counsel Defense.

¶70 Lexington further argues that the trial court abused its discretion in failing to instruct on the advice of counsel defense to the bad faith claim. We read the jury instructions as a whole, and will not overturn a verdict when there is no significant possibility that the jury was misled. *Petefish ex rel. Clancy v. Dawe*, 137 Ariz. 570, 576, 672 P.2d 914, 920 (1983).

¶71 Lexington proposed the following instruction:

> **Reliance on Counsel**
>
> If you find that Lexington reasonably relied on the advice of its counsel, the law firm of Israel & Gerity, when handling Irvin's claim for insurance coverage, then you must

> find for Lexington on Irvin's claims for (a) breach of the implied covenant of good faith and fair dealing, and (b) bad faith tort.

¶72 As drafted, Lexington's instruction is an incorrect statement of the law, and the trial court properly refused to so instruct the jury. Lexington cites no case that supports the proposition that reliance on the advice of counsel alone provides an absolute defense, absolving an insurer of liability.[4] Rather, the issue is whether the insurer reasonably believed that Irvin's position could be rejected within the bounds of the law. *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, ¶ 20, 995 P.2d 276, 279 (2000). The instruction says nothing about whether Lexington's employees reasonably believed its position; rather it focuses on whether it was reasonable to rely on outside counsel. The trial court does not have a duty to "reword the requested instruction so as to eliminate the incorrect statement." *Porterie v. Peters*, 111 Ariz. 452, 455, 532 P.2d 514, 517 (1975).

¶73 This court recently underscored that an insurer owes a duty of good faith to an insured and cannot delegate that duty to another party, including an attorney. *See Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 156, ¶ 56, 213 P.3d 288, 305

[4] The authority Lexington cites, *State Farm Mutual Automobile Insurance Co. v. Lee*, discusses the privilege waiver issues involved in the advice of counsel defense. 199 Ariz. 52, 55, ¶ 6, 13 P.3d 1169, 1172 (2000). It does not hold that the defense is an absolute bar in a bad faith claim.

(App. 2009). Therefore, an insurer may be liable for bad faith and punitive damages if its attorney took actions in furtherance of the insurer's business and within the scope of the attorney's agency. Consequently, the insured was entitled to have the jury consider the insurer's liability for both bad faith and punitive damages based on the actions of the outside attorneys, as well as the insurer's own employees who worked on the claim.

¶74 The evidence must also support the claimed instruction. An expert witness for Lexington testified that a reasonable insurance company should not rely solely on advice of counsel.

¶75 Finally, the instructions given did not preclude Lexington from arguing, or the jury from considering, whether Lexington had acted reasonably in retaining counsel to advise it about coverage and in relying on counsel's coverage opinions. *See Porterie*, 111 Ariz. at 458, 532 P.2d at 520 (holding that a court is not required to instruct on every refinement). Viewed as a whole, the instructions given properly guided the jury and do not support a new trial on bad faith.

IV. The Trial Court Properly Awarded Irvin Attorneys' Fees, Taxable Costs, and Punitive Damages.

¶76 Lexington raises three basic objections to the damages awarded to indemnify Irvin: (1) the amount of attorneys' fees incurred was unreasonable; (2) Irvin should not have received

his taxable costs; and (3) Lexington should not be required to pay the punitive damages awarded in federal court.

A. Irvin Was Entitled to Recover the Attorneys' Fees Awarded.

¶77 The jury determined, and our analysis of the Policy coverage confirms, that Lexington breached its contract with Irvin. When an insurer erroneously denies coverage and refuses to defend its insured, it is liable for the resulting judgment and defense costs incurred up to the policy limits (absent the refusal of a settlement offer). *See Watson v. Ocean Acc. & Guar. Corp.*, 28 Ariz. 573, 580, 238 P. 338, 341 (1925) (holding as a matter of law that an insured denied bargained-for coverage and forced to defend itself is entitled to attorneys' fees expended as an element of damages); *Rogan v. Auto-Owners Ins.*, 171 Ariz. 559, 563, 832 P.2d 212, 216 (App. 1991)[5]*; accord Peterborough Oil Co. v. Great Am. Ins. Co.,* 397 F. Supp. 2d 230, 243-44 (D. Mass. 2005) (when an insurer improperly fails to defend a lawsuit, it is liable for all defense costs and (assuming policy coverage) the entire resulting judgment or settlement); *Brandt v. Superior Ct.,* 693 P.2d 796, 799-800 (Cal. 1985) (recognizing that attorneys' fees can be awarded as damages as part of the recovery of policy benefits); *see also Home Ins. Co. v. Pinski Bros., Inc.*, 500 P.2d 945, 949-50 (Mont.

