No. 96528-5

(Washington Court of Appeals No. 76009-2-I)

SUPREME COURT OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurer doing business in Washington State,

Appellant,

v.

BRIAN SYKES, ET AL.,

Respondent.

APPELLANT'S PETITION FOR REVIEW

Jaquelyn A. Beatty, WSBA #17567
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 223-1313
Attorneys for Respondent
Zurich American Insurance Company

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I. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Zurich American Insurance Company ("ZAIC") seeks review of the decision terminating review in *Sykes v. Singh,* issued first as an unpublished decision by Division I of the Court of Appeals on August 13, 2018 (the "Opinion"). On October 16, 2018, Division I filed its Order Granting Motion to Publish the Opinion. (A copy of the Opinion and the Order Granting Motion to Publish are attached as Appendix A.)

This case is linked and this petition is related to *Zurich Am. Ins. Co. v. Singh*, No. 76479-9-I.

II. ISSUE PRESENTED FOR REVIEW

Petitioner asks this Court to review the procedures for conducting reasonableness hearings and require that they comport with the ordinary rules and expectations for judicial proceedings and the fundamental requirement of due process of law.

Reasonableness determinations under RCW 4.22.060 are conducted without a jury. They set the measure of presumed damages that are awarded against insurers in related bad faith failure-to-defend cases. This Court has acknowledged that insurers' interests should be protected in reasonableness hearings because, like this case, an insured may have no incentive to minimize the amount of a settlement. The reasonableness hearing process tends to be perfunctory and varies widely, leaving insurers without basic due process protection. This petition presents the issue of whether this Court should establish fundamental standards for

reasonableness hearings when they are used to set the presumed measure of damages for insurer bad faith. ZAIC urges adoption of the standards set forth in section IV. C. Petitioner seeks review under RAP 13.4(b)(3) and 13.4(b)(4).

III. STATEMENT OF THE CASE

On July 20, 2011, two commercial trucks collided. The ensuing chain collision affected many vehicles and resulted in the death of Rachel Beckwith. ZAIC's insured, Joginder Singh d/b/a AP Transport ("Singh"), owned one truck, driven by employee Richard Noble. The limit of Singh's policy with ZAIC was $1 million. Gilliardi Logging & Construction owned the other truck, driven by employee Mullins.

Three months after the accident, The Estate of Rachel Beckwith and Rachel's parents sued suit Singh, Noble, Gilliardi, and Mullins. ("*Beckwith*"). ZAIC defended Singh and Noble. One year after the accident, the Washington State Patrol concluded the collision was caused by Singh's driver Noble. Two months before trial, ZAIC paid Singh's policy limits to settle *Beckwith.*[1] Had *Beckwith* not settled and gone to trial, Singh faced a multi-million-dollar judgment and bankruptcy.[2]

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[1] CP 222-23. "CP" references pertain to the record in this action, Court of Appeals No. 76009-2-I, unless designated as "CP ___ (No. 76479-9-I)."

[2] Defense counsel determined the wrongful death claim had a value that "significantly exceeds the combined value of all other personal injury claims," and that the $3 million insurance available ($1 million for Singh and $2 million for Gilliardi) was "arguably not enough insurance to fully compensate the Beckwith Estate and Rachel's parents for the death and

When the *Beckwith* suit settled, only Farmers Insurance Company had sued—for $25,150.32.[3] Other claimants had submitted documentation of damages totaling $76,510.89.[4] Brian Sykes was not among them.

Sixteen months later, Brian Sykes sued Singh and Noble. Up to this point, the only information ZAIC ever had about Sykes' injuries, until one day before the reasonableness hearing, was that he: "Had a bloody hand. Relatively minor injuries."[5]

ZAIC did not defend Singh against Sykes' suit because Singh's policy was exhausted. "Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements."[6] As to that suit, Sykes proposed a $250,000 settlement. Singh accepted.[7] Under their agreement, Singh was to

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consortium claims in that lawsuit by itself." CP 195. One of the Beckwith lawyers, Max Meyers, testified in *Singh v. ZAIC* that the case was worth $15 million. RP 383-386 (No. 76479-9-I).

As early as March 2012, ZAIC and defense counsel determined the greatest exposure facing Singh and Noble was the *Beckwith* suit. Defense counsel recommended that Singh's limits be reserved for that purpose. Singh agreed. CP 187-188 (No. 76479-9-I).

[3] Ex. 243, p. 6 (No. 76479-9-I).

[4] Ex. 215, p. 3-12; Ex. 217; Ex. 219; Ex. 220; Ex. 221, p. 1-3, 6-8; Ex. 222, p. 2; Ex. 223, p. 5; Ex. 225; Ex. 228; Ex. 233, p. 4; CP 183-185; CP 233, p. 5; CP 479-527; (No. 76479-9-I).

[5] Reported by defense counsel in CP 399 (No. 76479-9-I). *See also* CP 99 "Sykes sustained an injury to his finger and his shoulders and back were sore."

[6] CP 220.

[7] CP 125-126; 271; 268-269.

continue his case against ZAIC. Sykes agreed to limit his collection to the first $240,000 of any judgment against ZAIC. Singh's own obligation was to pay Sykes $10,000 over five years, and Singh would keep any recovery above $240,000.[8] Meanwhile, Singh had sued ZAIC alleging breach of contract, bad faith, negligence, and CPA and IFCA violations that allow treble damages. *See* No. 76479-9-I.

