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

MWW, PLLC, a Washington corporation,
Plaintiff / Respondent,

v.

KIRIBATI SEAFOOD COMPANY, LLC; and
OLYMPIC PACKER, et al.
Defendants.

KIRIBATI SEAFOOD COMPANY, LLC; and
OLYMPIC PACKER, et al.,
Counterclaim Plaintiffs,

v.

MWW, PLLC; and DENNIS MORAN et al.,
Counterclaim Defendants / Respondents.

MONITOR LIABILITY MANAGERS, LLC; and CAROLINA
CASUALTY INSURANCE COMPANY,
Intervenors and Appellants.

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I. INTRODUCTION

The parties below litigated vigorously for two years in a case that generated an extraordinary number of filings. Before trial, after lengthy settlement negotiations, with no assistance or support from a highly exposed liability carrier, and with the insured's personal assets increasingly exposed to an excess judgment because of the "wasting" nature of the liability insurance policy, the parties settled. Unhappy with a result that it had largely created, the liability carrier for MWW voluntarily sought and received permission to intervene in and contest the reasonableness of the settlement. The liability carrier lost, and the settlement was found reasonable. Arguments advanced by the carrier in this appeal are: (1) not preserved for appeal; (2) clearly resolved against the carrier by settled law; (3) dependent upon facts for which there was substantial support—against the carrier—in the record .

The Trial court knew the case and the record cold. As to the carrier's principal complaint—collusion between the parties—the court said, "I can't think of another set of attorney and parties that are less likely to collude than this group."

II. STATEMENT OF ISSUES

1. Should this Court deny review because Monitor failed to preserve its claims of error in the superior court? **Yes.** Review is precluded

under RAP 2.5(a) and the invited-error doctrine.

2. Did the superior court have the authority to conduct a reasonableness hearing? **Yes.** Reasonableness hearings are governed by RCW 4.22.060. *See Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012). The interpretation of a statute is a question of law that this Court decides de novo. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

3. Did the superior court properly find that Monitor failed to timely respond to a settlement communication? **Yes.** This Court reviews factual findings in reasonableness hearings for substantial evidence. *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 584, 216 P.3d 1110 (2009).

III. STATEMENT OF THE CASE

A. Litigation Between MWW and Kiribati

Dennis Moran is an attorney. His law firm, MWW, PLLC, sued Kiribati Seafood Co., LLC, Olympic Packer LLC, and other defendants for unpaid attorney's fees and costs. CP 3370–71. Kiribati Seafood Co. and Olympic Packer asserted malpractice and breach-of-fiduciary-duty counterclaims against MWW and joined Mr. Moran as a counterclaim defendant. CP 3371, 3385. For simplicity, this Brief refers to MWW and Mr. Moran together as “MWW” and refers to the remaining parties in the

underlying action together as “Kiribati.” Attorney William H. Walsh defended MWW against the counterclaims. CP 3412. Attorney John R. Neeleman represented Kiribati. CP 3391.

A fierce and prolonged litigation ensued. MWW claimed that Kiribati owed about \$1.1 million plus interest in unpaid fees and costs. CP 3413, 3583. MWW asserted the right to collect this sum from proceeds from a judgment Kiribati obtained in *Kiribati Seafood Co. v. Port of Papeete et al.* Those proceeds were deposited in the superior court registry. Monitor concedes: “At MWW’s request, the trial court created a receivership to preserve Kiribati’s assets in the interest of MWW.” Appellants’ Br. at 3–4. Although other creditors made claims against those funds, *id.* at 4, the superior court found that MWW had a fully secured priority lien on the funds, CP 3583.

For its part, Kiribati alleged counterclaim damages against MWW in excess of \$2.5 million. CP 3392, 3583. MWW had a professional liability insurance policy issued by Monitor Liability Managers, LLC and Carolina Casualty Insurance Company (together, Monitor). Appellants’ Br. at 2. Monitor defended MWW under a reservation of rights. *Id.* at 3.

The superior court judge who found the settlement reasonable also presided over pretrial proceedings. She found that “this was probably a more transparent case than most cases, given the amount of preparation

and summary judgment practice that went into it.” VRP 47: 13–15. About each side’s counsel, the judge found: “I can’t think of another set of attorneys and parties that are less likely to collude than this group. If there was an argument to be made over five bucks, they would have spent \$500 arguing over it. This was just the way this case went.” *Id.* 46:16–21.

Monitor does not challenge these findings on appeal.

B. Hard-Fought Settlement Negotiations

1. Perspective of Kiribati’s Counsel

Mr. Neeleman filed a declaration explaining his perspective on the case as Kiribati’s counsel. CP 3391–99. He believed Kiribati was in a strong negotiating position. The amount claimed by Kiribati dwarfed the amount claimed by MWW, four to one. CP 3392. Kiribati’s “liability theories were repeatedly tested by summary judgment motions and remained intact (except for a \$26 million economic loss claim that would have been the subject of an appeal), up through [a] hearing on May 18, 2012, approximately three weeks before trial.” *Id.* Mr. Neeleman predicted that the fee agreements upon which MWW based its claims “would be set aside, the Court requiring MWW to prove its fee by quantum meruit.” *Id.* Because MWW’s professional liability insurance had a limit of \$1 million, reduced by MWW’s defense expenses, Mr. Neeleman concluded that MWW faced a significant risk of a judgment in excess of its policy limits.

Id. He therefore “felt that ultimately Mr. Moran and his insurer would capitulate in the face of exposure to substantial uninsured liability.” *Id.*

As bullish as Kiribati was, Mr. Neeleman stated that “ultimately, we had to substantially lower our expectations for a number of reasons.” CP 3394. “A primary factor was Mr. Moran’s and his counsel’s toughness and resiliency in the face of risks that a trial posed for Mr. Moran and MWW.” *Id.* “We were extremely frustrated that Mr. Moran seemed bent on saving the insurer as much money as possible as a matter of principle, and the vigor of his and Mr. Walsh’s litigation is a matter of record in this case.” *Id.* Kiribati had other problems. There was the matter of the \$900,000 to \$1.3 million sitting in the court’s registry, against which MWW made its claim for unpaid fees. According to Mr. Neeleman, “Kiribati’s members were anxious to ensure that they would realize a net recovery from the Court registry,” but MWW’s claims were by far the largest against that money. CP 3394–95. Meanwhile, all of the parties understood “that daily MWW’s available insurance proceeds were being dissipated.” CP 3394.