[5] We treat an unconditional denial of coverage as a refusal to defend. *Rogan*, 171 Ariz. at 563 n.3, 832 at 216 n.3.

1972) (holding that the insured was entitled to recover costs expended to defend himself on all covered and uncovered claims, even though some of the claims brought against the insured were not covered).

¶78 Evidence introduced at the post-trial damages hearing supports the finding that it was reasonable and necessary for Irvin to retain counsel to protect his interests after the *Southern Union* verdict and Lexington's refusal to participate. Attorney Andrew Sherwood testified about the amount of work, size and complexity of the issues, the reasonableness of the rates charged, and the appropriateness of the number of hours expended. Irvin submitted his invoices in support of the claimed amounts.

¶79 To evaluate the amount of attorneys' fees incurred as damages when the insurer wrongfully declines coverage, the courts have applied a commercial reasonableness standard. *Knoll Pharmaceutical Co. v. Auto. Ins. Co. of Hartford*, 210 F. Supp. 2d 1017, 1024 (N.D. Ill. 2002). What was actually paid is arguably not evidence of market value, but market value itself. *Id.* (citing *Medcom Holding Co. v. Baxter Travenol Labs., Inc.*, 200 F.3d 518, 520, 521 (7th Cir. 1999); *Balcor Real Estate Holdings, Inc. v Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996)); *cf. Schweiger v. China Doll Rest., Inc.*, 138 Ariz.

183, 187-88, 673 P.2d 927, 931-32 (App. 1983) (explaining that the fees actually charged are presumed reasonable).

¶80 Lexington complains that Irvin failed to prove he actually paid or was responsible for paying his fees. But Irvin testified that he sold stock in a family company to pay one firm and borrowed additional money to pay incurred fees, which he is now required to repay. This arrangement does not prevent Irvin from recovering fees as damages. *See Catalina Foothills Ass'n v. White*, 132 Ariz. 427, 428, 646 P.2d 312, 313 (App. 1982) (permitting fee claims even when the fees are actually paid by a third party). The weight to be accorded to this fact was within the trial court's discretion. *See id.*

B. The Parties Stipulated to Irvin's Taxable Costs.

¶81 Lexington also argues that it bears no liability for Irvin's taxable costs based on a failure of proof and lack of coverage under the Policy. We reject these arguments.

¶82 Lexington claims that Irvin cannot recover this amount because he failed to introduce evidence. But as Irvin points out, the parties stipulated to the amount incurred in their joint pre-trial statement as "at least $131,000." Therefore, Irvin was not obligated to offer supporting evidence. *See Gangadean v. Flori Inv. Co.*, 106 Ariz. 245, 248, 474 P.2d 1006, 1009 (1970).

¶83 Nor can we agree with Lexington's position that taxable costs fall outside of the Policy's "ultimate net loss" definition. Such losses include "the sums, including defense costs, for which the insured is legally liable as damages by reason of a judgment . . . ." "Defense Costs" are defined as "attorney's fees, costs and expenses and other fees, costs and expenses incurred in connection with the . . . defense . . . of a claim or suit covered hereunder." Because Irvin incurred the taxable costs as part of his *Southern Union* defense costs, he is entitled to recover them as damages. The amount of those fees was properly determined by the trial court.

C. The Policy Coverage Extends to the Punitive Damages Claim.

¶84 Lexington also contends that Irvin was not entitled to recover punitive damages. It premises this argument on (1) the Policy's language, (2) collateral estoppel with respect to the federal verdict and A.R.S. § 12-820.04 (2003), (3) public policy, and (4) Lexington's intent with respect to the insurance purchase.

1. The Policy Does Not Clearly and Distinctly Communicate a Punitive Damages Exclusion.

¶85 The Policy provides for indemnity in an amount "which the insured shall become legally obligated to pay as damages because of . . . public officials errors and omissions . . . ."

Courts across the country have held that "damages" in an insurance policy encompasses punitive damages.[6]

¶86 "[I]f an insurer wishes to limit its liability, it must employ language in the policy which clearly and distinctly communicates to the insured the nature of the limitation." *Roberts v. State Farm Fire & Cas. Co.*, 146 Ariz. 284, 286, 705 P.2d 1335, 1337 (1985) (finding coverage for honey damage as an "ensuing loss" notwithstanding the insect damage exclusion).[7] In *Price v. Hartford Accident & Indemnity Co.*, the Arizona Supreme Court held that if a policy does not exclude coverage for

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[6] *See Fluke Corp. v. Hartford Acc. & Indem. Co.*, 34 P.3d 809, 814-16 (Wash. 2001); *United States v. Sec. Mgmt. Co.*, 96 F.3d 260, 269 (7th Cir. 1996); *City of Old Town v. Am. Employers Ins. Co.*, 858 F. Supp. 264, 269 n.6 (D. Me. 1994).