Sykes filed a "Joint Motion for Determination of Reasonableness," signed only by Singh. ZAIC intervened. The moving papers demonstrated no adversity between the parties. Their submission included no documentation of any wage loss, no medical testimony linking an attorney's list of Sykes' injuries to the accident, no information the defense had a favorable IME, and no information allocating fault to Gilliardi.

ZAIC filed a written opposition. One day before the scheduled reasonableness hearing, Singh filed his reply, and for the first time submitted nine declarations and heavily redacted medical bills as the movants' only documentation of damages.[9] The trial court did not hold the movants to their burden of proof, it did not consider that Singh had minimal stake in the outcome, and declared the entire $250,000 settlement reasonable. In Singh's separate action against ZAIC, the jury was

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[8] CP 131.

[9] CP 319-322; 324-410.

instructed that if it found ZAIC breached the "implied duty of good faith," it must award the $250,000 as damages.[10]

On appeal ZAIC urged Division I to scrutinize the trial court's proceedings and set minimum standards to ensure basic due process for insurers. Division I declined, but noted in its Opinion at 15-16:

> At oral argument before this court, we asked counsel for Zurich if she saw this case as a vehicle to take to the Supreme Court, so that the court could be asked to tighten up the standards for reasonableness hearings and take another look at cases like *Butler* and *Besel*. Counsel responded: "Yes I am. I'll be frank about it."

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Petition implicates article 1, section 21 of the Constitution of the State of Washington.

As it did in this case, the outcome of a reasonableness hearing conducted under RCW 4.22.060 becomes the presumptive measure of damages to be awarded against an insurer in a bad faith failure to defend case. And, as it did in this case, that hearing devolved into one that failed to comport with basic notions of due process and fairness, or assure the integrity of the result. These results occur despite the oft-stated intention of this Court and of the Courts of Appeal that an insurer's interests must be protected in these proceedings.

In *Safeco Ins. Co. of Am. v. Butler,* 118 Wn.2d 383, 823 P.2d 499 (1992), this Court adopted a special rule for insurance bad faith cases even

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[10] CP 2512, 2513 (No. 76479-9-I).

though bad faith is a tort that does not require intentional misconduct or fraud. *Indus. Indem. Co. v. Kallevig*, 14 Wn.2d 907, 916-17, 792 P.2d 520 (1990).[11] A majority of this Court held "that if harm is an element of the cause of action, the court should impose a rebuttable presumption of harm once the insured meets the burden of establishing bad faith," *Safeco, 118 Wn.2d at 390.* Previously this Court limited presumed damages to first amendment cases, in accord with holdings of the United States Supreme Court.[12] *Safeco* did not answer the question of what harm should be presumed. Was it attorney's fees incurred by the insured? Was it an insured's emotional distress? But these harms, if otherwise recoverable for the tort of insurance bad faith, are amenable to proof.

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[11] "The right of trial by jury shall remain inviolate, but the legislature may provide ... for waiving of the jury in civil cases where the consent of the parties interested is given thereto." Wash. Const. art. I, Sec. 21. In *Bird v. Best Plumbing Grp. LLC*, 175 Wn. 2d 756, 787, 287 P.3d 551 (2012), Justice Wiggins wrote: "I would hold that the judicially created application of the reasonableness hearing to decide the reasonableness of a covenant judgment violates the right to jury determination of damages, a right that article 1, section 21 dictates "shall remain inviolate." He was joined by justices Madsen, and J.M. Johnson.

[12] The United States Supreme Court has recognized, in cases involving important personal rights (free speech and due process), that there are limited instances when it may be appropriate to presume harm and award presumed damages. *See Carey v. Piphus* 435 U.S. 247, 255-56 (1978) (due process) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350 (1974) (defamation). However, even in these types of cases the Supreme Court has rejected presuming harm and damages in all instances, reserving presumptions for extreme circumstances. At present, Washington insureds seek presumed damages in nearly all cases alleging bad faith.

Next, in *Besel v. Viking Ins. Co.*, 146 Wn. 2d 730, 738-39, 49 P.3d 887 (2002), this Court decided the amount of the stipulated—or confessed—judgment between the insured and a third party claimant was the "proper measure of damages" for an insurer's bad faith failure to defend if deemed reasonable in a separate proceeding.

This Court has held that "reasonableness determinations" are non-jury proceedings. *Bird v. Best Plumbing Grp. LLC*, 175 Wn. 2d 756, 773, 287 P.3d 551 (2012). The only forum insurers have in which to contest what will become the presumed measure of damages, subject to trebling in the separate bad faith case, is the reasonableness hearing. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005). Because juries are not involved, due process considerations are critically important to insurers whose interests are directly at stake.

B. This Court should grant review **to set procedural and evidentiary standards for reasonableness hearings** when used to set the measure of presumed damages for insurer bad faith.

As the record here demonstrates, in practice the process fails to comport with even the minimal requirements of due process or those of the RCW 4.22.060. The trial court and the Court of Appeals shifted the burden of proof from the proponent of the settlement to the insurer. Both courts failed to appreciate that as a judicial proceeding, the Rules of Evidence still apply. ER 1101.

Reasonableness hearings conducted to establish the measure of presumed damages for insurer bad faith currently take many forms. The number of appeals from reasonableness determinations in bad faith cases shows the process has problems.[13] Trial courts have not been instructed on what the procedure should be.

