

NO. 38411-6-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

RSUI INDEMNITY COMPANY, Intervenor Below and Appellant,

v.

VISION ONE, LLC, Plaintiff and Respondent,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY, Defendant
and Appellant,

and

D&D CONSTRUCTION, INC., Defendant, Third-Party 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.

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**BRIEF OF APPELLANTS RSUI INDEMNITY COMPANY, MCNAUL
EBEL NAWROT & HELGREN, PLLC, AND INDIVIDUAL
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ORIGINAL

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INTRODUCTION

Appellant RSUI Indemnity Company (RSUI) appeals the denial of its CR 60 motion to vacate the trial court's previous ruling that RSUI's insured's settlement of a lawsuit was reasonable. RSUI moved to vacate the reasonableness determination under CR 60(b)(4) and (b)(11) when RSUI learned that its insured declined an offer by the plaintiff to settle for \$2 million and then counter-offered to settle for a higher judgment of \$3.3 million against itself coupled with a kickback to itself of 33% of any insurance proceeds from the insured's policy with RSUI. The insured then settled for \$3.3 million against itself without any kickback. The insured is respondent Berg Equipment & Scaffolding, Inc. (Berg) and the plaintiff is respondent Vision One, LLC and Vision Tacoma Inc. (Vision).

At the time of the September 2008 hearing to determine whether the settlement was reasonable, Berg and Vision did not produce the email showing this 33% kickback proposal. When RSUI asked for copies of emails and documents leading up to the settlement, Berg's lawyers told the court that they had no new documents or anything that even hinted at collusion.

In 2010, the trial court denied RSUI's CR 60 motion and imposed CR 11 sanctions on RSUI and its counsel, the law firm of

McNaul Ebel Nawrot & Helgren, PLLC, and two individual attorneys (collectively "McNaul Ebel") for having filed the motion. RSUI appeals from the denial of CR 60 relief and RSUI and McNaul Ebel appeal from the imposition of CR 11 sanctions.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant RSUI's CR 60(b) motion. CP 1014.¹

2. The trial court erred in granting respondent Vision's Motion For Sanctions under CR 11, which was joined by respondent Berg. CP 1010.

3. The trial court erred in entering Finding of Fact (FF) 2, that RSUI's attorney, David A. Linehan, "signed and filed a declaration asserting that he had personal knowledge that the documents showed 'collusion in their negotiation of the settlement.'" CP 13371.

¹ There are two sets of Clerk's Papers relevant to this appeal. The Clerk's Papers from the earlier appeal by RSUI from the Court's determination of reasonableness of settlement and Philadelphia's and Vision's cross-appeals from the judgment on the jury verdict, exceed 13,000 pages in length. The Pierce County Clerk's office restarted pagination for the Clerk's Papers for RSUI's present appeal. All references in this brief to Clerk's Papers 1-1433 are to this second set of Clerk's Papers. All references above page 1433 relate to the earlier appeals by RSUI, Philadelphia, and Vision. References to the first set of clerk's papers 1-1433 are preceded by "I", to distinguish them from the second set.

4. The trial court erred in entering FF 3 that, “[t]hese specific phrases ‘improper means’ and ‘collusion’ and ‘kickback scheme’ were baseless and without merit in that they were not ‘well grounded in fact’ and not based on an actual inquiry that was reasonable under the circumstances.” CP 13371.

5. The trial court erred in entering FF 5 that, “[t]he timing of the pleadings is suspicious.” CP 13371.

6. The trial court erred in entering FF 7 to the extent that it implies that after RSUI filed its amended CR 60(b) motion, the original motion somehow remained effective. CP 13471-72.

7. The trial court erred in entering conclusions of law that RSUI’s CR 60 motion was baseless and advanced without reasonable inquiry and awarding attorney fees to Berg in the amount of \$18,500 and Vision in the amount of \$44,250. CP 13372.

8. The trial court erred in entering judgment on CR 11 sanctions in favor of Vision. CP 13437.

9. The trial court erred in entering judgment on CR 11 sanctions in favor of Berg. CP 13439.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Has a party committed 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?

2. Were CR 11 sanctions an abuse of discretion because the following assertions were well grounded in fact and warranted by existing law: Vision and Berg engaged in misrepresentation and misconduct by failing to disclose Berg's 33% kickback proposal; and, the settlement amount of \$3.3 million was arrived at by collusion where Berg rejected Vision's demand to settle for \$2 million, countered with an offer to pay Vision \$3.3 million with a kickback, after which the parties settled for \$3.3 million?

3. Are the attorney's fees awarded to Vision and Berg erroneous and grossly excessive?

STATEMENT OF PROCEDURE

Respondent Vision sued Vision's insurance company, appellant Philadelphia Indemnity Insurance Company, for coverage of a construction incident. ***Vision One, LLC v. Philadelphia Idem.***

Ins. Co., 158 Wn. App. 91, 95 ¶¶1, 241 P.3d 429 (2010).² Berg, a subcontractor, was named as a third-party defendant.

Shortly before the trial of this construction dispute, Vision settled with Berg for an assignment of Berg's primary insurance policy of \$1 million, an assignment of Berg's rights against its excess carrier RSUI, and a stipulated judgment of \$2.3 million to be collected entirely from RSUI. CP 26-28. Vision and Berg moved for a determination that the settlement was reasonable, CP 910, a determination that in some circumstances can establish a presumptive measure of damages if RSUI were found to have acted in bad faith.³ *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002).

RSUI intervened and opposed the reasonableness of the settlement, but the trial court, Judge Kitty-Ann van Dorninck, approved the settlement. CP 43-45. RSUI's earlier appeal challenged the order approving the settlement as reasonable. That appeal has been argued and will be decided with this subsequent appeal.

² This is the opinion deciding issues in Philadelphia's appeal against Vision.

³ RSUI believes that none of these circumstances are applicable in this case.

The following year, RSUI conducted discovery in a coverage action RSUI brought in federal court against Vision and Berg and discovered emails that had not been disclosed at the time of the reasonableness hearing. In spring 2010, RSUI moved to vacate the reasonableness determination under CR 60. CP 329.

The trial court denied RSUI's CR 60 motion, CP 1014, and found that RSUI and McNaul Ebel had violated CR 11, CP 1010. The court then imposed sanctions on RSUI and McNaul Ebel in the amount of \$44,250 for Vision plus \$18,500 for Berg. CP 13437, 13439. RSUI and McNaul Ebel appeal.

STATEMENT OF FACTS

A. This case arises out of the collapse of a concrete slab during a concrete pour at a condominium project.

Vision was developer of a condominium project and Philadelphia was Vision's insurer. *Vision v. Philadelphia, supra* ¶1. Vision contracted with D&D for the concrete work, and D&D contracted with Berg for shoring equipment to support the poured concrete slabs. *Id.* at ¶4. As D&D poured concrete, the slab collapsed, injuring several workers and delaying construction. CP 163.

Vision's insurer Philadelphia denied coverage for the collapse. *Vision v. Philadelphia, supra*, ¶7. Vision sued

Philadelphia for breach of contract and bad faith and sued D&D for causing the collapse. *Id.* at ¶¶1-2. Both Philadelphia and D&D filed third-party complaints against Berg. CP 165.

Vision settled with D&D for payment of only \$25,000. CP 166. D&D assigned to Vision all of D&D's claims against Berg. *Id.* As a result, Berg became the focus of liability to the exclusion of D&D.

B. Appellant RSUI, as excess insurer for Berg, participated in mediation and repeatedly asked Berg for information that might support coverage.

RSUI underwrote an excess liability insurance policy for Berg that had different exclusions than those contained in Berg's primary insurance policy. CP 103. RSUI's limit of liability was \$1 million in excess of the underlying insurance provided by Berg's primary insurer, Admiral. *Id.*

Admiral's underlying policy insured Berg for liability in the amount of \$1 million each occurrence. CP 109. Admiral issued a reservation of rights letter to Berg on May 8, 2006. CP 108-09. Admiral assigned attorney Dan Mullin to defend under the reservation of rights. CP 120.

Although RSUI was an excess carrier with no duty to defend, RSUI adopted Admiral's reservation of rights. CP 104. RSUI

additionally relied on an exclusion contained in the excess policy for “your operations” or “your work” on any “residential project,” which includes condominiums. *Id.* RSUI stated in the letter that it possessed “insufficient information” to determine that exclusions apply, and requested additional information. CP 105-06. The letter continued, “[t]he present positions taken on behalf of RSUI are based upon information currently available to RSUI and are not intended to be all encompassing or exhaustive.” CP 106. Finally, RSUI asked to be “kept apprised of all developments associated with the litigation filed against Berg” *Id.*

Berg did not respond to RSUI’s request for information. CP 139. Ten months later, on April 18, 2007, RSUI wrote to Berg and attorney Mullin explaining that, without the requested information, RSUI assumed that the exclusions from the 2006 letter apply: “If you believe we are mistaken, please provide us with the information we had requested before and the facts and details sufficient for us to determine whether the exclusions identified in that letter do not apply.” *Id.*

Berg subsequently claimed that RSUI denied coverage in the April 18, 2007 letter, and Judge Lasnik ruled in RSUI’s coverage action that Vision and Berg were estopped from claiming

that the denial came at any other time. CP 149-50. Nonetheless, RSUI continued to invite Berg to provide further information or otherwise explain why RSUI's coverage determination was incorrect. CP 141.

Meanwhile, Berg's defense counsel Dan Mullin wrote to Admiral and RSUI, advising them that Vision's alleged damages had now increased from \$400,000 to over \$4 million, creating "a mountain out of a molehill." CP 181. Mullin followed up with a January 21, 2008 pre-trial/mediation report analyzing the claims against Berg in some detail. CP 161. At the end of Mullin's 19 page analysis, he concluded that jury allocation of fault to Berg within 25-50% was "within the realm of a reasonable jury verdict." CP 179. Mullin considered Vision to be exaggerating its damages, concluding that a realistic assessment of damages was approximately \$500,000 - \$750,000. *Id.*

Vision, Berg, and their insurers mediated on February 6 and 7, 2008. *Id.* RSUI, by its retained attorney Michael D. Helgren, attended the mediation and advised the mediator that RSUI did not believe there was coverage under RSUI's excess policy, but that RSUI would consider contributing to a settlement. CP 949. The mediation was adjourned without a settlement demand from Vision

and RSUI was not thereafter invited to participate in further discussions. *Id.* Nonetheless, Helgren asked Berg's attorneys for any information that would support coverage, advising that RSUI would reconsider coverage if there were legal basis to do so. CP 950.