Lexington cites a series of authorities, but none discusses whether the unrestricted reference to "damages" in an insurance policy signifies only compensatory damages. *See Downs v. Sulphur Springs Valley Elec. Coop.*, 80 Ariz. 286, 293-94, 297 P.2d 339, 343-44 (1956) (holding that punitive damages could not be awarded in light of an amendment removing that component from statute listing damages recoverable in a wrongful death action), *superseded by statute*, A.R.S. §§ 12-611, -613; *Commercial Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 255 n.4, 902 P.2d 1354, 1359 n.4 (App. 1995) (in a case raising no punitive damages issue, the court distinguished "damage" from "damages" and explained that the latter denotes a sum of money used to compensate a victim of another's negligence); *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 8, ¶ 35, 31 P.3d 114, 121 (2001) (MacGregor, J., dissenting) (arguing that punitive damages should not be awarded when the tortfeasor dies because no punishment results).

[7] As Irvin points out, Lexington's counsel acknowledged that punitive damages are covered absent an express exclusion.

punitive damages, an Arizona court will not help the insurer avoid its obligation to pay them. 108 Ariz. 485, 488, 502 P.2d 522, 525 (1972) (holding that punitive damages were covered by a policy providing coverage for all sums for which the insured may be held liable). The court underscored that no public policy obstacle exists to enforcing this recovery. *Id.*

¶87 The Policy's definition of damages does not exclude punitive damages or limit coverage to compensatory damages. "Damages" includes "damages for death and for care and loss of services resulting from personal injury and damages for loss of use of property resulting from property damage, and damage resulting from public officials errors and omissions." Moreover, the Policy contains five pages of exclusions (A through P, with subparts) which contain no mention of punitive damages. Under *Price*, punitive damages fall within the scope of coverage. *See id.*; *accord State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 258 & n.10, 782 P.2d 727, 734 & n.10 (1989) (explaining that the reasons for requiring an express exclusion of punitive damages in a liability policy are more compelling than in the case of uninsured motorist and underinsured motorist policies because the insured expects such coverage).

¶88 Lexington nevertheless contends the Policy excludes punitive damages indirectly. The insurer contends that the

"occurrence" definition only covers an accident that results in damages. For reasons previously explained, we hold that the occurrence definition here is not so limited. Moreover, we do not find that such language would clearly and distinctly notify the insured of the punitive damages exclusion.

¶89 Lexington's alternative argument is that the "expected or intended" damages language is sufficient to exclude punitive damages. Again, we disagree. Proof of an evil mind to support punitive damages does not require evidence of a subjective intent to injure. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 130, ¶ 24, 180 P.3d 986, 995 (App. 2008) (holding that liability for punitive damages can result from a "conscious disregard of 'a substantial *risk* of significant harm to others.'") (quoting *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 38, 144 P.3d 519, 531 (App. 2006)). Substantial risk is a lower threshold than either of the standards for intent in tort: subjective desire or substantial certainty of a specific harm. *See Mein*, 219 Ariz. at 99-100, ¶ 16, 193 P.3d at 793-94 (quoting Restatement (Second) of Torts § 8A (1965)). Therefore, a jury could award punitive damages without violating the Policy. *See Warner*, 218 Ariz. at 130, ¶ 24, 180 P.3d at 995.

2. Collateral Estoppel Does Not Apply to the Punitive Damages Award.

¶90 Consistent with our prior collateral estoppel analysis of the federal verdict, we reject Lexington's argument that the doctrine precludes the punitive damages award. The wording of the jury instructions underscores the inapplicability of collateral estoppel here.

¶91 The federal jury received an instruction listing various factors which could establish an evil mind, including the following:

> Defendant acted to serve his own interests, having reason to know and consciously disregarding a substantial risk that his conduct might significantly injure the rights of others.

In light of this formulation, the trial court ruled that it is unclear whether the federal jury specifically determined that Irvin intended to cause injury when it assessed punitive damages. We agree. When a general verdict is subject to differing interpretations, courts do not speculate as to what was actually decided. *Owens*, 873 F.2d at 609-10; *Glass v. U.S. Rubber Co.*, 382 F.2d 378, 384 (10th Cir. 1967). Accordingly, no collateral estoppel exists on the issue of Irvin's intent to cause injury.