In this case, the trial court did not conduct an adversarial hearing and did not apply the Rules of Evidence. For example, the trial court did not require that the moving parties prove, in their case in chief, that Sykes' medical expenses were reasonable and necessary and related to injuries caused by ZAIC's insured.[14] Here, Singh offered Sykes' medical bills, heavily redacted, with his reply brief the day before the hearing. The Court of Appeals approved this procedure. Although the Rules of Evidence deem such medical records admissible, ER 904 requires the documents be served on all other parties 30 days before. This permits a

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[13] *Bird v. Best Plumbing, supra,* 175 Wn.2d 756 (2012); *Mut. Of Enumclaw Ins. Co. v. Day*, 197 Wn. App. 753, 393 P.3d 786 (2017); *Water's Edge Homeowners Ass'n v. Water's Edge Assoc.,* 152 Wn. App. 572, 216 P.3d 1110 (2009); *Owners Ass'n v. Meadow Valley, L.L.C.,* 137 Wn. App. 810, 156 P.3d 240 (2007); *Red Oaks, supra,* 128 Wn. App. 317 (2005); *Werlinger v. Warner, supra,* 126 Wn. App. 342, 109 P.3d 22 (2005); *Howard v. Royal Specialty Underwriting, Inc.,* 121 Wn. App. 372, 89 P.3d 265 (2004).

[14] At page 4, the Court of Appeals states that "Sykes presented his medical bills and declarations from his medical providers." Sykes took no role at the reasonableness hearing. Only Singh signed the "joint" brief and only Singh presented witnesses (Sykes and his wife) and submitted declarations. Singh provided heavily redacted medicals bills with declarations in reply.

party reasonable time to examine the records, assess their completeness and reliability, and determine the necessity of medical testimony to explain or rebut the content.

Singh's declarations were not subject to cross examination. There was no documentation of actual wage loss.

The Court of Appeals said: "The information Sykes presented was of a type often presented in settlement negotiations." Opinion at 10. The Court of Appeals also remarked: "The procedures for handling evidence at these hearings is within the court's discretion and may include less traditional evidence," citing *Pickett v. Stephens-Nelson,* 43 Wn. App. 326, 334-35, 717 P.2d 277 (1986). Opinion at 10. *Pickett* involved a hearing held to determine whether a settlement was reasonable for purposes of establishing the amount of set-off available to a non-settling defendant. *Pickett* did not involve establishing the presumed measure of damages to be imposed, and potentially trebled, in a separate bad faith case against an insurer.

The trial court also discounted—to zero—the evidence ZAIC offered of Gilliardi's comparative fault.[15] On this point the Court of Appeals simply said: "This is *not an untenable position,*" Opinion at 13, which ignores which side bears the burden of proof and what the measure of the proof should be. *Chausee v. Maryland Cas. Co.,* 60 Wn. App. 504,

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[15] This evidence consisted of the *Beckwith* settlement with Gilliardi and the two expert reports from that case implicating Gilliardi. CP 208-209; 278-308.

510-511, 803 P.2d 1339, *rev. den.* 117 Wn.2d 1018 (1991), would suggest the standard is a preponderance of the evidence. But given the effect of determining presumed damages in this manner (at a reasonableness hearing without a jury) for later use in the insurance bad faith case, requiring proof of reasonableness under a clear and convincing standard would better protect the interests of insurers.

This Court has said the goal of ensuring reasonable settlements is to protect insurers from liability for excessive judgments. In *Besel*, this Court approved the procedure adopted in *Chaussee* and approved conducting a reasonableness hearing in the underlying action prior to litigation against an insurer. Simultaneously, this Court issued a note of caution: "We are aware that an insured's incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount." *Besel*, 146 Wn. 2d at 737–38. As Division One noted in *Red Oaks*, *supra*, "[t]he insured may be persuaded to settle for an inflated amount in exchange for immunity from personal liability." *Red Oaks*, 128 Wn. App. at 322. *See also Chaussee*, 60 Wn. App. at 510–11: An "insured may settle for an inflated amount to escape exposure .... [w]e share this concern about consent judgments coupled with a covenant not to execute." The "reasonableness of a settlement with an insured who is not personally liable for a settlement is open to question because the insured will have no incentive to minimize the amount." *Werlinger v. Warner,* 126 Wn. App. 342, 351, 109 P.3d 22 (2005). The reasonableness hearing in

this case, and often in these cases generally, failed to serve the purpose intended.

Singh's motive was to maximize the amount because he hoped to recover treble damages under the CPA and IFCA. There was no showing of adversity between the parties Singh and Sykes. Singh had no stake in the outcome, other than agree to the highest amount possible. This highlights the challenges ZAIC and all other insurers face in this situation. How is it conceivably fair to insurers to allow a determination of reasonableness based on information "of a type presented in settlement negotiations" when that determination becomes the measure damages, subject to trebling, in the separate bad faith case?

Fair consideration of an insurer's interests calls for this Court to announce minimum standards for the reasonableness hearing process when it is used to determine the measure of presumed damages that will be imposed in the later bad faith case. The Supreme Court of Texas recently addressed the problem posed by using agreed settlements and uncontested judgments to set the damages for insurers who in bad faith fail to defend their insureds, and stated: "Today we clarify that the controlling factor is whether, at the time of the underlying trial or settlement, the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages and thus the defendant—insured's covered liability loss." *Great Am. Ins Co. v. Hamel,* 525 S.W. 3d. 655, 666 (2017).

