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NO. 38411-6-II

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SEAL OF THE COURT OF APPEALS
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II

RSUI INDEMNITY COMPANY,
Intervenor Below and Appellant,

v.

VISION ONE, LLC,
Plaintiff and Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC.,
Third-Party Defendant and Respondent.

and

MCNAUL EBEL NAWROT & HELGREN, PLLC, MICHAEL D.
HELGREN and DAVID LINEHAN,
Appellants.

**CONSOLIDATED REPLY OF RSUI INDEMNITY COMPANY,
MCNAUL EBEL NAWROT & HELGREN, PLLC, & INDIVIDUAL
ATTORNEYS MICHAEL D. HELGREN AND DAVID LINEHAN**

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INTRODUCTION

Berg and Vision should have disclosed their email negotiations, secretly exchanged just a few weeks before the reasonableness hearing. The withheld emails plainly stated that Berg “countered” Vision’s \$2 million demand by offering \$1.3 million more of RSUI’s money, provided that “Berg receive 33% of any recovery from RSUI” CP 231. They then secretly settled at the higher number. Whatever their after-the-fact rationalizations might be, their undisclosed emails were plainly relevant evidence at the reasonableness hearing. Berg and Vision not only failed to disclose them, but even denied their existence. This misconduct warranted granting RSUI’s CR 60(b) motion to show cause why the trial court’s prior reasonableness determination should not be vacated for further discovery and an evidentiary hearing.

But even if this Court disagrees regarding the CR 60(b) motion, it should nonetheless strike down the CR 11 sanctions as unsupported and excessive. If this Court would have affirmed a ruling setting aside the reasonableness determination, then the sanctions are unsupported because the motion was well grounded in fact and warranted by existing law. In any event, \$62,750 in fees on an allegedly “baseless” motion is excessive.

REPLY RE STATEMENTS OF THE CASE

A. Berg's & Vision's heavy reliance on counsel's arguments during the reasonableness and CR 60(b) hearings is as improper as it is telling.

Berg's and Vision's response briefs cite to and rely heavily upon counsel's arguments during the reasonableness and CR 60(b) hearings. Berg BR 3, 5-6, 8-9, 23-26, 30, 34, 43-44; Vision BR 4, 9, 22-23. This is both improper and telling. It is improper because counsel's arguments are not evidence.

It is telling because it shows they do not have evidence to blame RSUI and its counsel for challenging their secret settlement and for alleging improper conduct. Relying instead on their counsel's arguments during those hearings, Berg and Vision essentially blame RSUI and its counsel for not being clairvoyant. RSUI could not know before the September 2008 reasonableness hearing about secret emails undisclosed before that hearing. RSUI also could not know of Berg and Vision's future (and ever-evolving) explanations of their later-discovered secret email exchange. Yet as they did below, Berg and Vision try to justify the trial court's rulings based not on evidence, but on explanations first made during the CR 60/CR 11 proceedings that took place in 2010. That is as impermissible as it is unjust.

B. The parties essentially agree on the key facts, but Berg and Vision equivocate on the details.

The parties essentially agree on the key facts. For instance, there is no dispute on the following:

- ◆ Admiral defended Berg under a reservation of rights;
- ◆ RSUI adopted Admiral's reservation and asserted two additional exclusions under its own policy;
- ◆ RSUI attended the February 2008 mediation;
- ◆ a few weeks after that mediation, Vision demanded \$2.5 million to settle the case (\$1 million from Admiral, \$1 from RSUI, and \$500,000 from Berg);
- ◆ Berg told RSUI that it had no interest in settling for these amounts;
- ◆ RSUI thereafter repeatedly asked Berg to respond regarding the coverage issues;
- ◆ many months passed with no response from Berg;
- ◆ RSUI suddenly received three days' notice of a September 2008 reasonableness hearing.

Compare BA 7-11, 29 with Berg BR 4-6, 8 and with Vision BR 5.

Similarly, there is no dispute that

- ◆ at the reasonableness hearing, the trial court gave RSUI a weekend to discover evidence of collusion; and
- ◆ Berg's and Visions' counsel provided nothing to RSUI over that weekend.

Compare BA 12-14, 29 with Berg BR 8-9 and with Vision BR 8-9.

And there is no dispute that

- ◆ on the following Monday, Vision and Berg unequivocally told the trial court that they had no additional information or documents relevant to the reasonable hearing.

Compare BA 14-15, 29 with Berg BR 9 and Vision BR 8-10.