A few weeks after the mediation, in mid-February 2008, Vision offered to settle with Berg for \$2.5 million, consisting of \$1 million from Berg's primary insurer Admiral, \$1 million "payable only by RSUI with a covenant not to execute on any other assets of Berg," and \$500,000 to be paid by Berg. CP 187. Helgren asked Berg's counsel if Berg were interested in settling for these amounts but was told "no." CP 184. Afterward, during the spring and summer of 2008, Helgren left messages for and wrote on several occasions to Berg's coverage attorney Petrich asking for information, but received no response. CP 185, 191, 193. Helgren likewise asked Mullin to encourage Petrich to contact him, but again received no response from Petrich. CP 185.

C. In September 2008, RSUI intervened in this action after receiving three days' notice of Vision's and Berg's motion to approve the reasonableness of their settlement, and the trial court found the settlement was reasonable.

On September 9, 2008, RSUI first received notice that Vision and Berg had settled and had noted a motion for approval of the reasonableness of their settlement on September 12, three days later. CP 1173. RSUI learned for the first time that Vision and Berg had agreed to settle for a total of \$3.3 million, \$1 million payable by Berg's primary insurer Admiral, and a stipulated judgment in the amount of \$2.3 million, to be collected only from RSUI under an assignment of rights from Berg to Vision. CP 28. Vision agreed to indemnify and hold Berg harmless from any personal injury claims arising out of the collapse. CP 29.

Vision attorney Randy Aliment recited in a declaration that the settlement negotiations were complicated and "took a tremendous amount of time to resolve and all against the backdrop of Philadelphia's and RSUI's steadfast refusal to participate in any meaningful way." CP 267. Aliment asserted, "at no time has there been any collusion between Berg and Vision regarding any aspect of this case, including negotiation of the settlement agreement" CP 270. Despite having no personal knowledge of post-

mediation communications (or the lack thereof) between RSUI and Berg, CP 339, Aliment stated that after the February mediation, “RSUI has refused to participate any further and has remained consistent in its outright denial of coverage.” CP 269. These representations are directly contrary to the Helgren declaration, made with personal knowledge, that RSUI was not apprised of any settlement discussions between February 2008 (when Berg flatly refused Vision’s \$2.5 million settlement offer) and September 9 (when RSUI received notice of the settlement agreement). CP 184.

The trial court granted RSUI’s motion to intervene at a reasonableness hearing on September 12, 2008, three days after RSUI learned of the settlement. CP 1187. The court denied RSUI’s motion to continue the hearing for two weeks, *id.*, but did continue the hearing over the weekend, from Friday the 12th to Monday the 15th. CP 1188. Berg’s attorney Mullin told the court that during the February mediation, “RSUI would not provide us with any authority, and no coverage.” *Id.* Berg’s attorney Petrich told the court that there had been an “absolute refusal of RSUI to participate in the mediation” *Id.* All of this was contrary to the declaration of Helgren. CP 184.

The trial court stated that RSUI could look for evidence of fraud or collusion over the weekend and assess the settlement's reasonableness. 9/12 RP 10-11, 53-54.⁴ The hearing concluded at 4:06 p.m. CP I:394.⁵ At 4:30 p.m., a McNaul Ebel legal assistant sent an email to attorneys for Vision and Berg seeking all documents relating to Berg's liability and "how the figure of \$3.3 million was determined" no later than 9:30 a.m. on Monday, September 15. CP I:456. Berg's coverage counsel Petrich sent a 4:33 p.m. email offering to make documents available in this office for the next 27 minutes in Tacoma, while obviously knowing that RSUI's attorney was already in transit from the Pierce County hearing to McNaul Ebel's Seattle office and could not possibly comply with this unilaterally imposed deadline. CP I:458, 464, 9/15 RP 33.

On Sunday September 14, Petrich advised RSUI's counsel that he did "not have any case status reports, valuations, correspondence relating to the settlement agreements, or documents relating to the settlement other than (potentially) a handful of earlier drafts of the settlement agreement." CP I:471.

⁴ The September 12, 2008 transcript is part of the record in RSUI's first appeal.

⁵ Clerk's papers paginated beginning with a "1" are from RSUI's earlier appeal.

Because no one had kept RSUI informed of settlement negotiations since February 2008, RSUI could not have had any documents pertaining to the negotiation of the settlement.

Berg's defense counsel Mullin responded on Saturday afternoon that RSUI could review his files for so long as he remained in the office that day. CP 461. RSUI replied on Sunday asking for access, but Mullin never responded. CP I:467, 9/15 RP 33-34, 40-41.

When the court reconvened the hearing on Monday, September 15, RSUI's attorney explained that he had been unable to obtain any information from Vision and Berg, in effect denying RSUI its right to conduct any meaningful discovery regarding the reasonableness of the settlement. E.g., *Besel*, 146 Wn.2d at 739; *Water's Edge Homeowners Ass'n v. Waters Edge Assocs.*, 152 Wn. App. 572, 582, 216 P.3d 1110 (2009), *rev. denied*, 168 Wn.2d 1019 (2010); *Indep. Sch. Dist. No. 197 v. Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600, 608 (Minn. App. 1995). The court invited Vision's and Berg's attorneys to "jump up and respond to that," explaining that, she had expected that "there would be some communication." CP 240. Berg coverage counsel Petrich responded, "this morning when I got to the office, I did review my

settlement file, and I determined that there was absolutely nothing here that was anything different or new that [RSUI] didn't already have, from my point of view." CP 240 (emphasis added).

Berg counsel Mullin argued that the burden was on RSUI to produce evidence of fraud or collusion and that RSUI had failed: "I don't know of anything that we can provide to RSUI that in any way gives a hint of collusion or fraud. If they have some evidence, they should be presenting it today." *Id.* (emphasis added). Vision's counsel sat silently while Berg's counsel made these statements to the trial court. The trial court concluded that there was no evidence of bad faith collusion or fraud and approved the settlement as reasonable. CP 541, CP 43-45.

D. In August 2009, RSUI learned through discovery in a coverage action in federal court that Vision and Berg had failed to provide the trial court or RSUI with emails showing that Berg proposed a judgment against itself for \$1.3 million more than Vision had proposed, coupled with a 33% kickback to Berg.

RSUI appealed from the reasonableness determination. That appeal has been briefed and argued and is consolidated for decision with this appeal. RSUI also filed a coverage action in federal court. CP 950.

During discovery in the federal action, RSUI obtained for the first time correspondence and emails between Vision and Berg leading up to the September 2008 settlement. CP 23, 380. Despite discovery requests that sought the production of these documents earlier in the litigation, the documents were finally produced to RSUI in August 2009. *Id.*

The critical email string is as follows.

1. August 25, 2008: Vision proposes to settle for \$2 million.

Vision proposed a \$2 million settlement, of which Berg's primary insurer Admiral would pay \$1 million, with the remaining \$1 million to be collected from RSUI:

— Admiral pays \$1,000,000 to Vision One and Vision Tacoma ("Vision").

— Vision and its carriers will provide a complete indemnity to Berg against the bodily injury claims [arising from the concrete collapse].

...

— 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 extracontractual 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.

CP 220-21 (A copy of the email, CP 214-21, is appended to this brief). In other words, under the Vision proposal, the damages were no more than \$2 million. Of that \$2 million, Berg would pay nothing even in the event of personal injury claims, Admiral would pay \$1 million, and Vision would look exclusively to RSUI to collect the additional \$1 million under an assignment of rights from Berg.

2. August 27, 2008: Berg proposes that the judgment against itself be increased from \$2 million to \$3.3 million, with a kickback to Berg.

In response to Vision's offer to settle for \$2 million, Berg offered to enter into a stipulated judgment for \$3.3 million to be collected entirely from Berg's insurers, with a 33% kickback to Berg of any recovery from RSUI:

1. Admiral will pay \$1 million to VO [Vision One].

...

5. There will be a complete release between the parties: Berg, VO, VT [Vision Tacoma] and D&D. Berg will be dismissed from the litigation with prejudice.

6. VO/VT will indemnify and hold harmless Berg and Admiral from any and all personal injury claims arising out of the collapse, including but not limited to Thompson, Grand and the 4 recently identified claimants from L&I.

7. Berg will assign its rights against RSUI with the condition that there is a stipulated judgment (not filed) in the

amount of \$3.3 million which can only be executed and collected against RSUI, and further that Berg receive 33% of any recovery from RSUI for its bad faith refusal to provide coverage.

CP 231 (a copy of the email is appended to this brief).

The next day, Vision counter-offered with many of the same terms in Berg's August 27th offer, but Vision increased the settlement amount from the \$2 million it previously offered and the \$3.3 million in Berg's counter, to \$5.5 million. CP 234-35. Berg's counsel Mullin pointed out that this increase in Vision's demand "may be perceived as a step backwards, rather than forward." CP 234.

3. August 29, 2008: Vision agrees to Berg's \$3.3 million proposal, but omits the 33% kickback.

On August 29 Vision modified its counter-proposal to \$3.3 million, but without any sharing agreement with Berg (CP 233) (copy appended to this brief):

Berg will assign all of its rights including its coverage and extra contractual rights against RSUI with the condition that there is a stipulated judgment (not filed) unless necessary in the amount of \$3.3 million which can only be executed and collected against RSUI.

Less than a week later, on September 4, Vision, Berg, Admiral, D&D, and D&D's insurers entered into a written settlement agreement incorporating these terms. CP 26.

In short—in the course of four days in late August 2008 and unbeknownst to RSUI or the Court at the time of the reasonableness hearing—Berg rejected an offer to settle for a stipulated \$2 million judgment against itself, to be paid solely from insurance; counter-offered to settle for a stipulated \$3.3 million judgment against itself to be recovered solely from insurance with a 33% kickback to Berg of anything received from RSUI; and then accepted a judgment against itself for \$3.3 million to be paid solely by the insurers without any kickback.