Reasonableness hearings are judicial proceedings and as such the Rules of Evidence should apply. Even if one applies only the MAR standards, referenced in exceptions in ER 1101, the standards are higher than those employed by the trial court here and approved by the Court of Appeals. Setting procedural and evidentiary standards will promote uniformity, and provide fair notice to all parties about what to expect. Minimum standards could include:

1) Trial courts should be reminded that although their determinations may set the measure of damages in the separate bad faith case, bad faith has not yet been established. Parties seeking a reasonableness determination may not discuss the insurer's alleged misconduct. However, trial courts must be mindful of the purpose for which the hearing is being held and therefore protect insurers from determinations that do not reflect a fair and objective consideration of all evidence presented.
2) The moving parties must serve any motion for determination of reasonableness and all supporting documentation on any insurer they seek to bind at least 90 days before the noting date of their hearing. All documentation should be of the type that would ordinarily be admissible at trial. This time will allow for written and deposition discovery of the type generally permitted by the Rules of Civil Procedure.

3) The burden is on the moving parties to establish reasonableness under a clear and convincing standard.

4) Intervention to participate in the reasonableness hearing and to conduct discovery related thereto should be freely permitted if requested by the potentially affected insurer.

5) If requested by the insurer, the trial court should allow the insurer access to all percipient witnesses with knowledge of the claimant's injuries and damages for which the claimant alleges the insured is responsible, by way of deposition or otherwise, and to those witnesses' records, if any. Insurers shall have the power of subpoena and may conduct discovery related to each of the factors announced in *Chausee.*

6) To the extent necessary for full disclosure of all relevant facts and issues, the trial court shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

7) The court shall apply the Washington Rules of Evidence. In general, the hearing should be conducted as an adversarial proceeding between the claimant and the insured such that the insured has a real stake in the outcome.

8) All testimony of parties and witnesses shall be made under oath or affirmation.

9) Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

10) All parties may submit proposed findings and conclusions and the trial court shall articulate its findings and conclusions in writing, with supporting references to evidence in the record.

V. CONCLUSION

In reasonableness determinations, intervening insurers are routinely denied the constitutional and other protections that all other parties to civil litigation enjoy. Yet the hearing will establish the amount of damages a jury is instructed to award in the separate bad faith action. Therefore, trial courts must conduct reasonableness hearings in accordance with specific standards of which all parties have notice. Even if an insurer has wrongfully refused to defend its insured, it should not be liable for its insured's settlement or judgment unless the amount is determined in a sufficiently adversarial proceeding that demonstrates the insured has a real stake in the outcome. The insured must bear actual risk of liability for the damages awarded or agreed upon, or have some other meaningful incentive to ensure the amount accurately reflects the injured claimant's damages recoverable from the insured.

Respectfully submitted this 15th day of November 2018.

KARR TUTTLE CAMPBELL

By: */s/ Jacquelyn A. Beatty*
Jacquelyn A. Beatty, WSBA No. 17567
Attorney for Respondent Zurich American Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that on November 15, 2018, I caused to be served the foregoing document to:

George Mix	☐	Via U.S. Mail
Mix Sanders Thompson, PLLC	☐	Via Hand Delivery
1420 5th Ave., Ste 2200	☒	Via Electronic Mail
Seattle, WA 98101-1346	☐	Via Overnight Mail
george@mixanders.com	☒	CM/ECF via court's website

I declare under penalty of perjury under the laws of the state of Washington on November 15, 2018, at Seattle, Washington.

/s/ Kay M. Sagawinia
Kay M. Sagawinia
Legal Assistant to Barbara J. Brady and Jacquelyn A. Beatty

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN SYKES and NICOLE SYKES, husband and wife; and BRIAN SYKES and NICOLE SYKES, as guardians of RILEY SYKES, JAYDEN SYKES and MIA SYKES, minors, Respondents, v. JOGINDER SINGH, d/b/a AP TRANSPORT, a Washington company, and JANE DOE SINGH, husband and wife; and Respondents, RICHARD H. NOBLE, JR. and SUSAN NOBLE, husband and wife; and GILLIARDI LOGGING AND CONSTRUCTION, INC., a Washington corporation; and MICHAEL M. MULLINS and JANE DOE MULLINS, Defendants, ZURICH AMERICAN INSURANCE COMPANY, Appellant.	No. 76009-2-I DIVISION ONE UNPUBLISHED OPINION FILED: August 13, 2018

BECKER, J. — A liability insurer refused to defend its insured, leading to a bad faith lawsuit. The measure of damages in the bad faith lawsuit was the

amount of a settlement in the underlying lawsuit. In this appeal, the insurer challenges a trial court determination that the settlement was reasonable.[1] We affirm.

FACTS

Respondent Brian Sykes was injured in a 16-vehicle traffic accident on July 20, 2011. According to the accident report by the Washington State Patrol, westbound traffic in the right lane of I-90 was jammed up by vehicles that had slowed to merge onto northbound I-405. A semitruck, owned by Joginder Singh and driven by his employee, approached too fast from behind. The Singh truck swerved into the adjacent lane, where it collided with a logging truck owned by Gilliardi Logging and Construction Inc. The logging truck careened into a sedan occupied by nine-year-old Nancy Beckwith, who died three days later from severe injuries sustained in the crash. The momentum of the Singh truck carried it forward into several other vehicles, one of which was pushed into the truck Sykes was driving. The Sykes truck sideswiped several other cars as it rolled onto the driver's side and eventually skidded to a stop.