Similarly undisputed is that

- ◆ in August 2009, RSUI discovered in the federal coverage action that Berg's and Vision's counsel had secretly exchanged undisclosed emails a few weeks before the reasonableness hearing;
- ◆ in the first of these undisclosed emails, Vision demanded \$2 million from Berg's insurers to settle the case (\$1 million from Admiral, \$1 million from RSUI),
- ◆ Vision also offered to fully indemnify Berg against bodily injury claims, and
- ◆ **"The settlement agreement would include an assignment of [Berg's] coverage and extracontractual rights against RSUI";**
- ◆ Berg "countered" by offering to pay \$3.3 million (\$1 million from Admiral, \$2.3 million collectible solely from RSUI),
- ◆ demanded that **"Berg receive 33% of any recovery from RSUI,"** and
- ◆ accepted Vision's indemnity and demand for assignment of Berg's extra-contractual rights;
- ◆ Vision eventually accepted these terms, omitting the proposed kickback to Berg; and

- ◆ less than a week later (on September 4, 2008) Berg, Vision, Admiral, D&D and its insurers entered into a written settlement agreement incorporating these terms.

Compare BA 16-18, 30 *with* Berg BR 11-14 *and with* Vision BR 10.¹

While the above facts are key, Berg and Vision equivocate on the details, proffering essentially 100 pages of rationalizations for their actions. For instance, according to them (and the trial court) Berg and Vision engaged in “arm’s-length” negotiations. *See, e.g.*, Berg BR 7; Vision BR 6-8. Yet both Vision and Berg refer to Berg’s kickback proposal as a “sharing” proposal. *See, e.g.*, Berg BR 36; Vision BR 34. Agreeing to “share” someone else’s money is not indicative of arm’s-length negotiations.

On this last point, Berg and Vision go to great lengths in attempting to rationalize why Berg’s “counter-offer” to pay \$1.3 million more of its insurer’s money is not actually what it seems. *See, e.g.*, Berg BA 11-14, 23-25, 29-32, 36-39, 43-45; Vision BR 17-20, 22-23, 25-41. When RSUI filed its CR 60(b) motion, however, it was not privy to any of these explanations. As further discussed below, the very extent of these equivocations undermines the trial court’s rulings.

¹ While Vision fails to address the actual language of the emails in its facts, it does not deny that they say what they say.

REPLY RE ARGUMENT

- A. A party commits fraud, misrepresentation or other misconduct justifying relief under CR 60(b)(4) when the party withholds material evidence and represents in open court that it has provided all material evidence to the adverse party.**

Based on the undisputed facts set forth above, Berg and Vision committed misrepresentation or other misconduct. BA 28-40. Under a great deal of legal authority, their secret settlement had many indicia of collusion, including that

- ◆ the secret settlement was facially unreasonable because Berg offered to pay more than Vision demanded;
- ◆ Berg misrepresented the evidence relevant to collusion, failing to disclose the red-flag emails, and affirmatively stating that RSUI had all relevant documents;
- ◆ although Berg's mediation memo set its exposure under \$1 million (CP 177-79), and although Berg told RSUI it was not interested in settling for \$2.5 million after the mediation, Berg then concealed from RSUI that Admiral subsequently tendered its limits (triggering RSUI's policy) and that secret settlement negotiations were ongoing;
- ◆ the secret negotiations were not serious, but rather were based on pie-in-the sky damage numbers that Berg's counsel earlier told RSUI were untenable;
- ◆ the secret negotiations considered a profit to the insured in the form of a proposed kickback of RSUI money to Berg; and
- ◆ Berg and Vision attempted to harm the insurer's interest by inflating the settlement amount and excluding RSUI.

BA 34-36. Thus, the trial court abused her discretion in denying RSUI's CR 60(b)(4) motion. BA 28-40.

1. Berg's response evades the key question and its after-the-fact rationalizations are irrelevant.

Berg does not directly respond to this argument, but rather spends 13 pages rationalizing its actions. Berg BR 29-41. It largely relies upon argument of counsel at the reasonableness and CR 60(b) hearings. *Id.* These after-the-fact rationalizations are neither evidence nor relevant.

The simple issue is whether Berg and Vision had to disclose their secret email exchange at the reasonableness hearing. Whatever the apologia might be, there is no question that these emails were relevant and material to whether Berg and Vision colluded in secret to increase the amount RSUI might pay. Their failures to disclose these emails to the court undermined the very purpose of the reasonableness hearing. The trial court abused its discretion in failing to set aside its reasonableness determination.