None of these documents were presented to the trial court at the time of the motion to approve the settlement as reasonable in September 2008. CP 23, 380. To the contrary, at the September 2008 hearing seeking approval of the settlement, Berg’s counsel assured the trial court after reviewing their files that “there was absolutely nothing in here that was anything different or new that [RSUI’s counsel] didn’t already have . . .” and that, “I don’t know of anything that we can provide to RSUI that in any way gives a hint of collusion or fraud.” CP 240.

Based on the newly discovered emails, RSUI moved in this Court (in connection with its first appeal) for an order to take

additional evidence under RAP 9.11. The motion was denied. CP 753-54.

Meanwhile, Vision filed a motion in federal court to preclude RSUI from collaterally attacking the superior court's determination that the Vision/Berg settlement was reasonable. CP 49. Judge Lasnik eventually denied this motion because RSUI did not intend to challenge the reasonableness determination in federal court. CP 422.

RSUI had also sought discovery from Mullin in the federal action, but Mullin claimed that communications regarding settlement were privileged and not subject to discovery. CP 748-50. On August 20, 2009, RSUI filed a motion to compel production from Mullin. CP 750. In December 2009, Judge Lasnik ordered production of documents and a privilege log for all non-produced documents. CP 311. In response to Judge Lasnik's order, Mullin produced some documents and continued to withhold others on the basis of privilege. CP 314-15. To date, Mullin has still not produced all of the relevant emails, having listed 47 of them on its privilege log. CP 809-13. The parties' joint motion asking Judge Lasnik to resolve Mullin's continuing claims of privilege is still pending. CP 313-18.

In December 2009, Judge Lasnik partially granted summary judgment in favor of RSUI on Vision's bad faith claim, concluding that RSUI's denial of coverage based on the residential work exclusion was incorrect but reasonable and not in bad faith. Judge Lasnik further ordered that Vision's claim for alleged bad faith in the post-coverage denial investigation would have to go to trial. CP 146, 152-53. Shortly thereafter, Judge Lasnik stayed the coverage case pending a final determination of the state court appeal, recognizing that the state court appeal—both RSUI's appeal of the reasonableness determination and the Vision and Philadelphia cross-appeals—implicated Vision's damages theories in the federal case. CP 325-28. As Vision has appealed this Court's decision on the Vision and Philadelphia cross-appeals to the Washington State Supreme Court, the federal case will remain stayed for some time.

E. RSUI moved to vacate the determination that the Vision/Berg settlement was reasonable, but the Court denied the motion and granted CR 11 fees to Vision and Berg.

Unable to add critical emails to its first appeal, RSUI filed a motion to vacate the judgment under CR 60(b)(4), providing relief from a judgment or order for “[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party,” and CR 60(b)(11) allowing vacation of a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” CP 1-16. RSUI argued that Vision and Berg repeatedly misled the Court about the basis for their settlement, by asserting an absence of collusion, by claiming prior disclosure to RSUI of all material documents, and about RSUI’s willingness “to be involved” (CP 13) (emphasis in original):

The undisputed documentary evidence establishes that Berg and Vision One cooperated in creating an inflated settlement that, at least for a while, envisioned a kickback to Berg. Worse, RSUI’s own insured, Berg, instigated that fraud. By all indications, if not for Berg’s instigation Vision would have agreed to a \$2 million total settlement (seeking no more than the \$1 million policy limits from RSUI), as Vision *itself* proposed in a settlement offer made on August 25, 2008, mere days before the vastly inflated settlement terms were finalized. Instead, it agreed to a \$3.3 million settlement with a stipulated judgment for more than twice RSUI’s policy limits. Berg has never explained why the settlement was \$1.3 million *higher* than what Vision was willing to take only days earlier. Yet Vision and Berg told the Court there was no collusion and their settlement fairly reflected Vision’s alleged damages.

RSUI filed the CR 60 motion on April 7, 2010. On April 13, RSUI attorney Helgren called Vision attorney Aliment to propose lifting the stay of proceedings in the federal litigation for the limited purpose of obtaining key rulings on damage issues. CP 379-80, 950. Helgren explained that he thought that having the damage

rulings from the federal court could facilitate settlement. *Id.* Aliment told Helgren, “we’re not really interested in talking to you.” CP 951. The Rule 60 motion had Aliment’s firm “all worked up” and he accused McNaul Ebel of claiming that Aliment accepted a kickback scheme. *Id.* Helgren responded that the motion did not accuse Aliment of accepting the kickback proposal and suggested that they both review the motion. *Id.*

Aliment never told Helgren, in this call or later, that he believed that the motion and the McNaul Ebel attorneys violated Rule 11 or that Vision would seek CR 11 sanctions. CP 952. Nonetheless, as a professional courtesy to Aliment, McNaul Ebel filed an amended motion making it more explicit that RSUI had not discovered documents showing that Vision actually accepted Berg’s kickback proposal. *Id.* RSUI’s amended CR 60 motion is at CP 329 and a markup comparison between the original motion and the amended motion is at CP 512. Representative changes from the original motion (with strikeouts) and the amended motion (with underscore) are as follows:

- ◆ RSUI has since learned that the sudden increase [from Vision’s offer to settle for \$2 million to Berg’s counter offer to settle for \$3.3 million] ~~stems from a collusive~~ began with a proposed agreement to inflate the amount in order to accommodate a

proposed kickback scheme hatched by Berg (as used herein meaning the sharing of proceeds), though discovery to date has not established that the proposed kickback scheme was accepted by Vision. (CP 514).

- ◆ No document produced to RSUI indicates that Vision ever rejected Berg's 33 percent kickback proposal, or that Berg and Vision did not enter into a side agreement containing that provision. (CP 519-20)
- ◆ The undisputed documentary evidence establishes that Berg and Vision One cooperated in creating an inflated settlement ~~that, at least for a while, envisioned after Berg proposed~~ a kickback to Berg. ~~Worse, RSUI's own insured, Berg, instigated that fraud.~~ (CP 525)

Vision and Berg responded in high dudgeon to RSUI's CR 60 motion. Vision's counsel Aliment called the motion "ludicrous and shocking" and stated that he was "profoundly offended, both personally and professionally" CP 379. Berg's attorney Mullin labeled the motion as "insulting" and stated that he was "outraged." CP 648-49. Both Aliment and Mullin expressly denied that there had been any agreement for a kickback. CP 378-79, 648.

Both Vision and Berg claimed that Aliment had testified in his deposition in federal court in August 2009 that there was no kickback scheme, and that Mullin had never even been asked about the proposal for a kickback in Mullin's deposition. CP 360, 633. This is inaccurate. Aliment did not directly answer a question about a kickback, instead he discussed Mullin's proposal that Mullin

serve as co-counsel in some way in Vision's planned lawsuit against RSUI for bad faith. CP 927-28. Aliment's deposition testimony that "it was in play for a while," CP 928, refers to Mullin's participation, not to any sharing arrangement. Mullin was asked when he first discussed the possibility of a sharing arrangement and replied vaguely. CP 702.

Aliment also accused RSUI of filing the CR 60 motion for the improper purpose of creating settlement leverage by accusing Aliment and his firm of misconduct. CP 379-80.

Both Vision and Berg also asked for fees and sanctions under CR 11. CP 352, 620.

RSUI replied that neither Vision nor Berg explained why "they didn't disclose and explain the emails before the reasonableness hearings, rather than then (incorrectly) telling the Court that RSUI and the Court had before them all material settlement exchanges." CP 859. RSUI also pointed out that Vision and Berg misstated the deposition evidence when they claimed incorrectly that Vision attorney Aliment expressly stated that Vision rejected the proposed 33% kickback and that RSUI's attorneys never asked Mullin about the kickback proposal. CP 865-69. RSUI also pointed out that Vision's argument that the CR 60 motion was

brought for the improper purpose of obtaining settlement leverage was factually incorrect because the CR 60 motion would be heard and resolved before the parties could even obtain federal court rulings as RSUI proposed in the call to Aliment. CP 871-73. RSUI also responded on the merits of both the CR 60 motion and the CR 11 motion. RSUI also attached to its reply a highlighted copy of the amended CR 60 motion demonstrating that RSUI neither asserted that the kickback scheme was accepted by Vision nor accused Vision of fraud. CP 884-99.

The trial court heard argument on July 1, 2010. The court asked RSUI why the motion had not been brought within the one year deadline applicable to CR 60 motions brought under a different subdivision of that rule instead of waiting until after a year. 7/1 RP 13, 15. RSUI responded that it obtained the first discovery of these emails in August 2009, almost a year after the reasonableness hearing in 2008. *Id.* 13-14. RSUI knew that Mullin was withholding documents under a claim of privilege and RSUI had moved for their production before the one year deadline expired, but Judge Lasnik did not order production of any of the documents or of a privilege log until December 2009, after the one year deadline expired. *Id.*

The court also questioned RSUI about Vision's theory that the motion was brought for an improper purpose, to obtain settlement leverage. *Id.* at 15-16. RSUI responded that Vision had mischaracterized what RSUI had proposed and that Vision's theory was inconsistent with the facts. What RSUI proposed was to ask Judge Lasnik to resolve certain damages issues in the federal case—which RSUI believed might eventually facilitate settlement. By contrast, the CR 60 motion was already set for hearing. The CR 60 motion thus would have been heard and decided long before Judge Lasnik would have ruled on the damages issues, even if Vision had agreed with RSUI to seek those rulings. *Id.* at 16-17. The CR 60 motion and RSUI's proposal to seek rulings on damages issues were independent of one another—there was not, and could not be, any link.

The trial court denied RSUI's CR 60 motion: "I don't think there was anything improper that was done in September of 2008, and I don't think any of the new information changes my mind about that." *Id.* at 30. The court then heard argument on CR 11 and granted Vision's and Berg's motion (*Id.* at 59):

I really haven't seen language used like this against other lawyers. I haven't. So it's upsetting to me, too, just because I do have respect for the attorneys that are involved. I think

these are really harsh words. I do think its sanctionable. I don't know exactly what the remedy is. I think they are asking for attorney fees. We're probably going to have to have another hearing about that, in terms of what is really the remedy. I do find the language, the allegations to be improper without reasonable inquiry and based on an objective standard that it's inappropriate to have these kinds of pleadings.