Beckwith's estate brought a wrongful death suit against Singh and Gilliardi. In March 2013, the suit was settled. The settlement with Singh was for the policy limits of $1 million contributed by Singh's insurer, appellant Zurich American Insurance Company. The settlement with Gilliardi was for the policy limits of $2 million contributed by Gilliardi's insurer, except that $100,000 was

[1] This appeal is linked with cause number 76479-9-I, in which the insurer appeals from the judgment on the jury verdict in the bad faith lawsuit.

held in reserve to pay any future claims that might arise from Gilliardi's role in the accident.

Not long after the accident, Sykes notified Singh that he had a claim for his injuries. Sykes filed suit against Singh on July 16, 2014, shortly before the statute of limitations expired. Sykes did not timely sue Gilliardi. Thus, he lost the opportunity to make a claim against Gilliardi's $100,000 reserve.

Sykes sought damages for injuries he sustained in the accident and loss of consortium damages for his wife and two children. Because Singh's policy limits were exhausted, Zurich refused to defend him. Singh retained counsel and answered the Sykes complaint on September 17, 2014. On October 6, 2015, Singh brought a bad faith claim against Zurich for refusing to defend him.

The trial of Sykes against Singh was set for June 6, 2016. On January 4, 2016, the parties agreed to binding arbitration. The arbitration was set for May 20, 2016. On May 1, 2016, Singh's attorney contacted Sykes to suggest settlement by means of a covenant judgment:

> My client is concerned about the danger and costs associated with the arbitration hearing. What are your thoughts on a covenant judgment and stipulation not to execute? You would agree to only collect from the proceeds of my client's bad faith claim against Zurich. Thoughts?

Sykes responded with an itemized list of $304,262.10 in damages. He offered to settle for $250,000.00. Singh agreed, and the parties entered a stipulated judgment in that amount, with a covenant that Sykes would not execute against Singh personally except for $10,000.00. Recovery of the remaining $240,000.00 would be limited to the proceeds, if any, of Singh's bad faith claim.

"When a defendant whose liability insurer has acted in bad faith proceeds to make his own settlement with an injured plaintiff, the amount of that settlement may become the presumptive measure of damage in the bad faith lawsuit, but only if a trial court determines that the settlement is reasonable." Werlinger v. Warner, 126 Wn. App. 342, 344, 109 P.3d 22, review denied, 155 Wn.2d 1025 (2005). Because of the possibility that an insured "may settle for an inflated amount to escape exposure," Washington courts have long recognized the need for a mechanism to prevent collusion in settlements containing covenants not to execute. Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 510-11, 803 P.2d 1339, 812 P.2d 487, review denied, 117 Wn.2d 1018 (1991). A reasonableness hearing under RCW 4.22.060 is that mechanism. To determine whether such a settlement is reasonable, the trial court is guided by the nine factors first articulated in Glover for Cobb v. Tacoma General Hospital, 98 Wn.2d 708, 717-18, 658 P.2d 1230 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988):

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

Singh and Sykes filed a joint motion for determination of reasonableness. Zurich intervened and opposed the motion. The hearing was held on September 16 and 23, 2016. Sykes and his wife testified and were cross-examined by Zurich. Sykes presented his medical bills, declarations from his medical

providers, and declarations from friends and family. The parties addressed the Glover factors in oral argument. The trial court gave an oral ruling concluding the settlement was reasonable. Singh proposed a written order with factual findings regarding each of the nine Glover factors. On October 5, 2016, Zurich filed objections to the proposed order and suggested modifications to the findings. The court entered the proposed order finding the settlement reasonable, with modifications responsive to some of Zurich's objections. The settlement was then used as the measure of damages in Singh's bad faith suit against Zurich.

Zurich appeals from the trial court's determination that the settlement was reasonable.

LEVEL OF SCRUTINY

The settling parties bear the burden of establishing reasonableness. Water's Edge Homeowners Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 594, 216 P.3d 1110 (2009), review denied, 168 Wn.2d 1019 (2010). A determination of reasonableness is reviewed for abuse of discretion. "The trial judge faced with this task must have discretion to weigh each case individually." Glover, 98 Wn.2d at 718. The inquiry necessarily involves factual determinations which will not be disturbed on appeal when supported by substantial evidence. Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 774-75, 287 P.3d 551 (2012). No single factor controls, and all nine are not necessarily relevant in all cases. Besel v. Viking Ins. Co of Wis., 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002).

Zurich contends the appellate courts have allowed the conduct of reasonableness hearings to become "very loose."[2] Zurich argues that if the trial court had scrutinized the evidence more carefully, the court would have necessarily concluded that $250,000 was an excessive and collusive settlement.

The Supreme Court views the process of considering the Glover factors as sufficient to protect insurers from collusive settlements and excessive judgments if the insurer has notice of the reasonableness hearing and has an opportunity to argue that the settlement is not reasonable. Besel, 146 Wn.2d at 739.

Zurich was notified of the reasonableness hearing. The notice could not have come as a surprise. By virtue of having denied Singh's tender of defense two years before the hearing and having been sued for bad faith, Zurich could anticipate the possibility that its insured, Singh, would enter into a covenant judgment settlement that would require a reasonableness hearing.

Zurich had ample opportunity to argue that the settlement was unreasonable. As an intervening party, Zurich was empowered to subpoena witnesses. As Singh's insurer, Zurich had access to documents used by counsel for Singh in responding to the Beckwith claim. Thus, Zurich "was not a complete 'stranger to the case.'" Howard v. Royal Specialty Underwriting, Inc., 121 Wn. App. 372, 379, 89 P.3d 265 (2004), review denied, 153 Wn.2d 1009 (2005). The trial court scheduled a second day of the hearing a week after the first day for the specific purpose of ensuring that Zurich had ample time to respond in writing to

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[2] Brief of Appellant at 25.

late-filed declarations and to recall witnesses if desired. Zurich was allowed additional time to present its written objections to Singh's proposed findings.