¶92 Lexington alternatively argues that A.R.S. § 12-820.04 also precludes a punitive damages award. The statute provides:

"Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages." *Id.; see Carey v. Maricopa County*, 602 F. Supp. 2d 1132, 1144 (D. Ariz. 2009) (holding that A.R.S. § 12-820.04 precluded a physician from recovering punitive damages on his state law claims against public entities or employees acting within the scope of their duties).

¶93 The problem here is that the *Southern Union* jury received no instruction on A.R.S. § 12-820.04. Consequently, it made no determination and collateral estoppel does not apply. *See Chaney Bldg.*, 148 Ariz. at 573, 716 P.2d at 30 (declining to apply the collateral estoppel doctrine because there was no litigation of issue between the contractor and the architect).

¶94 This punitive damages claim arises in an insurance coverage context. Absent fraud or collusion, neither of which is alleged here,

> an insurance company which refuses to defend its insured is bound by a judgment against its insured with respect to all matters which were litigated or could have been litigated in that action. . . . By refusing to defend, the insurer takes the risk that it may have erred in determining that the policy did not provide coverage. Having refused to provide a defense, the insured is said to have been "vouched in" the action against the insured and is bound by the judgment.

Paynter, 122 Ariz. at 200-01, 593 P.2d at 950-51.

¶95 Accordingly, Lexington is bound by the judgment in this case. Its A.R.S. § 12-820.04 argument amounts to an impermissible collateral attack on a claim and damages that have already gone to judgment before a court with jurisdiction to decide these matters. Even if the award of punitive damages was erroneous, "the issue here is not whether judgment should have been rendered but whether there is insurance coverage for the judgment that was rendered." *Gilbreath v. St. Paul Fire & Marine Ins. Co.*, 141 Ariz. 92, 97, 685 P.2d 729, 734 (1984) (finding coverage for damages awarded against a mother under invalid emotional distress theory); *Paynter*, 122 Ariz. at 204, 593 P.2d at 954 (holding defendant insurer liable for damages awarded against insured up to the policy limits after the insurer refused to defend the underlying tort action against its insured). Because coverage exists here, Lexington is liable for the punitive damages award. Our holding obviates the need to discuss the parties' remaining arguments.

3. Indemnifying Irvin for Punitive Damages Does Not Violate Public Policy.

¶96 Lexington also contends that indemnifying Irvin for punitive damages would violate public policy. Arizona law holds otherwise. As we stated in *Price*, "public policy would be best served by requiring the insurance company to honor its

obligation," including the payment of punitive damages. 108 Ariz. at 488, 502 P.2d at 525.

¶97 Similarly, a federal district court held that an insurer was required to indemnify a judge held liable for punitive damages in a civil rights suit in *Harris v. County of Racine*, 512 F. Supp. 1273 (E.D. Wis. 1981). The court explained:

> As in Judge Harvey's case, [public officials] may as a consequence lose the protection of their official immunity. The public interest is not served if they are in addition prohibited from insuring themselves against the possibility of personal liability. Fear of the consequences of acting can prohibit more than impermissible conduct. It can also have a substantially inhibiting effect on the exercise of reasonable discretion. Avoidance of that effect, which is in turn caused by fear of "the devastating impact on particular individuals" of a punitive damages award, is, "the very essence of the public policy which encourages and accepts insurance." A judge-made rule that public policy prohibits a municipality from insuring its employees against such catastrophic risks as they are now exposed to would be ludicrous in that it could destroy the effectiveness of the municipalities.

Id. at 1283 (citation omitted).

¶98 Lexington invokes *Juarez v. CC Services, Inc.*, 434 F. Supp. 2d 755 (D. Ariz. 2006), and *State Farm Mutual Automobile Insurance Co. v. Wilson*, 162 Ariz. 251, 782 P.2d 727 (1989), but its reliance upon those authorities is misplaced. According to

Lexington, *Juarez* holds that policy coverage cannot be triggered because the stipulated judgment was contrary to Arizona law. *See Juarez*, 434 F. Supp. 2d at 762-63. The court determined that the plaintiff was a co-employee of the defendant and had already sought worker's compensation benefits for a work injury. *Id.* at 762. Section 23-1022 therefore prevented him from bringing suit against a co-employee for additional coverage. *Id.*

¶99 Lexington maintains that Irvin is similarly precluded by statute from obtaining indemnity for the punitive damages judgment. We do not read *Juarez* so broadly. There, the insurer was not estopped from relitigating coverage after the plaintiff and a defendant entered into an agreement under which the defendant faced no liability in the non-litigated judgment. *Id.* at 757. Lexington, in contrast, wanted the trial court to address a statutory defense that was unresolved in a litigated case in which Lexington declined to participate.