Vision and Berg submitted fee declarations seeking CR 11 sanctions. By the time of their replies, Vision was asking for \$130,085 for opposing RSUI's CR 60 motion and seeking sanctions, and Berg was asking for \$52,464. CP 1316-17, 1346.

Vision proposed 21 findings of fact and six conclusions of law in support of an award. CP 1031. The trial court entered a greatly abbreviated set of seven findings and seven conclusions. CP 13371-72 (copy appended to this brief). The court awarded Vision \$44,250 for 150 hours of work and awarded Berg \$18,500 for 100 hours of work. *Id.* This appeal followed.

ARGUMENT

- A. A party commits fraud, misrepresentation or other misconduct justifying relief under CR 60(b)(4) or CR 60(b)(11) when the party withholds material evidence and represents in open court that it has provided all material evidence to the adverse party.**

CR 60(b)(4) gives the Court discretion to set aside a judgment or order for “[f]raud . . . misrepresentation, or other misconduct of an adverse party” Subsection (b)(11)

authorizes setting aside a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” RSUI presented evidence of the following:

RSUI first learned that Vision and Berg had settled and noted a motion for approval of the reasonableness of their settlement three days before the September 12 hearing, CP 1173;

On September 12, 2008, the trial court continued the reasonableness hearing from Friday to Monday to give RSUI the weekend to look for evidence of fraud or collusion and assess the settlement’s reasonableness, 9/12 RP 10-11, 53-54;

Over the weekend, Berg’s attorneys Petrich and Mullin refused to make reasonable accommodation for RSUI’s attorneys to review documents, CP I:458, 464, 9/15 RP 33, 35 (Petrich), CP I:467, 9/15 RP 33-34, 40-41 (Mullin);

On September 15, after RSUI counsel explained he was unable to obtain information from Vision and Berg, Berg coverage counsel Petrich responded that there was absolutely nothing in his settlement file different or new from what RSUI already had, CP 240, which was of course impossible because RSUI had not been provided with any documents from the August 2008 settlement negotiations, including the critical email string that led to the settlement;

Berg’s defense counsel Mullin told the court that, “I don’t know of anything that we can provide to RSUI that in any way gives a hint of collusion or fraud.” CP 240.

RSUI did not learn until August 2009, 11 months later, that at the time of the settlement hearing, Berg’s counsel and Vision’s counsel had in their files emails showing that:

On August 25, 2008, Vision offered to settle for \$2 million, \$1 million to be paid by Berg's primary insurer Admiral, with the remaining \$1 million to be paid only by RSUI under an assignment from Berg to Vision of Berg's contractual and extra-contractual rights against RSUI, with Vision completely indemnifying Berg against bodily injury claims. CP 220-21.

On August 27, two days later, Berg offered to consent to a \$3.3 million stipulated judgment against itself, with Admiral paying \$1 million, and the remaining portion of the judgment to be collected solely from RSUI, with Vision indemnifying Berg from any and all personal injury claims, provided that Berg receive 33% of any recovery from RSUI. CP 231.

On August 29, Vision counter-offered to settle for \$3.3 million, but without any sharing agreement with Berg. CP 233.

The sequence of these emails directly undermined the Vision/Berg position that the settlement for the increased amount was reasonable and that Berg's attorneys had no documents that were material to the determination of reasonableness that had not been provided to RSUI. The failure of either Vision or Berg to provide these documents to RSUI or the court and the statement to the court that all relevant documents had been provided to RSUI were misrepresentations or misconduct justifying relief from judgment under CR 60(b)(4) and (b)(11).

This Court reviews a trial court's ruling on a CR 60(b) motion for abuse of discretion. ***Mitchell v. Wash. State Inst. of Pub. Policy***, 153 Wn. App. 803, 821 ¶48, 225 P.3d 280 (2009), *rev.*

denied, 169 Wn.2d 1012 (2010). A trial judge abuses her discretion if the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Id.*

A party moving under CR 60(b)(4) is not required to demonstrate that the opposing party's conduct materially affected the outcome of the proceeding at issue. ***Mitchell***, 153 Wn. App. at 825; ***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.3d 1040 (1985). “[A] litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.” ***Taylor***, 39 Wn. App. at 836-37 (citations omitted). It is the fact of misconduct that is dispositive, not its effect. As the Court of Appeals recently observed in a different context:

The driving force behind the decision was the court's appreciation of its obligation to insist upon candor from attorneys. Misleading the court is never justified. As stated in ***Fisons***: “Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” ***Fisons***, 122 Wn.2d at 355 (citation omitted).

Goble v. Gabel, 149 Wn. App. 119, 136, 202 P.3d 355 (2009).

This Court and our Supreme Court have repeatedly emphasized the importance of discovery to the fair conduct of litigation consistent with fundamental due process. As our Supreme Court stated in *Fisons*:

The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

This system obviously cannot succeed without the full cooperation of the parties.

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (quoting *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (citations from *Gammon* omitted by *Fisons*)).

This Court has similarly underscored the importance of full discovery. *E.g.*, *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 325, 54 P.3d 665 (2002). The observation of the trial judge in *Smith v. Behr* is equally apt here: "Perhaps nothing in the discovery of this case is as important as what was not disclosed." 113 Wn. App. at 325. The Court of Appeals has also upheld the

principle that it may be appropriate to set aside a judgment under CR 60(b)(4) where fraud, misrepresentation, or other misconduct consists of the failure to disclose evidence that is crucial to the court's decision. **Marriage of Maddix**, 41 Wn. App. 248, 249-50, 252, 703 P.2d 1062 (1985).

The reasonableness of a settlement with a covenant not to execute and assignment of insurance proceeds is evaluated under the nine **Chaussee** factors, which include "any evidence of bad faith, collusion or fraud" **Water's Edge**, 152 Wn. App. at 585 (citing **Chaussee v. Maryland Cas. Co.**, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991)).

Our courts have not addressed the nature of collusion that would undermine the reasonableness of a settlement, but other courts have discussed collusion in more detail. **Safeco Ins. Co. of Am. v. Parks**, 170 Cal. App. 4th 992, 88 Cal. Rptr. 3d 730, 748 (2009) ("In this context, collusion occurs when the insured and the third party claimant work together to manufacture a cause of action for bad faith against the insurer or to inflate the third party's recovery to artificially increase damages flowing from the insurer's breach." (emphasis added)); **Indep. Sch. Dist.**, 525 N.W.2d at 607 ("Collusion, for purposes of [evaluating whether a settlement may

be enforced against an insurer], is a lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining.”); **Continental Cas. Co. v. Westerfield**, 961 F. Supp. 1502, 1505 (D.N.M.), *aff’d sub nom. Cont’l Cas. Co. Hempel*, 108 F.3d 274 (1997));

Collusion and fraud in this context are not necessarily tantamount to the common-law tort of fraud in that there need not be a misrepresentation of a material fact. (Cite omitted). Any negotiated settlement involves cooperation to a degree. It becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer or nonsettling defendant. Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer. They have in common unfairness to the insurer, which is probably the bottom line in cases in which collusion is found.

(quoting Stephen R. Schmidt, **The Bad Faith Setup**, 29 TORT & INS. L.J. 705, 727-28 (1994)).

The newly-discovered emails, combined with the previous evidence about the settlement, relate directly to the factors identified by Schmidt:

Unreasonableness: No litigant that was paying its own money for a settlement would reject an offer to pay \$2 million and instead offer to pay \$3.3 million.

Misrepresentation: Berg’s attorneys claimed that they had provided to RSUI all information relevant to collusion and the

negotiation of the settlement, which was obviously a misrepresentation of a key fact because RSUI had not been provided with the August 2008 emails.

Concealment: Berg never told RSUI that the underlying insurer, Admiral, had tendered its limit of \$1 million, which would have triggered RSUI's excess policy. Nor did Berg advise RSUI of ongoing settlement negotiations despite the fact that RSUI had contacted Berg to inquire about Berg's interest in settlement.

Lack of serious negotiation on damages: As Washington courts and others have recognized, part of the moral hazard of covenant judgments is that there is a risk that the insured lacks an incentive to obtain the lowest damage number it can and will, instead, settle for anything that minimizes its own exposure and transfers it to the absent insurer. Here, the pattern is even more extreme. If Berg's concern was to eliminate its exposure (the moral hazard discussed in ***Chaussee, 60 Wn. App. at 510***), it would have accepted the first offer from Vision that provided Berg with (a) full indemnity on the potential personal injury claims and (b) a full release without any payment from Berg. Instead, Berg's counter-offer to Vision increased the amount of the settlement to accommodate a proposed kickback. Vision increased its offer of settlement to \$5.5 million only 4 days after offering to settle for \$2 million. None of this email exchange was based on the actual damages Vision could legitimately obtain from Berg if it went to trial.

Profit to the insured: Berg was the insured and would have profited from Berg's 33% kickback proposal. The only reason that Berg increased the offer to \$3.3 million was to accommodate the proposed kickback.

Attempts to harm the interests of the insurer: The entire course of negotiation was intended to harm the interests of RSUI by excluding it from negotiations and concealing the course and nature of the settlement negotiations.

Given these factors, there is no question that Berg and Vision acted together to inflate Vision's recovery to artificially increase what they would later claim in the federal action to be the presumptive damages flowing from the insurer's alleged breach, which the California Court of Appeals defined as collusion. **Safeco v. Parks**, *supra*. And during this crucial four day period, there was a lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining, which the Minnesota Court of Appeals defined as collusion. **Indep. Sch. Dist. No. 197**, *supra*. Under **Mitchell, Roberson, Taylor**, and like cases, the fact of such misconduct mandated granting the CR 60 motion.

The trial court abused her discretion by denying the CR 60 motion on the ground that, "I don't think there was anything improper done in September of 2008, and I don't think of any of the new information changes my mind about that." RP 30; **Mitchell**, 153 Wn. App. at 821 ¶48 (party moving under CR 60(b)(4) is not required to demonstrate that the opposing party's conduct materially affected the outcome of the proceeding). In so ruling, the trial court disregarded undisputed evidence showing misrepresentations by both Vision and Berg, and, contrary to cases

such as *Mitchell*, appeared to demand that RSUI demonstrate that the additional evidence actually would have changed the outcome of the reasonableness hearing.

