

No. 64291-0

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Appellant.

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BRIEF OF APPELLANT

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Attorneys for Appellant Farmers Insurance Exchange

Douglas G. Houser, OSB #600384, *pro hac vice*  
Jerret E. Sale, WSBA #14101  
Deborah L. Carstens, WSBA #17494  
Janis C. Puracal, WSBA #39234  
BULLIVANT HOUSER BAILEY PC  
1601 Fifth Avenue, Suite 2300  
Seattle, Washington 98101-1618  
Telephone: 206.292.8930  
Facsimile: 206.386.5130

Philip A. Talmadge, WSBA #6973  
Sidney C. Tribe, WSBA #33160  
TALMADGE/FITZPATRICK PLLC  
18010 Southcenter Parkway  
Tukwila, WA 98188-4639  
Telephone: 206.574.6661  
Facsimile: 206.575.1397

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## **I. INTRODUCTION**

James Bird sued Best Plumbing, alleging that Best Plumbing's negligence in cutting a sewer line on his property destabilized the hillside and caused substantial expense to him to stabilize it. Best Plumbing's insurer, Farmers Insurance Exchange, defended Best Plumbing without a reservation of rights. Shortly before trial, Best Plumbing engaged personal counsel, and only days before trial was set to begin, Bird and Best Plumbing agreed to settle their dispute for an amount well over the policy limits. Bird then scheduled a hearing in the trial court on short notice to Farmers seeking a determination that the settlement was reasonable. The trial court held it was reasonable.

The trial court erred in denying Farmers' request for a jury trial, in determining reasonableness when the parties had not negotiated at arm's length, and in determining that the settlement amount agreed to by the parties was reasonable.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering the Order re Discovery on May 15, 2009, denying Farmers' demand for a jury trial.

2. The trial court erred in entering the Order on Reasonableness Hearing on September 28, 2009, finding that the settlement between Bird and Best Plumbing was reasonable and in

entering the Judgment against Farmers on October 23, 2009, in accordance with the court's September 28, 2009, order.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is an insurer's constitutional right to a jury trial violated by the court's determination of damages in a reasonableness hearing?

(Assignment of Error 1)

2. Is an insurer's right to due process violated by the court's denial of the insurer's demand for a jury trial? (Assignment of Error 1)

3. When negotiating the terms of settlement, Best Plumbing's personal counsel did not know, understand, or evaluate Best Plumbing's liability or Bird's damages and could not have negotiated the settlement at arm's length. Was collusion established as a matter of law? (Assignment of Error 2)

4. If the parties failed to negotiate at arm's length, should the trial court decline to determine whether the amount of the settlement was reasonable? (Assignment of Error 2)

5. Bird did not plead a claim for statutory (intentional) trespass, he stipulated (and the court ordered) there would be no new causes of action at trial, and Bird's attorney acknowledged that Best Plumbing was only negligent. Did the trial court err in determining that

Bird had a 75% chance of prevailing on a statutory trespass claim?

(Assignment of Error 2)

6. Bird's property damage claim was substantially disputed by Best Plumbing. Did the trial court err in determining that the settlement value of Bird's property damage claim against Best Plumbing was 100% of Bird's alleged cost of repair? (Assignment of Error 2)

#### **IV. STATEMENT OF THE CASE**

##### **A. Factual Background—Chronology**

James Bird owns a house on Perkins Lane in Seattle (CP 5), an area susceptible to landslides (CP 2702–26). In April 2005, Bird's neighbor hired Best Plumbing to repair a leaking sewer line. (CP 627) In the course of its work, Best Plumbing cut into what it incorrectly determined was an abandoned sewer line on Bird's property. (*Id.*) Within days of the cut and at Bird's request (with Bird's express permission), Best Plumbing visited the property twice to make repairs to the sewer line. (RP 7/23/09, 258:19–259:11)

According to Bird, the repairs were faulty and he continued to smell sewage and notice moisture in the ground and slumping soil on the hillside above his property. (RP 7/23/09, 259:14–261:25) But Bird did not mention the problem to Best Plumbing. (RP 7/23/09, 262:1–21) Instead, Bird allegedly began removing buckets full of sewage-laden soil

from the hillside himself. (RP 7/23/09, 262:22–269:16) Bird’s excavation took place over the course of six months. (*Id.*) During this time, however, Bird also began construction of a parking pad at the top of his property, for which he also needed to excavate earth from the hillside. (CP 782–83) On August 5, 2005, Bird suffered a heart attack, which he alleged occurred while he was removing sewage-laden soil from the hillside. (CP 452) (Bird’s wife testified that the heart attack occurred while Bird was constructing the parking pad. (CP 782–83))

In January 2006, Seattle’s Department of Planning and Development (DPD) issued a stop work order to prohibit Bird from further excavating the hillside and required Bird to develop a stabilization plan. (CP 2739) Bird hired a geotechnical engineer, who developed a stabilization plan for DPD’s review. (CP 1517–33) Only then—over one year after Best Plumbing first visited Bird’s property—did Bird notify Best Plumbing of his claim that Best Plumbing had damaged the hillside. (CP 2750–51)

Best Plumbing reported Bird’s claim to its liability insurer, Farmers, and Farmers agreed to defend Best Plumbing without a reservation of rights. (CP 13) Farmers retained and paid for attorneys from Hollenbeck Lancaster & Miller and, later, Helsell Fetterman (together “Defense Counsel”) for that purpose. (*Id.*)

Bird filed suit against Best Plumbing on May 7, 2007, alleging that Best Plumbing's negligence had caused damage to the hillside. (CP 5-7) Bird sought to recover the cost to stabilize the hillside in accordance with his geo-engineer's report, as well as for water damage to his house. (*Id.*)

Defense Counsel's evaluation of the claim, as it developed over time, was that Best Plumbing would be found negligent and would be held responsible for the cost to repair some, but not all, problems associated with the hillside. (CP 1399) In July 2008, the court held on summary judgment that Best Plumbing trespassed as a matter of law. (CP 1756-57) The court ruled that the nature and extent of the damage was to be determined at trial. (*Id.*)

In November 2008, Bird demanded \$1.2 million in settlement. (CP 2783) Best Plumbing's liability limits were \$2 million. (CP 17)

By stipulation and order signed by the trial court on January 7, 2009, the parties agreed "[t]here will be no new causes of action" and [n]o new witnesses shall be named." (CP 492-94) Discovery closed on January 26, 2009. (CP 3723)

On February 11, 2009, Bird made a policy limits (\$2 million) demand to Best Plumbing. (CP 2802) Bird alleged he could recover in excess of \$3 million for his claim. (CP 2803) Bird's settlement demand had increased because, for the first time, he asserted a claim for statutory

(intentional) trespass, which if successful could provide a basis for treble damages and attorney fees. (CP 2802) At that time, Bird's attorney, Rick Wathen, had advised his client that the statutory trespass claim was unlikely to "get any traction" in the trial court and, even if it did, "that we would loose [sic] this issue" in the Court of Appeals. (CP 778) Nevertheless, he proposed asserting it "as a scare tactic" against Farmers because "Farmers knows" that "[o]ur courts are notorious for making decisions contrary to insurance companies." (*Id.*)

In February 2009, both Bird and Best Plumbing hired new counsel. (CP 3437) On February 26, Bird's new counsel, Will Smart, sent a letter to Best Plumbing's new counsel, Richard Dykstra, proposing a stipulated judgment with an assignment of rights against Farmers. (CP 727) In that letter, Bird asserted that his claim was now worth in excess of \$9 million. (CP 740) Again, Bird's assessment increased with the addition of new claims that had never been pled or explored in discovery, including a new personal injury claim for Bird's heart attack and a new claim for emotional distress damages. (*Id.*)

On March 2, Dykstra informed Farmers he had been hired to act as Best Plumbing's personal counsel. (CP 3730–31) He notified Farmers that he expected Farmers to pay \$2 million to settle the case but that Defense Counsel was instructed not to talk with Farmers about the value

of the case. (*Id.*) On March 4, Dykstra relented and permitted Farmers to consult with Defense Counsel so long as Farmers “agreed not to use information gained from [Defense Counsel] against Best Plumbing.” (CP 3734–35) Nevertheless, Dykstra instructed Defense Counsel not to provide Farmers their evaluation of possible jury outcomes. (CP 14) That same day, Farmers offered to mediate, and Bird declined. (CP 159)

On March 5, Defense Counsel filed a motion in limine to exclude Bird’s assertion of a statutory trespass claim at trial. (CP 671) Farmers again evaluated the case on all available information and did not offer its limits. (CP 166) As of March 6, Best Plumbing’s president, Bill Lilleness, believed that Best Plumbing’s defenses were excellent and that Bird “is unethical and looking for a payday for his shack and neither I nor Farmers should be that payday.” (CP 1429)

Dykstra then entered into settlement negotiations with counsel for Bird. (CP 166) Defense Counsel and Farmers were not informed of, were not invited to participate in, and did not participate in negotiations. (CP 14; RP 7/23/09, 348:3–349:11) Dykstra spent less than three hours familiarizing himself with the case (CP 3136–38)—he did not review discovery, deposition transcripts, expert reports, witness interviews, or Defense Counsel evaluations, and he did not talk with Defense Counsel about the merits of the case. (CP 1053, 1084–1107) He did not conduct

an evaluation of the damages asserted (except to the extent he asked Bird's counsel about them). (*Id.*) Dykstra did not undertake any evaluation of the statutory trespass claim and had no knowledge whether it could reasonably be asserted at trial. (*Id.*) Although Dykstra was the only person involved in negotiations who could assert the merits of Best Plumbing's case, he eschewed any responsibility to know them or assert them. (CP 1084–1107)

On March 16, 2009, Bird and Best Plumbing entered into a settlement agreement (“Stipulated Judgment”) in which Best Plumbing agreed to have judgment entered against it in the amount of \$3,750,000 and to assign to Bird any rights against Farmers, and Bird agreed to seek recovery only from Farmers and not to execute against Best Plumbing. (CP 113)

**B. Procedural History**

After signing the Stipulated Judgment, Best Plumbing turned all of its defense files, including privileged materials, over to Bird. (CP 1213) Bird then moved the trial court for a determination that the Stipulated Judgment was reasonable in order to use that amount as the measure of damages in a subsequent bad faith suit against Farmers. (CP 443)

The trial court allowed Farmers to intervene in the case to protect its interests. (CP 478) Bird noted a hearing to determine reasonableness

on five days' notice. (CP 3737) Over Bird's objections, the trial court continued the hearing and permitted Farmers to conduct discovery regarding the alleged reasonableness of the settlement. (CP 478) Farmers demanded, but was denied, the right to a jury trial on the reasonableness determination. (CP 307)

After a bench hearing, the trial court found that the \$3.75 million Stipulated Judgment was reasonable. (CP 3433) Farmers challenges that decision on appeal. (CP 3449)

#### **V. SUMMARY OF ARGUMENT**

Washington courts permit insured defendants (or their assignees) to recover the amount of a settlement from a liability insurer who is contractually or extra-contractually liable to its insured, but only if the amount of the settlement is reasonable. The amount of a reasonable settlement is (unless the insurer proves collusion or fraud) the measure of damages against the insurer. Further, Washington courts have permitted the reasonableness determination to be made in the liability case, requiring the insurer to intervene in order to be heard on the damages issue.