By thoroughly considering the Glover factors (also referred to as Chaussee or Besel factors), the trial court applied the degree of scrutiny called for by Besel. We find nothing amiss in the process.

FACTUAL DETERMINATIONS

The settlement allocated $220,000 to Sykes and $30,000 to his wife and children for loss of consortium. Zurich contends that in evaluating Sykes' claim against Singh, the court should have realized that Sykes had relatively minor injuries, little wage loss, and "no reasonable expectation of recovering anything close to $250,000." According to Zurich, the trial court made factual determinations concerning the Glover factors that are not supported by substantial evidence.

"Washington courts have found a trial court's reasonableness determination to be valid even when the trial court fails to list any of the Chaussee factors and instead simply mentions that the parties addressed the factors in their briefs and the trial court considered the briefs." Water's Edge, 152 Wn. App. at 585. Here, though, the trial court made findings pertaining to each of the factors. We have used these findings to structure our review.

Releasing Person's Damages

The trial court found that the plaintiffs' damages "are significant as a result of this serious accident." The court found that Sykes had suffered numerous injuries, including but not limited to posttraumatic stress disorder, ongoing

depression, chronic whiplash syndrome, headaches, bulging cervical discs, strains, and sprains. "Moreover, the property damage photographs speak for themselves. Mr. Sykes makes a very credible witness and the court notes that he has presented evidence of damages related to the accident and the fact his children were around the same age as a girl who perished in this accident."

The settlement identified special damages of $67,915, the amount Sykes obtained in worker's compensation from the Department of Labor & Industries. That amount included $12,500 for the amount of Sykes' loss of earning power as stipulated by his employer, and it also included reimbursement for Sykes' medical bills. The medical bills submitted to the trial court totaled just under $48,000. The medical bills were accompanied by declarations from medical providers stating that the treatments were necessitated by the accident.

Zurich claims the medical expense claims were inflated. Zurich asserts the trial court should have placed more weight on the report of an independent medical examiner and other evidence indicating the only physical injuries Sykes suffered as a result of the accident were a minor whiplash, superficial lacerations, and a dorsolumbar strain that quickly resolved. Zurich contends a reasonable settlement would have valued the medical expenses at about $14,000, including about $2,500 for psychological treatment.

When addressing the competing medical evidence, the trial court stated that the court was "familiar with" the independent examiner and noted that the examiner "typically testifies on behalf of defendants in personal injury cases." The court stated, "Considering this in light of plaintiffs' treating health care

providers' proof, the court finds there would have been a question of fact pertaining to the special damages incurred but that plaintiffs' arguments would be more persuasive than defendants' arguments." Zurich's objection to this finding was that a jury would not be "familiar" with the witness and "because a witness typically testifies for one side or the other does not mean his or her testimony is not credible."

The trial court's assessment that the independent examiner's report would not carry the day with a neutral fact finder, while perhaps overly dismissive in tone, does not demonstrate bias or arbitrariness as Zurich contends. The court was looking at a fault-free plaintiff who had been through a terrifying experience and had suffered measurable physical injury as a result. A trial court, because of its experience with damage awards, is capable of making an informed judgment about the weight a particular professional witness can add to the evidence. Sykes was prepared to prove to an arbitrator that his medical expenses were necessary and that his psychological damage was ongoing. The Department of Labor and Industries considered his medical documentation sufficient to support the award of worker's compensation. The trial court did not abuse its discretion by rejecting Zurich's argument that medical expenses were inflated.

Zurich's objections assume that evidence produced at a reasonableness hearing must be ignored if it is not presented in a form that would be admissible at a trial. For example, to support its position that the medical special damages were only $14,000, Zurich argued that many of the injuries itemized by Sykes in his testimony "are not supported by any medical testimony, particularly as to their

duration and whether they are related to the accident on a more probable than not basis. Many are duplicative. The source of these various diagnoses in the record is uncertain, if it exists at all, and the court did not identify these in its oral ruling." This objection is part of Zurich's overarching complaint that the current process for determining the reasonableness of a settlement unfairly disregards the interests of insurers. Zurich argues that until Washington "eliminates these presumptions that relieve policyholders from the usual tort burdens of proving harm and damages, while simultaneously eliminating insurers' access to juries on these elements enjoyed by all other tort defendants, then it is incumbent on courts at all levels to put the adverse parties to their proof. Trial courts should not give the benefit of the doubt to a settlement presented for approval under RCW 4.22.060."[3]

A potential problem with the admissibility or sufficiency of evidence is certainly something a trial court can consider at a reasonableness hearing. But Zurich cites no authority indicating that the trial court must rely only on evidence formally admissible at a trial. The procedures for handling evidence at these hearings is within the court's discretion and may include less traditional evidence. Pickett v. Stephens-Nelsen, Inc., 43 Wn. App. 326, 334-35, 717 P.2d 277 (1986). The information Sykes presented was of a type often presented in settlement negotiations. The law does not require settling parties to prepare for a reasonableness hearing as exhaustively and expensively as if they were preparing for trial.

[3] Brief of Appellant at 4.