Berg repeats its claims before the trial court that Vision's \$2 million offer could not possibly have included Berg's extra-contractual rights against RSUI because that amount was only policy limits. Berg BR 29-32. Again, hindsight is irrelevant. Berg

and Vision should have produced their secret emails for consideration at the reasonableness hearing and then offered evidence regarding any explanations during the hearing. Arguments of counsel are not evidence. To the contrary, the many minutiae Vision and Berg now offer just emphasize the relevance of their improperly withheld evidence.

Moreover, Berg's argument is contrary to the indisputable language of Randy Aliment's undisclosed August 2008 email (CP 220-21, emphases added):

. . . we are prepared to counter as follows so as to preserve what is left of our wasting policy:

Admiral pays \$1,000,000 to Vision

Vision and its carriers will provide a **complete indemnity to Berg against the bodily injury claims.**

The Berg equipment is is [sic] a trailer. It will be returned at the conclusion of trial.

There will otherwise be a **complete release** between Berg, D&D and Vision.

A stipulated judgment against Berg in the amount of \$2,000,000 although we are willing to discuss some other way to access this policy that does not involve a judgment. **The settlement agreement would include an assignment of coverage and extrcontractual [sic] rights against RSUI. The remaining \$1,000,000 to be paid only by RSUI, with a covenant not to execute on any assets of Berg other than the RSUI policy.**

The settlement agreement by and between Berg, Vision and D&D shall be subject to court approval to avoid any claim by Philadelphia that the settlement prejudices their subrogation or other rights.

Mullin's office may not associate as counsel for Philadelphia and will not otherwise participate in any other proceeding related to the collapse.

This is a complete settlement offer that includes indemnifying Berg and assigning Berg's extra-contractual rights. Nothing in this email even hints at anyone paying more than \$2 million. Had Berg accepted this offer, this aspect of the case would have been over.

Instead of closing the deal, Berg "countered" by meeting all but two of Vision's demands: (1) RSUI will pay Vision \$1.3 million more, while "Berg [will] receive 33% of any recovery from RSUI"; and (2) Berg "cannot ethically agree" to bargain over Mr. Mullin's representation. CP 231. Whatever label is used, this withheld email unequivocally states that Berg is offering more of RSUI's money –behind RSUI's back – and wants a piece for itself.

Indeed, it is troubling for Berg's counsel to be arguing (seemingly against his own client's interests) that Vision could have refused to settle had Berg simply said, "we accept." The quote from Dan Mullin (Berg BR 30) says that he needed to dot his i's and cross his t's, but it says nothing about why he did not mind his p's and q's and simply accept Vision's \$2 million offer. This quote also

focuses on a need to resolve the PI claims, but Aliment's \$2 million demand included fully indemnifying Berg against those claims. Even if all of Mullin's rationalizations were relevant, they do not justify the trial court's refusal to set aside the reasonableness determination, permit discovery, and hold an actual hearing – with testimony (instead of argument) from counsel.

Berg claims that it “balked” at Vision's subsequent \$5.5 million demand – without a kickback to Berg – so it was not colluding with Vision. Berg BR 32. But Dan Mullin's late-afternoon email does not reject Vision's counter; rather, it warns Aliment off the massive stipulated judgment as a potential deal-breaker, and reiterates the kickback idea (CP 234, emphasis added):

I was a little surprised by this counter. . . . As a small business, the idea of a \$5.5 million assignment is daunting and could break the deal. Berg was agreeing to the risks associated with the assignment **with the understanding that they may receive 33% of any recovery against RSUI.** This helped to balance their concerns. **Your counter may be perceived as a step backwards, rather than forward.** Please give this consideration **and let me know if this is truly the counter you want me to suggest to the clients.**

First thing the next morning, Aliment came back at \$3.3 million, without the kickback, and their settlement closed. CP 233. While Mullin was protecting Berg, no one was protecting RSUI from Berg and Vision's secret plans.

Berg also argues that it did not withhold material evidence because there was “nothing nefarious about the . . . emails.” Berg BR 33-36. As shown above, on their face the secret emails plainly demonstrate collusion both to inflate the amount RSUI might pay and to “share” RSUI’s money. Even in light of Berg’s rationalizations, their withheld emails remain relevant and material to the reasonableness determination. The trial court erred in failing to set that determination aside due to Berg’s and Vision’s failures to produce the secret emails or even acknowledge their existence.