2. April 18, 2012 Mediation

The parties mediated on April 18, 2012, with respected mediator Lou Peterson. CP 3395; VRP 46:22. Monitor was asked to attend. The Monitor adjuster, Temperance Walker, decided not to attend the mediation

but, rather, to participate only by telephone. CP 3515. She would later not answer calls to her. Paul Fogarty, Monitor's coverage counsel, did attend. *Id.* The mediation lasted from 9:00 AM until after 11:00 PM. CP 3395. "For most of the mediation the parties were more than \$1 million apart—Kiribati demanding over \$500,000 net recovery and MWW demanding over \$500,000 net recovery." *Id.* Late in the evening, Mr. Moran met personally with one of Kiribati's representatives. *Id.* They "discussed the possibility of settling for a net payment to Mr. Moran of \$200,000—\$400,000 would be paid to Kiribati by Mr. Moran's insurer, and Kiribati would in turn pay \$600,000 to Mr. Moran." *Id.* But the mediation ended without a settlement. *Id.* "Subsequently, there were various extremely acrimonious exchanges between the parties regarding the failure of the case to settle." *Id.*

3. May 3, 2012 Negotiations

The parties discussed settlement again on May 3, 2012. CP 3396. Mr. Neeleman suggested a settlement in which Kiribati would pay MWW \$550,000. *Id.* In exchange, MWW would pay Kiribati \$550,000 from MWW's insurance coverage, pay an additional \$50,000 to the Estate of Kurt Ochsner, and provide a satisfaction of judgment for two of Kiribati's

members in the amount of \$28,395.43,¹ reflecting payment on April 19, 2012. *Id.* Mr. Neeleman stressed that he did not have authority from Kiribati to make this offer. *Id.* If MWW indicated a willingness to enter into such a settlement, then Mr. Neeleman “would see if this would be acceptable” to Kiribati. *Id.* “Mr. Moran thanked me for the call and I never heard back.” *Id.*

4. Summary Judgment Hearing and Final Settlement Negotiations

About two weeks later, on May 18, the superior court held oral argument on cross motions for summary judgment. CP 3396. The court denied MWW’s motions in part and took the rest of MWW’s motions and all of Kiribati’s motion under advisement. CP 3396–97. Afterward, Mr. Moran told Mr. Neeleman that MWW could agree to a settlement involving a \$550,000 payment from Kiribati to settle MWW’s claims and a \$550,000 payment from MWW’s insurance to settle Kiribati’s claims. CP 3397. Kiribati rejected the offer and transmitted a counteroffer through the mediator. CP 3397, 3516. Mr. Neeleman explained, “[O]ver the weekend we decided to test Mr. Moran’s resolve, and propose a settlement whereby the insurer would pay Kiribati \$750,000, and Kiribati would pay

¹ The superior court entered this judgment on April 19, 2012, in favor of MWW as a sanction for abuse of the litigation process by Kiribati Seafood Co. and the two members. CP 2452–53; *see also* CP 2378–84.

\$450,000 to Mr. Moran.” CP 3397.

Kiribati received no response to its counteroffer by May 22. CP 3397. Time was ticking, and trial was just three weeks away. CP 3396, 3582. On behalf of Kiribati, Mr. Neeleman saw “the prospect of the immense amount of work and expense and potential vagaries and risks inherent in any three week jury trial.” CP 3395. At 9:00 AM the next day, Mr. Neeleman had to travel to Boston to prepare and defend the deposition of one of Kiribati’s representatives, Lawrence Crovo. CP 3397. On behalf of MWW, Mr. Walsh stated that MWW expected “its expenses and costs of trial preparation and a three-week trial to be around \$180,000.” CP 3414. The projected defense costs would have decreased the insurance available to cover a judgment against MWW to under \$400,000. “[T]he uncertainty of trial remains and so does the risk of MWW’s potential exposure well beyond its insurance limits.” *Id.*

Mr. Neeleman urged the mediator, Mr. Peterson, to speak with Mr. Moran. CP 3397. In the next hours, Mr. Peterson had several conversations with Mr. Moran and Mr. Walsh. *Id.* Mr. Peterson told Mr. Neeleman “that Mr. Moran would only agree to a settlement involving a payment to Mr. Moran of \$550,000 in exchange for a payment to Kiribati by Mr. Moran’s insurer of \$550,000.” *Id.* Mr. Neeleman discussed the offer with Kiribati and then countered with a proposal for “payment to Mr.

Moran of \$550,000 in exchange for a payment to Kiribati by Mr. Moran's insurer of \$550,000, plus \$75,000 on account of the Ochsner claim settlement, and satisfaction of judgment entered against Kiribati, Coscia and Crovo in the amount of \$28,395.43 on April 19, 2012." CP 3397-98. MWW held firm. It "would only agree to a payment to Mr. Moran of \$550,000 in exchange for a payment to Kiribati by Mr. Moran's insurer of \$550,000, and satisfaction of the judgment entered against Kiribati, Coscia and Crovo in the amount of \$28,395.43 on April 19, 2012." *Id.* According to Mr. Neeleman, "Another difficult discussion with my clients ensued, and finally they authorized me to accept the latest offer." *Id.*

The case was settled. The same day, the court entered an order denying the remainder of MWW's cross motions for summary judgment. CP 3396-97. The court never ruled on Kiribati's cross motion. CP 3397.

C. The Written Settlement

The parties compromised MWW's claims for unpaid fees and costs. CP 3589. Kiribati agreed to pay MWW \$550,000 to settle them. *Id.* The parties also compromised Kiribati's counterclaims. *Id.* MWW agreed to pay Kiribati \$550,000 to settle them. *Id.* MWW agreed to execute the satisfaction of judgment requested by Kiribati, in the amount of \$28,395.43. *Id.* In other words, MWW gave up its right to collect on that judgment. Each side executed a general release of the other. CP 3589-90.

The settlement identifies which assets would be used to pay the settlement funds. MWW's payment would come from its liability insurance coverage and its right to payment under the April 19 judgment. CP 3589. Kiribati's payment would come from the money it received in settlement of the counterclaims instead of the money held in the court's registry. *Id.* The settlement explicitly stated that MWW's release of Kiribati included "those claims that were or could have been asserted in the Litigation including against the proceeds of the Judgment in the matter *Kiribati Seafood Company, et al. v. Port of Papeete et al.*" *Id.* Under the settlement, the insurance funds would first be deposited in an escrow, from which a check would be made to Kiribati. CP 3589. Kiribati was then required to endorse the check back to the escrow, which would use the money to pay MWW its share of the settlement. *Id.* Although Monitor attempts to draw suspicion on this arrangement, the superior court found that the structure of the settlement was reasonable because of the unusual circumstances involving Kiribati, its other creditors, the money in the registry, and the "history of money tracing problems and contempt orders related thereto." CP 3584.

The parties agreed to dismiss the claims and counterclaims after receiving payment. CP 3591. The agreement contained confidentiality and non-disparagement provisions. *Id.*

D. The Reasonableness Hearing

MWW filed a motion asking the superior court to conduct a reasonableness hearing under RCW 4.22.060 and to find the settlement reasonable. CP 3418–24. The reasonableness of a settlement is judged based on the well-known reasonableness factors articulated in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717–18, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), and *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487 (1991). MWW’s motion was supported by declarations from Mr. Moran, Mr. Neeleman, and Mr. Walsh. CP 3370–78, 3391–99, 3412–15.

Notice was given to Monitor, which successfully moved to intervene. VRP 3:20–4:4. Notice was also given to all of the parties who had appeared in the action, including the receiver and the estate of Kurt Ochsner. CP 3378.