¶100 Moreover, *Juarez* holds that the insurer was not estopped from relitigating in a coverage action an issue that was not actually decided in the underlying case. *Id.* at 755. The rationale was that no identity of interest existed between the plaintiff and the employer. *Id.* at 759-60. As Irvin points out, this holding supports his argument. *See id.*

¶101 Equally unavailing is Lexington's argument concerning *Wilson*, which arose in a substantially different context. The Arizona Supreme Court held that public policy did not support holding the underinsured motorist (UIM) insurer liable for punitive damages absent an express undertaking in the contract. *Wilson*, 162 Ariz. at 260, 782 P.2d at 736. Uninsured (UM) and UIM coverage are designed only to insure against bodily injury. *Id.* at 258, 782 P.2d at 734. The court explained that UM coverage is more limited than liability coverage, and neither UM nor UIM coverage is designed to compensate the victim for total loss (property as well as personal); instead, they serve as gap fillers. *Id.* at 256, 782 P.2d at 732. The legislative intent would be subverted by requiring the victim's insurance company to pay punitive damages. *Id.* at 255, 782 P.2d at 731. Moreover, punitive damages are not intended to be compensatory, and are not recoverable unless specifically provided for. *Id.* at 260, 782 P.2d at 736.

¶102 *Wilson* is distinguishable from this case. The State was not in the market for gap filler insurance when it purchased the Policy.

4. The State Intended to Purchase Coverage in Compliance With A.R.S. § 41-621.

¶103 Lexington further contends that the State could not possibly have intended to purchase insurance coverage for

punitive damages in view of the statutory prohibition on such damages in A.R.S. § 12-820.04. We disagree.

¶104 The risk manager for the State, Ray DiCiccio, testified that the State informs its broker of the statutory insurance coverage requirements and directs the broker to purchase an excess policy mirroring those requirements as much as possible. The relevant statute, A.R.S. § 41-621(A)(3), requires the Department of Administration to obtain insurance "against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization." Similarly, as we have noted, the Policy covers a State employee or agent "while acting within the course and scope of employment or authorization."

¶105 DiCiccio explained that the State is not required to pay punitive damages awarded against any employee. But DiCiccio further testified that the head of the Department of Administration has discretion to pay such an award, if it is "within the course and scope of their authorized duties." This evidence indicates the State's intent to buy insurance to cover whatever damages may be awarded against it.

¶106 Preston's testimony also supports this conclusion. She testified that Lexington knew all along that any punitive

damage award in the *Southern Union* litigation would be within the "net loss" provision of Lexington's Policy.

¶107 As the trial court noted, Lexington has made an unpersuasive attempt to reason backwards from public policy to find the State had no intent to purchase punitive damage coverage. The State need not have relied exclusively on A.R.S. § 12-820.04, but could have insured itself and other employees against the risk of punitive damages in a case such as this one. The record and public policy simply do not support the conclusion that exclusion of punitive damages was necessarily part of the Policy. In any event, we resolve any ambiguity as to intent against the insurer.

V. The Trial Court Did Not Abuse its Discretion in Excluding McDonald's Report and Admitting Malgram's Testimony.

¶108 Lexington also raises the following evidentiary challenges: (1) the admission of Gilbert Malgram's expert testimony on insurance practices, and (2) the admission of only a limited portion of Mel McDonald's impeachment report on Irvin's conduct (the McDonald Report) and the associated limitations on McDonald's testimony. We will affirm a trial court's rulings on the admission or exclusion of evidence absent (1) a clear abuse of discretion or legal error and (2) prejudice. *Gasiorowski v. Hose*, 182 Ariz. 376, 382, 897 P.2d 678, 684 (App. 1994). The improper admission of evidence does

not constitute reversible error if the jury would have reached the same verdict without the evidence. *Id.*; *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 88, ¶ 7, 977 P.2d 807, 810 (App. 1998).

A. Malgram's Testimony

¶109 Lexington complains that Malgram's testimony about the insurer's deviation from industry standards was irrelevant to the bad faith claim. At trial, Lexington objected based on relevance only, and did not mention Rule 403.