Berg similarly uses its attorney’s arguments at the various hearings to show that “RSUI had the opportunity to be as involved as it wanted to be.” Berg BR 33-34. But Berg told RSUI before the February mediation that its exposure was under \$1 million (failing to trigger RSUI’s policy), and it told RSUI after the mediation that it was not interested in settling for \$2.5 million. Its personal counsel stonewalled RSUI’s repeated requests for a response. RSUI had no inkling that Admiral had tendered its \$1 million limits or that the parties were secretly negotiating a settlement above those limits. ***These secret negotiations happened via emails:*** RSUI was not told, was not copied, and had no opportunity to participate.

Berg also continues to stonewall on the additional information it is withholding in the federal court action on the basis of privilege. Berg BR 35-36. The simple fact is that RSUI was not privy to these settlement negotiations, and Berg's communications are relevant to reasonableness. For instance, the single case that Berg relies upon demonstrates the proper way to hold a reasonableness hearing, in sharp contrast to what happened here. Berg BR 36 (citing *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (Div. I, 2004)).

In *Howard*, plaintiff entered into a settlement, which included a covenant not to execute and an assignment of one defendant's rights against an insurer (Royal) who declined to defend it. 121 Wn. App. at 375-76. Unlike here, Royal did provide a defense to another of the defendants,² so it had access to discovery and was privy to all of the relevant evidence going into the reasonableness hearing, *Id.* at 376-77, 379. Also unlike here, Royal had 30 days' – not three days' – notice of the hearing. *Id.* at 379.

Most importantly – and starkly different from these proceedings – the *Howard* trial court heard testimony and saw

² Again, RSUI had no duty to defend Berg, Admiral did.

massive amounts of evidence from both sides, including many thorough legal and medical reports and declarations, numerous reports from expert economists, much evidence regarding the plaintiffs' injuries, and “[a] **complete copy of the correspondence between counsel**” for the settling parties. *Id.* at 381-83 (emphasis added). Also unlike this case, the trial court in *Howard rejected the proposed settlement*, reducing it by \$2.6 million. *Id.* at 377.

Unlike in *Howard*, this trial court gave RSUI one weekend – a Saturday and a Sunday – to discover evidence of collusion, even though RSUI intervened for the first time on Friday afternoon. Whoever may be to blame for counsels' inability to connect over that weekend – and there are at least two sides to that story – opposing counsel had in its possession four emails showing that the settlement went from the \$2 million Vision demanded to the \$3.3 million Berg offered and that the parties discussed a kickback, but failed to disclose them to RSUI or the trial court. There was no reason for failing to disclose those emails, and no plausible excuse for not doing so. After-the-fact rationalizations are irrelevant.

Berg also equivocates about misrepresentations to the trial court. Berg BR 37-38. The misrepresentation that matters here is Berg's telling the trial court that there was no evidence of collusion.

Berg's response, "the fact remains that there is nothing special about these four innocuous emails that made them material to the trial court's reasonableness determination," is a remarkable exercise in question-begging. *Id.* at 39. The emails show collusion.

2. Vision's protestations make the problems here even more obvious.

Like Berg, Vision goes on for many pages (and ultimately 50 footnotes) trying to explain what "really" happened, with very little of it supported by relevant evidence or authority. Vision BR 25-42. If it takes so much effort for seasoned lawyers to try to explain away the obvious "red flags" and troubling failures to disclose to the trial court in this case, it is untenable to conclude that RSUI raised no evidence of collusion. This Court should reverse.

Remarkably, Vision begins its response with the false assertion that RSUI's counsel "conceded below that the terms of the Vision-Berg settlement are objectively reasonable." Vision BR at 28 (citing 7/1/10RP 22). Here is what RSUI's counsel really said:

So as Your Honor quite rightly noted, based on the information you had, yeah, that [\$3.3 million] looks like the number roughly in the middle of what the parties' positions were. **And that would obviously look reasonable if you didn't know these important details about what actually happened to make it go from a 2 million dollar settlement to a 3.3 million dollar settlement.**

7/1/10 RP 22. This is hardly an admission that \$3.3 million is “objectively reasonable” – it just looks reasonable on the surface, but not under the close scrutiny a court should apply here. This sort of overstatement is sadly consistent with much of Vision’s briefing here and below.