Zurich contends the trial court should have found that Sykes could have mitigated his pain and suffering if he had followed prescribed treatment. There was evidence that Sykes did not take muscle relaxers for back pain or undergo recommended psychological treatment. There was no evidence, however, that Sykes' damages would have been reduced by any significant amount if he had followed these recommendations. The trial court did not abuse its discretion by failing to discount the settlement on this basis.

Zurich also challenges the general damages. The settlement allocated approximately $150,000 in general damages for Sykes and $30,000 for the loss of consortium by his family members. Sykes attributed his general damages to pain and suffering and the emotional trauma of the accident. Zurich objects to the absence of expert testimony but fails to show that expert testimony is needed to support an award of general damages. Support for the general damages was provided by Sykes' own testimony along with declarations from friends and family that after the accident, Sykes became depressed and withdrawn. Zurich argues that the allocation to the Sykes children for loss of consortium was error in view of Sykes' testimony that he spent more time with them and had greater appreciation for them as the result of the accident. But in view of the evidence that Sykes suffered from ongoing depression, it was reasonable to include loss of consortium damages in the settlement.

Zurich contends Sykes inflated the amount of his lost wages and the trial court erred by finding his wage loss was $61,526.02. Zurich misreads the court's order. The findings state only that Sykes "alleged" a wage loss in that amount.

The record reflects that the trial court used the workers' compensation award as the yardstick for special damages. That award was for a total of $67,915.00 including medical bills as well as wage loss.

We conclude there was substantial evidence to support the factual determinations underlying the trial court's assessment that the damages awarded by the settlement were reasonable.

Merits of the Releasing Person's Liability Theory

It is undisputed that Sykes had a solid theory of liability. The trial court found that Singh had admitted liability for the collision and was vicariously liable for the negligence of his driver. Zurich assigns error to this finding only to the extent that the primary evidence of Singh's liability was the Washington State Patrol report. Zurich argues that because the report itself is hearsay and inadmissible at a trial, there was a substantial risk that Sykes would not have a liability expert at trial.

The parties were scheduled to go to arbitration, not trial. Zurich does not show that the report would have been inadmissible in an arbitration. And in any event, it is not unreasonable to assume that, if necessary, Sykes would have been able to obtain and present the evidence in a form that would overcome technical objections.

Merits of the Released Person's Defense Theory

and

Released Person's Relative Fault

The released person is Singh. Although Singh admitted liability, a potential defense theory was to set up Gilliardi as an empty chair. Sykes did not timely sue Gilliardi. If Singh could convince the fact finder to apportion fault to Gilliardi, Singh would be liable for only his own percentage of damages. Singh retained an expert in an attempt to point the finger at Gilliardi Logging as a nonparty at fault. There was evidence that Gilliardi's driver had a short window of time in which he might have avoided being hit by Singh's swerving truck.

Zurich contends the trial court should have reduced the settlement to reflect Gilliardi's relative fault. The trial court conceded in its oral ruling that Zurich "does have a point in the release or the nonsuing or suing too late the other insurance company." But the court found that the argument for assigning fault to the driver of the Gilliardi logging truck was "not particularly strong" in view of the report of the Washington State Patrol, which assigned 100 percent of fault to Singh's employee. This was not an untenable position. The neutral report of the State Patrol would likely carry more weight with a fact finder than the expert opinions obtained by interested parties, especially since those opinions did not specify a percentage of fault attributable to Gilliardi.

Risks and Expenses of Continued Litigation

and

Released Person's Ability To Pay

The trial court found that the risks and expenses of continued litigation would have been significant for Singh, who had to pay his attorney because he was not provided with defense counsel by Zurich. The parties would have had to pay the costs of arbitration. The court found that a judgment for Sykes could have resulted in bankruptcy and financial ruin for Singh. Zurich does not contest these findings on appeal.

Any Evidence of Bad Faith, Collusion, or Fraud

The trial court found no evidence of bad faith, collusion, or fraud: "The evidence presented suggested the parties engaged in arm's length negotiations and settled approximately one week prior to the scheduled arbitration hearing."

Zurich contends Sykes and Singh had the burden to show that the settlement was *not* procured through bad faith, fraud, or collusion. This is a misreading of Water's Edge and Besel. At the reasonableness hearing, the proponents of the settlement have the burden to prove the settlement is reasonable. In making this determination, the trial court considers whether there is *any evidence* of bad faith, collusion, or fraud as but one of the nine factors. Water's Edge, 152 Wn. App. at 594-95. If the court determines the settlement is reasonable, the burden shifts to the insurer to prove the settlement was *in fact* the product of fraud or collusion. Besel, 146 Wn.2d at 739.

Here, we are at the stage where the question is whether the trial court abused its discretion in finding the settlement to be reasonable. Water's Edge, 152 Wn. App. at 595. In Water's Edge, the trial court found a stipulated settlement for $8.75 million unreasonable largely because of a troubling history of negotiations between the attorneys for the insured defendants and the attorneys for the plaintiffs. The trial court credited an estimate by an attorney familiar with the case that the reasonable value of the case was closer to $500,000 in a worst case scenario. Water's Edge, 152 Wn. App. at 589. Nothing similar is shown by the record in this case.

As evidence of collusion, Zurich argues that Singh was motivated to agree to the covenant judgment because it protected him from the adverse effects a "real" judgment in favor of Sykes would have had.[4] According to Zurich, in view of Singh's lack of assets, the only viable reason for Sykes to sue Singh was to make a settlement that would allow Sykes to share in the proceeds, if any, of Singh's bad faith suit against Zurich. In that suit, Zurich argues, Singh would essentially be representing the interests of Sykes as well as his own interests.