¶110 Assuming, without deciding, that Lexington is correct on these scores, we nevertheless decline to reverse because the jury could have reached the same verdict even without the disputed evidence. *See Brown*, 194 Ariz. at 89, ¶ 20, 977 P.2d at 811 (holding that, even accepting the insured's claim of unfairness under Rule 403, the jury would have reached the same result because the remaining evidence indicated that one of the insureds had intentionally started the fire).

¶111 Other evidence bolstered the finding of bad faith. There was evidence that Lexington had notice of course and scope authorities that would have required coverage even for intentional torts. Lexington did not rely only on advice of counsel; it reached this conclusion on its own as well. In sum, evidence of post-federal verdict misconduct independently supports the punitive damages award. Because the probative

force of the admitted evidence supports the verdict, Lexington is not entitled to a new trial. *See Cano v. Neill*, 12 Ariz.App. 562, 567, 473 P.2d 487, 492 (1970).

¶112 Moreover, Malgram's other testimony was relevant even under Lexington's standard of relevance. Malgram also opined that Lexington failed to communicate with Irvin and could not properly rely solely on its counsel's opinion. His testimony assisted the jury in evaluating relevant evidence with respect to these issues and in making its bad faith determination and was therefore admissible. *See* Ariz. R. Evid. 702.

¶113 Lexington complains that Malgram should not have been permitted to testify about industry practices because he could not address the legal standards for bad faith. Malgram did not testify on that subject. Finally, the fact that Malgram was not cognizant of all aspects of the Southern Union litigation relates to the weight of his testimony, not its admissibility.

B. Limitation on the McDonald Report and Related Testimony

¶114 Lexington further objects to the limitations on evidence of the McDonald Report and McDonald's trial testimony. McDonald had prepared his report at the request of the Arizona Legislature. He described his role as lead prosecutor with an assignment similar to preparing a grand jury indictment of Irvin. Israel made his "no coverage" decision nine months

before McDonald made his impeachment recommendation in October 6, 2003.

¶115 Although Lexington maintained that the McDonald Report was admissible under Rule 803(8) of the Arizona Rules of Evidence,[8] the trial court declined to admit the entire report based upon lack of trustworthiness under that rule and also based on Rule 403. Irvin points out that the McDonald Report contains hearsay, including some excerpts from depositions and interviews at which Irvin was not represented. The document also incorporates legal opinions on whether the House of Representatives had reasonable cause to pursue impeachment, and matters unrelated to the *Southern Union* litigation. Further, some of the McDonald Report's factual findings were of particular concern to the trial court.

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[8] Rule 803(8) provides:

> **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

¶116 The trial court did not abuse its discretion in limiting the McDonald Report evidence. It allowed McDonald to read findings from the report that established foundational and undisputed matters, including Irvin's travels during the merger negotiations, the other commissioners' lack of awareness of the trips, and with whom Rose and Irvin had met.

¶117 As Rule 803(8) contemplates, not all government reports are entitled to a presumption of reliability or trustworthiness. The trial court has discretion to evaluate trustworthiness, and considers such issues as the report's hearsay content and sources. *See Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22-23 (6th Cir. 1984). Reports generated by congressional committees may involve political grandstanding, careful selection of witnesses, and partisan purposes, and therefore may be ruled inadmissible on those grounds as well. *See Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810, 814-15 (D.D.C. 1987). Courts are also concerned when the report sought to be introduced lacks finality and is subject to further review and evaluation. *See Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 101, 108 (E.D. Va. 2004) (declining to admit a report of the Federal Trade Commission administrative law judge issued after fifty days of testimony because it had yet to be presented to the agency).

¶118 At trial, Lexington attempted to obtain testimony about the McDonald Report from McDonald. The trial court limited the testimony to avoid the introduction of inadmissible evidence, but expressly ruled relevant the evidence that the insurer relied upon the McDonald Report when undertaking subsequent reviews of coverage. McDonald was permitted to describe the impeachment process, the purpose of his investigation, what the investigation entailed, and the fact that he had made findings. We find no abuse of discretion.

VI. The Trial Court Erred as a Matter of Law in Awarding Pre-judgment Interest on the Attorneys' Fees Damages.

¶119 Lexington also challenges the award of pre-judgment interest on fees Irvin incurred with the Greenberg Traurig firm in the *Southern Union* case. A party is entitled to pre-judgment interest on a liquidated claim as a matter of right. *Alta Vista Plaza, Ltd. v. Insulation Specialists Co.*, 186 Ariz. 81, 82, 919 P.2d 176, 177 (App. 1995).