The trial court questioned why the motion had not been brought in September 2009, within one year of the reasonableness determination. 7/1 RP 13, 15. Here too, the trial court's analysis is an abuse of her discretion: CR 60(b)(4) and CR 60(b)(11), the provisions under which RSUI moved, contain no one-year deadline, and RSUI is aware of no rule or court decision that requires it to forsake the use of those provisions in favor of bringing a motion within a year under a different provision of CR 60. Thus, this aspect of the trial court's analysis is irrelevant to evaluating the merits of RSUI's CR 60(b)(4) and (b)(11) motion.

Moreover, the trial court essentially penalized RSUI for being careful before seeking relief under CR 60. When Vision first provided RSUI with evidence showing Vision's and Berg's misrepresentations on the eve of the year anniversary of the reasonableness hearing, instead of rushing into a CR 60 motion, RSUI attempted to pursue discovery from Berg in federal court, but was stymied by Berg's resistance until Judge Lasnik ordered partial production and a privilege log in December 2009. Even by the time

RSUI brought its motion, Berg had still not produced a number of emails that it considered privileged, but which related to the settlement negotiation. RSUI should not be penalized for carefully pursuing discovery while the parties who had been in possession of the evidence all along dragged their feet and delayed RSUI's eventual motion.

The trial court also expressed concern about Vision's theory that the CR 60 motion was filed for an improper purpose, *i.e.*, to influence Vision's lawyers to settle the case. 7/1 RP 15-16 (7/1/10). The trial court's analysis conflated the standard for CR 60 with that for CR 11. Ultimately, however, the trial court rejected Vision's proposed finding of fact 13 that the CR 60 motion was filed for an improper purpose. CP 1035. Instead, the trial court found the timing of the pleadings "suspicious," FF 5, CP 13371, concluding that the motion "may likely have been filed for improper purposes," but that the court "cannot make a clear conclusion of law without a more thorough investigation." Conclusion 2, CP 13372.

Alternatively, RSUI seeks relief from the reasonableness determination under CR 60(b)(11), which gives trial courts discretion to grant relief from a judgment or order based on "[a]ny other reason justifying relief from the operation of the judgment."

Although Washington case law interpreting this provision is limited, it has been suggested that subsection (b)(11) is properly invoked when a party's failure to respond to his or her opponent's request for information prevents that party from fully and fairly presenting its position. ***Suburban Janitorial Servs. v. Clarke Am.***, 72 Wn. App. 302, 308-10, 863 P.2d 1377 (1993), *rev. denied*, 124 Wn.3d 1006 (1994). This is such a case. The trial court abused her discretion in failing to analyze RSUI's CR 60(b)(11) request for relief, instead addressing only CR 60(b)(4).

At a minimum, the trial court and RSUI were deprived of material information in September 2008 when Vision and Berg withheld the key emails proposing a kickback scheme and directly leading to a higher judgment against Berg. The trial court abused her discretion by not vacating the judgment, considering the additional evidence, and holding the settlement unreasonable or, at least, convening a full hearing with full discovery before deciding the issue.

The trial court in this case failed to consider evidence of bad faith, collusion, or fraud in September 2008 because Vision and Berg concealed the evidence. At the very least, the trial court was required to reopen the question of reasonableness and consider all

evidence relating to the issue. The court's failure to do so was an abuse of discretion.

- B. CR 11 sanctions were an abuse of discretion because the following assertions were well grounded in fact and warranted by existing law: Vision and Berg engaged in misrepresentation and misconduct by failing to disclose Berg's 33% kickback proposal; and, the settlement amount of \$3.3 million was arrived at by collusion where Berg rejected Vision's demand to settle for \$2 million, countered with an offer to pay Vision \$3.3 million with a kickback, after which the parties settled for \$3.3 million.**

The trial court abused her discretion in imposing a sanction under CR 11 because the assertions in the CR 60 motion and in the Linehan declaration were well grounded in fact, warranted by existing law, not interposed for an improper purpose, and based on reasonable inquiry under the circumstances. This Court reviews sanctions under CR 11 for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994).

The trial court should have granted the Rule 60 motion for all the reasons discussed above. Needless to say, if the Court reverses for the failure to grant the CR 60 motion, CR 11 sanctions must necessarily be reversed as well. But even if the Court were to affirm denial of the Rule 60 motion, that in itself would not justify CR 11 sanctions:

The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable.

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

A party or an attorney signing a pleading certifies:

[The] attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). The purpose of CR 11 is "to deter *baseless* filings and to curb abuses of the judicial system." ***Bryant, supra***, 119 Wn.2d at 219 (emphasis in original). "Both the federal rule and CR 11 were designed to reduce 'delaying tactics, procedural harassment, and mounting legal costs.'" *Id.*, quoting 3A L. Orland, ***Wash. Prac., Rules Practice*** § 5141 (3d ed. Supp. 1991).

CR 11 is not intended to "chill an attorney's enthusiasm or creativity in pursuing factual or legal theories," because if an attorney's theories were chilled, wrongs would go uncompensated.

119 Wn.2d at 219. As the Court observed in **Bryant**, “our interpretation of CR 11 thus requires consideration of both CR 11’s purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.” *Id.*

In reviewing CR 11 sanctions, this Court should consider the broad discretion of a trial court in granting or denying relief under CR 60. **Mitchell**, *supra*, 153 Wn. App. at 821 ¶48. This Court should ask whether the Court would have affirmed a trial court order vacating the reasonableness determination under CR 60 if the trial court had so ruled. If this Court might have affirmed an order of vacation, the CR 60 motion cannot be a violation of CR 11 because it would be well grounded in fact and warranted by existing law. Based on the evidence presented, RSUI respectfully submits that the Court would have affirmed an order vacating the reasonableness determination.

The Supreme Court has held that a party must be given an “opportunity to mitigate the sanction by amending or withdrawing the offending paper.” **Biggs v. Vail**, 124 Wn.2d at 198. Amendment of a paper “does not expunge the violation, although such corrective action should be used to mitigate the amount of

sanction imposed.” *Id.* at 199-200. The Supreme Court added, “[p]rompt notice of the possibility of sanctions fulfills the primary purpose of the rule, which is to deter litigation abuses.” *Id.* at 198.

The trial court found that five days after RSUI filed the CR 60 motion, Vision attorney Aliment “expressed his concern about the CR 60(b) motion and the accusations therein,” and that two days later RSUI filed an amended CR 60(b) motion, “but the previous pleadings were not retracted or withdrawn.” FF 7, CP 13371-72. This was error. When a pleading is completely amended and the amendment does not adopt any part of the prior pleading but supersedes it, “the original pleading ceases to be a part of the record, being in effect abandoned, or withdrawn, and becoming *functus officio* with the result that the subsequent proceedings in the case are to be regarded as based upon the amended pleading, which will not be aided by anything in the prior pleading” *Herr v. Herr*, 35 Wn.2d 164, 166, 211 P.2d 710 (1949) (quoting 49 *C.J.* 558, Pleading § 773). Accordingly, any sanction imposed on RSUI for the initial motion must be limited to the seven days before the amended motion was filed, and any other sanction must be based on the amended motion and any alleged impropriety in the Linehan declaration.

The trial court found that the phrases “improper means,” “collusion,” and “kickback scheme” were not well grounded in fact. FF 1, 3, CP 13371. Vision and Berg do not deny that Berg declined an opportunity to settle for \$2 million, instead counter-offering a larger judgment against itself coupled with a 33% kickback, and that two days later Vision and Berg entered into a settlement for \$3.3 million without any kickback. They then withheld this evidence from the reasonableness hearing, telling the trial court that there had been no collusion in negotiating the settlement, CP 209, stonewalling RSUI’s efforts to obtain information about how they negotiated the settlement, and even telling the trial court that their files contained nothing different or new that RSUI didn’t already have and that there was nothing that they could provide to RSUI “that in any way gives a hint of collusion or fraud.” CP 240. Berg’s proposal was in fact a kickback and also constituted evidence of collusion under *Water’s Edge* and *Chaussee*. And, of course, the Court is to consider “**any** evidence of . . . collusion . . .” in evaluating whether a settlement is reasonable. 152 Wn. App. at 585 (emphasis added).

It was improper for Vision and Berg to claim to the trial court that they had reached a reasonable settlement when they knew

that Berg could have settled for \$2 million and virtually the same additional terms agreed to in connection with the \$3.3 million settlement. This Court has held that an abrupt shift from litigation to collaboration is “highly suspect and troublesome.” *Water’s Edge Homeowner’s Ass’n*, *supra*, 152 Wn. App. at 595. In *Water’s Edge*, this Court agreed that it was troubling that there was an appearance of “a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to [the defendant’s insurer] as intervenor.” *Id.* Here, although the relationship between Vision and Berg may have remained adversarial, Berg rejected Vision’s \$2 million offer in order to propose a 33% kickback under which Berg would participate in any recovery from RSUI. This joint effort to create a resolution beneficial to both parties and highly prejudicial to the insurer is evidence of collusion, and is well grounded in fact for purposes of bringing a CR 60(b) motion.

The use of the phrase “kickback scheme” was certainly well grounded in fact – RSUI repeatedly referred to it as a proposed kickback and specifically acknowledged in the amended motion that “discovery to date has not established that the proposed kickback scheme was accepted by Vision.” CP 331 (emphasis supplied).

The trial court erred in finding these phrases (“kickback,” “collusion,” etc.) baseless, without merit, and not well grounded in fact. FF 1, 2, 3, CP 13371.

The trial court also erred in entering FF 2 that RSUI attorney Linehan “signed and filed a declaration asserting that he had personal knowledge that the documents showed ‘collusion in their negotiation of the settlement.’” CP 13371. Linehan’s actual assertion on personal knowledge was that, “[i]t was not until August 2009 . . . that RSUI first obtained [the emails] showing collusion in their negotiation of the settlement” CP 23. The thrust of Linehan’s statement was the timing of when RSUI first received the pertinent emails (in August 2009) and the collusion to which he referred is the collusion discussed in RSUI’s CR 60 motion and this brief such as the misrepresentations made to the trial court that all material documents regarding the settlement had been provided to RSUI. This statement was neither baseless, made without personal knowledge, nor without merit.

The trial court also erred in FF 3 in finding that the Rule 60 motion was not based on actual inquiry that was reasonable under the circumstances. CP 13371. Having been denied the relevant documents at the reasonableness hearing, RSUI sought discovery

of the documents in the federal court action and obtained them on or about August 7, 2009. RSUI also sought discovery of more documents from Berg, which Berg declined and only produced – in part – in January 2010 following Judge Lasnik’s order compelling their production. There are even more documents that Berg has not yet produced, but RSUI has been unable to obtain those documents to date. Moreover, as explained in the Statement of Facts, *supra*, Vision’s Aliment and Berg’s Mullin testified vaguely and equivocally about whether Vision had accepted Berg’s proposed 33% kickback. CP 702, 927-28. RSUI had exhausted the avenues of inquiry open to it. RSUI appropriately moved to vacate the reasonableness determination, which would have opened the door to complete discovery and a new hearing to determine the reasonableness of the settlement.

The trial court refused to find that the Rule 60 motion was filed for an improper purpose. Ignoring the Helgren declaration, which was the only direct evidence before the court, the court found the timing “suspicious,” FF 5, CP 13371, but also concluded that although the motion “may likely have been filed for improper purposes,” the court “cannot make a clear conclusion of law without a more thorough investigation. CL 2, CP 13372. To the extent the

court gave its unsupported supposition any weight, that too was error.

In conclusion, the trial court's findings and conclusions do not support the imposition of CR 11 sanctions on RSUI and its counsel. The CR 11 sanctions were an abuse of discretion.

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

For all the reasons discussed above, the trial court erred in finding a CR 11 violation and in awarding sanctions. Accordingly, the attorney fees awarded to Vision and Berg should be reversed.

Even if the Court were to uphold a CR 11 violation, the fee award is grossly excessive. Even if RSUI had never used the terms the court found improper – “collusion and kickback scheme,” “collusion in their negotiation of the settlement,” “improper means,” “collusion,” and “kickback scheme” – the Rule 60 motion would still have been proper because the emails show that Berg could have settled for \$2 million instead of inflating the judgment against itself to \$3.3 million, and because Vision and Berg withheld from the court and RSUI relevant evidence that the settlement was unreasonable. Vision and Berg failed to identify what fees were incurred in responding specifically to the allegedly improper

allegations and the trial court erred in failing to limit a sanction to those fees. The Court should reverse.

CONCLUSION

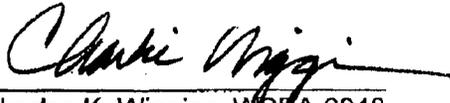
Vision's and Berg's attorneys turned the goal of full disclosure upside down, concealing evidence bearing on the reasonableness of their settlement and even telling the trial court that they had not withheld any material evidence from RSUI. When RSUI discovered some of the critical emails in the federal lawsuit and moved to vacate under Rule 60, Vision and Berg successfully diverted the trial court from their own misconduct by savagely attacking RSUI and the McNaul Ebel attorneys, unfairly accusing McNaul Ebel of acting without well grounded facts or legal support.

This Court should reverse the denial of RSUI's CR 60 motion and hold the settlement unreasonable based on the evidence presented to the trial court. In the alternative, the Court should reverse and remand with instructions that any evidence of misconduct or collusion must be considered in re-determining the reasonableness of the Vision/Berg settlement. The Court should also reverse the CR 11 sanctions. Indeed, even if this Court were to uphold some aspect of the CR 11 findings and conclusions, the

Court should reverse the sanctions as excessive and remand for re-determination of sanctions tied directly to the specific violations.

RESPECTFULLY SUBMITTED this ^{30th} day of December 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 3rd day of January, 2011, to the following counsel of record at the following addresses:

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A handwritten signature in black ink, appearing to read 'Barbara H. Schuknecht', written over a horizontal line.

Barbara H. Schuknecht
WSBA No. 14106
Attorney for Appellant

APPENDIX A

REDACTED

From: Dale Kingman [mailto:dkingman@gordontilden.com]
Sent: Monday, August 25, 2008 3:40 PM
To: Dan Mullin; ppetrich@dpearson.com
Cc: Aliment, Randy
Subject: FW: Vision One Settlement Proposal

Dear Dan and Peter:

Below you will find a rebuttal to Dan's last offer email along with a counter proposal to settle the case. The settlement offer is at the end of the rebuttal and includes a complete indemnification of Berg along with a money demand. Now that both sides have had their say on the facts, let's move toward resolution.

I am advised this is the final offer that will be put forth from Vision and its insurers. If you wish to discuss or ask questions, please call me on my cell, below. I am in DC until Thursday but am available to discuss.

Thank you

Dale

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From: Allment, Randy [mailto:rallment@willamskastner.com]
Sent: Monday, August 25, 2008 1:49 PM
To: Dale Kingman
Cc: Edmonds, Jerry; Hofmann, Doug; William Pelandini; Roger Hebert; Henry Hebert
Subject: RE: Vision One Settlement Proposal

Dale,

The following is our rebuttal to Mullin's 8/11/08 email.

Mullins claim: Vision One's case has not gotten better and Berg has received favorable rulings and uncovered important evidence. Berg is way off base, misunderstands the law and will suffer a very large verdict because of Berg's many errors tremendous exposure under the product liability act and other theories of law. We just completed the last discovery deposition - Ed Huston, a structural engineer for Phi Ins Co that Berg referred to in its 8/11/08 email. Huston finally confirmed what D&D

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CP 214

has been claiming for months and Berg has been denying. Huston is positive there was a 7th frame in the collapsed area and Berg's drawing only calls for 6. D&D presented this testimony early on that Berg instructed D&D to add the 7th frame and Berg has been denying it. Berg has suffered a devastating credibility blow and will not recover.

Rebuttal: A partial list of of Berg's errors and contribution to the collapse is as follows:

Berg's drawings- required that D&D follow drawings and no changes without permission from Berg
Stringer/joist orientation- aligned against the slope (contrary to Jasco manual which Berg had and D&D did not)
Berg Missed the slope in the ramp area
Installation of shoring system
D. Johnson's verbal instruction to place 7th tower in collapsed area
D. Johnson's verbal instruction to go forward with pour after he inspected the shoring installation
Lack of tightly fitted screwjack base plates
Mismatched equipment
Lack of wedges
Lack of stabilizer caps
Lack of proper extension support pins for frame legs
Lack of proper locks for frame coupling pins for towers
Lack of sufficient cross braces
Lack of interbraces
Corrosion
Rewelding
Berg's 8/18/05 drawing not provided to D&D until after 10/1/05 collapse- even if D&D had followed the 8/18/05 drawing, the collapse still would have occurred
Berg's 10/14/05 drawing provided to re-do the pour after the collapse is wrong- if D&D had followed the 10/14/05 drawing, the re-pour would have collapsed
Berg did not do load calculations
Berg violated ANSI 10.9- an engineer is required to review the shoring layout. Berg is the only company supplying shoring to others our shoring experts know who does not comply with ANSI

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CP 215

10.9
Lack of swivel jacks
Supervision of installation

Mullin Claim: Judge Van Doornink ruled that Berg can show evidence that D&D was cited for WISHA violations, and Vision One will NOT be able to get in the citation against Berg since it was overturned on appeal. Berg claims this is very damaging evidence against D&D and that there are multiple violations for D&D's work and Vision Ones' failure to supervise it. There are multiple violations and they are characterized as "serious."

Rebuttal: D&D and Berg were both cited by DLI for WISHA violations regarding the shoring collapse. This is nothing new. The judge ruled months ago at one of about fifty motions in limine that DLI citations against D&D are admissible and the DLI citations against Berg are not. Long before this lawsuit was filed D&D decided not to fight the DLI citation and "move on" with the project. Berg got its DLI citations dismissed claiming, among other things, that Berg had no workers on the Reverie project. This is false because Berg's Dwight Johnson directed the placement of shoring in the key ramp area that failed and he and others at Berg made other errors as well that contributed to the collapse. If DLI had known Berg had a worker directing work at Reverie and exposed to the danger, Berg's citation would likely not have been dismissed. D&D was not a party to and had no standing to participate in Berg's fight with DLI. It is totally false that there is a citation for Vision One's failure to supervise D&D's work. Neither Vision One (VO) nor Vision Tacoma (VT) ever received a citation for the shoring collapse at Reverie. The state could and would have issued such a citation if the DLI thought VO or VT was the general contractor in charge of safety on the project. Owners/developers and construction managers do not control the work of architects, engineers, shoring suppliers and other specialty work because they do not know how to do it.

Mullin Claim: Vision One has fought hard against Berg's claims that VO has overall responsibility for safety at the project (Stute duties). The judge has consistently ruled in Berg's favor on this. It means that Vision One and Vision Tacoma will be parties on the verdict form to whom fault can be assigned.

Rebuttal: This is also nothing new, but only affects apportionment for the injury claims. It should not reduce VO's claims against Berg for damages. VO and VT moved to dismiss Berg's and Thompson's claims that VO, as the owner/developer, and VT, as the construction manager, had a duty over how D&D placed the shoring and how Berg prepared load calculations and shoring layouts and directed D&D's work. The judge denied VO's/VT's motion to dismiss because there were issues of fact. Berg has focused great energy and time that VO and/or VT are really the general contractor and therefore under the 1991 Stute case have a duty for safety for all those working on the job. The contract documents show VO is the owner/developer and VT is the construction manager. A project does not require a general contractor. Companies whose employees are directly involved in supervising, directing and/or performing particular parts of the work on a construction site each have a duty, as those particular parts of the work, to comply with safety regulations and provide a safe workplace. An owner/developer of a construction project may retain control by contract, or may affirmatively exercise control, over safety practices for the project as a whole, or over the manner in which a particular contractor, or a company hired by the contractor, does its work. If an owner/developer does retain or exercise such control, it has a duty, along with companies directly involved in the work, to exercise ordinary care to see that the work is performed in a safe manner. VO and VT have factual, legal and expert support that owners, developers and construction managers are not required to be shoring experts and are not required to ensure that the shoring suppliers and shoring placers do their work properly.

Mullin Claim: Berg has uncovered evidence that Vision One hid documents and has even altered documents to try and avoid the safety issue.

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MULLIN 00361

CP 216

Rebuttal: No such evidence exists. If he has it, it should have been produced in discovery. If he wants us to seriously consider his position, he should produce it now. On the other hand, we have shown repeated untruthfulness by Berg witnesses.

Mullin Claim: Berg's claim against Vision One has been bolstered by additional evidence Berg has found. For example, Vision One and Vision Tacoma have vehemently denied that they were a "general contractor" on the project. Besides multiple documents, testimony and common sense, we recently were provided a photo from one of the subcontractor's files. It shows a big sign on the job trailer identifying Vision Tacoma as the general contractor!! See the attached picture.

Rebuttal: The contract documents show there was no general contractor for this project. VO, VT and D&D are all registered general contractors. That means is they can perform contracting work and sub work out to others. But for the Reverie project none was the general contractor. VO had no employees on the job as owners usually do. VT had one representative on the job for scheduling and to assure the owners got what they were paying for, but VT had no contract with any sub or trade performing the work. This is a common arrangement to avoid the extra cost of a general contractor. Someone on the job had Stute duties- D&D had this duty. Berg was very surprised when its own submittals to the court confirmed this. D&D sought help from Berg to perform and Berg failed terribly and has been trying to cover up since the event.

The photo says:
Vision Tacoma
Construction
General Contractor with phone and registration #.

Vision Tacoma had no contract with any trade or any entity doing any work on this project. VT was the construction manager and only contracted with VO to serve as construction manager. The contract documents should control.

Mullin Claim: Vision One and Vision Tacoma are looking at significant exposure in this case, along with D&D. They were in the best position to assure compliance with the WISHA requirements on the shoring, and they failed to do that.

Rebuttal: Shoring is a specialized activity that is performed by concrete contractors and shoring suppliers. It is nonsense to claim the owner/developer or the construction manager are in the best position to assure WISHA shoring compliance. This would turn the custom and practice in the industry on its head.

Mullin Claim: Berg recently learned that D&D's president, Dwayne Walters, passed away. This is a critical blow to Vision One's case. Walters was the only English speaking person putting up the shoring for D&D. Since he will not testify live, Vision One will be hard pressed to push its theories of the case. They simply won't have the evidence they hoped to present at trial.

Rebuttal: Duane Walter's death was tragic and untimely but fortunately we have the 2 days of video deposition testimony. We have an effective direct exam from his video deposition, including the critical testimony about how Dwight Johnson came to resolve Berg's missed slope in the collapsed area and told D&D to add an extra shoring tower. We also have D&D's English speaking foreman, Luis Alejandro, who supervised his father, Jaime Alejandro, the shoring foreman. The Alejandres have worked with D&D for 15-20 years. We also will admit into evidence much of the damaging evidence against Berg through the early investigators for Philadelphia Insurance, Brenda Toole. Toole testified

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that Dwight Johnson first admitted to her that he had reviewed D&D's shoring installation and gave directions about how it should be done. Days later he denied he said this to her. Toole will also testify that Wayne Fox told he had not done load calculations and that Berg's drawings contributed to the collapse.

Mullin Claim: On the claims against Berg, Vision One fought hard in arguing that there was no evidence that cross braces were missing in the collapsed area. Berg claims this is absolutely crucial to the case and that if the cross braces were missing, the collapse was caused by the poor workmanship of D&D. Berg claims they have indisputable evidence that more than one cross brace was missing in the collapsed area. One of the engineering experts, Ed Huston, was at the project immediately following the collapse. He photographed and documented more than one missing cross brace IN the collapsed area. His deposition was taken July 23rd and he testified about the missing cross braces, confirmed that Berg's design was sufficient, albeit with a reduced safety factor, and the missing cross braces were the primary cause of the collapse. Berg claims it has experts who will trumpet this as well.

Rebuttal: The claim about missing cross braces is not new. Berg has argued this since they came to Reverie on the day of the collapse and took pictures of missing cross braces. Discovery showed that the people who investigated the debris from the collapsed area can not support what Berg wants to argue about a missing cross brace. Discovery from the engineers and those hired do do the debris counts went extremely well for D&D. All D&D witnesses have testified cross braces were properly installed in the collapsed area.

Mullin claims, "if the cross braces were missing, the collapse was caused by the poor workmanship of D&D" Even if the the cross braces were missing, this did not cause the collapse. Our experts will say that the slab would have collapsed due to Berg's errors even if all the cross braces were properly installed. Moreover, the collapse would not have occurred from a missing cross brace as Berg claims. Philadelphia Insurance Company hired the first engineer to inspect the collapse, Brenda Toole, who in turn hired Ed Huston to do structural analysis work. Toole was on site 10/5, and Huston on site 10/7. Toole said at deposition:

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22 Q. What I want to clarify here is eventually you came to
23 the conclusion that true cross braces, that is, braces
24 within a frame were not a problem and that the lack of
25 interbraces in your view or Mr. Huston's view were a
1 problem?

2 A. In the area of failure, the cross braces didn't seem
3 to be a problem. Lack of interbraces did. Outside
4 the area of failure, cross braces were missing in many
5 cases and I didn't see any interbraces elsewhere.

Toole also said that Berg's drawing contributed to the collapse: 153

24 Q. Did you come to a conclusion on a more probable than
25 not basis that the drawings contributed to the
1 collapse?

2 A. They contributed in part to the collapse in my
3 opinion.

Huston was deposed recently and he testified like Berg's metallurgist did on March 3, 2008, that pictures of the shoring tower in the southwest corner of the collapsed area show 2 pins in place on the upper tower on the north side. Cline and Huston have theorized that the pins would have been distorted if the cross braces had been ripped off them from the falling debris. They conclude the cross brace was

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missing at that location. We believe this is meaningless.

First, this southwest tower did not collapse and was not the start of the collapse. Our experts and Berg's experts have testified the collapse started elsewhere and even if a cross was missing in the southwest corner, it did not cause the collapse. Moreover, Berg came to this very area to give directions about how to install the shoring because Berg missed the slope and an extra shoring tower was needed. If a cross brace was missing, Berg was standing right there and should have said something. The absence of a cross brace will lower the strength of the shoring tower less than half of the reduced strength that results from Berg's errors by running the stringers in the ramp area against the slope with no wedges resulting in eccentric loading. We know there were no wedges and this alone is enough to cause the collapse. Finally, cross braces pulled out of other pins in frames in the collapsed area without damaging the pin. The cross braces were not missing and could not have started this collapse.

Finally at the 2nd session of Huston's deposition he corrected a critical error he made about how much concrete had been poured at the ramp before the collapse. He thought only the western row of towers had concrete poured over them, and he now realizes the pour had progressed to the row of towers to the east. He conceded that the start of the collapse could be where the other structural engineers say it started and he conceded could not possibly have been caused by a missing cross brace on the tower in the southwest corner.

Mullin Claim: Vision One's damage claims have not fared much better. The court dismissed their claim for damages due to the downturn in the condo market. They have now converted the claim to an argument that the collapse caused delay and investors backed out of their contracts. Problem is they do not have a single witness to support their allegations. The judge came within a whisker of throwing it out altogether. Judge Van Doornink made it clear that evidentiary objections will be looked on favorably at the time of trial on these issues. In any event, Vision One's damage claim is a duck-taped theory without good evidence. In fact, Vision One's entire damage claim is undermined by their own project superintendent, Lonny Arneson. As you know, Lonny is a terrible witness for Vision One.

Rebuttal: Contrary to Berg's allegations concerning the weakness of Vision One's damage claim, and the judge's supposed skepticism concerning this claim, the judge has consistently ruled against Berg on its pre-trial motions to exclude Vision One's delay damage claim and supporting evidence, including:

- Berg's Motion for Partial Summary Judgment to dismiss Vision's delay damage claim;
- Berg's Motion In Limine No. 10, to exclude Mr. Pederson's damage summaries and backup and testimony regarding the same;
- Berg's Motion In Limine No. 11, to exclude all documents referring to real estate market downturn; and
- Berg's Motion In Limine No. 12, to exclude Mr. Hurme's testimony.

Berg's claims concerning the judge's treatment of Vision One's damage claim is inaccurate. Mr. Pederson will provide expert testimony, supported by ample documentary evidence, concerning the amount of Vision One's damages. Mr. Hurme will testify concerning the effect of the delay on Vision One's ability to sell the units. Mr. Mullin is correct that he can offer objections, but Vision One is well aware of what they likely will be and is fully prepared to meet them.

In addition, even Berg's experts agree that Vision One's initial proposed construction schedule was reasonable. We will establish, through Stacy Kovats, Lonny Arneson and others, that the 30 day delay became a 90 day delay in large part due to the delay in delivery of the panels, a factor over which Vision One had no control. Vision One did everything possible to mitigate the damage and even the defense experts agree that Vision One and the framers did an excellent job of mitigating the damage once the panels were delivered. In fact, after the critical "dry-in" stage, the project was essentially back on track, a fact the defense witnesses have also acknowledged. The evidence will establish that Vision One did an outstanding job of minimizing the delay.

The simple fact remains undisputed, there are purchasers who backed out of their purchase agreements

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because of the delay. VO has expert testimony and the judge will allow the \$6 million damage claim to go to the jury. Lonny Arneson was a good witness and he is honest. Randy Berg and Dwight Johnson were not honest witnesses.

Mullin Claim: Finally, Judge Van Doornink ruled on July 25th in Berg's favor on the affirmative claims against D&D for breach of contract and its failure to pay for the equipment Berg leased to them at the project. This arose out of the assignment D&D made to Vision One. Effectively, D&D gave away all claims it may have against Berg. The judge agreed and ruled that D&D could not assert any of these defenses to Berg's claim. Essentially, the only remaining issue is how much D&D owes. Berg has already filed evidence showing it is about \$100,000. With the death of Mr. Walters, there is no way to defend the claim.

Rebuttal: D&D did assign its claims against Berg to VO. The judge said D&D's offset would be dealt with later by the court. D&D's defenses have not vanished. VO can assert any defense D&D would have had against Berg's claims. Berg tried to have the judge dismiss D&D's claims against Berg, and the judge said they are not dismissed- they have been assigned. D&D's defenses have not vanished, they are just owned now by VO.

Here is the language in the proposed order:

D&D may not assert during the jury trial any of the Assigned Claims as an offset against Berg's claims against D&D, Inc., nor may Berg's claims against D&D as initially asserted in Cause Number 06-2-11520-7 (including any subsequent reassertion of those claims) be asserted during the jury trial as an offset against Assigned Claims. The Court will rule after jury trial as to the extent if any that Assigned Claims and Berg's claims against D&D may be used as offsets after the amount of such claims, if any, have been established by jury verdict in either direction, one against the other.

Berg is trying to get back shoring damaged by Berg's errors. D&D owes no money to Berg because Berg took back its shoring except for the items damaged by Berg's errors.

The evidence against Berg does not support Berg's requirement for a walkway and complete indemnification. However, 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 One and Vision Tacoma ("Vision").
- Vision and its carriers will provide a complete indemnity to Berg against the bodily injury claims.
- The Berg equipment is is a trailer. It will be returned at the conclusion of the trial.
- There will otherwise be a complete release between Berg, D&D and Vision.

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- 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 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. In the event of court approval, Vision will proceed to trial against Philadelphia for all of its damages. Berg agrees to assign all expert work product and access to Berg's witnesses to Vision.

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

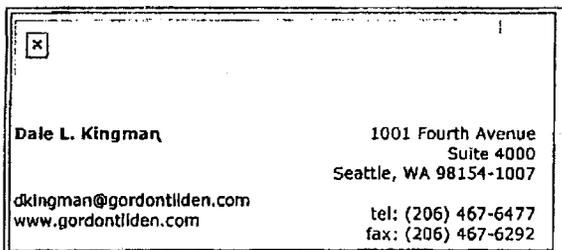
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raliment@williamskastner.com



From: Dale Kingman [<mailto:dkingman@gordontlden.com>]
Sent: Wednesday, August 13, 2008 12:40 PM
To: Aliment, Randy
Subject: FW: Vision One

Below you will find the counter to your offer of yesterday.

Dale



From: Dan Mullin [<mailto:dmullin@MullinLawGroup.com>]
Sent: Wednesday, August 13, 2008 12:15 PM
To: Dale Kingman

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APPENDIX B

Dan Mullin

From: Dale Kingman [dkingman@gordontilden.com]
Sent: Wednesday, August 27, 2008 2:07 PM
To: Dan Mullin; raliment@williamskastner.com
Subject: Re: Vision One

I read the latest from Dan and appreciate the direct contact. I will be in Seattle tomorrow if you need me.
Sent via Blackberry by Dale L. Kingman
Cell Ph: 206-420-9140
Office: 206-467-6477

----- Original Message -----

From: Dan Mullin <dmullin@MullinLawGroup.com>
To: Dale Kingman; raliment@williamskastner.com <raliment@williamskastner.com>
Sent: Wed Aug 27 13:59:50 2008
Subject: Vision One

Gentleman

Dale is out of the office so I thought it best to write directly to both of you. We have considered Vision One's offer. We may be close, but there are some elements to a resolution that Berg and Admiral require. With that said, here is our counter offer:

1. Admiral will pay \$1 million to VO
2. Berg will release their affirmative claims
3. Berg will allow reasonable access to their experts and witnesses with the understanding that VO/VT is responsible for any fees or costs associated with that access or the experts or witnesses
4. Berg will not agree, and cannot ethically agree, that the Mullin firm will not continue to represent it in collapse related matters.
5. There will be a complete release between the parties: Berg, VO, VT and D&D. Berg will be dismissed from the litigation with prejudice
6. VO/VT will indemnify and hold harmless Berg and Admiral from any and all personal injury claims arising out of the collapse, including but not limited to Thompson, Grand and the 4 recently identified claimants from L&I.
7. Berg will assign its rights against RSUI with the condition that there is a stipulated judgment (not filed) in the amount of \$3.3 million which can only be executed and collected against RSUI, and further that Berg receive 33% of any recovery from RSUI for its bad faith refusal to provide coverage

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8/27/2008

MULLIN 00371

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APPENDIX C

him. I also called Randy Berg and learned that there is a family emergency and he is out as well.

Under the circumstances, it is not possible to respond to your offer before noon. Realistically, I probably won't be able to until Tuesday. I assume that you will keep the offer open until the clients have had a chance to review it. Thanks for your courtesies.

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From: Aliment, Randy [<mailto:raliment@williamskastner.com>]
Sent: Fri 8/29/2008 7:43 AM
To: Dan Mullin
Subject: RE: Vision One Counter Proposal

Dan,

I have had the opportunity to discuss this with the carriers. They are willing to modify paragraph 7 as follows:

7. Berg will assign all its rights including its coverage and extra contractual rights against RSUI with the condition that there is a stipulated judgment (not filed) unless necessary in the amount of \$3.3 million which can only be executed and collected against RSUI:

There are no other changes. This offer remains open until noon today and will be withdrawn at that time if not accepted.

Randy

Randy J. Aliment
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601 Union Street, Suite 4100
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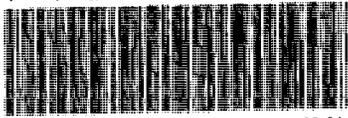
From: Dan Mullin [<mailto:dmullin@MullinLawGroup.com>]

VONE003810

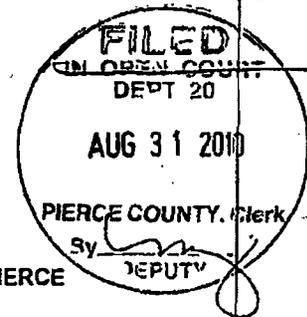
9/2/2008

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APPENDIX D



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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

VISION ONE LLC,

Plaintiff(s),

vs.

PHILADELPHIA INDEMNITY INSURANCE

COMPANY,

Defendant(s).

Cause No: 06-2-05810-6

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING CR11 SANCTIONS
AGAINST RSUI**

Based on the hearing held July 1, 2010, all the pleadings and the Court file, the Court makes the following:

Findings of Fact:

1. On April 8, 2010, "RSUI's CR 60(b) Motion for Relief from Reasonableness Order" was filed in Court. The motion sought relief under CR 60(b)(4) Relief from Judgment or Order for "fraud, misrepresentation, or other misconduct of an adverse party." In the pleadings, RSUI alleged that Berg Equipment & Scaffolding Co., Inc. ("Berg") and Vision One, LLC, Vision Tacoma, Inc., and D&D, Inc. (collectively "Vision") using "improper means" entered into a settlement figure and obtained a reasonableness finding from this court." (RSUI's Amended CR 60(b) Motion for Relief from Reasonableness Order, page 2). Repeatedly, RSUI referred to Berg and Vision's "collusion and kickback scheme."
2. On April 8, 2010, David Linehan signed and filed a declaration asserting that he had personal knowledge that the documents showed "collusion in their negotiation of the settlement."
3. These specific phrases "improper means" and "collusion" and "kickback scheme" were baseless and without merit in that they were not "well grounded in fact" and not based on an actual inquiry that was reasonable under the circumstances.
4. There are several separate court actions proceeding at the same time, the appeal of the trial; the appeal of the trial court's reasonableness hearing; the federal lawsuit; and the motion before the trial court.
5. The timing of the pleadings is suspicious. The depositions for the federal lawsuit were taken of some of the principals, including: Jerry Edmonds on August 19, 2009, Randy Aliment August 19, 2009; Peter Petrich on August 12, 2009, and Daniel Mullen on August 18, 2009. The one year time limitation for a motion to consider new evidence did not run until September 15, 2009. RSUI had a full month after these depositions to file a motion before this trial department without the necessity of accusing opposing counsel of fraud and misrepresentation. They chose not to do so.
6. United States District Judge Robert Lasnik in a summary judgment ruling on December 18, 2009, granted the defendants' motion (Vision) and denied plaintiff's motion (RSUI) regarding coverage, determining that RSUI's policy provided coverage to Berg.
7. On April 13, 2010, Mr. Helgren telephoned Mr. Aliment and inquired about settlement of the federal litigation. During the call, Mr. Aliment expressed his concern about the CR 60(b) motion

and the accusations therein. Two days later an amended CR 60(b) motion was filed, but the previous pleadings were not retracted or withdrawn.

CONCLUSIONS OF LAW

1. RSUI's CR 60(b) Motion for Relief from Reasonableness Order alleging fraud, misrepresentation or other misconduct was baseless and advanced without an inquiry that is reasonable under the circumstances of this case based on an objective standard.
2. RSUI's CR 60(b) Motion may likely have been filed for improper purposes, to gain some advantage in negotiations, based on the timing. The Court cannot make a clear conclusion of law without a more thorough investigation.
3. RSUI was no longer under the one-year time frame of CR 60, so therefore should have more carefully and thoughtfully proceeded with a reasonable inquiry before accusing opposing counsel of fraud, misrepresentation, or other misconduct.
4. The allegations were serious and would constitute serious professional misconduct and likely result in discipline. The accused attorneys were compelled to vigorously defend against the allegations.
5. RSUI had the opportunity not to file the offending pleadings or to withdraw them after the conversation with Randy Aliment or at any time prior to the July 1, 2010 oral argument, but again, chose not to. The conversation with Randy Aliment was sufficient notice for purposes of CR 11.
6. The primary purpose of CR 11 is to deter baseless filings and to curb abuses of the judicial system.
7. RSUI shall pay the following in attorneys fees which are reasonably attributable to the specific sanctionable filings:

Berg's fees: There was a need for Berg to file a separate brief because two of Berg's attorneys were being personally accused of misconduct; they had the right and the duty to respond separately from Vision One. However, a lodestar analysis is not appropriate. A reasonable amount of fees for all attorneys representing Berg is 100 hours at \$185/hour or \$18,500.

Vision One's fees: The Court finds 150 hours as being a reasonable amount of hours to spend defending against the allegations of misconduct. There is evidence in the billings of numerous conferences discussions and excessive times spent on some of the pleadings, i.e. RAP 7.2(e) briefing.

An hourly rate of \$295 is reasonable. Therefore \$44,250 is reasonable.

DATED this 31st day of August, 2010.



Judge Kitty-Ann van Doorninck