For instance, Vision argues that \$3.3 million was reasonable because Vision was claiming \$5.5 million, and the jury might apportion 25% to 50% to Berg. Vision BR 28. Twenty-five to fifty percent of \$5.5 million is less than \$3.3 million. And Berg’s counsel told RSUI that at most, \$750,000 was attributable to Berg. CP 179. Vision also notes that Berg eliminated its exposure to personal injury claims, but Berg’s counsel told RSUI that the PI claims were “grossly inflated.” CP 176. While the case might have had a reasonable settlement value of \$1 million, or at the very most \$2 million, \$3.3 million is unreasonable, particularly in light of the evidence of secret collusion – or “sharing” – in this record.

Vision – in harmony with Berg – claims that the settlement was negotiated at “arm’s length” because the litigation was “hard fought.” Vision BR 29-30. Tough litigation precludes neither settlements nor collusion. Vision proffers a dramatic image of litigation engendering insurmountable personal animosities, but

people put aside their differences and settle all the time. And no matter how much Berg and Vision “disliked” each other, that did not stop them from inflating the settlement or talking in secret about “sharing” RSUI’s money.

Vision’s next argument is extremely confused. Vision BR 31. Vision talks about what would happen if “Berg assigned *to RSUI* only its \$1 million policy-limits *coverage* claim against RSUI” *Id.* (first emphasis added). Its lengthy footnote says the same thing: “. . . and Berg assigned *to RSUI* its coverage and at least some *extracontractual* claim(s) against RSUI” *Id.* at n.38 (first emphasis added). It is difficult to sort out what this tangled web might mean, but it is plainly irrelevant here.

Vision more clearly claims that RSUI “misreads Aliment’s reference to \$2 million in the August 25 e-mail as a proposal to buy both Berg’s \$1 million coverage claim against RSUI *and* Berg’s extracontractual claims against RSUI for \$1 million.” Vision BR 31-32. But that is just what his undisclosed email says (CP 221):

A stipulated judgment against Berg in the amount of \$2,000,000 although we are willing to discuss some other way to access this policy that does not involve a judgment. **The settlement agreement would include an assignment of coverage and extrcontractual [sic] rights against RSUI. The remaining \$1,000,000 to be paid only by**

RSUI, with a covenant not to execute on any assets of Berg other than the RSUI policy.

While Berg did not accept this offer, RSUI is not misreading it.

The unarticulated crux of Vision's arguments seems to be that "extracontractual" must mean over the \$1 million policy limits. Not so. In plain English (well, borrowing from Latin), extra-contractual rights are those arising outside the contract; *i.e.*, the bad faith claims. In order to recover on its extra-contractual rights, Vision has to establish an extra-contractual tort theory: that RSUI acted in bad faith. The federal court has already rejected Vision's theory that RSUI denied coverage in bad faith: "RSUI's coverage determination was reasonable and not in bad faith." CP 151-52. So far, it appears that Berg's extra-contractual rights are worth \$0.

Vision (like Berg) "explains" that Berg could not simply accept its \$2 million offer because they still had to negotiate a value for Berg's extra-contractual rights to use against RSUI as a presumptive measure of damages in a bad-faith action. Vision BR 31 n.38. Far from answering the questions raised by their actions in this case, this "explanation" manifests the core problem: Berg and Vision stopped negotiating against each other, and began working together in secret to set up RSUI.

And contrary to the thrust of Vision's argument, RSUI need not prove what was hidden in the minds of Mullin and Aliment, *contra* Vision BR 32. The strong evidence of collusion – on its face – raises so many questions that it was untenable for the trial court to deny RSUI's motion to reexamine the reasonableness determination. Again, RSUI need not demonstrate that the opposing party's conduct materially affected the outcome. BA 31 (citing *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009), *rev. denied*, 169 Wn.2d 1012 (2010); *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004), *rev. denied*, 155 Wn.2d 1002 (2005); *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836-37, 696 P.2d 28, *rev. denied*, 103 Wn.2d 1040 (1985)). This Court should reverse.

In a paragraph spanning roughly three pages, Vision argues that “[c]areful lawyers . . . would have anticipated” that “any stipulated judgment had to be the sum of the \$1 million coverage-limits claim against RSUI *plus* the negotiated estimated value of the indemnity and assignment of extra-contractual rights against RSUI.” Vision BR 32-34. It further claims that Berg actually negotiated the non-coverage claim “*down* to \$1.3 million, not *up* to \$1.3 million.” *Id.* at 34. None of this is true. The very convoluted

nature of Vision's rationalizations makes plain that even "careful lawyers" could not foresee such contortions. The plain language of the secret emails establishes collusion. While further explanations might potentially allay some such concerns, that calls for a hearing with evidence, not a denial of the motion.