¶120 "Whether a claim is liquidated is a question of fact." *Able Distrib. Co. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 406, 773 P.2d 504, 511 (App. 1989). Whether a party is entitled to interest is a legal question that we review de novo. *Gemstar Ltd. v. Ernst & Young,* 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996).

¶121 In Arizona, a claim is liquidated if "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 544, ¶ 39, 96 P.3d 530, 542 (App. 2004) (quotation omitted). Arizona courts have long held that attorneys' fees are unliquidated claims, and interest accrues on such claims after judgment. *Schwartz v. Schwerin*, 85 Ariz. 242, 249-50, 336 P.2d 144, 148-49 (1959).

¶122 The trial court, however, set interest to accrue on the Greenberg Traurig defense costs at the rate of 10 percent per annum. Until judgment was entered in *Southern Union* and fees were resolved by the trial court's judgment, however, there was no evidence from which the total fees for the defense of the action could be calculated. *See Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcontinental Ins. Co.*, 218 Ariz. 13, 24-25, ¶¶ 48-51, 178 P.3d 485, 496-97 (App. 2008) (holding that a stipulated judgment, which included attorneys' fees, was not liquidated for purposes of pre-judgment interest until the court determined that the amount was reasonable). Prior to that time, accrual of interest was improper and the award of pre-judgment interest was erroneous. *See id.* The fact that Irvin had an agreement with his counsel and made payments periodically does not change the analysis, as those amounts still did not become

liquidated until the trial court assessed their reasonableness. *See id.* We therefore reverse and vacate this portion of the judgment. *See id.*

¶123 Reversal is also warranted because Irvin never produced any evidence that he supplied Lexington with the supporting data as is required for pre-judgment interest. Irvin's counsel effectively admitted his failure to find evidence of the dates of invoice payments when he offered to supply the information after judgment. Without such information, Lexington could not determine the amount Irvin claimed was owed. Accordingly, the trial court is directed to vacate that portion of the judgment awarding pre-judgment interest on the Greenberg Traurig fee award. *See Alta Vista*, 186 Ariz. at 83, 919 P.2d at 178 (explaining that pre-judgment interest will not accrue until the claimant provides "sufficient information and supporting data" to allow the debtor to determine the amount owed); *see also Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, 289, ¶ 37, 205 P.3d 1128, 1136 (App. 2009) (holding that a demand for a lump sum payment without itemization was insufficient).

VII. Irvin Was Entitled to Pre-judgment Interest on the Bad Faith Damages Claim as of the Date of the Complaint, Not the Date He Paid the Capital Gains Tax.

¶124 Lexington also contests the trial court's award of pre-judgment interest on the bad faith damages claim. This

amount represents the capital gains tax Irvin paid when he sold stock to fund his own defense. The trial court set the accrual date as December 30, 2003, the date the capital gains tax was paid.

¶125 Irvin contends that the pre-judgment interest timing is proper, or at least should run from the date he filed the complaint. Lexington counters that Irvin was required to make a specific demand on the insurer for the amount comprising his bad faith damages. Based upon *Alta Vista* and *Cendejas*, we find that pre-judgment interest should accrue from March 25, 2004, the date Irvin filed his complaint against Lexington.

¶126 Irvin's complaint states that, as a consequence of Lexington's breach of the duty to cover his defense, it is "liable to Irvin for all foreseeable direct and consequential damages resulting from that breach, including all damages set forth in Irvin's September 23, 2003 Notice of Claim . . . ." According to the copy of the notice attached as Exhibit A to the complaint, Irvin identifies the $579,173.73 expense as damages he incurred. Accordingly, we hold this demand is sufficient to allow Lexington to determine the amount owed.

¶127 Lexington posits that Irvin's assertion of claims for unliquidated bad faith damages for emotional distress, in addition to the capital gains tax, renders all the bad faith damages unliquidated. Lexington cites no authority for this

argument. There is no reason why one claim cannot include both liquidated and unliquidated damages. *See Aker Verdal A/S v. Neil F. Lampson, Inc.*, 828 P.2d 610, 616-18 (Wash. Ct. App. 1992).

VIII. The Trial Court Did Not Abuse its Discretion in Awarding Attorneys' Fees in the State Court Litigation.

¶128 Lexington also contests the trial court's award of attorneys' fees to Irvin pursuant to A.R.S. § 12-341.01(A) (2003). This court reviews the fee award for an abuse of discretion. *Harris v. Reserve Life Ins. Co.*, 158 Ariz. 380, 384, 762 P.2d 1334, 1338 (App. 1988). We view the record in the light most favorable to sustaining the trial court's decision. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 31, 20 P.3d 1158, 1168 (App. 2001) (citations omitted).