Monitor filed a response to the reasonableness motion and a declaration signed by the adjuster, Ms. Walker. CP 3476–84, 3486–93. Monitor addressed only two of the nine *Glover/Chaussee* factors. It stated, first, that Monitor was “an interested party as [e]nunciated in the *Chaussee* factors when evaluating the reasonableness of a settlement as defined in *Water’s Edge Homeowners Ass’n v. Water’s Edge Associates*, 152 Wn.

App. 572, 585, 216 P.3d 1110 (2009).” CP 3477. Second, Monitor argued that the settlement was unreasonable “because it appears to be a collusive attempt by Moran to profit from his insurance policy and for Kiribati to extinguish its prior debt to Moran through Monitor’s insurance money and to the potential exclusion of other creditors.” *Id.* Monitor also asked the court to hold that the determination of the settlement’s reasonableness would not establish Monitor’s contractual obligation to pay insurance benefits. CP 3478. Coverage issues would remain for subsequent litigation between MWW and Monitor.

MWW filed a reply, with supplemental declarations from Mr. Walsh and Mr. Neeleman. CP 3494–501, 3514–16, 3519–22.

The superior court held the reasonableness hearing on June 8, 2012. VRP 1. Today, Monitor argues that, despite its own request to participate, the court erred in holding a reasonableness hearing in the first place. But that argument was never made below. Quite the opposite. Mr. Fogarty, representing Monitor, promptly pressed Monitor’s two arguments at the hearing: first, that “the settlement amount they’re going to propose—the settlement itself is not reasonable,” VRP 4:9–12, and, second, that the Court should not make a ruling on whether Monitor owed coverage, VRP 5:1–2. Mr. Fogarty added: “**I don’t have an issue dealing with the 550 number as reasonable or not.** The issue I have is if you

determine that 550 is reasonable, that you're not determining that it's reasonable for Monitor to pay." VRP 14:9–12 (emphasis added). The parties and the superior court easily agreed that the result of the reasonableness hearing would not establish coverage. VRP 5:9–10, 6:2–4, 15:16–23. It never does. *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 267, 199 P.3d 376 (2008) (stating that while a settlement found reasonable is the presumptive amount of damages, "the presumptive damages are not necessarily the covered damages").

After taking evidence and hearing argument from all parties, including Monitor, the superior court delivered a 10-page oral ruling finding the settlement reasonable. VRP 38:8–47:19. Eleven days later, the court entered written findings of fact and conclusions of law. CP 3581–93. The court found that the parties participated in two years of contentious litigation and that they engaged in good-faith, arm's length settlement discussions through a mediator. CP 3582–83. The court found the amounts to be paid under the settlement reasonable according to the *Glover/Chaussee* factors. CP 3583–84. Addressing the structure of the settlement, the superior court found:

The Court finds the structure of the settlement is reasonable. The Court finds that under the circumstances of this case with the appointment of a Receiver, the intervention of several creditors, the presentation of various judgments and filing of competing security interests, and

the history of money tracing problems and contempt orders related thereto, it is reasonable for the parties to structure the \$550,000 insurance payment into an escrow rather than have it paid into the registry of the court or directly to Kiribati. The Court finds it is reasonable for the MWW fee claim to be paid out of that escrow, under these circumstances where MWW has a priority attorney's fee lien claim on the proceeds. The Court record contains ample evidence, including numerous Receiver reports, regarding the funds currently in the Court's registry, amounts claimed by various creditors and the potential disposition of those funds.

CP 3584. The Court found no evidence of fraud or collusion. CP 3585. It found that "the settlement is beneficial to the interests of the other parties in the case who are not parties to the settlement agreement." *Id.* The Court also considered the damages; the merits of the liability theories; the merits of the defense theories; the relative faults; the risks and expenses of the imminently scheduled trial; and the parties' relative abilities to pay judgments against them. *Id.* It found that the evidence "weigh[ed] strongly in favor of a finding that the settlement is reasonable and prudent on both sides." *Id.*

E. The Timeliness Issue

Monitor argues that the trial court erred in finding that Monitor did not timely respond to a May 18, 2012 settlement communication. Appellants' Br. at 23–25. Monitor injected this issue into the reasonableness hearing by making a misleading presentation that "disturbed" the court.

Trying to prove collusion, which is one of the *Glover/Chaussee* factors, Monitor submitted a declaration signed by its adjuster, Ms. Walker, who testified that Monitor “was excluded” from settlement negotiations both during the April mediation and during the May negotiations that led up to the settlement. Ms. Walker stated:

4. The parties had a mediation on April 18, 2012. ... At the end of the April mediation session, Monitor understands that Moran reached a tentative settlement with Monitor’s consent for \$600,000 to Moran from the court registry money and \$400,000 from Monitor. Monitor was excluded from the negotiations that led to this tentative deal. At the time, Moran’s defense counsel had my personal cell phone number and was advised to call me. Notwithstanding, Monitor was excluded from the talks.

5. Monitor was again excluded from the settlement talks that led to the current proposed settlement of \$550,000. Unbeknownst to Monitor, Moran negotiated with Kiribati without Monitor’s knowledge, approval or input. At approximately 10 p.m. on May 22, 2012, apparently after the settlement talks had occurred and a proposed settlement reached, Moran then attempted to reach me by calling me on my personal cell phone at home, in an attempt to impose the settlement on Monitor.

CP 3487–88.

In reply to Monitor, MWW submitted a declaration by Mr. Walsh. CP 3514–16. Mr. Walsh explained that Ms. Walker, herself, made the decision not to attend the April 18 mediation in person. CP 3515 (“The decision was her choice and we did not object, but we also did not encourage her to participate by phone or discourage her from attending in

person. That was her choice.”). Mr. Walsh also explained that Monitor was in fact represented at the mediation by Mr. Fogarty as coverage counsel. *Id.* Mr. Walsh had several phone calls with Ms. Walker to discuss the negotiations. *Id.*

After the mediation, I sent her a detailed email providing her details of what had transpired. At the end of the mediation, which ended at approximately 10:30 p.m., Pacific Standard Time, I personally asked the mediator to speak with Paul Fogarty, coverage counsel for Monitor, and explain to him where the parties were in their negotiations. My understanding is that communication as made that night. In sum, I made every effort to communicate with Monitor during the mediation and ensure that it had what information I had as it became available to me.

CP 3515–16.

Mr. Walsh then turned to Ms. Walker’s statement that Monitor was excluded from the May settlement negotiations.

8. On May 18, 2012, I communicated the nature of the Court’s rulings on dispositive motions issued earlier that day and the impact on the parties’ risks at trial.

9. After the May 18, 2012 hearing, Kiribati transmitted an offer to us through the Mediator, Mr. Peterson. I sent that to Monitor the same day by email and received no response. From May 18, 2012 through May 22, 2012 when a tentative agreement was reached, which was stated in writing to be contingent on Monitor approval, both Mr. Moran and I attempted to communicate continually with Ms. Walker regarding the settlement communications that were taking place. We did not receive timely responses. Monitor’s first response was May 25, 2012.

10. For the reasons detailed above, Monitor was never “shut out” of settlement communications in this case.

CP 3516.