Vision next addresses what it calls a "fallback argument": Vision and Berg had to disclose the secret emails at the reasonableness hearing, rather than telling the trial court that they had no evidence even hinting at collusion. Vision BR 34-37. This was never a fallback, but rather was front and center at the CR 60(b) hearing. *See, e.g., 7/1/10 RP at 5-6.* With perhaps unintended irony, Vision notes that if it had disclosed to the trial court a "claim-sharing" provision in the settlement agreement, "there would have been nothing wrong with that." Vision BR 34-35. How true.

But it is ironic because concealing their secret "sharing" proposal raised the very red flag Vision claims did not exist. *Id.* There also "would have been nothing wrong with" straightforwardly telling RSUI that Admiral had tendered its limits and a settlement well above what Berg had already rejected was in the works. Indeed, doing so might well have avoided all of the issues before

the Court in this appeal. Cf. Jarret, Feldman & Goodnight, *Secret "Mary Carter" Settlement Agreements*, KCBA BAR BULLETIN, April 2011 (noting that secret settlements compromise the adversary system and "strain the relationship among counsel, pushing the limits of professional courtesy"); **McCluskey v. Hardorff-Sherman**, 68 Wn. App. 96, 103-04, 841 P.2d 1300, 1304-05 (1992), *aff'd on other grnds.*, 125 Wn.2d 1 (1994).³ In **McCluskey**, there was no evidence of a secret agreement; but here, the secret agreement appears on the face of the unambiguous emails left undisclosed at the reasonableness hearing – prejudicing that hearing.

Vision next asserts a wish-list of hoped for statements from this Court that are directly contrary to existing case law. Vision BR 35-37. Collusion has been an element of the reasonableness determination for a very long time. See, e.g., **Water's Edge Homeowners Ass'n v. Water's Edge Assocs.**, 152 Wn. App. 572,

³ "The existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact. Such agreements are referred to as 'Mary Carter Agreements.' **Booth v. Mary Carter Paint Co.**, 202 So.2d 8 (Fla. Dist. Ct. App. 1967). Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court. . . . See **Daniel v. Penrod Drilling Co.**, 393 F. Supp. 1056 (E.D. La. 1975); **Ward v. Ochoa**, 284 So.2d 385 (Fla. 1973) **Maule Indus., Inc. v. Rountree**, 284 So.2d 389 (Fla. 1973); **Ratterree v. Bartlett**, 238 Kan. 11, 707 P.2d 1063 (1985)."

585, 216 P.3d 1110 (2009), *rev. denied*, 168 Wn.2d 1019, (2010) (citing ***Chaussee v. Maryland Cas. Co.***, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (citing ***Glover v. Tacoma Gen. Hosp.***, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled on other grounds*, ***Crown Controls v. Smiley***, 110 Wn.2d 695, 756 P.2d 717 (1988))). Collusion – like any sort of fraud or misrepresentation – is not easy to prove, and often can be established only by evidence of the settlement negotiations. *See, e.g., Howard*, 121 Wn. Ap. at 382 (noting that the trial court considered the collusion element and that it viewed a “complete copy of the correspondence between counsel for” the settling parties). Indeed, even then, the evidence is likely to be inferences from negotiations because litigants are unlikely to say explicitly that they are colluding against the absent insurer. This Court should reject Vision’s invitation to make it virtually impossible to establish secret collusion.

Vision characterizes as a “second fallback argument” RSUI’s fundamental point that when the trial court gave RSUI one weekend to discover evidence of collusion, Berg and/or Vision had to turn over the emails. Vision BR 38-39. Vision again begs the question, arguing that because the emails do not show collusion, they did not need to produce them. *Id.* The opposite is true: the emails suggest

collusion, so Vision had to produce them. Vision could not simply withhold evidence of a secret settlement in hopes of later explaining-away the evidence. Vision's rationalizations could have been weighed had it turned over the emails at the reasonableness hearing, but now it is too late for excuses.

Vision also attempts to distinguish *Water's Edge*, *supra*. Vision BR 39-40. And it is fair to say that there is a stark difference between that case and this one: that trial court conducted a thorough and exhaustive review under *Chaussee* and rejected a collusive settlement, but this trial court failed to do so.