This appeal challenges the constitutionality and propriety of the procedure whereby an insurer who has demanded a jury is required to defend the issue of damages, without a jury, in an abbreviated and expedited hearing in the liability action, a lawsuit in which it is not a party

(the “Reasonableness Hearing Procedure”). An insurer is entitled by the Washington State Constitution to a jury trial on the issue of damages, and Farmers was denied that right by the trial court here—because the trial court held no jury right attaches at the time of the reasonableness hearing and because the jury in any subsequent action against the insurer is foreclosed from independently assessing the settlement’s reasonableness (and therefore does not truly set the damages in such action). The violation of Farmers’ right to a jury trial also constitutes a violation of the right to due process.

Moreover, RCW 4.22.060, on which this Court has relied, does not, by its terms, authorize a procedure to determine damages against a non-party insurer. No other statute or rule authorizes such a procedure, and the Washington Supreme Court has not identified any. Nor is there any practical or policy reason to adopt the Reasonableness Hearing Procedure, which serves to compromise an insurer’s interests without favoring any legitimate interests of its insured.

In addition, negotiations between claimant Bird and defendant/insured Best Plumbing were not conducted at arm’s length, were therefore collusive, and cannot establish the presumptive measure of damages against Farmers. Washington courts expressly recognize the moral hazard presented by settlement reached by a claimant with a

defendant who has no personal responsibility to pay—that the situation provides the settling parties with incentive to inflate the settlement. For that reason, even while permitting such settlements in principle, the courts require that the settlements not be collusive—that is, that they be negotiated “at arm’s length” by parties who can assert the respective merits of their claims as adversaries.

In this case, Best Plumbing’s negotiations were conducted solely by Dykstra, who did not have knowledge of the substance of the case sufficient to assert Best Plumbing’s defenses, and who denies any obligation to do so in any event. These negotiations did not satisfy any reasonable definition of “arm’s length.” Consequently, these negotiations could not and did not avoid the moral hazard and could not, as a matter of law, establish the measure of damages.

Finally, the trial court erred in determining, on the evidence before it, that the \$3.75 million settlement was reasonable. First, the court determined that Bird’s claim for treble damages and attorney fees under the statutory trespass statute had a settlement value of 75% of its full potential value. Because Bird had never pled an intentional trespass claim and there was no evidence to establish that Best Plumbing was anything but negligent, the value of the statutory trespass claim was negligible. Second, Bird’s property damage claim was disputed with regard to

liability, proximate cause, and damages. There was at the very least *some* risk that Bird would not recover the entire amount of his property damage claim. The trial court erred by assigning a settlement value of 100% of Bird's alleged property damage claim.

## VI. ARGUMENT

### A. Deciding the issue of damages against an insurer in the liability action, without a jury, is unconstitutional and contrary to law and policy.

After settling his claims against Best Plumbing, Bird sought a reasonableness hearing pursuant to RCW 4.22.060. (CP 443) That statute, enacted as part of the 1981 Tort Reform Act, provides a means to allocate liability among joint tortfeasors.<sup>1</sup> With little explanation or analysis, the Washington courts have extended the application of RCW 4.22.060 to determine the measure of damages for insurer bad faith.<sup>2</sup> Specifically, the courts have ruled that, when the parties in the underlying liability action have settled their dispute by means of a consent judgment,<sup>3</sup>

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<sup>1</sup> *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991).

<sup>2</sup> The insurer also may be bound by a settlement judicially approved as reasonable in a subsequent dispute regarding coverage. *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 259, 199 P.3d 376 (2008). A settlement determined to be reasonable may constitute the measure of damages for either a breach of contract claim or a bad faith claim against the insurer. *Id.* For convenience, Farmers refers only to Bird's potential assertion of an alleged bad faith claim; the arguments apply equally with respect to an alleged breach of contract claim.

<sup>3</sup> Hereafter, the term "consent judgment" refers to a settlement between plaintiff and insured in which the parties agree to entry of a stipulated judgment with a

a statutory reasonableness hearing may be conducted in the liability action to determine whether the settlement is reasonable. The amount of a reasonable settlement then becomes the measure of damages in a subsequent bad faith action against the insurer unless the insurer can prove the settlement was the product of fraud or collusion.<sup>4</sup> Whether the settlement amount is reasonable cannot be challenged again in the bad faith action.<sup>5</sup>

Applying RCW 4.22.060 to provide for an expedited determination of damages as preparatory to a bad faith claim deprives an insurer of its constitutional rights. Farmers, like all defendants, has a constitutional right to a jury trial on the question of the amount of damages in any action between it and its insured. Confused by the procedure it was employing, the trial court denied Farmers a jury trial. By that ruling, Farmers is forever precluded from having the question of reasonableness decided by a jury, a guaranteed constitutional right.

Moreover, although this Court has held that reasonableness hearings against insurers' interests may be conducted under RCW 4.22.060 pursuant to the Washington Supreme Court's decision in *Besel v.*

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covenant not to execute against the insured and an assignment to the plaintiff of the insured's rights against the insurer.

<sup>4</sup> See, e.g., *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 374–75, 89 P.3d 265 (2004).

<sup>5</sup> *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 755, 58 P.3d 276 (2002).

*Viking Insurance*,<sup>6</sup> neither the language of the statute nor of the *Besel* opinion supports that conclusion. RCW 4.22.060 provides for allocation of liability among joint tortfeasors and nothing else; *Besel* never addressed the issue and does not purport to make RCW 4.22.060 something it isn't. And, there is no other legal authority, either statute or rule, that can be used to haul an insurer into court to defend itself on short notice as to an element of a claim not yet stated against the insurer.<sup>7</sup>

The existence of the right to a jury trial presents an issue of law subject to de novo review.<sup>8</sup>

**1. The right to have a jury determine damages is guaranteed by the Washington Constitution.**

Article 1, § 21, of the Washington Constitution provides that the right to trial by jury “shall remain inviolate.”<sup>9</sup> The courts have recognized that the state constitution affords broader protection of the

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<sup>6</sup> *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 49 P.3d 887 (2002).

<sup>7</sup> The Reasonableness Hearing Procedure, often conducted with little or no discovery and on short notice, serves to limit the insurer's ability to prepare and present its defenses. Here, Farmers was permitted discovery that disclosed substantial, significant information that Farmers could never have discovered and presented if, as Bird proposed, Farmers would had to have defended itself with five days' notice and no discovery.

<sup>8</sup> *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 878, 205 P.3d 979 (2009).

<sup>9</sup> See also CR 38. The Seventh Amendment to the federal constitution does not apply to the states in civil trials. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711 (1989). Thus, the right to a jury trial in civil proceedings is protected only by Article 1, § 21 of the Washington Constitution. *Id.*

right to a jury trial than its federal counterpart<sup>10</sup> and have characterized the right as a valuable one that must be “jealously guarded.”<sup>11</sup> Where the question is doubtful, the right to a trial by jury must always be preserved.<sup>12</sup>

In determining the scope of the right to a jury trial and the causes of action to which it applies, the courts examine the nature of the right as it existed at the time of the adoption of the constitution.<sup>13</sup> The right to a jury trial extends to all legal (as opposed to equitable) actions.<sup>14</sup> This includes actions sounding in tort.<sup>15</sup> Bad faith claims against an insurer are tort actions and are therefore to be decided by a jury.<sup>16</sup>

Washington courts have long recognized that the issue of damages must be decided by the jury.<sup>17</sup> This principle is illustrated in the Washington Supreme Court’s decision in *Sofie v. Fibreboard Corp.*<sup>18</sup> In that case, the court considered whether a statutory cap on noneconomic damages violated the constitutional right to trial by jury. The statute

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<sup>10</sup> *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008).

<sup>11</sup> *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941).

<sup>12</sup> *Bain v. Wallace*, 167 Wash. 583, 587, 10 P.2d 226 (1932); *Auburn Mech., Inc. v. Lydig Constr., Inc.*, 89 Wn. App. 893, 898, 951 P.2d 311 (1998).

<sup>13</sup> *Sofie*, 112 Wn.2d at 645; *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010).

<sup>14</sup> *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967).

<sup>15</sup> *Endicott*, 167 Wn.2d at 884–85; *Sofie*, 112 Wn.2d at 649–50.

<sup>16</sup> See *Evans v. Cont’l Cas. Co.*, 40 Wn.2d 614, 630, 245 P.2d 470 (1952); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 259, 63 P.3d 198 (2003).

<sup>17</sup> See, e.g., *Endicott*, 167 Wn.2d at 884; *Eoff v. Spokane, P&S Ry. Co.*, 70 Wash. 270, 274, 126 P. 533 (1912).