What Zurich describes are generic characteristics of a covenant judgment stipulated to by a liable defendant whose insurer has breached its duty to defend or has otherwise acted in bad faith. It is well established that such settlements are permissible under Washington law. See generally Safeco Ins. Co. of Am. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992). At oral argument before this court, we asked counsel for Zurich if she saw this case as a vehicle to take to the

[4] Brief of Appellant at 45.

Supreme Court, so that the court could be asked to tighten up the standards for reasonableness hearings and take another look at cases like Butler and Besel. Counsel responded, "Yes I am. I'll be frank about it."[5]

It must be remembered that Singh was paying defense costs out of his own pocket and was facing personal liability well in excess of $250,000 if the case proceeded to arbitration. If an insured is offered a settlement that effectively relieves him of any personal liability, at a time when his insurance coverage is in doubt, the insurer who is disputing coverage cannot compel the insured to forego a settlement which is in his best interests. Butler, 118 Wn.2d at 397. The settlement did not prevent Zurich from defending itself in the bad faith action. If the jury found Zurich did not act in bad faith, Zurich would not be liable for any of the settlement amount. Howard, 121 Wn. App. at 380. If Singh were unable to prove that Zurich's refusal to defend him was wrongful, Singh's settlement with Sykes would not affect Zurich.

On this record, the trial court did not abuse its discretion by finding there was no evidence of bad faith, collusion, or fraud.

Extent of the Releasing Person's Investigation and Preparation of the Case

The trial court found that with the exception of Sykes' failure to timely sue Gilliardi, "counsel for both parties had prepared this case thoroughly and were prepared for binding arbitration." Zurich claims this finding is unsupported by

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[5] Wash. Court of Appeals oral argument, Zurich Am. Ins. Co. v. Sykes, 76009-2-I (June 12, 2018), at 7 min., 36 sec. through 7 min., 38 sec. (on file with court).

substantial evidence. We disagree. Singh's liability could not realistically be denied. Evidence of Gilliardi's liability was available. Preparation for arbitration primarily required attention to evidence of damages. Sykes compiled his medical bills and obtained declarations from his medical providers as well as from friends and family. Singh deposed Sykes and required him to submit to an independent medical examination that controverted Sykes' evidence. Sykes and his wife were prepared as witnesses and gave testimony that the trial court found to be compelling. The trial court had a tenable basis to find that both parties were prepared.

Zurich faults Singh and Sykes for failing to offer evidence comparable in quality to the evidence that supported the reasonableness determination in Howard, 121 Wn. App. at 381. In that case, the settlement was $17.4 million. Howard, 121 Wn. App. at 377. The settling parties presented a neurological evaluation, several expert reports, a life care plan, medical literature, videos of the victim's rehabilitation therapy, and a number of depositions. The fact that the parties in Howard presented more abundant evidence does not mean that Singh and Sykes were unprepared for arbitration of a case that settled for $250,000.

Interests of the Parties Not Being Released

The court found that other interested parties, Zurich and the Department of Labor and Industries, were provided with notice of the hearing and that Zurich fully participated.

Zurich denies that it had a full opportunity to participate at the hearing. Zurich particularly objects to the court's acceptance of declarations from Sykes'

medical providers that were submitted, over Zurich's objection, the day before the reasonableness hearing began. But because the court continued the hearing to the next week to allow Zurich time to respond to these declarations in writing, Zurich fails to show that it was prejudiced. Zurich argues that a reasonableness hearing is inadequate to protect an insurer from an inflated judgment because it is not a jury trial conducted according to court rules. As previously discussed, the law is to the contrary.

As the court noted, counsel for Zurich took a deposition of Sykes' attorney to explore the possibility of collusion, cross-examined Sykes and his wife at the hearing, and submitted pleadings that the court took into consideration. We conclude the court gave appropriate consideration to Zurich's interests.

CONCLUSION

The determination of reasonableness by a trial court is an exercise of discretion guided by the Glover factors. No single factor controls. We have reviewed the court's factual determinations and conclude they are supported by substantial evidence. We find no abuse of discretion in the court's finding that the settlement of $250,000 was reasonable.

Affirmed.

Becker, J.

WE CONCUR:

Trickey, J

Appelwick, C.J.

FILED
10/16/2018
Court of Appeals
Division I
State of Washington

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

BRIAN SYKES and NICOLE SYKES, husband and wife; and BRIAN SYKES and NICOLE SYKES, as guardians of RILEY SYKES, JAYDEN SYKES and MIA SYKES, minors, Respondents, v. JOGINDER SINGH, d/b/a AP TRANSPORT, a Washington company, and JANE DOE SINGH, husband and wife, Respondents, ZURICH AMERICAN INSURANCE COMPANY, Appellant.	No. 76009-2-I ORDER GRANTING MOTION TO PUBLISH

Respondent Joginder Singh d/b/a AP Transport has filed a motion to publish the opinion filed on August 13, 2018. Appellant Zurich American Insurance Company has filed an answer to the motion. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the unpublished opinion filed on August 13, 2018, shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:

Becker, J.

KARR TUTTLE CAMPBELL

November 15, 2018 - 1:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76009-2
Appellate Court Case Title:	Zurich American Insurance Company, Appellant Intervenor vs. Bryan Sykes, et al., Respondents
Superior Court Case Number:	14-2-19591-5

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