The superior court judge was understandably concerned by Ms. Walker's misleading declaration alleging that Monitor was excluded from negotiations. The following exchange occurred during the reasonableness hearing between the court and Monitor's counsel:

THE COURT: The declaration that doesn't tell me that you were present for the settlement negotiations, although in a different room, doesn't say anything about that, and it also doesn't say that, in fact, Mr. Walsh—according to Mr. Walsh's declaration, I'm asking you if this is correct, Ms. Walker asked if she could attend the April 18th mediation by phone. I consulted with the mediator's office and confirmed she'd be able to do so.

MR. FOGARTY: That's correct, your Honor.

THE COURT: So she had the ability to participate, and during the mediation had several phone calls with her to discuss negotiations. After mediation, I sent her a detailed E-Mail, providing her details. That doesn't sound like being excluded from negotiations.

VRP 26:9–22. Mr. Fogarty admitted that there were phone calls between Mr. Walsh and Ms. Walker, although Mr. Fogarty alleged that MWW negotiated with Kiribati beyond the settlement authority given by Monitor.

VRP 26:23–27:7. Mr. Fogarty also admitted that he participated in the mediation as Monitor's coverage counsel. VRP 27:8–9. “But I was not the person who was in any way, shape, or form handling the numbers back and forth, and—but I can tell you right now I was—I sat there for 13 hours.” VRP 27:10–13. Regarding the settlement negotiations that

occurred in May, Mr. Fogarty didn't deny that Monitor failed to respond until May 25, by which time Mr. Moran had already entered into the settlement without the insurer's consent. *E.g.*, VRP 28.

Monitor now argues that these facts had nothing to do with the reasonableness determination. As shown, Monitor put the issue before the court as part of its argument on reasonableness. At the hearing, it was Mr. Fogarty, again, who connected this discussion to one of the reasonableness factors, the possibility of collusion. VRP 24:8–17, 28:21–22.

In its oral findings, the superior court stated:

With regards to collusion, it is somewhat hard to countenance the insurer's arguments, given that I'm getting declarations from the insurer that apparently only told a portion of the picture, and I'm a little disturbed by that, that the insurer put forth a declaration that only told me part of the story, in terms of communications.

But having said that, what we know, even by this insurer's statements today, is that the insurer was given an opportunity to participate in both mediations, the claims adjuster, Ms. Temperance Walker, I guess she's the insurance adjuster, the representative of the insurer, had the opportunity to come out here personally, but chose to make herself available by phone.

...

So I think it's completely without merit for the insurer to claim that they were not able to participate in these negotiations and were somehow shut out.

VRP 45:8–21, 46:13–15. The superior court's written findings, entered 11 days later, provide:

Monitor's coverage counsel, Paul Fogarty, attended the entire April 18, 2012 mediation in person. Ms. Walker had the opportunity to attend the mediation in person but chose to attend by phone, which was a business risk Monitor chose to take. The claim that Monitor was "shut out" from settlement negotiations is without merit. The Court finds no basis to find that the settlement agreement was a result of bad faith, collusion, or fraud.

CP 3585. As a footnote to this, the superior court found: "Kiribati's settlement offer of May 18 was timely and almost immediately communicated to Monitor; Monitor did not timely respond." *Id.*

IV. ARGUMENT

A. Monitor challenges just one factual finding on the basis of insufficient evidence. All other findings are verities on appeal.

Monitor assigns error to the superior court's order granting MWW's motion to determine reasonableness and to four findings of fact. Appellants' Br. at 1–2. But Monitor challenges just one finding—that it failed to timely respond to the May 18 settlement communication—on the basis of insufficient evidence. *Id.* at 23. In support of its other assignments of error, Monitor simply argues that the superior court erred in holding a reasonableness hearing in the first place. *Id.* at 1–2. As discussed below, there is ample evidence for the superior court's finding that Monitor failed to timely respond to the settlement communication. But it is significant that Monitor does not argue that any of the court's other findings is lacking in evidence. The failure by an appellant to challenge the

sufficiency of the evidence “renders the trial court’s findings of fact verities on appeal.” *Nordstrom Credit, Inc. v. Dep’t of Revenue*, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993).

Monitor sprinkles its brief with innuendo against its insureds, all but accusing MWW of trying to steal from Monitor. Monitor says it’s improper for MWW to receive money from Kiribati in settlement of the fee claims, when Monitor is paying money to Kiribati in settlement of the malpractice counterclaims. Monitor calls the settlement a “nullity,” suspicious, and an “impermissible ‘pass through’ arrangement.” Appellants’ Br. at 4, 6, 11. The implication is that Monitor believes that MWW should have given up its fee claims in the effort to settle the malpractice counterclaims. Otherwise, Monitor argues, MWW is improperly benefiting from the Monitor insurance.

There are two problems with Monitor’s approach, and both of them speak volumes about the manner in which Monitor views its relationship to insureds. First, the purpose of insurance is to benefit the insured. People buy liability insurance so that they do not have to lose their personal assets if they get sued. When an insurance company pays a claim and the insured does not lose personal assets, then the purpose of insurance has been achieved. The approach taken by Monitor seeks to place the risk of loss back onto the insured. That risk, of course, was

assumed by Monitor when it accepted the insurance premium.

Second, Monitor's accusation that MWW is taking something to which it is not entitled actually masks Monitor's attempt to take something from MWW that does not belong to Monitor—that is, MWW's fee claims against Kiribati. Having purchased the insurance, MWW had the right to have Monitor pay to settle the malpractice counterclaims. And having performed the legal work, MWW had the right to obtain payment from Kiribati. Consequently, there is nothing nefarious about a settlement in which (1) Monitor, the insurer, pays Kiribati for the malpractice counterclaims consistent with the terms of coverage; (2) Kiribati pays MWW for the fee claims; and (3) a net payment to MWW results. The settlement is simply a fair and accurate reflection of the parties' rights and responsibilities.

Monitor admits that MWW had the professional liability policy. Appellants' Br. at 2. If a jury had returned a verdict finding MWW liable to Kiribati for malpractice, then Monitor admits that the remaining policy limits would have been available to pay that liability. *Id.* at 9.² Monitor does not challenge the evidentiary sufficiency for the superior court's

² Monitor admits this fact in the following manner: "Payment for any judgment on the malpractice claim would come either from the remaining limits of the insurance or from some other source." Appellants' Br. at 9. "From some other source" is the insurer's euphemism for Mr. Moran's personal assets.

finding that \$550,000 was a reasonable settlement of Kiribati's counterclaims, CP 3583–84; the court's finding that \$550,000 was a reasonable settlement of MWW's fee claims, CP 3583; the court's finding that the settlement's method of payment, utilizing the escrow, was reasonable, CP 3584; the court's finding that the reasonableness factors weighed "strongly in favor of a finding that the settlement is reasonable and prudent on both sides," CP 3585; the court's finding that "both parties to the settlement have competently investigated and prepared their cases," *id.*; or the court's finding "that the settlement was negotiated in good faith, at arm's length through a competent mediator and there is no evidence of collusion or fraud," *id.*

Monitor's appeal is doomed by the facts.