<sup>18</sup> *Sofie*, 112 Wn.2d at 636.

allowed the jury to award noneconomic damages but directed the trial judge to reduce the award, if necessary, in accordance with a formula set forth in the statute.<sup>19</sup>

The *Sofie* court began its analysis by examining the nature of the right to a jury trial as it existed at the time of the adoption of the Washington Constitution in 1889. The court noted that a case decided in 1888 (*Baker v. Prewitt*<sup>20</sup>) established that the jury must decide the issue of damages.<sup>21</sup> The court then explained:

If our state constitution is to protect as inviolate the right to a jury trial at least to the extent as it existed in 1889, then *Baker's* holding provides clear evidence that the jury's fact-finding function included the determination of damages. The evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages.<sup>22</sup>

The court concluded the statutory cap on noneconomic damages interfered with the jury's obligation to determine damages and was therefore unconstitutional.<sup>23</sup>

The Washington Supreme Court has endorsed pattern jury instructions in bad faith cases, including a special verdict form specifically directing the jury to determine the amount of damages caused by an

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<sup>19</sup> *Id.* at 638–39.

<sup>20</sup> *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888).

<sup>21</sup> *Sofie*, 112 Wn.2d. at 645 (citing *Baker*, 3 Wash. Terr. 595).

<sup>22</sup> *Id.* at 645–46.

<sup>23</sup> *Id.* at 638.

insurer's bad faith.<sup>24</sup> In addition, this Court recently held that a proposed trial plan in a class action bad faith case violated the insurer's right to a trial by jury because it did not permit the jury to decide damages on a case-by-case basis.<sup>25</sup>

Our state's constitution guarantees an insurer the right to have the amount of bad faith damages decided by a jury.

**2. The Reasonableness Hearing Procedure is used to determine the amount of damages recoverable from the insurer.**

The only purpose of the Reasonableness Hearing Procedure is to determine the measure of damages caused by Farmers' potentially alleged bad faith.<sup>26</sup> Although Bird, as Best Plumbing's assignee, had not yet filed suit against Farmers, the parties noted the hearing for the purpose of determining whether their settlement was reasonable so as to establish the damages Bird can claim against Farmers. (CP 443)

The trial court's determination that the \$3.75 million settlement between Bird and Best Plumbing was reasonable establishes the measure of damages in a potential subsequent action against Farmers, unless

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<sup>24</sup> See WPI 320.00-.07.

<sup>25</sup> *Sitton*, 116 Wn. App. at 257-58.

<sup>26</sup> E.g., *Werlinger v. Warner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005) (“[T]he sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.”).

reversed. Farmers has a constitutional right to have a jury decide this issue, and the trial court erred in concluding otherwise.

**3. By denying Farmers' demand for a jury in the reasonableness hearing, the trial court precluded all opportunity for Farmers to have reasonableness/damages decided by a jury.**

Washington courts have determined that the amount of a settlement determined to be reasonable by a court becomes the “presumptive” measure of damages in any subsequent proceeding.<sup>27</sup> The presumption is conclusive, however, on the question whether the amount of the settlement is reasonable. The “presumption” can be rebutted only by showing that the settlement was the product of fraud or collusion.<sup>28</sup>

Consequently, if the determination of reasonableness in this matter is not overturned, Farmers cannot seek to have it reviewed in a subsequent suit against it by Bird. Farmers will be denied a jury trial on damages in the reasonableness hearing, and it will be denied a jury trial on damages in the bad faith action. It will lose its constitutional right to a jury trial on the question of damages. Either (1) an insurer in Farmers' position must be provided a jury trial in the reasonableness hearing or, better, (2) the insurer should be provided a jury trial in the bad faith action, and the Reasonableness Hearing Procedure should be discarded as superfluous.

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<sup>27</sup> See, e.g., *VanPort Homes*, 147 Wn.2d at 755.

<sup>28</sup> *Id.*

**4. The trial court erroneously relied upon RCW 4.22.060 to deny Farmers' demand for a jury.**

The trial court's denial of Farmers' jury demand reflects the court's misunderstanding of the purpose of the reasonableness hearing in this case. In particular, the court relied upon *Schmidt v. Cornerstone Investments, Inc.*,<sup>29</sup> in which our supreme court held there is no right to a jury trial in a reasonableness hearing held *for the purpose of allocating liability among tortfeasors*. Under pre-1986 Washington law, such hearings were meaningful in determining the offset available to non-settling defendants when a plaintiff and a defendant settled. All of the parties to such a hearing were parties to the action and had participated in discovery, motions practice, etc. Five days' notice of the hearing under RCW 4.22.060 was not a hardship to such parties. Moreover, the parties' participation in the hearing was legitimate as each had a financial stake in the outcome. Finally, the plaintiff and non-settling defendant(s) would still have a jury trial on damages. Here, as explained above, the reasonableness hearing was intended to determine the measure of damages, and the trial court's reliance on *Schmidt* was therefore misplaced.

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<sup>29</sup> *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990).

In *Schmidt*, the plaintiffs settled their claims against some, but not all, defendants.<sup>30</sup> The trial court then conducted reasonableness hearings pursuant to RCW 4.22.060 to determine the amount of the offset to the judgment against the remaining defendants.<sup>31</sup> The court found that, although the plaintiffs settled with one defendant for \$50,000, the reasonable value of that settlement was actually \$150,000.<sup>32</sup>

On appeal, the plaintiffs argued that RCW 4.22.060 was unconstitutional because it allowed the trial court to reduce the amount of a damage award instead of having the issue resolved by a jury.<sup>33</sup> In dicta,<sup>34</sup> the court rejected this argument, concluding the right to a jury trial does not apply to equitable proceedings, such as a proceeding to determine the amount of an offset.<sup>35</sup>

The determination of reasonableness by the trial court in *Schmidt* did not prevent or limit either party from arguing the issue of damages to the jury at trial. Here, however, Farmers' right to have a jury determine the measure of damages has been denied.

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<sup>30</sup> *Schmidt*, 115 Wn.2d at 156.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 159.

<sup>34</sup> The court concluded the plaintiffs had not properly raised the issue on appeal. *Id.* at 160.

<sup>35</sup> *Id.* at 161. In contrast, the right to a jury trial *does* apply to a determination of the allocation of fault. *Edgar v. City of Tacoma*, 129 Wn.2d 621, 628, 919 P.2d 1236 (1996); *Geschwind v. Flanagan*, 121 Wn.2d 833, 839–40, 854 P.2d 1061 (1993).

**5. Violation of the right to trial by jury is also a due process violation.**

Under the Washington Constitution, Article 1, § 3, a person may not be deprived of property without due process of law.<sup>36</sup> Due process involves, among other things, procedural regularity, respect for law, and just treatment.<sup>37</sup> Due process challenges are subject to de novo review.<sup>38</sup>

The Washington Supreme Court has long-recognized that denial of the right to a jury trial on an issue for which the jury right exists violates due process. In *State v. Strasburg*,<sup>39</sup> decided by the Washington Supreme Court in 1910, a criminal defendant challenged a statute that deprived him of the right to have the question of his sanity resolved by a jury. Our supreme court concluded that, because intent was an element of the charged offense, deprivation of a jury trial on the defendant's mens rea constituted a due process violation:

The due process of law provision of our Constitution . . . probably does not of itself mean right of trial by jury; but it

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<sup>36</sup> Washington's Constitution provides due process protection equal with that of federal law. *In re Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001).

<sup>37</sup> *Nguyen v. State Dep't of Health Med. Quality Assur. Comm'n*, 144 Wn.2d 516, 523, 29 P.3d 689 (2001).

<sup>38</sup> *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009); *Gourley v. Gourley*, 158 Wn.2d 460, 479, 145 P.3d 1185 (2006). Although Farmers did not allege violation of its due process rights in the trial court, a party may allege the existence of "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a); *Conner v. Universal Utils.*, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (party may raise issue of denial of procedural due process in a civil case at the appellate level for the first time).

<sup>39</sup> *State v. Strasburg*, 60 Wash. 106, 117, 110 P. 1020 (1910).

does mean in connection with the provision ‘the right of trial by jury shall remain inviolate,’ that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our Constitution.<sup>40</sup>

Because Farmers has the right to have a jury determine civil damages in Washington State, violation of that right is a due process violation as well as the violation of the right to a jury trial.<sup>41</sup>

**6. The Reasonableness Hearing Procedure is not an appropriate mechanism for deciding damages.**

Because Farmers has demanded (CP 120–22), and is constitutionally entitled to, trial by jury on the issue of damages, the Reasonableness Hearing Procedure wastes judicial resources and is superfluous. Moreover, (a) RCW 4.22.060 does not, by its terms, provide legal authority for the Reasonableness Hearing Procedure, and no other authority has been identified, and (b) there is no practical or policy justification requiring an insurer, which is not a party to the liability case, to defend itself in an expedited, abbreviated, and untimely proceeding. Instead, the determination of damages should be made in an action against the insurer, just as it would be in any other case not involving a consent judgment between the claimant and insured.

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<sup>40</sup> *Strasburg*, 60 Wash. at 117.

<sup>41</sup> *Id.*

- a. ***There is no legal basis for using a statutory reasonableness hearing to determine the measure of damages for insurer bad faith.***

This Court has expressly endorsed the Reasonableness Hearing Procedure used by the trial court here and has held that it is authorized by RCW 4.22.060.<sup>42</sup> In doing so, this Court erred. The Court should reconsider its prior decisions and overrule them. RCW 4.22.060 does not authorize a Reasonableness Hearing Procedure to determine damages against a liability insurer, and there is no other statute or rule authorizing such a procedure.

The procedure for determining reasonableness of a settlement between a plaintiff and insured was first addressed in this Court's decision in *Chaussee v. Maryland Casualty Co.*<sup>43</sup> In *Chaussee*, the Court recognized that an insurer may be liable for the amount of a settlement between the plaintiff and the insured if it acts in bad faith.<sup>44</sup> "However, the insurer is liable only for the amount of the settlement that is reasonable and paid in good faith."<sup>45</sup>

The *Chaussee* court explained that Washington case law provided "limited guidance" regarding how to determine the reasonableness of a

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<sup>42</sup> *Howard*, 121 Wn. App. 372; *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005).

<sup>43</sup> *Chaussee*, 60 Wn. App. 504.