B. Under CR 11, RSUI's assertions were well grounded in fact and warranted by existing law: Vision and Berg engaged in misconduct by failing to disclose Berg's 33% kickback proposal; and they arrived at the \$3.3 million settlement amount through collusion, where Berg rejected Vision's \$2 million demand, instead offering to pay Vision \$1.3 million more of RSUI's money and take a kickback, and the parties settled for the inflated amount.

Rule 11 sanctions are improper here because, as outlined above, the evidence that Berg and Vision admittedly failed to disclose to RSUI and the trial court in the reasonableness hearing proves that they used "improper means" to withhold relevant evidence regarding "collusion" and a proposed "kickback scheme." BA 40-48. If this Court believes that had the trial court granted

RSUI's CR 60(b) motion it would have affirmed, then the CR 11 sanctions are improper because the allegations were well grounded in fact and warranted by existing law. *Id.* at 42. Regardless of whether the Court reverses the CR 60(b) ruling, it should reverse the sanctions as unfounded and excessive.

1. Berg's arguments do not improve with repetition.

Berg largely rehashes its earlier arguments, hoping to justify the sanctions. Berg BR 43-49. Simply repeating over and over that emails unambiguously increasing the settlement amount and seeking a kickback do not show collusion cannot make it so. The sanctions must fall because the evidence shows collusion.

Berg again turns to *Howard* to claim that its "sharing proposal" was not "underhanded." Berg BR 44. But that is not the issue. In *Howard*, the insurer had participated in the litigation, had 30 days' notice of the reasonableness hearing, had all of the relevant discovery and settlement correspondence, and "was able to present substantial evidence." 121 Wn. App. at 379. Here, RSUI had not participated in that manner in the underlying litigation (as an excess carrier, it had no right to do so), had only three days' notice of the hearing, lacked a great deal of the relevant discovery, lacked all of the secret settlement correspondence, and had little

opportunity to present substantial evidence of “improper means.”

Howard is correct, but it is nothing like this case.

Berg crosses the line in arguing that the “express language of the August 2008 emails” indicates that “the sharing proposal was made at a time when the settling parties had yet to negotiate a value for extracontractual damages.” Berg BR 44 (citing “2CP 673, 704”). The cited email says no such thing, and Mullin’s vague explanations are no help either. Had Berg simply produced the emails, provided RSUI a reasonable opportunity for discovery, and offered testimony explaining the circumstances, the trial court might have had the evidence necessary to evaluate those explanations, but one thing is sure: RSUI would not have had to discover the emails for the first time almost a year later in the federal litigation, much less bring a CR 60(b) motion based on Berg’s improper conduct, the evidence of collusion, and the kickback proposal.

Berg next paints a misleading picture, arguing that RSUI had the emails “in its possession for approximately eight months before filing its CR 60(b) motion.” Berg BR 45. As has been repeatedly explained, RSUI did not obtain copies of the emails until August 2009 (CP 23), RSUI then sought to bring them before this Court, which declined to accept them, and RSUI tried to compel discovery

in the federal court before that action was stayed. All of this took months, eventually forcing RSUI to bring its CR 60(b) motion.

Berg argues that it is “troubling” to suggest that these sanctions are “chilling.” Berg BR 45. But Berg just reiterates that it did nothing wrong. *Id.* It also repeatedly complains about the words that RSUI used. *Id.* ***Chaussee*** and its progeny require the use of the term “collusion” in challenging the kind of secret deal-making that went on here. “Improper means” accurately referred to secretly inflating the amount RSUI might pay. CP 330. ***Water’s Edge*** itself uses the phrase “kick back” in similar circumstances. 152 Wn. App. at 595-97. It certainly chills reasonable advocacy to sanction counsel for using legally appropriate words.⁴

Berg makes a convoluted argument that the trial court could – but did not – consider whether the CR 60(b) motion was filed for an “improper purpose.” Berg BR 46-47. The trial court apparently rejected the “improper purpose” argument because it could not reach a clear conclusion on it. CP 13372. But it is not clear why

⁴ Berg also complains about the word “scheme” (Berg BA 44), but the first three definitions in WEBSTER’S THIRD NEW INT’L DICTIONARY at 2029 (1993) do not comport with Berg’s reading: a scheme is just a plan.

the trial court made findings and conclusions on something it was unclear about.

Finally, Berg argues that RSUI did not withdraw its initial motion when it filed an amended motion. Berg BR 47-49. It argues that a motion is not a pleading, so *Herr v. Herr*, 35 Wn.2d 164, 211 P.2d 710 (1949) is distinguishable. But there is no reason to so limit *Herr's* useful rule. And contrary to Berg's insinuation, the amended motion did not "adopt" the prior motion by not changing every jot and tittle. The amendment withdrew the prior pleading.

2. Visions' repetitions do not help either.

Vision too rehashes its claims that it did nothing wrong by failing to disclose the emails to the trial court or to RSUI. Vision BR 42-46. But Vision goes even beyond the trial court's ruling (limited to the use of "collusion," "improper purpose" and "kickback scheme" – CP 13371) complaining that RSUI accused Aliment of "*fraud.*" Vision BR 42 (dramatic italics in original). Again, "fraud" is the word CR 60(b)(4) uses. A lawyer should not be sanctioned for using the language of a Court Rule. (And in the end, the trial court did not sanction RSUI for using the term "fraud." CP 13371.)

Other than this, Vision just begs the question, repeating that CR 11 sanctions were *ipso facto* appropriate because RSUI should

have somehow both divined and simply accepted Vision's rationalizations about the emails. Those explanations are not even relevant to the issue before the Court: is it tenable to uphold a reasonableness determination in the face of concealed evidence of secret collusion and a proposed kickback, or should the trial court have set it aside or at least held a hearing?

The only proper course for Berg's and Vision's counsel was to disclose the emails in September 2008, allow time for discovery, and offer testimony supporting their explanations for what the emails mean. Instead, they hid the emails, told RSUI and the court none existed, and hoped for the best. If that is not reasonable grounds for filing a CR 60(b)(4) motion, it is hard to imagine what is.

3. Neither Berg nor Vision addresses the crucial point that regardless of whether the CR 60(b) ruling is reversed, the CR 11 ruling should be.

Berg and Vision fail to address the fact that, as noted above and in the opening brief, even if the CR 60(b) ruling stands, the CR 11 ruling should fall. Put a different way, if this Court would have affirmed a ruling setting aside the reasonableness determination on this record, then the CR 11 sanctions are insupportable. The simple truth is that Berg and Vision should have disclosed the emails. Since they did not, RSUI tried various means to get them

before this Court without success. RSUI therefore appropriately brought the CR 60(b) motion. The motion was well grounded in the unambiguous language of the emails, and soundly based on existing law like ***Chaussee*** and ***Water's Edge***. This Court should reverse the CR 11 sanctions.

C. The attorney's fees awarded to Vision and Berg are erroneous and grossly excessive.

Regardless of whether RSUI used the terms "collusion," "kickback scheme" and "improper means," the CR 60(b) motion was proper because the emails – on their face – show supposed adversaries' proposal to "share" RSUI's money, complete with Berg bidding-up the amount. BA 48. In light of this, and assuming *arguendo* that the CR 11 ruling stands, the amount awarded, unlimited to responding to the allegedly improper statements, is grossly excessive and should be reversed. *Id.* at 48-49.

Berg just asserts 100 hours at \$185 is *ipso facto* reasonable. Berg BR 49. As in the trial court, Berg gives no justification for spending so much time responding to an allegedly baseless motion. The amount is as unreasonable as it is unsupported.

Vision thinks that \$44,250 is a reasonable amount to spend responding to a baseless motion, for no better reason than that it

could have been more. Vision BR 46-47. Again, as in the trial court, Vision fails to justify its fees. This Court should reverse.

Finally, both Berg and Vision state at various places in their briefs that RSUI “still” has not apologized. It is correct to say that RSUI does not believe it has anything to apologize about: its allegations were well grounded in fact and based on established law. Perhaps more importantly, when attorneys engage in secret negotiations about how to “punish” an insurer for asserting its legal rights, and in fact increase the amount of the settlement to that end, and then tell the trial court that those very negotiations either do not exist or are irrelevant to whether the settlement was reasonable, those are the attorneys who should apologize.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the rulings denying RSUI’s CR 60(b) motion and hold the settlement unreasonable as a matter of law. In the alternative, this Court should reverse and remand for a full hearing on the CR 60(b) motion, including all of the relevant evidence. In any event, the Court should reverse the CR 11 sanctions as unfounded and excessive.

RESPECTFULLY SUBMITTED this 20th day of April,
2011.

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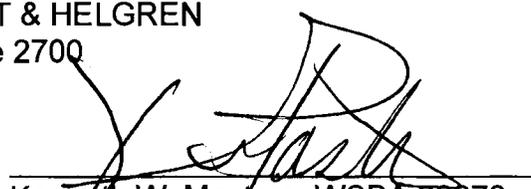
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