B. Monitor failed to preserve any of the issues for review.

Monitor raises two issues: (1) Did the superior court have the power to hold a reasonableness hearing? (2) Did the superior court err in finding that Monitor failed to timely respond to a settlement communication? Neither issue is reviewable.

1. Monitor failed to challenge the superior court's power to hold a reasonableness hearing. This Court should refuse to review the issue under RAP 2.5(a).

Under RAP 2.5(a):

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party

may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

“Rule 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); see *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (“An issue, theory or argument not presented at trial will not be considered on appeal.”). The rule serves two important purposes: It promotes judicial economy. *Scott*, 110 Wn.2d at 685 (“The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.”). And it promotes basic fairness. 2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.5 author’s comments (7th ed.) (“[T]he opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level,

rather than facing newly-asserted error or new theories and issues for the first time on appeal.”).

Monitor never argued that the superior court lacked the power to conduct the reasonableness hearing. Monitor voluntarily participated in the hearing and conceded that the court had authority to evaluate the settlement’s reasonableness. *See supra* Part III.D.

When a party fails to preserve an issue by raising it in the superior court, RAP 2.5(a) states that the appellate court may consider it in three circumstances: if the superior court lacked jurisdiction; if the appeal involves the failure to establish sufficient facts upon which relief can be granted; or if the superior court’s decision constitutes manifest error affecting a constitutional right. RAP 2.5(a). Monitor does not discuss RAP 2.5(a). The case does not fit into any of the exceptions. To begin with, the superior court unquestionably had jurisdiction over this matter. *See* RCW 2.08.010. Second, Monitor challenges just one finding—which it calls irrelevant to the reasonableness analysis—for allegedly insufficient evidence. Appellants’ Br. at 23. Monitor doesn’t argue that the ultimate reasonableness determination was lacking in evidentiary support. Finally, Monitor identifies no manifest error committed by the superior court nor any constitutional right infringed upon by the superior court. Monitor cites no constitutional provision in its brief.

This Court should hold that Monitor did not preserve its argument that the superior court erred in conducting a reasonableness hearing. The Court need not address the merits of that argument.

2. Review of both issues presented in Monitor’s brief is precluded by the invited-error doctrine.

This case calls for a straightforward application of the invited-error doctrine. “The original goal of the invited error doctrine was to prohibit a party from setting up an error at trial and then complaining of it on appeal.” *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (quotation and brackets omitted). Today, this doctrine applies regardless of whether the appellant acted negligently or in bad faith. *Id.*

Although Monitor now argues that the court should never have held a reasonableness hearing, Monitor voluntarily intervened in, and took full advantage of, the proceedings. Monitor asked the court to carve out coverage issues, which the court did. But all along Monitor conceded that it was proper for the Court to pass on the settlement’s reasonableness. At the hearing, Mr. Fogarty stated on behalf of Monitor: “**I don’t have an issue dealing with the 550 number as reasonable or not.** The issue I have is if you determine that 550 is reasonable, that you’re not determining that it’s reasonable for Monitor to pay.” VRP 14:9–12 (emphasis added). What could be clearer than this invitation to rule on the

settlement's reasonableness?

Monitor also argues that the superior court erred in entering a finding that it, Monitor, failed to timely respond to a settlement communication. But it was Monitor who injected this issue into the proceedings by submitting a declaration from its adjuster claiming that Monitor "was excluded" from settlement negotiations. *See supra* Part III.E. Monitor used that declaration to support its argument that MWW and Kiribati colluded. *Id.* In reply, MWW submitted a declaration from Mr. Walsh, which served as the basis for the superior court's finding that Kiribati's settlement offer of May 18, 2012, was timely and almost immediately communicated to Monitor and that Monitor did not timely respond. CP 3585. The bottom line is that Monitor raised this issue and asked the superior court to rule on it.

But all of that was before the superior court rejected Monitor's arguments and found the settlement reasonable. Having lost, Monitor reversed course on appeal, challenging the superior court's authority to hold a reasonableness hearing and arguing that Monitor's participation in settlement negotiations was irrelevant to the reasonableness analysis. This is gamesmanship, plain and simple. It consumes time, wastes judicial resources, and is an affront to public policy favoring the finality of judgments. Review of the issues articulated in Monitor's brief is forbidden

by the doctrine of invited error.

3. Monitor failed to preserve its objection to the admissibility of MWW's reply declarations.

Monitor states that the superior court should not have considered Mr. Walsh's reply declaration, filed to address Monitor's argument that it "was excluded" from settlement negotiations. Appellants' Br. at 2; *see also id.* at 24. But Monitor did not object to the declaration or move to strike it. ER 103; *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000) ("Without an objection, an evidentiary error is not preserved for appeal."). As a result, the issue of the reply declaration's admissibility is not before this Court.

C. It was proper for the Court to hold a reasonableness hearing.

Monitor now argues that the superior court lacked authority to hold a reasonableness hearing. But the fact of the matter is that Monitor chose to involve itself in the proceeding. It voluntarily intervened. VRP 3:20–4:4. It asserted its status as an interested party under the cases establishing the right to a reasonableness hearing. CP 3477. And it requested affirmative relief. *Id.* Having chosen to involve itself in the reasonableness hearing, Monitor should not now be heard to argue that the superior court should never have done it in the first place.

Reasonableness hearings are governed by RCW 4.22.060. *See Bird*, 175 Wn.2d at 767. The interpretation of a statute is a question of law

that this Court decides de novo. *Ervin*, 169 Wn.2d at 820.

1. Reasonableness hearings are an entrenched part of Washington insurance law.

“After discovery reveals the strengths and weaknesses of the parties’ respective positions, the vast majority of liability actions are settled without trial.” *T & G Constr.*, 165 Wn.2d at 263–64. An insured defendant may independently negotiate a pretrial settlement if his liability insurer refuses in bad faith to settle the plaintiff’s claims. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). Moreover, an insured who is defended under a reservation of rights always has the right to “make the ultimate choice regarding settlement.” *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 389, 715 P.2d 1133 (1986). The amount of the settlement will be the presumptive measure of harm in a later bad-faith or coverage case, provided the settlement is found reasonable under the nine-factor test in *Glover*, 98 Wn.2d at 717–18, and *Chaussee*, 60 Wn. App. at 512. See *T & G Constr.*, 165 Wn.2d at 266–67.

The nine *Glover/Chaussee* criteria are: (1) the claimant’s damages; (2) the merits of the claimant’s liability theory; (3) the merits of the settling party’s defense theory; (4) the settling party’s relative fault; (5) the risks and expenses of continued litigation; (6) the settling party’s ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the

claimant's investigation and preparation of the case; and (9) the interests of the parties not being released. *Glover*, 98 Wn.2d at 717. No one factor controls, and the "trial judge faced with this task must have discretion to weigh each case individually." *Id.* at 718.

The reason for this process is that an insurer who acts in bad faith in either failing to defend or failing to settle a claim exposes the insured to a potentially devastating judgment. As a matter of public policy, an insured in that position ought not be "required to wait until after the storm before seeking refuge." *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 629, 245 P.2d 470 (1952) (quotation omitted); *see also Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002) ("An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away.").

The superior court judge in the underlying case conducts a reasonableness hearing under RCW 4.22.060. *Besel* stated: "[T]he *Chaussee* criteria protect insurers from excessive judgments especially where, as here, the insurer has notice of the reasonableness hearing and has an opportunity to argue against the settlement's reasonableness." *Besel*, 146 Wn.2d at 739. In *Bird*, 175 Wn.2d at 767, the Supreme Court "explicitly approve[d] the application of RCW 4.22.060" to

reasonableness hearings involving a settlement between a plaintiff and an insured defendant.

Below, Monitor argued that the settlement was collusive. *E.g.*, CP 3480. The superior court found otherwise. CP 3585. Insurers have often argued that settlements negotiated by their insureds are susceptible to fraud and collusion. The argument was made in *Besel*, where the issue was whether a settlement found reasonable in a reasonableness hearing should serve as the presumptive measure of damages in a subsequent bad-faith case. The argument was also made in *Bird*, where the insurer argued that superior court judges should not conduct equitable RCW 4.22.060 hearings for such settlements. The argument failed in *Besel* and *Bird*, and it should fail here. *Chaussee*, *Besel*, and *Bird* all state that the purpose of the reasonableness hearing is to guard against fraud and collusion and to protect insurers from excessive judgments. *Bird*, 175 Wn.2d at 765–66; *Besel*, 146 Wn.2d at 738 (“This approach promotes reasonable settlements and discourages fraud and collusion.”); *Chaussee*, 60 Wn. App. at 512.

2. Reasonableness hearings are commonly used to evaluate settlements in other contexts as well.

Monitor attaches significance to the fact that the settlement did not call for a covenant judgment. “Covenant judgment” is shorthand for a settlement involving a stipulated judgment against the insured, a covenant

not to execute against the insured's personal assets, and an assignment to the claimant of the insured's coverage and bad-faith claims against the insurer. *Bird*, 175 Wn.2d at 764–65. According to Monitor, there is something unique about a covenant-judgment settlement that makes a reasonableness hearing appropriate only for that specific kind of settlement. But reasonableness hearings are actually very common, and trial court judges routinely use them to evaluate settlements in many different contexts not limited to insurance or covenant judgments.

Reasonableness hearings occur in the contribution setting, using the same statute and the same *Glover/Chaussee* factors as in the insurance setting. RCW 4.22.060; *Glover*, 98 Wn.2d at 717. In class actions, CR 23(e) has for more than 40 years required “approval of the court” for settlements. The test the trial judge applies to a class-action settlement is basically the same as the test used in the insurance and contribution settings. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188–89, 35 P.3d 351 (2001) (articulating criteria that apply to class-action settlements, including the likelihood of success by the plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; and the presence of good faith and the absence of collusion). Trial courts also hold reasonableness hearings for settlements involving a claim by a guardian, a receiver, or a personal representative. SPR 98.08W. As

discussed, the litigation between MWW and Kiribati involved the receiver for Kiribati, *supra* Part III.A, and the estate of Kurt Ochsner, *supra* Part III.B. The reasonableness hearing below therefore occurred not just under RCW 4.22.060, *Besel*, and *Bird*, but according to SPR 98.08W, too. This was effectively conceded by Monitor during the hearing. Monitor had suggested that the receiver was not a part of the settlement, which led the court to ask, incredulously, “What do you mean, why isn’t the receiver part of the settlement?” VRP 29:14–15. Monitor was forced to concede: “Apparently, there’s \$1.3 million in the registry of the court, and there is a receiver who apparently is administering or trying to resolve claims against Mr. Kiribati and gathering money. Well, so theoretically he—he or she is—would be an interested party.” VRP 29:16–21.

In each of the above scenarios, the reasonableness hearing provides a forum for interested parties to oppose the settlement with evidence and argument. The goal is always to take into consideration and protect the interests of the individuals who are affected by the settlement, whether they signed the settlement or not. *E.g.*, *Glover*, 98 Wn.2d at 717 (identifying as a factor the interests of the parties not being released). Reasonableness hearings promote settlement, efficiency, certainty, and compensation of claimants. In all settings, the reasonableness inquiry presents a matrix of legal and factual considerations that the trial judge in

the underlying action is best suited to evaluate. MWW and Kiribati—and, indeed, Monitor—had compelling reasons to ask the superior court to convene the reasonableness hearing. The alternative would have meant uncertainty for all of the parties and piecemeal litigation involving the insurer, the receiver, and all those who claimed an interest in Kiribati’s assets. It bears repeating that all parties below, including Monitor, voluntarily chose to participate in the reasonableness hearing.

3. RCW 4.22.060 applies to a settlement without a covenant judgment.

In no context in which a trial court conducts a reasonableness hearing is a covenant judgment required. Monitor cites no case that supports its novel argument. *Evans v. Continental Casualty Co.* is the pathmarking case holding that an insurer who acts in bad faith is liable for the amount of a reasonable settlement. That case didn’t involve a covenant judgment. The settlement called for payment, releases, and dismissals with prejudice. *Evans*, 40 Wn.2d at 624. The Supreme Court held:

That a reasonable settlement made in good faith has many of the attributes of a judgment was recognized by the United States Supreme Court in the *St. Louis Dressed Beef* case, *supra*, when, speaking through Mr. Justice Holmes, it said ‘a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.’

Id. at 630. To repeat, the Court stated that “a reasonable settlement made in good faith has many of the attributes of a judgment.” *Id.*

True, *Bird* observed that many settlements involve covenant judgments. 175 Wn.2d at 764–65. But nothing in *Bird* or any other case holds that that is the only kind of settlement that can be evaluated in a reasonableness hearing. To the contrary, *Bird* “explicitly” held that RCW 4.22.060 governs reasonableness hearings conducted in the insurance context. *Bird*, 175 Wn.2d at 767. RCW 4.22.060 (emphasis added) reads:

(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. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. 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. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the 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.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

The statute applies to settlements that include **either** “a release, covenant not to sue, covenant not to enforce judgment, **or** similar agreement.”

RCW 4.22.060(1) (emphasis added). The statute simply requires a settlement—not a stipulated judgment, a covenant not to execute against personal assets, or an assignment of coverage and bad-faith claims. The settlement here has a release, which is one of the examples given in RCW 4.22.060(1). CP 3429–30.

Monitor’s attention is on language in the statute that provides that a “hearing shall be held on the issue of the reasonableness of the amount to be paid.” Appellants’ Br. at 21. According to Monitor, the settlement between MWW and Kiribati doesn’t require an amount to be paid. *Id.* Monitor is wrong. If no one were paying anyone under this settlement, then Monitor wouldn’t be appealing the case. The settlement requires a payment to Kiribati from MWW’s insurance. It requires a payment to MWW from the money that Kiribati receives in settlement of the malpractice counterclaims.

The settlement agreement conceivably could have provided that Kiribati's payment would have to come from the money already deposited in the court's registry instead of the money received in settlement of Kiribati's counterclaims. That wouldn't have made one bit of difference for Monitor, but it would have made matters much more time-consuming, expensive, and uncertain for the insured. The superior court found:

The Court finds the structure of the settlement is reasonable. The Court finds that under the circumstances of this case with the appointment of a Receiver, the intervention of several creditors, the presentation of various judgments and filing of competing security interests, and the history of money tracing problems and contempt orders related thereto, it is reasonable for the parties to structure the \$550,000 insurance payment into an escrow rather than have it paid into the registry of the court or directly to Kiribati. The Court finds it is reasonable for the MWW fee claim to be paid out of that escrow, under these circumstances where MWW has a priority attorney's fee lien claim on the proceeds. The Court record contains ample evidence, including numerous Receiver reports, regarding the funds currently in the Court's registry, amounts claimed by various creditors and the potential disposition of those funds.

CP 3584. Monitor does not challenge the evidentiary sufficiency for these findings. They are, therefore, verities on appeal. *Nordstrom Credit*, 120 Wn.2d at 941.

It is not improper for a settlement to identify the asset to be used for payment. Nothing in such an arrangement precludes a court from holding a reasonableness hearing. In this respect, the settlement between

MWW and Kiribati is identical to a covenant-judgment settlement. As *Besel*, 146 Wn.2d at 737, *Bird*, 175 Wn.2d at 765, and *Safeco Insurance Co. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992), all explain, a covenant-judgment settlement is simply an agreement to seek recovery only from a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured. The settlement between MWW and Kiribati is no different. Washington law resoundingly rejects insurers’ argument that an insured is not harmed when the settlement does not require him to pay out of his personal assets. “[W]hen a carrier acts in bad faith, ‘it is in no position to argue that the steps the insured took to protect himself [or herself] should inure to the insurer’s benefit.’” *Besel*, 146 Wn.2d at 737 (quoting *Greer v. N.W. Int’l Ins. Co.*, 109 Wn.2d 191, 204, 743 P.2d 1244 (1987)).

4. Monitor’s argument damages insureds and weakens the reasonableness-hearing procedure.

Monitor’s argument—that an insured does not have the protection of the reasonableness-hearing procedure unless he enters into a covenant judgment—would leave many insureds whose carriers have acted in bad faith with no palatable remedy against insurer abuses. A judgment can be harmful to the insured because it exposes the insured’s personal assets to execution but also because of the harm it causes to an insured’s

professional reputation. If Monitor's argument were correct, the insured could either (1) proceed to trial, where he faces the potential of a devastating judgment; or (2) take advantage of the reasonableness-hearing procedure, but only if the insured agrees to liability through the entry of a publicly filed judgment against him. Monitor's argument would defeat the purpose of the reasonableness-hearing procedure and weaken this powerful disincentive against insurer bad faith.

After the summary-judgment hearing on May 18, 2012, MWW faced a trial just three weeks away and exposure to a judgment over \$2.5 million with an insurance policy that had been significantly depleted from its \$1 million limit. CP 3583. MWW expected "its expenses and costs of trial preparation and a three-week trial to be around \$180,000," CP 3414, meaning that the coverage available to satisfy an adverse verdict was plummeting with every passing day. The uncertainty of trial remained, and so did the risk of MWW's exposure well beyond its insurance limits. *Id.* The parties were about to embark on an expensive trip to Boston for a deposition. CP 3397. Meanwhile, as the superior court found, Monitor was failing to respond to settlement communications from its insured. CP 3516. Where would MWW and insureds like it be without the reasonableness-hearing procedure? The Supreme Court has said that an insured is not "required to wait until after the storm before seeking

refuge.” *Evans*, 40 Wn.2d at 629 (quotation omitted); *see also VanPort Homes*, 147 Wn.2d at 765 (“An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away.”). But that’s exactly what Monitor’s argument would do.

5. Monitor’s other arguments are meritless.

- a. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 250 P.3d 121 (2011), does not support Monitor’s position.**

Monitor cites the *Unigard* case for the proposition that a superior court should not conduct a reasonableness hearing unless the settlement includes a covenant-judgment provision. Appellants’ Br. at 14–15. *Unigard* does not so hold. That case did not even involve a settlement that fixed the amount of the defendant’s liability. Instead, the settlement provided that the defendant would assign his rights against the insurer to the plaintiff, that he would pay \$20,000, and that the claims against him would survive to the extent that they could be satisfied through the assignment of rights. 160 Wn. App. at 917. No reasonableness hearing occurred because no one requested it and the parties did not agree to the value of the claims. *Id.* at 917, 923. The case therefore did not implicate the holdings of *Evans* and *Besel* that an insurer is liable for the amount of a reasonable settlement, and the case did not implicate the holdings in

Besel and *Bird* sanctioning the use of reasonableness hearings. *Unigard*, 160 Wn. App. at 923 (“Because [the parties] did not settle on an amount that Engelmann suffered in damages, the determination of damages was a task for the jury.”). There was no settlement value to be evaluated for reasonableness.

b. The settlement is supported by ample consideration.

Monitor argues that Kiribati did not receive any consideration apart from dismissal of MWW’s claims. Appellants’ Br. at 17. Monitor also labels the settlement “is a nullity.” *Id.* at 11. Both characterizations are incorrect.

The superior court found that MWW’s claims against Kiribati were “fully secured by a priority attorney’s fee lien in funds currently on deposit in the Court’s registry.” CP 3583. In the settlement, MWW agreed to release all of its claims against those funds. CP 3589. The fact that the settlement required Kiribati to pay its \$550,000 share of the settlement with the money received from the settlement escrow meant that \$550,000 that would otherwise have been withdrawn from the money then existing in the court’s registry was allowed to remain in the registry for the benefit of Kiribati and its other creditors. As Mr. Neeleman stated in his declaration describing the litigation and settlement negotiations,

“Kiribati’s members were anxious to ensure that they would realize a net recovery from the Court registry.” CP 3394–95. Kiribati also received a satisfaction of judgment for \$28,395.43, which was a separate asset owned by MWW and Mr. Moran. CP 3589; *see also* CP 2378–84, 2452–53. All of this is good and valuable consideration.

As for Monitor’s argument that the settlement is null, there is no authority presented for the proposition that the settlement is unenforceable. It is a valid contract between MWW and Kiribati.

c. MWW did not have an incentive to inflate the amount paid to settle Kiribati’s counterclaims.

Monitor argues that MWW had an incentive to inflate the amount of its own liability to Kiribati. Appellants’ Br. at 18 (“Because the amount of the settlement here is the exact amount that MWW intends to be paid, MWW’s interest was best served to inflate the amount of the settlement as much as possible.”). The suggestion, again, is that such a settlement is collusive. This is factually incorrect. The superior court found that “this matter progressed through more than two (2) years of contentious litigation by all parties leading to this settlement agreement.” CP 3582–83. It also found that the parties “engaged in good faith, arm’s length settlement discussions through the mediator and came to a tentative settlement of the remaining claims in this matter.” CP 3583. The court

found that \$550,000 was a reasonable settlement of the malpractice counterclaims. *Id.* Monitor does not challenge the evidentiary sufficiency of any of these findings. They are verities on appeal. *Nordstrom Credit*, 120 Wn.2d at 941.

d. Monitor received sufficient notice.

In passing, Monitor states that it received “minimal notice of the hearing,” allegedly compounded by “the court’s inexplicable denial of Carolina’s request to conduct any discovery.” Appellants’ Br. at 12. The reasonableness-hearing statute, RCW 4.22.060, requires at least five days’ written notice. Monitor received eight. Appellants’ Br. at 4. Whether to allow further discovery in advance of a reasonableness hearing is committed to the superior court’s discretion. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379–80, 89 P.3d 265 (2004) (affirming the superior court’s denial of discovery before the reasonableness hearing). Because Monitor does not assign error to the amount of notice received or the superior court’s ruling on discovery, Appellants’ Br. at 1–2, and because Monitor presents no pertinent authority or analysis, *id.* at 13–22, these issues are not before the Court. They should be disregarded.

e. It makes no difference that the lawsuit involved claims and counterclaims.

Monitor notes that the underlying litigation involved claims and

counterclaims and that settlement addressed both. It argues, “Unlike in the covenant judgment context, it would be unfair on these facts to treat the ‘settlement amount’ as the measure of MWW’s liability to Kiribati for liability insurance purposes.” Appellants’ Br. at 20. Elsewhere, Monitor argues that MWW’s liability “was not the primary driver of the settlement because it **was the plaintiff**.” *Id.* at 12. Monitor’s argument, again, reveals Monitor’s view of the relationship between it and its insureds. When an insured is sued on a counterclaim, and the counterclaim is covered under the insurance policy, does the insurer not owe a duty to defend? Does the insurer not owe the insured a duty of good faith? Does the insurer’s bad faith failure to settle not expose the insured to a devastating judgment? Do the insurer’s duties and the insured’s remedies depend on the fortuity of which side sued the other first?

There is nothing unusual about litigation involving claims and counterclaims. And there is nothing unusual in having competing claims of approximately equal value. Had the case proceeded to trial, the jury could have returned verdicts in favor of both sides. Monitor would have been required to pay MWW’s liability to Kiribati. MWW would then have had the ability to execute its judgment against the asset that Kiribati had just acquired—the money from Monitor. It is impossible to say whether or not the settlement predicted, beyond a shadow of a doubt, exactly the

verdict that the jury would have returned. No legal authority requires the settling parties to prove such a thing. It suffices that the parties reached a settlement of the Kiribati counterclaims that the superior court judge—who presided over the long and hard-fought litigation—found reasonable applying the nine *Glover/Chaussee* factors. CP3583.

D. The superior court correctly found that Monitor failed to timely respond to the May 18 settlement communication.

One of the *Glover/Chaussee* factors is whether there is any evidence of bad faith, collusion, or fraud. *Glover*, 98 Wn.2d at 717. Below, Monitor argued that the settlement was the result of collusion and attempted to support this argument with a declaration from the adjuster, Ms. Walker, that Monitor “was excluded from the settlement talks that led to the current proposed settlement of \$550,000” in May 2012. CP 3487. As the superior court observed in its oral ruling, Ms. Walker’s declaration “only told a portion of the picture, and I’m a little disturbed by that, that the insurer put forth a declaration that only told me part of the story, in terms of communications.” VRP 45:11–14.

Specifically addressing Monitor’s collusion argument, the superior court found that “it’s completely without merit for the insurer to claim that they were not able to participate in these negotiations and were somehow shut out.” VRP 46:13–15. In written findings delivered 11 days later, the

superior court found:

Ms. Walker had the opportunity to attend the mediation in person but chose to attend by phone, which was a business risk Monitor chose to take. The claim that Monitor was “shut out” from settlement negotiations is without merit. The Court finds no basis to find that the settlement was the result of bad faith, collusion, or fraud.

CP 3585. As a footnote to this passage, the superior court found that “Kiribati’s settlement offer of May 18 was timely and almost immediately communicated to Monitor; Monitor did not timely respond.” *Id.* The footnote was amply supported by a declaration signed by MWW’s defense counsel, Mr. Walsh. CP 3515–16.

Monitor challenges the superior court’s last finding above, the footnote. Monitor first argues that its conduct “is an issue germane to coverage litigation, not a reasonableness hearing.” Appellants’ Br. at 23. As discussed, this argument is barred by the invited-error doctrine. *See supra* Part IV.B.2. The finding directly addresses Monitor’s collusion argument and Ms. Walker’s declaration, which go to the reasonableness of the settlement under *Glover* and *Chaussee*.

Monitor’s second argument is that the finding “was not supported by either admissible or sufficient evidence.” Appellants’ Br. at 23.

Incorrect again. Mr. Walsh’s declaration stated:

9. After the May 18, 2012 hearing, Kiribati transmitted an offer to us through the Mediator, Mr.

Peterson. I sent that to Monitor the same day by email and received no response. From May 18, 2012 through May 22, 2012 when a tentative agreement was reached, which was stated in writing to be contingent on Monitor approval, both Mr. Moran and I attempted to communicate continually with Ms. Walker regarding the settlement communications that were taking place. We did not receive timely responses. Monitor's first response was May 25, 2012.

10. For the reasons detailed above, Monitor was never "shut out" of settlement communications in this case.

CP 3516. Mr. Fogarty admitted that he attended the entirety of the mediation on behalf of Monitor. VRP 27:8–9. The superior court's finding easily passes appellate review. *Water's Edge*, 152 Wn. App. at 584 (stating "that a reasonableness hearing necessarily involves factual findings which we will not disturb on appeal if substantial evidence supports them").

Finally, Monitor argues—in passing and ever so briefly—that it "never had a meaningful opportunity to respond" to Mr. Walsh's declaration before the hearing. Appellants' Br. at 23. MWW filed Mr. Walsh's declaration in reply to an argument made by Monitor. The declaration is directly responsive to Ms. Walker's declaration. Monitor didn't move to strike the declaration. It didn't object to the superior court's consideration of it either during the reasonableness hearing or in the 11 days between the reasonableness hearing and the entry of the superior court's written findings of fact and conclusions of law. Monitor

did not, as it clearly could have done, seek telephonic testimony by Ms. Walker if there was anything inaccurate about Mr. Walsh's declaration. In response to questioning by the court, Mr. Fogarty did not deny the details of Mr. Walsh's declaration. VRP 26–28. If there had ever been any vitality Monitor's argument, Monitor waived it, as discussed above. ER 103; *Davis*, 141 Wn.2d at 850 (“Without an objection, an evidentiary error is not preserved for appeal.”).

The superior court gave Mr. Fogarty ample opportunity during argument to address specific points from the declaration, and he did so. The court took Mr. Fogarty's responses into consideration and weighed them before delivering her decision. In any event, the purpose of a reply is to address facts and arguments presented in response to a motion. That's what occurred below. There is no rule that a court must disregard declarations filed in reply.

V. CONCLUSION

Having voluntarily petitioned to participate in the reasonableness hearing, Monitor should not now be heard to complain about the results. That is especially true when Monitor's primary argument, collusion, rests on an assertion that it was shut out of settlement discussions. That assertion was false and found to be so by the superior court. Monitor's arguments in this appeal were not preserved and are, in any event, easily

rejected under settled law.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

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