<sup>44</sup> *Id.* at 510.

<sup>45</sup> *Id.*

consent judgment.<sup>46</sup> Accordingly, the Court looked, by analogy, to the contribution provisions of the Tort Reform Act, RCW ch. 4.22. The court also examined case law interpreting those provisions, including the Washington Supreme Court's decision in *Glover v. Tacoma General Hospital*.<sup>47</sup> In *Glover*, the court set forth nine factors to be considered when evaluating reasonableness for purposes of RCW 4.22.060:

(1) the releasing person's damages; (2) the merits of the releasing person's liability theory; (3) the merits of the released person's defense theory; (4) the released person's relative fault; (5) the risks and expenses of continued litigation; (6) the released person's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing person's investigation and preparation of the case; and (9) the interests of parties not being released.<sup>48</sup>

The *Chaussee* court adopted the *Glover* factors to determine the reasonableness of a settlement in the context of a claim for an insurer's bad faith failure to settle a claim against its insured.<sup>49</sup> Significantly, the Court adopted only the *factors* used to determine reasonableness under RCW 4.22.060; it did *not* adopt or authorize the use of the *procedure* set forth in that statute.<sup>50</sup>

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<sup>46</sup> *Id.* at 509.

<sup>47</sup> *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), *overruled on other grounds*, *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

<sup>48</sup> *Glover*, 98 Wn.2d at 717.

<sup>49</sup> *Chaussee*, 60 Wn. App. at 512.

<sup>50</sup> In fact, the plaintiffs in *Chaussee* did not obtain a determination of reasonableness using RCW 4.22.060. Instead, because they filed the underlying

In *Howard v. Royal Specialty Underwriting*,<sup>51</sup> however, this Court approved the use of the statutory reasonableness hearing *procedure* to determine the amount of damages caused by an insurer's bad faith. The *Howard* court cited the Washington Supreme Court's decision in *Besel v. Viking Insurance Co.*<sup>52</sup> and stated that the *Besel* court had "specifically approved" the use of a reasonableness hearing in this context.<sup>53</sup> In *Red Oaks Condominium Owners Association v. Sundquist Holdings*,<sup>54</sup> this Court reiterated that the Supreme Court "has already held" that a reasonableness hearing is appropriate to determine the measure of damages for insurer bad faith.<sup>55</sup>

In fact, the *Besel* court did not "specifically approve" the use of statutory reasonableness hearings to decide the measure of damages for insurer bad faith—that issue was not even before the *Besel* court. In *Besel*, the plaintiff had requested and was granted a reasonableness hearing in the trial court. The opinion does not reference RCW 4.22.060. It states merely, "The covenant judgment was expressly contingent on a

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action against the insured in their capacities as guardians for their son, they were required to obtain approval of the settlement in accordance with SPR 98.16W. That rule requires that a settlement entered into by a guardian be deemed "adequate" (not reasonable). Significantly, the SPR 98.16W hearing procedure does not establish damages against any party, much less a non-party.

<sup>51</sup> *Howard*, 121 Wn. App. 372.

<sup>52</sup> *Besel*, 146 Wn.2d 730.

<sup>53</sup> *Howard*, 121 Wn. App. at 378.

<sup>54</sup> *Red Oaks*, 128 Wn. App. 317.

<sup>55</sup> *Id.* at 324 (quoting *Howard*, 121 Wn. App. at 379).

finding and entry of an order of reasonableness consistent with the criteria established in *Chaussee . . .*.<sup>56</sup> The insurer did not challenge either the reasonableness of the settlement or the propriety of conducting a reasonableness hearing in the liability action, either in the trial court or on appeal.

The *Besel* court was not asked to decide and did not decide whether a reasonableness hearing in the liability action for the purpose of determining damages recoverable from an insurer was proper or whether it was authorized by RCW 4.22.060. Thus, *Besel* does **not** stand for the proposition that the measure of damages for insurer bad faith should be resolved in a reasonableness hearing in the underlying action.<sup>57</sup>

No other Washington Supreme Court decision has held that the procedure set forth in RCW 4.22.060 should be used to determine the measure of damages for insurer bad faith, and nothing in the statute authorizes the use of reasonableness hearings for this purpose. RCW 4.22.060 was adopted by the Washington Legislature in 1981 as part of the Tort Reform Act. That Act retained joint and several liability in Washington as a central principle but adopted contribution among joint

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<sup>56</sup> *Besel*, 146 Wn.2d at 734.

<sup>57</sup> See *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) (when a legal theory is not discussed in an opinion, that case is not controlling in a future case where the issue is properly raised).

tortfeasors to more fairly apportion fault among defendants. In the specific context of settlements between a plaintiff and one of several defendants, the Legislature provided (in RCW 4.22.060) for a hearing on the reasonableness of the settlement, which would provide an offset against plaintiff's recovery from non-settling defendants.<sup>58</sup>

Consistent with the purposes of the Act—to determine the offset to which remaining defendants are entitled—the statute provides (in relevant part):

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. . . . A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. . . .

(2) . . . [T]he claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

RCW 4.22.060 does not consider or address the issue of insurers' responsibility to pay settlements. Nor should it, since the Tort Reform Act

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<sup>58</sup> Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 18–20 (1981); see also Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZAGA L. REV. 69 (1984/85).

itself does not address that issue. None of the language in the Act, and none of the language in RCW 4.22.060, addresses or authorizes a procedure to determine the amount of damages recoverable from a non-party insurer. In fact, the application of RCW 4.22.060 and its procedures to a consent judgment is the proverbial wedging of the square peg into a round hole.

In *Hamilton v. Maryland Casualty Co.*,<sup>59</sup> the California Supreme Court explained why a reasonableness hearing in the underlying action is not an appropriate forum to determine the measure of damages caused by an insurer's bad faith. In that case, the trial court in the underlying action approved a consent judgment between plaintiffs and insured in accordance with Cal. Civ. Code § 877.6, California's analogue to RCW 4.22.060. The plaintiff, as the assignee of the insured, then filed suit against the insurer for breach of contract. The plaintiff asserted the amount of the consent judgment should be the presumptive measure of damages for the insurer's alleged breach.<sup>60</sup>

In rejecting this argument, the court explained the distinction between a determination of reasonableness for purposes of comparative liability and a determination for purposes of establishing an insurer's

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<sup>59</sup> *Hamilton v. Md. Cas. Co.*, 117 Cal. Rptr. 2d 318 (Cal. 2002).

<sup>60</sup> *Id.* at 320.

liability for the amount of a settlement entered into by its insured. In the former, the court examines “whether the amount of the settlement is within the reasonable range of the settling tortfeasor’s proportionate share of comparative liability for the plaintiff’s injuries.”<sup>61</sup> In making this determination, the trial court’s primary concern is whether the settling tortfeasor is paying *less* than its proportionate share of the plaintiff’s loss.<sup>62</sup> In contrast, the insurer’s concerns are that the tortfeasor is paying *more* than its proportionate share or too easily admitting liability.<sup>63</sup> The court explained, “The § 877.6 hearing is not designed to test those questions. It follows that for purposes of a dispute between the settling tortfeasor and its insurance company, the evidentiary showing made at the § 877.6 proceedings cannot be a substitute for an actual trial.”<sup>64</sup>

RCW 4.22.060 does not provide authority to hold an expedited, abbreviated, and untimely reasonableness hearing for the purpose of determining the amount of damages recoverable from an insurer. No other statute provides authority for such a procedure. The civil rules do not authorize such a procedure. Rather, the civil rules authorize a plaintiff to commence suit against an insurer and to prove his claim, nothing less.

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<sup>61</sup> *Id.* at 326 (quoting *Tech-Bilt, Inc. v. Woodward Clyde & Assocs.*, 213 Cal. Rptr. 256 (Cal. 1985)).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 327.

**b. *There is no practical or policy justification for using an abbreviated, expedited procedure to determine damages against an insurer.***

An insured is entitled to recover damages to compensate for harm caused by an insurer's bad faith. In Washington, those damages may be the amount of a reasonable settlement between plaintiff and insured, even when the settlement results in a consent judgment.<sup>65</sup> The courts have expressly recognized the moral hazard, however, presented by this scenario. In *Chaussee v. Maryland Casualty Co.*, for instance, this Court acknowledged that "an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement."<sup>66</sup>

The insured defendant who is willing to accept entry of a judgment against him has no incentive to limit the amount of the judgment since he has no responsibility to pay it. Indeed, if difficult negotiations as to the amount of settlement would jeopardize the insured's opportunity to be released from financial risk, the insured has a significant incentive not to assert the merits of his claim in negotiations. The insured has no incentive to drive the settlement down nor, unless the insured puts the plaintiff at

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<sup>65</sup> *Besel*, 146 Wn.2d at 738.

<sup>66</sup> *Chaussee*, 60 Wn. App. at 510; see also *Nw. Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. 546, 555, 997 P.2d 972 (2000) (recognizing that when interests of plaintiff and insured are aligned, "one cannot be confident that the litigation accurately established the value of the claim").

risk of trial, any leverage to do so. The plaintiff, on the other hand, has a legitimate incentive to maximize the amount of the settlement, and he has the leverage to achieve that goal because he can offer the insured almost everything the insured wants at no cost to the insured.<sup>67</sup> Under the circumstances, neither party has a *real* interest in minimizing the amount of the settlement. At most, the settling parties are constrained by the possibility a court or jury may determine the amount of the settlement is so high within a conceivable settlement range as to be unreasonable. This is a process fraught with incentives for collusively inflated settlements, given the absence of a real financial stake for the insured to participate seriously in settlement negotiations.

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<sup>67</sup> As one commentator explained:

If the assignment and covenant not to execute are exchanged before a judgment, there is no incentive for either party to engage in the kind of adversarial process which normally ensures that a settlement or judgment accurately reflects the value of the case. The plaintiff will always strive for a judgment admitting liability and a large amount of damages. The usual check in this situation is the position of the insured, who has his own incentive to minimize loss. But since the covenant not to execute relieves the insured of personal liability, his only incentive is to agree to whatever terms will persuade the plaintiff to abandon his suit. The correlative incentive for the plaintiff to agree is the potential for increased recovery by pursuing the insured's bad faith claim against the carrier. *The final result is that neither party is motivated to seriously negotiate over issues of damages and liability because the end goal is to structure the deal so that the carrier, a nonparty to the agreement, pays.*

Chris Wood, *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 TEX. L. REV. 1373, 1385 (1997) (emphasis added).

Courts in other jurisdictions also have recognized the problems that arise when a plaintiff seeks to hold an insurer liable for the full amount of a consent judgment. In *Miller v. Shugart*,<sup>68</sup> cited by this Court in *Chaussee*, the Minnesota Supreme Court explained, “It is also evident that, in arriving at the settlement terms, the defendants [insureds] would have been quite willing to agree to anything as long as plaintiff promised them full immunity.”<sup>69</sup> In *USAA v. Morris*,<sup>70</sup> also cited in *Chaussee*, the Arizona Supreme Court explained that an insured “might settle for an inflated amount or capitulate to a frivolous case merely to escape exposure or further annoyance.”<sup>71</sup>

As this Court and others have repeatedly recognized, a consent judgment does not necessarily correspond to the actual settlement value of a liability claim in which both parties risk the adverse result of trial.

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<sup>68</sup> *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

<sup>69</sup> *Id.* at 735.

<sup>70</sup> *United Servs. Auto. Ass’n v. Morris*, 741 P.2d 246 (Ariz. 1987).

<sup>71</sup> *Id.* at 253. See also *Romstadt v. Allstate Ins. Co.*, 844 F. Supp. 361, 363 (N.D. Ohio 1994), *aff’d*, 59 F.3d 608 (6th Cir. 1995) (insured’s attorney testified amount of consent judgment entered into by his client was “irrelevant” and that he made no investigation of the claim or determination as to whether the amount was reasonable); *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599, 609 (Alaska 2003) (covenant settlement agreements are subject to abuse, and insured who is fortunate enough to be able to enter into one has no incentive not to agree to a very high damage award); *Wright v. Fireman’s Fund Ins. Cos.*, 14 Cal. Rptr. 2d 588, 603 (Cal. Ct. App. 1992) (insured’s best interest served by agreeing to damages in any amount, so long as he has no personal liability for those damages); *Glenn v. Fleming*, 799 P.2d 79, 92 (Kan. 1990) (consent judgment with covenant not to execute may not represent an arm’s length determination of the value of plaintiff’s claim).

While Washington courts have accepted the moral hazard thereby presented in order to promote settlement, they recognize that court scrutiny of the settlement's reasonableness is required. But the critical balance between the interest of the insured in obtaining a release of liability through settlement and the insurer's interest in paying only reasonable settlements is thrown out of balance when the Reasonableness Hearing Procedure compromises the insurers' legitimate interests.

No court decision discussing the Reasonableness Hearing Procedure has expressed that an abbreviated and expedited procedure is required to protect the legitimate interests of the insured. Although the claimant and insured may prefer that an insurer's ability to defend itself is impaired, such interests are not legitimate. Their legitimate interests are to recover from the insurer the amount of a *reasonable* settlement, if the insurer is legally liable to pay it. There is no legitimate reason why such determination needs to be made even before the insurer's liability has been pled, much less established.

On the other hand, the Reasonableness Hearing Procedure can and often does impair an insurer's ability to defend its interests. Five days' notice under RCW 4.22.060 and very limited, if any, discovery by the insurer on the issues to be addressed at the hearing plainly prejudices an insurer. The abbreviated and expedited procedure serves to limit the

insurer's access to information and ability to present evidence completely and cogently. Presumably, the procedure is attractive to claimants/insureds for that very reason. Even when the impairment of the insurer's defense does not reach constitutional procedural due process dimensions, it does affect fairness—it unnecessarily jeopardizes the insurer's right to a fair hearing in court.

The circumstances of this case are illustrative. Here, Farmers moved to intervene when it learned of the Stipulated Judgment. (CP 107) Bird then served a Motion for Determination of Reasonableness on Farmers, with supporting declarations by Bird's attorney Wathen and Best Plumbing's attorney Dykstra (among others), and requested a reasonableness hearing in five days. (CP 443, 3737) Bird objected to Farmers' request to postpone the hearing to allow Farmers time to conduct discovery, arguing both that Farmers was not legally entitled to more time to prepare and did not need discovery. (CP 125)

The court granted Farmers discovery so that Farmers could “get behind” the declarations proffered by Bird and Best Plumbing. (CP 478) In the course of that discovery, Farmers learned the following (a few examples only), none of which would have been available to Farmers if Bird's objections had prevailed:

- Farmers’ discovery revealed that Bird’s claim for \$1,000,000 for damages related to his heart attack was untenable. Bird, in his motion for determination of reasonableness, represented that “[t]he heart attack was the proximate result of Best Plumbing’s wrongful conduct, as explained in the declaration of Dr. Dipboye.” (CP 452) Through discovery, Farmers learned that Dr. Dipboye was an internist who did not treat Bird for the heart attack and was not retained until ten days *after* the parties entered into the settlement agreement. (CP 412, 751) Bird did not offer testimony from his treating physician who had, Farmers discovered, previously told Bird that his heart attack was not likely caused by removing soil from the hillside. (CP 416, 768, 773) Farmers’ discovery also uncovered Birds’ response to a motion in limine in which Bird represented to the court just a few months before the settlement that Bird “does not now, nor has he ever, claimed that his heart attack was caused by Best Plumbing’s negligence and trespass.” (CP 413, 483) Based upon Farmers’ presentation of this evidence, the trial court agreed that the damages relating to Bird’s heart attack had no reasonable settlement value. (CP 3441–42)
- Farmers’ discovery revealed a side agreement between Bird and Best Plumbing that altered the terms of the Stipulated Judgment. Twice during the reasonableness proceedings, Bird represented to the trial court that Bird and Best Plumbing remained adversaries through negotiations as evidenced by a provision in the Stipulated Judgment whereby Bird retained the right to void the entire settlement agreement and place the matter back on the trial calendar. (CP 449, 1057, 1226) In fact, the parties had entered into a separate agreement whereby Bird had, in fact, waived the right to void the agreement in exchange for receiving Best Plumbing’s privileged file materials. (CP 1056–57, 1213)
- Farmers’ discovery revealed the lack of Dykstra’s efforts to evaluate the claim and negotiate the settlement, as discussed elsewhere in this brief. The evidence disclosed in discovery informed and contradicted the statements by Dykstra in his declaration that he had “evaluated” the Stipulated Judgment, which was, in his opinion, “reasonable.” (CP 166)

- Farmers’ discovery revealed evidence tending to undermine the declaration of Wathen, Bird’s counsel, who was prepared to testify that “the settlement was reasonable.” (CP 1012) Farmers obtained private email communications between Wathen and Bird in which Wathen, only three months before the parties entered into the Stipulated Judgment, informed Bird that he did not have a claim for treble damages for statutory trespass. (CP 404–05, 407, 710, 714, 776–79) Wathen, in fact, explained to Bird that his sole claim was for negligence. (CP 710)

To be clear, Farmers would not have known this information simply because it was Best Plumbing’s insurer; it could learn this information only by being provided the opportunity for discovery. In *Howard v. Royal Specialty Insurance*, this Court decided that, because the insurer was not a “stranger to the case,” having retained counsel for the insured and thus having had access to information obtained during the course of the litigation, the insurer was not entitled to discovery to protect its due process rights.<sup>72</sup> This conclusion ignores the fact that defense counsel appointed and/or paid by the insurer represents the interests of the insured, not the insurer.<sup>73</sup> If the insurer, in fact, appropriates information gleaned from its insured’s defense to benefit its own position on coverage

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<sup>72</sup> *Howard*, 121 Wn. App. at 379. In fact, this Court held in *Red Oaks*, 128 Wn. App. at 326, that the Reasonableness Hearing Procedure does not violate the due process rights of an insurer that first saw the settlement agreement only three days before a hearing on six days’ notice. Even if the decision is correct on constitutional grounds, it cannot be gainsaid that the insurer’s ability to defend itself was severely limited and almost certainly compromised.

<sup>73</sup> *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986).

against its insured, such action is tantamount to bad faith.<sup>74</sup> The insurer cannot dictate what discovery is obtained by the insured defendant, and, absent extraordinary circumstances, it has no right to conduct discovery itself. An insurer's exercise of control over defense counsel could constitute bad faith by the insurer and an RPC violation by defense counsel.<sup>75</sup> In addition, defense counsel may not have timely reported to the insurer, and indeed, defense counsel may be under instructions from policyholder counsel not to do so.<sup>76</sup> In the present case, for example, Dykstra instructed Defense Counsel to withhold critical settlement information from Farmers.<sup>77</sup> (CP 3730–31) Moreover, the parties may have conducted only limited discovery at the time a settlement is reached because it was in their interests, but not the insurer's, to do so. Under some circumstances, the insurer may properly argue that the parties did

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<sup>74</sup> *Ellwein v. Hartford Acc. and Indem. Co.*, 142 Wn.2d 766, 781–82, 15 P.3d 640 (2001) (appropriation of insured's expert by insurer constitutes bad faith), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003).

<sup>75</sup> See *Tank*, 105 Wn.2d at 388 (defense counsel retained by insurers to defend insureds under a reservation of rights cannot allow insurer to influence counsel's professional judgment). Farmers did not reserve rights in the present case, but it is common that insurers will do so.

<sup>76</sup> The policyholder's instructions to defense counsel pose an immovable hurdle to the insurer. Under *Tank*, defense counsel must resolve all conflicts of interest between the insured and the insurer in favor of the insured. *Tank*, 105 Wn.2d at 388 (“[P]otential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed.”).

<sup>77</sup> The instructions were later rescinded, but only under conditions, and arguably not so as to relieve Farmers from prejudice.

them. In short, it cannot reasonably be assumed that an insurer will be well informed about the *Glover* factors simply because of its status as insurer or, more particularly, that the insurer will be so well informed as to fairly face a hearing on short notice.

Not only does the Reasonableness Hearing Procedure exacerbate a significant moral hazard and compromise an insurer's ability to defend its legitimate interests, but it is wasteful. First, because an insurer who demands it is entitled to a jury trial, it is cumbersome and unnecessary to empanel two juries, one in the liability action and one in the bad faith action, to try the case against the insurer. Second, as here, the procedure can result in two actions proceeding at once in the form of an appeal from the liability action and prosecution of the coverage/bad faith action. Third, as discussed in the following section, the procedure raises unnecessary complications regarding how decisions in the reasonableness hearing can or should affect decisions in the bad faith action.

To summarize, the Reasonableness Hearing Procedure unjustifiably limits an insurer's ability to defend its legitimate interests, at great risk to, if not actual violation of, the insurer's right to procedural due process. The issue of an insurer's damages should be decided—by a jury, unless waived—in the bad faith action brought against the insurer.

**B. The Stipulated Judgment was collusive as a matter of law and therefore cannot provide the presumptive measure of damages for Farmer’s alleged bad faith.**

The amount of a reasonable consent judgment constitutes the presumptive measure of damages for insurer bad faith unless the insurer can show that the judgment was the product of fraud or collusion.<sup>78</sup> The meaning of “collusion” is a question of law and is reviewed de novo on appeal.<sup>79</sup> Determining whether a settlement is collusive presents a question of fact, but if reasonable minds cannot disagree on all the evidence, then the question can be decided as a matter of law, and this Court can decide the question de novo.<sup>80</sup> The legal effect of collusion presents a question of law to be decided de novo.<sup>81</sup>

In this case, Farmers presented evidence establishing that, as a matter of law, the Stipulated Judgment was the product of collusion between Bird and Best Plumbing. (CP 1050–59) Thus, the amount of that judgment cannot be the presumptive measure of damages in a subsequent bad faith action against Farmers. Instead, Bird must prove the amount of damages, if any, caused by Farmers’ alleged bad faith.

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<sup>78</sup> *Besel*, 147 Wn.2d 730.

<sup>79</sup> *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 415, 213 P.3d 931 (2009) (citations omitted).

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

**1. Failing to negotiate at arm's length constitutes collusion.**

The Washington Supreme Court has equated collusion with a failure to negotiate at arm's length.<sup>82</sup> And, in *Water's Edge Homeowners Association v. Water's Edge Associates*,<sup>83</sup> Division II of the Washington Court of Appeals held that collusion exists when a settlement reveals “a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to [the insurer.]”<sup>84</sup> That case involved a consent judgment similar to the Stipulated Judgment between Bird and Best Plumbing, and the appellate court affirmed the trial court's finding that the settlement was unreasonable based, in large part, on collusion.<sup>85</sup>

Similarly, in *Continental Casualty v. Westerfield*,<sup>86</sup> the federal district court in New Mexico held that “[c]ollusion may be found where the evidence demonstrates an absence of conflicting interests—‘the lack of

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<sup>82</sup> *Besel*, 147 Wn.2d at 739; *T & G Constr.*, 165 Wn.2d at 257 (settlement negotiated at arm's length not fraudulent or collusive); see also *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 706, 187 P.3d 306 (2008) (finding of no collusion or fraud supported by evidence of “vigorous” settlement negotiations).

<sup>83</sup> *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009), review denied No. 83813-5 (March 30, 2010).

<sup>84</sup> *Water's Edge*, 152 Wn. App. at 595.

<sup>85</sup> *Water's Edge*, 152 Wn. App. at 581.

<sup>86</sup> *Continental Casualty v. Westerfield*, 961 F. Supp. 1502 (D. N.M. 1997), cited with approval in *MacLean Townhomes, LLC v. Charter Oak Fire Ins. Co.*, 2008 WL 2811161, at \*4 (W.D. Wash. 2008).

opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining.”<sup>87</sup> A lawsuit that lacks an adversarial nature is collusive because it “does not assume the ‘honest and actual antagonistic assertion of rights’ to be adjudicated—a safeguard essential to the integrity of the judicial process.”<sup>88</sup> The court held that a settlement agreement entered into by the plaintiff and the insured was collusive as a matter of law and granted the insurer summary judgment dismissing the suit against it.<sup>89</sup>

In the present case, the trial court concluded that neither Bird nor Best Plumbing had any incentive, or made any effort, to negotiate a truly reasonable settlement. The trial court found that “Mr. Lilleness [Best Plumbing’s owner] was clear in his deposition that all he cared about was protecting his personal assets from an excess judgment.” (CP 3439) The trial court further found that, “[l]ike Mr. Lilleness, Mr. Bird’s only interest in limiting the ‘blackboardable’ or final settlement numbers was the desire to obtain from the reasonableness hearing judge a stamp of approval.” (CP 3440)

The trial court, nonetheless, found that the Stipulated Judgment had been negotiated at arm’s length. The trial court based its conclusion

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<sup>87</sup> *Id.* at 1506 (citations omitted).

<sup>88</sup> *Id.* (citing *U.S. v. Johnson*, 319 U.S. 302, 304–05 (1943)).

<sup>89</sup> *Id.* at 1509.

on a finding that, despite the fact that Dykstra “never rolled up his sleeves and did a thorough analysis of the case such as that which one might do in preparation for trial,” he did “evaluate the case to *determine the risk of an excess judgment* against [Best Plumbing].” (CP 3439 (emphasis added)) But under Washington law, the “settlement value” of a claim is different from the “pure exposure value” or “full dollar value” of a claim; a settlement value not only reflects “the potential liability” of a party, but also “the risks or costs of going to trial that a reasonable person would consider in determining a reasonable settlement.”<sup>90</sup> Negotiating a reasonable settlement requires more than recognizing the worst-case scenario.

The trial court endorsed a settlement that resulted from negotiations between the parties that were intended to relieve Best Plumbing of its excess exposure; those negotiations were not intended, and were not effective, to determine a reasonable settlement amount under adversarial circumstances. The trial court applied the wrong standard.

**2. Bird and Best Plumbing failed to reach a good faith settlement negotiated at arm’s length.**

In this case, as the trial court expressly found, neither Bird nor Best Plumbing had an interest in negotiating a truly reasonable settlement at

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<sup>90</sup> See *Chaussee*, 60 Wn. App. at 514.

arm's length. (CP 3439, 3440) Bird's only interest in the settlement was to "create as big a pie as possible." (CP 1082) Likewise, Best Plumbing's only incentive was to secure its release with an assurance that the financial burden would fall on Farmers. Best Plumbing's owner, Lilleness, admitted that the amount of the Stipulated Judgment was irrelevant to Best Plumbing. He testified:

Q: The sentence [in the settlement agreement] starts out with, "Based upon these investigations, it is mutually agreed that the reasonable value of Mr. Bird's claim for damages is \$2,250,000." What specifically from the investigations led you to conclude that the claim for damages – or agree that the reasonable value of the claim for damages was \$2,250,000?

A: ***He could have put 3 million on it. He could have put 2 million. He could have put 1 million. To me, it didn't matter.***

(CP 1155 (emphasis added)) Best Plumbing, in fact, believed Bird's claim was "overblown" and that Bird did not sustain all the damages he claimed.

(CP 1149–50) Yet, Best Plumbing signed the Stipulated Judgment agreeing to settle an "overblown" claim for the overblown amount. (CP 1122)

Most significant, Best Plumbing's personal counsel (Richard Dykstra, who was hired a mere 18 days before the settlement (CP 1097–98, 1099–1100)) admitted that he did not negotiate settlement based upon

an understanding of the merits of the parties' claims and defenses or a fact-based analysis of the recoverable damages (CP 1053–54).

Dykstra testified that Best Plumbing “didn’t have an opinion” regarding the amount of the settlement (CP 1090), and agreed that Lilleness “just wanted out; he didn’t care what the amount was” (CP 1107).

Dykstra himself did not evaluate the reasonable settlement amount in consideration of the *Glover* factors. (CP 1052–54) Specifically, Dykstra testified that he did not review any discovery, deposition transcripts, expert reports, witness interviews, or evaluation letters to assess the merits of Bird’s case or Best Plumbing’s defenses. (CP 1053, 1084–1107) He did not conduct any legal research with regard to any of the claims asserted by Bird, including Bird’s new claim for treble damages for statutory trespass, which had never been pled or explored during discovery. (CP 1092) Dykstra never attempted to assess the credibility of either side’s witnesses (CP 1085–86) and “didn’t do an [ ] analysis to project what [he] thought the eventual outcome at trial would be” (CP 1089). Dykstra never even evaluated whether Bird had enough evidence to satisfy a prima facie case to recover treble damages for statutory trespass or damages related to Bird’s heart attack. (CP 1093–97, 1104, 1105–06) Dykstra testified that he relied solely on Bird’s counsel and his

own previous experience as a lawyer to evaluate Bird's assessment of damages:

Q: Okay. Did you do any independent analysis or investigation of the amounts that [Bird] listed as his elements of damage?

A: I didn't review any documentation. I may have asked Mr. Smart a question or two about what was his source for certain of these things. But for the most part I felt I understood enough about what was likely going to happen . . . to advise.

...

Q: . . . *Is there anything else that you relied upon other than your own experience in coming up with the range [of settlement] that you came up with, the [\$]2.5 million to [\$]7.5 million?*

A: *No.*

(CP 1101–03 (emphasis added)) Dykstra, in fact, spent less than three hours reviewing file materials before agreeing to the settlement. (CP 3136–38)

In short, Dykstra did not know enough to understand the reasonable value of the settlement (in light of the *Glover* factors) and could not have negotiated a settlement at arm's length. Dykstra was not in a position to assert to Bird's counsel, for instance, that, if the case went to trial, Bird was at risk of obtaining less than he claimed, because Dykstra, admittedly, did not know what points to argue. Dykstra could bring no leverage to bear in the settlement negotiations. With no one asserting the

defense position, the settlement could not have been negotiated at arm's length.

**3. Because the settlement was the product of collusion, the trial court erred by ruling on the reasonableness of the settlement.**

When a consent judgment is the product of collusion, it cannot establish the presumptive measure of damages.<sup>91</sup> Here, because the settlement was collusive as a matter of law, the amount of the settlement cannot establish the measure of damages against Farmers, and a determination of reasonableness is moot.

Typically, when the Reasonableness Hearing Procedure is used, consideration of fraud or collusion for the purpose of determining reasonableness (i.e., applying the *Glover* factors) occurs in the liability action while consideration of fraud or collusion as a defense to the presumption of reasonableness occurs in the bad faith action.<sup>92</sup> The reasonableness hearing, in which the insured bears the burden of proof as to all factors (including the absence of bad faith, fraud, or collusion), determines reasonableness and, if reasonableness is found, establishes the presumption of damages; in the bad faith action, the insurer bears the burden of proving that the settlement, previously found reasonable, was

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<sup>91</sup> *E.g., VanPort Homes, Inc.*, 147 Wn.2d at 765-66 (the amount of the settlement determined to be reasonable is presumed reasonable “unless the settlement is the product of fraud or collusion”).

<sup>92</sup> *Chaussee*, 60 Wn. App. at 512.

the product of fraud or collusion and, for that reason, does not establish the measure of damages. Thus, evidence of collusion is considered in two separate forums, at two separate times, with two different burdens of proof.

The two-fold examination of fraud or collusion raises a number of problems, which have not been comprehensively addressed or resolved by the Washington courts. For example:

- Should the liability court's determination concerning collusion—whether bad faith, collusion, or fraud did or did not have an impact on the amount of the agreed settlement—affect the question in the bad faith action whether the settlement is vitiated by collusion?
- If so, does that effect impinge upon a party's right to trial by jury in the bad faith action?
- Are there any circumstances when the determination as to collusion in the liability action should be determinative of the issue in the bad faith action?
- Does the answer to that question depend upon whether the insurer has been given an opportunity through discovery to investigate the existence of collusion?
- Should the jury in the bad faith action be apprised that the court in the liability action considered evidence of "bad faith, collusion, or fraud," and if so, what should the jury be told?
- Is the former determination reviewed for abuse of discretion and the latter for substantial evidence in the record?

These issues do not arise when there is only one action against the insurer—that is, they do not arise when the Reasonableness Hearing Procedure is not used. These difficulties surrounding the issues of fraud or collusion further illustrate why the Reasonableness Hearing Procedure is impractical and wasteful. Farmers argues that all questions pertaining to damages, including the reasonableness of the settlement, should be decided in the action against the insurer.

If, however, the Reasonableness Hearing Procedure is used, the issue of fraud or collusion can be addressed before any of the other *Glover* factors. When, as in this case, the evidence establishes that, as a matter of law, the settlement between insured and claimant was the product of collusion, there is no need to further consider reasonableness in light of all *Glover* factors because the settlement cannot be the presumptive measure of damages for insurer bad faith, even if it otherwise might be deemed reasonable.<sup>93</sup> The trial court erred when it ruled on the question of reasonableness.

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<sup>93</sup> Farmers acknowledges that RCW 4.22.060(1) provides, “A determination by the court that the amount to be paid [in settlement] is reasonable must be secured.” That provision does not apply. As discussed above, RCW ch. 4.22 prescribes an equitable procedure for determining the amount of an offset to which remaining defendants are entitled when one or more but not all jointly liable tort defendants have settled. By the statute’s terms, the procedure is not intended to determine an insurer’s damages at law. Even if RCW ch. 4.22 could be held to apply to determine an insurer’s damages, the language quoted above refers only to “the amount to be paid,” referring to the terms of an actual

C. **The trial court misconstrued RCW 4.24.630 and erroneously concluded that Bird's claim for statutory trespass had substantial settlement value.**

Bird argued below that the Stipulated Judgment was reasonable, in part, because Best Plumbing was liable for treble damages, attorney fees, and costs under RCW 4.24.630, which provides remedies for “wrongful” trespass. (CP 452) In response, Farmers argued that the settlement was unreasonable because, in order to recover on this claim, Bird needed to (1) obtain court approval to belatedly amend his complaint to plead statutory trespass, (2) escape summary judgment on the ground the trespass statute requires an intent to cause harm, and (3) prevail with the jury on the fact question whether Best Plumbing acted “wrongfully” under the statute. (CP 396–408, 1054–1056) The trial court disagreed and found the settlement on the basis of this claim reasonable. (CP 3443)

The trial court’s finding was erroneous in two respects. First, the trial court’s determination of the level of intent required to satisfy the statute was erroneous as a matter of law. An appellate court reviews de novo a trial court’s interpretation of a statute.<sup>94</sup> Second, the trial court’s finding that Bird had a 75% chance of prevailing on this claim was not

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settlement whereby the settling defendants will pay the plaintiff an actual sum as a result of settlement. In the case of a consent judgment, there is no “amount to be paid”; there is only the amount of the settlement, with the obligation to pay awaiting a determination of liability against the insurer in a separate lawsuit.

<sup>94</sup> *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000) (citing *Dep’t of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)).

supported by the evidence. An appellate court reviews findings of fact to determine whether there is substantial evidence to support those findings.<sup>95</sup>

The significance of the court's errors should be recognized. In the absence of a claim for treble damages and attorney fees, the settlement value of Bird's claim, though substantial, is relatively small and well within Best Plumbing's policy limits. If Bird can assert treble damages, however, and if he can make claim for his attorney fees, the full dollar value of his claim, and its settlement value, rises significantly. The risk of a statutory trespass claim provides the only basis upon which the value of Bird's claim could begin to approach the amount for which Bird and Best Plumbing settled.

**1. RCW 4.24.630 requires an intent to cause harm, not simply an intent to act.**

The trial court found that Best Plumbing's "acts of cutting and attempting repair of the pipe were wrongful as that term is defined in the statute." (CP 3443) The trial court erred as a matter of law by interpreting RCW 4.24.630 to require simply an intent to act rather than an intent to cause harm.

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<sup>95</sup> *Schmidt*, 115 Wn.2d at 158.

RCW 4.24.630 provides:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.

Because the statute is penal in nature, it must be strictly construed.<sup>96</sup>

By its terms, the statute requires the plaintiff to prove that the defendant trespassed upon the land and “*wrongfully* cause[d] waste or injury to the land.”<sup>97</sup> By the plain language of the statute, the defendant acts “wrongfully” when he “*intentionally and unreasonably* commits *the act . . .*”<sup>98</sup> The “act” at issue is the act of “caus[ing] waste or injury to the land.”<sup>99</sup> The trespasser, then, must intentionally and unreasonably cause waste or injury to land.<sup>100</sup> That is, the trespasser must intend to cause harm.

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<sup>96</sup> See, e.g., *Baily v. Hayden*, 65 Wash. 57, 61, 117 P. 720 (1911) (construing treble damages provision of timber trespass statute).

<sup>97</sup> RCW 4.24.630 (emphasis added).

<sup>98</sup> *Id.* (emphasis added).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; accord *Clipse v. Michaels Pipeline Constr., Inc.*, \_\_\_ Wn. App. \_\_\_, 225 P.3d 492, 494 (2010) (“The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully*

The legislative history of RCW 4.24.630 confirms this interpretation. The statute was proposed under Senate Bill 6080,<sup>101</sup> which was originally designed to address “forest lands and agricultural lands, which are generally located in sparsely populated and remote areas.”<sup>102</sup> The Legislature found that these lands “are particularly vulnerable to wrongful property damages, especially vandalism and theft.”<sup>103</sup> The bill’s sponsor, Senator Owen, confirmed:

[T]he idea is to deal with the tremendous amount of damage that we are having with people coming in and shooting up signs, shooting up restrooms. In the case of forest lands, shooting up trees, taking four-wheel drives and running them all over [agricultural] land and ripping up the ground.<sup>104</sup>

In support of the bill, the Legislature heard testimony from representatives of local forestry companies discussing their concerns that “[i]llegal dumping and vandalism are causing increasing costs to private landowners.”<sup>105</sup> The treble damages component was designed to “provide

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injuring personal property or real estate improvements on the land.”) (emphasis in original).

<sup>101</sup> S.B. 6080, 1994 Leg., 53rd Sess. (Wash. 1994). A copy of the Senate Bill can be found at CP 3244–45.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> S. Journal, 1994 Leg., 53rd Sess. (Wash. 1994) (January 28, 1994). A copy of the Senate Journal can be found at CP 3252–53.

<sup>105</sup> S.B. Report SB 6080 1994 Leg., 53rd Sess. (Wash. 1994). A copy of the Senate Bill Report can be found at CP 3258–59. *See also* Minutes of the Senate Hearing on January 14, 1994, a copy of which can be found at CP 3261; Transcript of the Senate Hearing on January 14, 1994, a copy of which can be

a deterrent for violators and help finance costs of cleanup.”<sup>106</sup> The legislative history behind RCW 4.24.630 confirms that the statute was designed to address conduct that is willful and malicious with an intent to cause harm.

The only reported Washington case applying the statute involved an intent to cause harm. In *Standing Rock Homeowners Association v. Misich*,<sup>107</sup> the Washington Court of Appeals held the standard was satisfied when the defendant acted knowingly and with the intent to cause harm. In that case, the defendant (Misich) had an easement across a road running through the plaintiff’s property.<sup>108</sup> The plaintiff erected unlocked gates on the property to discourage unauthorized use and to minimize wear and tear of the road.<sup>109</sup> Misich, in a show of defiance, repeatedly removed the gates without the permission of the plaintiff.<sup>110</sup> Misich even organized other easement holders and provided transportation, tools, and advice to assist the other easement holders in removing the gates.<sup>111</sup>

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found at CP 3263–68; Transcript of the House Hearing on February 8, 1994, a copy of which can be found at CP 3270–77.

<sup>106</sup> S.B. Report SB 6080 1994 Leg., 53rd Sess. (Wash. 1994).

<sup>107</sup> *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001).

<sup>108</sup> *Standing Rock*, 106 Wn. App. at 235.

<sup>109</sup> *Id.* at 236.

<sup>110</sup> *Id.* at 237.

<sup>111</sup> *Id.* at 246.

Misich's knowing conduct was found to satisfy the element of "wrongfulness," as defined in the statute.<sup>112</sup>

Indeed, because a plaintiff may be entitled to treble damages upon a claim for statutory trespass, United States Supreme Court authority requires that the level of culpability under the statute be "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."<sup>113</sup> Anything less would violate the requirements of due process.<sup>114</sup>

Here, the trial court's interpretation of the statute—requiring simply the intent to act and not the intent to harm—is contrary to Washington law. Moreover, this interpretation violates the standard for due process. Under this interpretation, a plaintiff would be entitled to punitive damages when the level of culpability is no greater than negligence.

**2. Bird did not plead and could not reasonably have pled or proved a statutory trespass claim.**

The trial court found that (1) Bird could have amended his complaint to include a claim for statutory trespass under RCW 4.24.630 and (2) there was evidence to support this claim under the court's

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<sup>112</sup> *Id.*

<sup>113</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citations omitted).

<sup>114</sup> *Id.*

interpretation of the statute. (CP 3443) Based upon these findings, the trial court concluded that Bird had a 75% chance of prevailing on this claim, including the claim for treble damages and attorney fees.<sup>115</sup> (CP 3446) There is no substantial evidence to support this finding.

**a. *The trial court lacked substantial evidence to find that Bird had a 75% chance of successfully amending his complaint to add a claim for statutory trespass.***

Bird's complaint did not include a claim for statutory trespass; Bird pled only negligent trespass. (CP 426–28) In fact, the complaint does not allege any intentional or unreasonable conduct by Best Plumbing. (*Id.*)

Although Bird argued to the trial court that he intended to amend his complaint to add a claim for statutory trespass, he could not reasonably have done so. The parties, by stipulation and order signed by the trial court on January 7, 2009, agreed “[t]here will be no new causes of action” and “[n]o new witnesses shall be named by any of the parties.” (CP 492–94) “A written stipulation signed by counsel on both sides of the case is binding on the parties and the court.”<sup>116</sup> The stipulation between Bird and Best Plumbing was a binding agreement between the parties.

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<sup>115</sup> There was no other basis upon which Bird could claim attorney fees against Best Plumbing.

<sup>116</sup> *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wn. App. 707, 715, 525 P.2d 804 (1974) (citations omitted).

Nevertheless, the trial court found that Bird could have amended his complaint. (CP 3442) The trial court lacked substantial evidence for this finding. At the time of settlement<sup>117</sup>—two days before trial—Bird had not made any effort to amend his claims. Neither Bird nor Best Plumbing had proposed jury instructions to set out the standard for statutory trespass (CP 525–47, 549–79), and neither party was prepared to argue at trial that Best Plumbing’s conduct rose to the level of a “wrongful” act under the correct interpretation of RCW 4.24.630 (CP 496–504, 506–23). Best Plumbing had, in fact, filed a motion in limine to exclude the allegations of statutory trespass on the ground they had never been pled or argued. (CP 671) There is no evidence to support the trial court’s determination that Bird would have been successful in amending his complaint two days before trial and in contravention of his stipulation to add a claim for punitive damages that would have introduced an element of willfulness into the case. The court erred in finding that Bird had a 75% chance of prevailing on a claim he had not pled and had waived.

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<sup>117</sup> *Green v. City of Wenatchee*, 148 Wn. App. 351, 369, 199 P.3d 1029 (2009) (trial court must determine whether settlement is objectively reasonable looking at the facts and circumstances as they existed at the time of settlement).

***b. Even if Bird could have amended his complaint, the trial court lacked substantial evidence to find that Bird had a 75% chance of prevailing on a claim for statutory trespass.***

As discussed above, to prevail on a claim for statutory trespass, Bird would have had to prove that Best Plumbing intended to cause harm. Yet, according to both Bird and Best Plumbing, Best Plumbing's workers mistakenly came onto Bird's property while attempting to repair a problem with the neighbor's sewer line. (CP 402–04, 627) Within days, Best Plumbing returned two more times, with Bird's express permission, to make repairs to Bird's sewer line. (RP 7/23/09, 258:19–259:11) Neither party ever argued that Best Plumbing intended to cause harm.

For example, Bird, in his motion for summary judgment, argued to the trial court that “rather than going on to the neighbor's property to investigate the sewer blockage, the workers for Best Plumbing came onto Mr. Bird's property. *They were simply at the wrong house.*” (CP 627) According to Bird, the Best Plumbing workers “dug up portions of Mr. Bird's sewer line and cut open the sewer line looking for the blockage.” (*Id.*) But, because the workers “were on the wrong property, they did not find any blockage in the sewer line. Apparently, at that point in time, Best Plumbing employees believed they had located an abandoned sewer line. As a result, they did not repair any of the cuts in the sewer line.”

(*Id.*) According to Bird, then, Best Plumbing’s workers simply made a mistake; there was no element of willfulness and no intent to cause harm. Best Plumbing cites these same facts of negligent trespass in its response to Bird’s motion for summary judgment. (CP 647–48)

The trial court lacked substantial evidence to find that Bird had a 75% chance of prevailing on this claim.

**D. There is no evidence to support the trial court’s finding that the settlement value of Bird’s property damage claim against Best Plumbing was 100% of Bird’s alleged cost of repair.**

The trial court held that, with respect to the statutory trespass claim, there were arguments on both sides such that “the inclusion of some calculation for treble damages is reasonable.” (CP 3443) The settlement value of a claim, the court acknowledged, must take into account not only the strengths of a claim but also its weaknesses. Yet, even though Bird’s property damage claims were disputed by substantial and cogent evidence, the trial court concluded that the reasonable settlement value of Bird’s property damage claim was 100% of Bird’s alleged cost of repair. (CP 3444) An appellate court reviews findings of fact to determine whether there is substantial evidence to support those findings.<sup>118</sup> The trial court lacked substantial evidence to support that finding.<sup>119</sup>

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<sup>118</sup> *Schmidt*, 115 Wn.2d at 158.

<sup>119</sup> This error was then compounded when the court held the damages could be trebled.

Farmers presented evidence at the reasonableness hearing that indicated Best Plumbing's liability for the full extent and cost of repair was in substantial dispute:

- Bird did not report the sewage problem to Best Plumbing, contrary to his earlier practice of reporting to Best Plumbing promptly (RP 7/23/09, 262:1–21);
- Contrary to the trial court's ruling that there was "ample expert testimony" supporting Bird's claim (CP 3444), no expert on behalf of Bird observed the sewage leak or any damage related to it or undertook any computations to determine that the earth movement was caused by the sewage leak (RP 9/8/09, 377:19–378:22; RP 9/9/09, 571:19–572–14);
- Best Plumbing's expert (Jacobson) would testify that, based upon his inspection of the residue on the allegedly faulty pipe, he could not conclude that it leaked while underground (RP 9/8/09, 359:11–366:20, 370:2–377:18);
- The hillsides in the area had a substantial history of instability (CP 1489, 1541–42, 2702–26);
- Bird's own expert (Chang) opined that the instability was caused, in part, by Bird's excavation (CP 1486, 1489, 1544–45);
- Even if the pipe was leaking and contributed to the instability of the hillside, it related only to the upper slope and not the lower slope (CP 1487, 1505–06), and Bird sought to recover for repair and stabilization of both (CP 1444);
- Best Plumbing's expert (Robert Pride) would testify that a less costly stabilization was possible (CP 1505–12).

According to the trial court's own rationale, determining settlement value does not generally permit the parties or a court to

completely disregard the risks posed by disputed, admissible evidence. The evidence in the record did not support the trial court's finding that Bird could reasonably claim 100% of the value of his property damage claim in settlement.

## **VII. CONCLUSION**

This Court need not reach the particulars of the Bird-Best Plumbing settlement to reverse. Farmers is entitled to have a jury determine whether the settlement was the reasonable measure of damages against it, and the trial court erred in denying Farmers' jury demand. Because Dykstra could not and did not negotiate an arm's length settlement of Bird's claims against Best Plumbing, their agreement was collusive, and the reasonableness determination should be vacated. If, however, the Court reaches the particulars of the settlement, the trial court erred in deciding that a settlement of \$3.75 million was reasonable. The judgment should be vacated, and the claim against Farmers in this action should be dismissed.

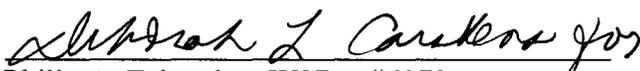
DATED: April 5, 2010.

Attorney for Appellant Farmers  
Insurance Exchange

BULLIVANT HOUSER BAILEY PC

By   
Douglas G. Houser, *pro hac vice*  
Jerret E. Sale, WSBA #14101  
Deborah L. Carstens, WSBA #17494  
Janis C. Puracal, WSBA #39234

TALMADGE/FITZPATRICK PLLC

By   
Philip A. Talmadge, WSBA #6973  
Sidney C. Tribe, WSBA #33160

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 5<sup>th</sup> day of April, 2010, I

caused to be served this document to:

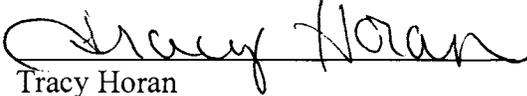
William C. Smart	<input type="checkbox"/>	via hand delivery.
Keller Rohrback, LLP	<input checked="" type="checkbox"/>	via first class mail.
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Seattle WA 98101-3052		

Jeffrey I. Tilden	<input type="checkbox"/>	via hand delivery.
Gordon Tilden Thomas & Cordell LLP	<input checked="" type="checkbox"/>	via first class mail.
1001 Fourth Ave., Ste. 4000	<input type="checkbox"/>	via facsimile.
Seattle WA 98154-1007		

Gavin W. Skok	<input type="checkbox"/>	via hand delivery.
Riddell Williams P.S.	<input checked="" type="checkbox"/>	via first class mail.
1001 Fourth Ave., Ste. 4500	<input type="checkbox"/>	via facsimile.
Seattle WA 98154-1192		

I declare under penalty of perjury under the laws of the state of

Washington this 5<sup>th</sup> day of April, 2010, at Seattle, Washington.

  
Tracy Horan