¶129 Irvin requested $515,272.00 in fees incurred with Gammage & Burnham through September 30, 2007, $280,478.50 in attorneys' fees incurred when Greenberg Traurig represented him in the coverage dispute, and $183,686.00 for fees incurred with Gammage & Burnham between October 1, 2007 and June 30, 2008. The trial court awarded $501,392.00 of the Gammage & Burnham fees through September 30, 2007, and $182,444.00 of its fees incurred through June 30, 2008, while awarding nothing for the Greenberg Traurig fees. The court reasoned that the Greenberg Traurig fees were not recoverable as the Policy did not cover

impeachment; however, the federal litigation fees were recoverable as damages[9] and the remaining fees were recoverable under A.R.S. § 12-341.01(A).

¶130 According to Lexington, the trial court abused its discretion in awarding the third set of fees by: (1) holding Lexington liable for work performed in relation to other defendants; (2) failing to determine a reasonable hourly rate; (3) finding transition time recoverable when Greenberg Traurig decided to withdraw; and (4) rejecting Hickman's arguments that the fees were unreasonable. The trial court found that the initial involvement of other defendants, the State and TIG, did not increase Gammage & Burnham's efforts. The issues were the same, and the effort expended would be essentially the same no matter how many defendants there were. Even Lexington could attribute only 1.8 of Gammage & Burnham's hours to the State or TIG.

[9] The amount of damages awarded is legally sufficient. The jury assessed damages in the amount of fees Irvin expended to obtain a stay of execution. Attorneys' fees incurred in obtaining benefits under an insurance contract are recoverable in a later action, but the fees may include only those incurred to obtain contract benefits and not those expended in seeking tort damages. *Schwartz v. Farmers Ins. Co.*, 166 Ariz. 33, 35-36, 800 P.2d 20, 22-23 (App. 1990) (holding that attorneys' fees incurred to obtain the benefit of an insurance contract are recoverable in a bad faith action). The fees awarded meet this requirement. *See id.*

¶131 Further, as Irvin points out, the actual hourly rate charged to Irvin is presumptively reasonable. *See China Doll*, 138 Ariz. at 187-88, 673 P.2d at 931-32. The trial court further determined that the fees fell within market range and were reasonable. *See Kadish v. Ariz. State Land Dep't*, 177 Ariz. 322, 332, 868 P.2d 335, 345 (App. 1993).

¶132 As to expert Gerald Hickman's objections, we agree with the trial court that, given the stakes of the litigation and the issues, the fees incurred were justified. This court declines to engage in an itemized analysis of attorneys' fees and thereby substitute our judgment for that of the trial court. Finally, we agree that Lexington could appropriately bear the cost of the transition between firms when Greenberg Traurig opted to withdraw, including fees for Gammage & Burnham's review of the file. We find no abuse of discretion.

IX. Irvin Is Entitled to Recover Reasonable Attorneys' Fees and Costs on Appeal.

¶133 Both Irvin and Lexington request an award of attorneys' fees on appeal. We find that Irvin is the successful party for purposes of A.R.S. § 12-341.01(A) (2003).[10] He is therefore entitled to recover a reasonable fee incurred in this

[10] Irvin's fee request does not cite A.R.S. § 12-341.01(A). He does, however, cite a case analyzing A.R.S. § 12-341.01(A), *Robert E. Mann Construction Co. v. Liebert Corp.*, 204 Ariz. 129, 60 P.3d 708 (App. 2003). We find this citation sufficient to preserve the appellate fee request.

appeal, which shall not include those fees concerning pre-judgment interest on his attorneys' fees. Our award is subject to Irvin's compliance with Rule 21(c) of the Arizona Rules of Civil Appellate Procedure. Finally, Irvin is entitled to recover his taxable costs on appeal. *See* A.R.S. § 12-341 (2003).

CONCLUSION

¶134 We reverse and vacate the trial court's award of pre-judgment interest on Irvin's attorneys' fees and the timing of pre-judgment interest on the bad faith damages award. On remand, the trial court shall deduct from its A.R.S. § 12-341.01(A) fee award to Irvin the amounts attributable to the pre-judgment interest issues on which Irvin has not prevailed here. We affirm the other rulings in all respects. Finally, we award Irvin his reasonable attorneys' fees and costs on appeal.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge