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

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LISA STEEL, individually and as Guardian *ad litem* for J.T., a  
minor; DOUGLAS THOMPSON and KRISTI BARBIERI, individually  
and as Guardian *ad litem* for S.R.B., a minor,

Appellants/Plaintiffs,

vs.

OLYMPIA EARLY LEARNING CENTER, et al.,

Respondents/Defendants,

vs.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondents/Intervener

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Since 2012, Appellants—six sets of parents and their minor children (collectively, “Appellants”; respectively, the “Parents” and “Children”)—have been attempting to obtain from the trial court reasonableness determinations regarding covenant judgment settlement agreements (“Settlement Agreements” or “Agreements”) with the defendants—Olympia Early Learning Center (“OELC”), and two of its officers, Stephen Olson and Rose Horgdahl (collectively, “defendants” or “insureds”)—as well as entry of stipulated judgments required by the Agreements. However, for the second time, Appellants find themselves forced to seek interlocutory relief from this Court. Like last time, at the urging of intervening insurance company Philadelphia Indemnity Insurance Company (“Philadelphia”), what should have been a simple, evidentiary hearing once again was warped into shambolic, open-ended proceedings unrecognizable and unauthorized under Washington law, requiring reversal.

Normally, these reasonableness proceedings would and should have been completed years ago. Under Washington law, trial courts may hold a reasonableness hearing on 5-days notice to the parties, without notice to the defendants’ insurer, without the participation of such insurers, and without becoming a “mini-trial” on damages or liability. This is so because Washington law holds that a trial court’s reasonableness determination is a narrowly-confined objective inquiry

focused only on the litigation posture, evidence, and law in existence at the time of settlement, all in service of the trial court's ultimate goal of determining whether the settlement fell within a reasonable range. Consistent with these principles, even when a trial court permits an insurer to intervene in a reasonableness proceeding, they are entitled only to a reasonable opportunity to appear and to be heard with little to no opportunity for discovery where, as is often true of insurers, they are no stranger to the case from having monitored and managed the litigation activities of their appointed defense counsel.

Unfortunately, almost immediately after the trial court permitted defendants' insurer, Philadelphia Indemnity Insurance Company ("Philadelphia"), to intervene in this case under the pretense of "focused discovery," these reasonableness proceedings devolved into an unfettered, unending, and unprecedented abuse of process completely afield from and contrary to Washington precedent, already once requiring interlocutory review by the Court and reversal of trial court orders requiring production of all of Appellants' attorney-client privileged communications and attorney mental impression and opinion work product to Philadelphia. However, with the Court's holding that the factors relevant to the trial court's reasonableness determination "may be assessed based on other evidence in Philadelphia's possession and the discovery already submitted to Philadelphia," *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 841, 381 P.3d 111 (2016) ("*Steel I*"), Appellants proceeded back to the trial court on remand for a reasonableness hearing in short order.

Or so Appellants thought. Instead, Philadelphia immediately resumed its attempts to distort what should have been perfunctory reasonableness proceedings into a tortuous procedural quagmire and endless fishing expedition. Ultimately, on Philadelphia's motion under CR 60(b)(11), the trial court *sua sponte* entered an order under CR 60(c) ("Summary Judgment Order") vacating an earlier November 2012 order dismissing the Parents' claims without a reasonableness determination or entry of judgment, reasoning that a recently-issued Court of Appeals decision constituted a "change in law" warranting extraordinary relief years after the fact.

But the trial court committed multiple legal errors in entering the Summary Judgment Order requiring reversal. The trial court lacked authority to vacate its previous interlocutory order under the plain language of CR 60(c)—which only preserves any other grounds for relief in a separate, independent action—and CR 60(b), which applies only to "final" orders. And, even if either rule applied, Washington law recognizes that the mere issuance of a new appellate decision is not a "change in law" warranting the extraordinary remedy of vacation. Moreover, RCW 4.22.060(1)'s mandatory plain language required a reasonableness determination regarding the covenant judgment settlements at issue. Additionally, even if the Court reached the merits of the order, both the trial court's and Philadelphia's reasoning for vacation—that the Agreements' release provisions obviated any need for a reasonableness determination that would establish the presumptive measure of harm in

any subsequent bad faith lawsuit against Philadelphia, as the releases would rebut the presumption—is not well-taken where those provisions did not release the defendants or Philadelphia from liability for the stipulated judgments, which would serve as the basis for such a presumption in any subsequent bad faith litigation. Finally, even if the Court accepted the trial court’s and Philadelphia’s reasoning, obtaining reasonableness determinations, entry of stipulated judgments, and the ability to use those stipulated judgments in subsequent bad faith litigation were all material terms of the Agreements, rendering the releases unenforceable and requiring reformation.

Moreover, despite a record showing Philadelphia’s extensive pre-settlement monitoring of and involvement with the litigation and receipt of over 200,000 pages of discovery after intervening, at Philadelphia’s demand the trial court ordered (“Discovery Order”) the depositions of the Parents; defendants; defense counsel; and the settlement guardians ad litem (“SGALs”) appointed by the Court regarding certain topics requested by Philadelphia. But here, too, the trial court erred as the areas of inquiry demanded by Philadelphia and permitted by the trial court largely consists of post-settlement liability, damages, and other fact discovery inconsistent with and unpermitted by Washington precedent regarding reasonableness hearings. Furthermore, the remainder of these areas of inquiry consist of *subjective* opinion evidence of the parties and defense counsel that Washington precedent repeatedly has recognized as irrelevant to a trial court’s *objective* reasonableness determination.

Additionally, all of the deposition discovery ordered by the trial court is completely duplicative of the evidence already in Philadelphia's possession. And, finally, the trial court acknowledged and Philadelphia admitted that the testimony of the SGALs—who became involved in the case after the settlements between the parties—is irrelevant to the trial court's reasonableness determination under RCW 4.22.060(1), an entirely different and separate determination than the SGAL proceedings under SPR 98.16W.

Recognizing the tenuous grounds for its orders, the trial court certified them for interlocutory review under RAP 2.3(b)(4). Because no tenable grounds support either order, Appellants respectfully request that the Court reverse them and remand for reasonableness determinations, entry of judgments, and other proceedings consistent with its opinion.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

- No. 1 The trial court erred in entering its June 22, 2017 Order Granting Philadelphia Indemnity Insurance Company's Motion Under CR 60 And To Dismiss Claims Of Adult Plaintiffs ("Summary Judgment Order").
- No. 2 The trial court erred in entering its June 22, 2017 Order Re Deposition Discovery ("Discovery Order").

### *Issues Pertaining to Assignments of Error*

- No. 1 Whether the trial court erred in entering its Summary Judgment

Order under CR 60(c) in this lawsuit where, by its plain language and under controlling precedent, that rule merely authorizes relief in a separate, independent action? (*Assignment of Error No. 1*).

No. 2: Whether the trial court erred in entering its Summary Judgment Order—vacating its earlier November 28, 2012 order—when no judgment has ever been entered in this case; the vacated order was interlocutory in nature; and, by its plain language, CR 60(b) applies only to “final” orders and decisions?

(*Assignment of Error No. 1*)

No. 3: Whether the trial court erred in entering its Summary Judgment Order on the basis of a “change in law” where the recent Court of Appeals ruling relied on by the trial court merely cited well-known, well-established Washington precedent—the exact same precedent cited by Philadelphia in seeking dismissal of the Parents’ claims in 2012—and did not constitute a “change in law” justifying relief under CR 60(b)(11)? (*Assignment of Error No. 1*).

No. 4: Whether the trial court erred in entering its Summary Judgment Order on the basis that no reasonableness determination was required where RCW 4.22.060(1)’s express, mandatory language requires such a determination when the parties enter into a settlement containing a covenant not to execute or other “similar agreement,” such as the Settlement Agreements in this case? (*Assignment of Error No. 1*).

- No. 5: Whether the trial court erred in entering its Summary Judgment Order on the basis that the release provisions in the Settlement Agreements precluded any presumption of harm in a subsequent bad faith lawsuit against Philadelphia, obviating the need for any reasonableness determination, when the Agreements did not release the defendants from liability for the stipulated judgments required to be entered under the Agreements, and the amount of those judgments once entered would constitute “harm” in any subsequent bad faith claims against Philadelphia? (*Assignment of Error 1*).
- No. 6: Whether the trial court erred in entering its Summary Judgment Order when the Agreements required entry of judgments in the amounts determined reasonable by the trial court, required a reasonableness hearing, and required reformation of the Agreements to effectuate these other provisions? (*Assignment of Error No. 1*)
- No. 7: Whether the trial court erred in entering its Discovery Order requiring post-settlement depositions of the Parents, the underlying defendants, defense counsel, and the SGALs, when Washington law and the majority of Washington’s sister jurisdictions preclude consideration of evidence created post-settlement in reasonableness determinations? (*Assignment of Error 2*).
- No. 8: Whether the trial court erred in entering its Discovery Order

requiring post-settlement depositions of the Parents, the underlying defendants, and defense counsel where the depositions sought subjective opinion evidence regarding the underlying lawsuits and the settlements, and such subjective opinion testimony of the parties and their counsel is irrelevant to the trial court's objective reasonableness determination? (*Assignment of Error No. 2*).

No. 9: Whether the trial court erred in entering its Discovery Order requiring depositions of the SGALs where—as acknowledged by the trial court and conceded by Philadelphia—their post-settlement testimony and opinions regarding whether to approve the Children's settlements under SPR 98.16W is irrelevant to the trial court's objective reasonableness determination under RCW 4.22.060? (*Assignment of Error No. 2*).

### **III. STATEMENT OF THE CASE**

This Court already has granted discretionary review in this case once.<sup>1</sup> After the 2011 arrest and conviction of an Olympia Early Learning Center (“OELC”) employee, Eli Tabor, for child rape and child molestation at the day care, sexual abuse victims who attended OELC and their parents (respectively, the “Children” and “Parents”; collectively, “Appellants”) brought negligence claims against OELC; its owner, Steve

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<sup>1</sup> *Steel I*, 195 Wn. App. at 822. For the Court's convenience, Appellants refer to the *Steel* opinion's recitation of facts where possible. Due to the lengthy history of this case, Appellants initially provide the general factual background of this case and more thoroughly discuss below the substantive and procedural facts relevant to the issues raised in this interlocutory review.

Olson; and an employee, Rose Horgdahl (collectively, the “defendants” or “insureds”).<sup>2</sup> Philadelphia Indemnity Insurance Company (“Philadelphia”), OELC’s liability insurer, retained defense counsel Michael Bolasina to defend its insureds.<sup>3</sup> In late September 2012, by then also represented by their own personal counsel, Paul Meyer and William Ashbaugh, the insureds entered into the covenant judgment Settlement Agreements with Appellants.<sup>4</sup> After the settlement, the trial court appointed six SGALs to recommend approval of the Children’s settlements under SPR 98.16W.<sup>5</sup>

After Appellants moved for entry of the stipulated judgments, in October 2012 “Philadelphia moved to intervene to conduct ‘focused discovery’ . . . and to participate in any reasonableness hearing.”<sup>6</sup> However, Philadelphia subsequently attempted through a series of motions to “expand the scope of discovery,” resulting in Appellants producing over

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<sup>2</sup> *Steel I*, 195 Wn. App. at 817; Clerk’s Papers (“CP”) 107.

<sup>3</sup> *Steel I*, 195 Wn. App. at 817; CP 1197.

<sup>4</sup> *Steel I*, 195 Wn. App. at 817,819, 837; CP 1229-30. A typical covenant judgment settlement agreement involves three features: “(1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff’s covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured’s coverage and bad faith claims against the insurer.” *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 765, 287 P.3d 551 (2012).

<sup>5</sup> CP 19-24, 3496, 3514, 3525, 3539, 3549, 3558, 7873-78, 7946-51, 8006-11, 8066-71, 8124-29. SPR 98.16W(a) provides in pertinent part: “In every settlement of a claim . . . involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it.”

In turn, SPR 98.16W(c)(1) requires the trial court to appoint a SGAL to “assist the court in determining the adequacy of the proposed settlement” through an “investigation” and “written report . . . with a recommendation regarding approval . . .”

<sup>6</sup> *Steel I*, 195 Wn. App. at 746-747.

200,000 pages of materials, including: defense counsel’s entire file; Appellants’ non-mental impression and non-opinion work product consisting of “all of the nonprivileged documents generated, maintained, or obtained in this case including medical records, public records request responses, witness communications, expert communications, subpoenas, pleadings, and documents received in discovery”; all other attorneys’ work product; and all communications among Appellants’ counsel, coverage counsel, and defense counsel up to the point of the settlements.<sup>7</sup>

Philadelphia, however, pressed for further discovery, moving to compel Appellants to produce all attorney-client privileged materials and work product containing attorney mental impressions.<sup>8</sup> On November 22, 2013, the trial court entered an order requiring Appellants to produce their attorney-client privileged materials and mental impression and opinion work product and certified the order for appellate review under RAP 2.3(b)(4).<sup>9</sup>

This Court accepted discretionary review on the issue of “whether the attorney-client privilege or the attorney opinion or mental impression privilege is waived for the purpose of determining the reasonableness of a settlement.”<sup>10</sup> Ultimately, it held that Appellants had not impliedly waived attorney-client privilege by seeking a reasonableness hearing,

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<sup>7</sup> *Steel I*, 195 Wn. App. at 818-19; CP 521-22.

<sup>8</sup> *Steel I*, 195 Wn. App. at 819, 821.

<sup>9</sup> *Id.* at 821.

<sup>10</sup> *Id.* at 822.

reasoning that Philadelphia could not demonstrate why such discovery was necessary given the quality and quantity of discovery already received by Philadelphia.<sup>11</sup> Similarly, the Court held that Appellants had not waived protection of their attorney mental impression and opinion work product, reasoning:

The *Glover/Chaussee* factors include damages, the merits of their liability theory, the merits of the insureds' defense theory and relative fault, the risks and expenses of continued litigation, the insureds' ability to pay, evidence of bad faith, collusion, or fraud, the extent of plaintiffs' preparation and investigation, and the interests of Philadelphia may all be assessed based on other evidence in Philadelphia's possession and the discovery already submitted to Philadelphia.<sup>12</sup>

Undeterred by these holdings, on remand Philadelphia resumed its demands for discovery—including the same attorney-client privileged materials at issue in *Steel I*—resulting in another series of discovery motions.<sup>13</sup> Ultimately, Philadelphia demanded depositions of the Parents, defendants, defense counsel, and the SGALs—*17 depositions* in all.<sup>14</sup>

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<sup>11</sup> *Id.* at 837-38. Recognizing the limited scope of its discretionary review, the Court also reasoned, “at the trial court’s discretion, Philadelphia can depose the plaintiffs to determine the strength of the abuse allegations in order to evaluate the settlement amount and the validity of the supporting confessions.” Appendix to Petitioners’ Motion for Discretionary Review (“Pet. MDR. Appx.”) at 383. The Court issued this clarifying amendment of its earlier, unqualified statement that Philadelphia “can depose the plaintiffs” in response to Appellants’ Motion for Clarification and Philadelphia’s responsive briefing regarding the limited scope of review. *Id.* This amendment to the opinion properly recognized that the issue of these depositions was not before the Court and, thus, were generally subject to the trial court’s discretion. As discussed below, however, recognizing that the trial court generally has discretion regarding an issue does not authorize the trial court to abuse such discretion.

<sup>12</sup> *Steel I*, 195 Wn. App. at 841.

<sup>13</sup> CP 3622.

<sup>14</sup> CP 7524-531.

Moreover, despite a previous November 9, 2012 oral ruling and November 28, 2012 memorandum order rejecting Philadelphia's contentions that release provisions contained within the Agreements obviated any need for a reasonableness hearing, Philadelphia again moved under CR 56 and CR 60(b)(11) to dismiss the Parents' claims and preclude a reasonableness determination and entry of judgment.<sup>15</sup>

On June 22, 2017, the trial court entered its Summary Judgment Order dismissing the Parents' claims without a reasonableness determination or entry of judgment on them, as well as its Discovery Order requiring the depositions of the Parents, defendants, defense counsel, and SGALs on certain topics.<sup>16</sup> The trial court certified both orders for discretionary review under RAP 2.3(b)(4).<sup>17</sup> On October 27, 2017, a commissioner of this Court granted discretionary review of both orders under RAP 2.3(b)(4).<sup>18</sup>

#### **IV. ARGUMENT**

##### **A. The Trial Court Committed Multiple Errors of Law in Entering the Summary Judgment Order**

###### **1. Relevant Facts**

Each Settlement Agreement contained the following settlement provision, identical other than the settlement amounts:<sup>19</sup>

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<sup>15</sup> CP 1017, 3892-93, 4743.

<sup>16</sup> CP 7849-53.

<sup>17</sup> CP 7851, 7853

<sup>18</sup> Ruling Granting Review (Oct. 27, 2017) at 10, 14.

<sup>19</sup> CP 4350; *see* CP 4350-4666 (all signed Settlement Agreements).

1. Amount. *Subject to the provisions of paragraphs 2, 3, and 4*, Plaintiff agrees to settle the claims against Defendants, for *entry of a judgment* in the principal amount of [settlement amount] without costs or attorney’s fees, against Steve Olson, Rose Horgdahl, and Olympia Early Learning Center and in favor of Plaintiff.

Emphasis added. These amounts totaled \$25 million.<sup>20</sup>

Paragraph 2 of the Agreements provided that the parties would stipulate to entry of judgments against the insureds for the agreed-upon amounts; that the insureds agreed the amounts were reasonable; that the defendants would argue in favor of reasonableness, “including, but not limited to, participation in a judicial reasonableness hearing and related hearings”; and that, should the trial court approve different amounts as reasonable, the insureds would stipulate to entry of judgments for those amounts.<sup>21</sup>

Paragraph 4 of the settlements provided an assignment by the insureds to Appellants of “any and all of their rights against Philadelphia

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<sup>20</sup> *Steel I*, 195 Wn. App. at 818.

<sup>21</sup> CP 4350. “Regarding a covenant judgment settlement in Washington, RCW 4.22.060(1) provides that when parties enter into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement, **a determination that the amount to be paid is reasonable must be secured.**” *Steel I*, 195 Wn. App. at 830 (emphasis added). The trial court’s reasonableness determination is one of **objective** reasonableness. *Dana v. Piper*, 173 Wn. App. 761, 776, 295 P.3d 305 (2013), utilizing nine factors often referred to as the “*Glover*” or “*Glover/Chaussee*” factors. *Steel I*, 195 Wn. App. at 831 (listing the *Glover* factors). In order to determine the objective reasonableness of the settlement, the trial court applies these factors to “the facts and law at the time of settlement,” *Villas at Harbour Pointe Owners Ass’n ex rel. Constr. Assocs., Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 762, 154 P.3d 950 (2007), “in light of the posture of the case at the time the settlements were reached.” *Mavroudis v. Pittsburgh–Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997).

In the covenant judgment context, the reasonable settlement amount determined by the trial court then operates as the presumptive measure of damages for any assigned bad faith claims brought by the plaintiffs against the defendants’ insurer. *Bird*, 175 Wn.2d at 765.

Indemnity Insurance Company and all related insurance companies, including but not limited to contractual and extra-contractual claims”; however, paragraph 4 also provided, “With the exception of whatever effect this assignment itself may have, *Defendants represent that they have done nothing and will in the future do nothing to impair or otherwise adversely affect the Assigned Claims.*”<sup>22</sup>

In exchange for these stipulations and assignments by the insureds, paragraph 3 of the Agreements provided a covenant by Appellants not to execute the judgments entered against the insureds.<sup>23</sup> Additionally, paragraph 5 provided a release of Appellants’ claims against the insureds:

5. Release. Upon full execution of this Agreement by all parties, Plaintiff forever releases and discharges Defendants from any and all of Plaintiff’s claims, causes of action, damage, debts, expenses, costs, attorneys’ fees, and other taxable costs, and any other demands of whatsoever kind, nature or description, whether past, present or future, known or unknown, and based on acts or omissions which are alleged or could have been alleged in the lawsuit.<sup>24</sup>

In order to effectuate the Agreements’ necessary actions, including entry of the stipulated judgements, paragraph 6 contained a cooperation clause requiring the insureds’ participation in a reasonableness hearing.<sup>25</sup> Moreover, consistent with the Agreements’ provisions that they were contingent on the insureds stipulating to entry of judgments in the amounts

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<sup>22</sup> CP 4350 (emphasis added).

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

<sup>24</sup> CP 4351.

<sup>25</sup> *Id.* No order of dismissal has been entered in this case.

determined as reasonable by the Court (and, inherently, that a reasonableness hearing had to take place) and that Appellants were entitled to the full legal effect of such stipulated judgments, the Agreements also limited the effect of any release of claims formalized through a dismissal of Appellants' lawsuits filed with the Court:

7. Dismissal. Not less than 30 days after the effective date of this agreement, the parties to this agreement shall file a stipulation and order for dismissal of all claims of Plaintiff against Defendants. ***The order of dismissal shall, however, state that the Court will retain jurisdiction for the purposes of conducting a fairness hearing and any related hearings unless such hearings occur before the dismissal. Additionally, the dismissal will not extinguish or in any way impede the legal effect of the judgment described in paragraph 2 above.*** The judgment will remain active subject to the covenant not to execute described in paragraph 3 above.<sup>26</sup>

Emphasis added. Finally, paragraph 11 of the Agreements provided a severability clause requiring reformation of the Agreements should any provision be found illegal, invalid, or unenforceable.<sup>27</sup>

Immediately after the trial court permitted Philadelphia to intervene in 2012, however, it began expanding the scope of its intervention far beyond so-called "focused discovery." For example, Philadelphia attempted to convince the trial court that it should decline ***even to hold a reasonableness hearing*** on the basis that the Agreements contained releases for the defendants.<sup>28</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> CP 4694-95.

Ultimately, at a November 9, 2012 hearing, the trial court heard extensive argument from Philadelphia based on existing Washington precedent regarding whether the release of liability provisions in the Settlement Agreements obviated the need for a reasonableness hearing and entry of judgments.<sup>29</sup> However, the trial court at that time rejected Philadelphia’s arguments, reasoning that it lacked discretion under RCW 4.22.060(1) to refuse to hold a reasonableness hearing and, regardless, Philadelphia’s arguments “elevate[d] form over substance” as either the specific release provisions in the Agreements or the typical covenant judgment requirement of entering a judgment payable only by Philadelphia, not the insureds, “ultimately involve[d] a downstream full release” from liability for the insureds, as Philadelphia ultimately would be responsible for satisfying those judgments.<sup>30</sup> On November 28, 2012, the trial court entered a memorandum opinion memorializing this decision, among others.<sup>31</sup>

After remand from this Court in *Steel I*, on March 9, 2017, Philadelphia also moved under a summary judgment standard under CR 60(b)(11) and CR 59 for dismissal of the Parents’ claims against the defendants without a reasonableness determination or entry of judgment, contending that a recent Division One opinion, *Mutual of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, *review denied*, 188 Wn.2d

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<sup>29</sup> CP 4716-4723, 4725.

<sup>30</sup> CP 4721, 4741-44.

<sup>31</sup> CP 4909.

1016 (2017), constituted a change in law.<sup>32</sup> In short, Philadelphia argued that the purpose of a reasonableness hearing in the covenant judgment context is to determine a reasonable settlement amount for the Appellants' claims against the insureds that, in turn, establishes the presumptive measure of damages in a subsequent bad faith lawsuit against the insurer; thus, according to Philadelphia, because the releases completely insulated the insureds from liability, they would rebut any presumption of harm in a subsequent bad faith lawsuit, thus obviating any need for reasonableness determinations or entry of judgment in the current proceedings.<sup>33</sup> Appellants responded that (1) Philadelphia's motion was untimely under CR 59; (2) CR 60(b), which by its plain terms applies only to final orders and decisions, was inapplicable to the trial court's November 28, 2012 interlocutory memorandum decision; and, even if CR 60(b) applied, (3) *Day* did not constitute a change in law; (4) RCW 4.22.060's plain language mandated a reasonableness hearing; (5) the releases in the Agreements were consistent with covenant judgments under Washington precedent and did not release the insureds from liability for the judgments required to be entered by the Agreements; and (6), even if the trial court ruled that the releases obviated the need for a reasonableness hearing and entry of judgments, both actions were required terms under the Agreements, necessitating reformation by the trial court.<sup>34</sup>

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<sup>32</sup> CP 3892-93, 3898-3900, 3905.

<sup>33</sup> CP 3900-905.

<sup>34</sup> CP 7293-95, 7297-7304.

On May 19, 2017, at a hearing on Philadelphia’s motion, the trial court orally ruled that *Day* constituted “new law directly on point” and *sua sponte* granted Philadelphia’s motion under CR 60(c), dismissing the Parents’ claims without a reasonableness determination or entry of judgment.<sup>35</sup> On June 22, 2017, the trial court entered its Summary Judgment Order pursuant to CR 60(c).<sup>36</sup>

But the trial court committed multiple errors of law in entering the Summary Judgment Order. First, the trial court lacked authority under CR 60(c)’s plain language to grant the requested relief or otherwise enter the order. Second, the trial court lacked authority under CR 60(b)’s to grant the requested relief because that rule applies only to final orders, not the November 28, 2012 interlocutory order Philadelphia sought to vacate. Third, the trial court lacked authority under CR 60 to grant the requested relief because the *Day* opinion did not constitute a “change in law” supporting relief under the rule. Fourth, RCW 4.22.060(1)’s mandatory language required a reasonableness determination. Fifth, under the Agreements’ provisions as a whole, the release provisions did not insulate the insureds from liability for the stipulated judgments required to be entered under the agreements, the basis for a presumption of harm in any subsequent bad faith litigation. Finally, at a minimum, the Agreements’ plain, material terms required both reasonableness determinations and entry of judgments against the insureds, requiring modification of the

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<sup>35</sup> Report of Proceedings (“RP”) (May 19, 2017) at 14.

<sup>36</sup> CP 7852.

release provisions to any extent they conflicted with these materials terms of the Agreements.

**2. As a matter of law, CR 60(c) did not authorize entry of the Summary Judgment Order**

The trial court erred as a matter of law in specifically relying on CR 60(c) to authorize its entry of the Summary Judgment Order. This court reviews interpretation of court rules de novo. *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013).<sup>37</sup> Washington courts interpret court rules in the same manner as statutes. *Jafar*, 177 Wn.2d at 526. “If the rule’s meaning is plain on its face, [the Court] must give effect to that meaning as an expression of the drafter’s intent.” *Id.* In determining the meaning of plain language, this Court considers “the ordinary meaning of words, basic rules of grammar, and the statutory context.” *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838, 215 P.3d 166 (2009).

By its own plain language, CR 60(c) did not authorize the trial court to enter the Summary Judgment Order. The rule provides: “This rule ***does not limit*** the power of a court to entertain an ***independent action*** to relieve a party from a judgment, order, or proceeding.” Emphases

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<sup>37</sup> Appellants note that, in general, courts review CR 60 orders for an abuse of discretion. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). However, this error and each other specific error inherent in the Summary Judgment Order are reviewed de novo. However, even if the Court reviewed this error and the other errors for abuse of discretion, such an abuse occurs when the trial court bases its decision on an erroneous view of the law or applies an incorrect legal standard. *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305 (2013). Thus, as discussed above and below, because the trial court based its decision on erroneous views of the law or applied incorrect legal standards in entering the Summary Judgment Order, it abused any discretion it had, requiring reversal.

added. Thus, it is well-established in Washington that CR 60(c) does not provide affirmative grounds for relief but merely preserves any relief available through an “independent”—i.e., separate—action. *In re Marriage of Shoemaker*, 128 Wn.2d 116, 125, 904 P.2d 1150 (1995) (“CR 60(c) specifically preserves the power of the court to entertain independent actions to set aside a judgment.”); *Krueger Eng'g, Inc. v. Sessums*, 26 Wn. App. 721, 724, 615 P.2d 502 (1980) (“The other available modes of relief mentioned by CR 60(c) all assume that a party will commence a separate action.”); 15 Wash. Prac., Civil Procedure §§ 39:15-39:16 (2d ed.) (CR 60(c) authorizes independent actions for relief from a judgment that must be commenced like any other action through filing of an independent complaint and service of process).

Here, there was no “separate” or “independent” action. Rather, the trial court entered its Summary Judgment Order in the *only pending action* between the parties. Moreover, although the trial court identified a “change in law” as the basis for entering the order under CR 60(c), it identified no rule or statute other than CR 60(c) authorizing this form of relief. But, as discussed above, CR 60(c) merely preserves other forms of relief available, if any; it does not in and of itself serve as an *independent* basis for relief.<sup>38</sup> Thus, lacking any authority under CR 60(c) to enter its

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<sup>38</sup> As discussed above, Philadelphia sought entry of the Summary Judgment Order under CR 60(b)(11) based on a “change in law.” As discussed above and below, Appellants argued before the trial court that CR 60(b) was inapplicable and did not authorize Philadelphia’s requested relief. Apparently to circumvent CR 60(b)’s limitations, the trial court then *sua sponte* granted the same relief—entry of the Summary Judgment Order based on a change in law—under CR 60(c).

But, in addition to the above reasons, the trial court also erred in applying CR

Summary Judgment Order, the trial court erred as a matter of law, requiring reversal.

**3. As a matter of law, CR 60(b) did not authorize entry of the Summary Judgment Order**

Furthermore, as discussed above, Philadelphia requested vacation of the trial court’s November 28, 2012 interlocutory order under CR 60(b)(11) due to a change in law. But CR 60(b) did not authorize the trial court to enter its Summary Judgment Order vacating its earlier interlocutory order because, by its plain language, the rule provides only to “final” orders.

CR 60(b) provides: “On motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a *final* judgment, *order*, or proceeding for the following reasons . . . .” Emphases added.

Thus, CR 60(b) is expressly inapplicable to interlocutory decisions such as this Court’s decision to hold a reasonableness hearing.<sup>39</sup> This is so

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60(c) in such a manner because it would render CR 60(b) superfluous. Like statutes, court rules “‘must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’” *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

Here, the trial court interpreted CR 60(c) as an affirmative ground for the same forms of relief authorized by CR 60(b)—vacation of a previous court order—on the same bases authorizing relief under CR 60(b), e.g., a change in law. But interpreting CR 60(c)—which, unlike CR 60(b), contains no limitations to “final” orders—in this manner would render CR 60(b) entirely superfluous, both in general and with respect to its limitation to “final” orders. Thus, for this additional reason, the trial court lacked authority to enter its Summary Judgment Order and erred as a matter of law, requiring reversal.

<sup>39</sup> Instead, when a party wishes to overturn an interlocutory trial court decision immediately, the only course of action is to request discretionary appellate review of that underlying decision, not to seek CR 60(b) relief from the trial court. *Mitchell*, 160 Wn. App. at 676-77.

because this Court has held that “[t]he plain language of CR 60(b) applies only to *final* judgments, *orders*, and proceedings.” *Mitchell*, 160 Wn. App. at 677 (emphases added); *see also Washburn v. Beatt Equipment*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992) (“CR 60(b) is not the proper vehicle to use where interlocutory orders are concerned.”) Accordingly, the trial court lacked authority to enter the Summary Judgment Order under CR 60(b), requiring reversal.

**4. The trial court erred as a matter of law in entering its Summary Judgment Order under CR 60(b)(11) because no “change in law” occurred**

Additionally, and again assuming *arguendo* that CR 60 generally applied to the trial court’s previous interlocutory order, the trial court nonetheless erred in entering its Summary Judgment Order under CR 60(b)(11) based on a “change in law.”

CR 60(b)(11) provides that a trial court may vacate a final order or ruling for “any other reason justifying relief from the operation of the judgment.” However, “Despite its broad language, the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b).” *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). “Furthermore, those circumstances must relate to ‘irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.’” *Furrow*, 115 Wn. App. at 673-74 (quoting *In re Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985)). And “irregularities” do not include “errors of law,” for which the only remedy

is appeal from a final order or judgment. *Furrow*, 115 Wn. App. at 674.

For example, in *Flannagan*, the Court held that a sufficient “change in law” occurred when Congress immediately passed a retroactively applicable statute in response to a previous, specific United States Supreme Court decision. 42 Wn. App. at 222; *see also Baker v. Nw. Tr. Servs., Inc.*, 193 Wash. App. 1051, 2016 WL 2868866, at \*5-6 *review denied sub nom. Baker v. PennyMac Loan Servs.*, 186 Wn.2d 1012, 380 P.3d 485 (2016) (discussing *Flannagan*’s procedural history and facts).<sup>40</sup>

In contrast, in *Baker*, the appellant claimed that a “change in law” warranting CR 60(b)(11) relief had occurred as a result of a new United States Supreme Court opinion. 2016 WL 2868866, at \*5. In rejecting this argument, this Court observed that “the change in law upon which the Bakers base their claim is nothing more than an opinion resolving a circuit split.” *Id.* Most importantly, this Court concluded: “allowing relief in a case because a later court decision alters or overrules precedent previously relied upon would have the exact effect warned about in *Flannagan*: allowing broad use of CR 60(b)(11) to provide a springboard for attacks on other final judgments.” *Id.*

As in *Baker*, and unlike in *Flannagan*, the trial court’s basis for finding a “change in law” merely consisted of a new court opinion, the same type of event this Court found insufficient and improper to justify

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<sup>40</sup> Appellants cite this Court’s unpublished opinion as a nonbinding authority accorded such value as this Court deems appropriate. GR 14.1(a).

CR 60(b)(11) relief. Moreover, the “change in law” in this case was even less of a “change” than the circuit-split-resolving opinion at issue in *Baker*. As characterized by Philadelphia before the trial court, the *Day* opinion turned on its observation that “covenant judgments do not release the insured from liability.” *Day*, 197 Wn. App. at 762 (citing *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002)). But in 2012, Philadelphia made this precise same contention, based on existing Washington law, to the trial court. The *Day* decision did not “change” the points of Washington law asserted by Philadelphia when the trial court made its prior interlocutory decision to hold a reasonableness hearing—indeed, *Day* itself exemplifies this through its citation to well-established Washington precedent (the same precedent cited by Philadelphia to the trial court in 2012) for the same legal points asserted by Philadelphia in its request for CR 60 relief. *Compare Day*, 197 Wn. App at 762-766 (citing existing Washington precedent regarding presumptive harm in insurance bad faith claims), *with* CP 714-15 (citing the same). Thus, because the issuance of the *Day* opinion did not constitute a “change in law” sufficient to warrant relief under CR 60(b)(11), the trial court erred in entering the Summary Judgment Order, requiring reversal.

**5. As a matter of law, RCW 4.22.060(1) mandatorily required a reasonableness hearing**

Moreover, the trial court erred as a matter of law in entering its Summary Judgment Order—precluding a reasonableness hearing regarding the Parents’ claims—because RCW 4.22.060(1)’s plain

language mandated a reasonableness determination. The statute applies to “a release, covenant not to sue, covenant not to enforce judgment, or similar agreement” and provides, “[a] hearing *shall* be held on the issue of the reasonableness of the amount to be paid . . . [a] determination by the court that the amount to be paid is reasonable *must be* secured.” Emphases added. Indeed, as this Court previously observed in *this case*: “The language of RCW 4.22.060(1) thus makes a reasonableness hearing mandatory . . . after a party enters into and seeks to enforce a covenant *like that at issue here*.”<sup>41</sup> *Steel I*, 195 Wn. App. at 836 (emphasis added). Accordingly, RCW 4.22.060(1) mandated a reasonableness determination regarding the Settlement Agreements at issue in this case. Thus, the trial court erred in entering its Summary Judgment Order precluding a reasonableness hearing regarding the Parents’ claims, requiring reversal.

**6. The trial court erred in dismissing the Parents’ claims**

Moreover, even if the Court addressed the merits of the Summary Judgment Order, the trial court erred in dismissing the Parents’ claims. As Philadelphia argued before the trial court, the release provisions contained within the Settlement Agreements precluded any presumption of “harm” to the insureds in any subsequent lawsuit by the Parents asserting the

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<sup>41</sup> Even if this Court determines that the Settlement Agreements were not traditional “covenant judgment” agreements as described by previous Washington precedent, it is undisputed that the Settlement Agreements included both a “covenant not to enforce judgment” against the underlying defendants or, at a minimum, was a “similar agreement” due to containing an agreement to stipulated judgments and a covenant not to execute those judgments against the underlying defendants. Thus, even if the Settlement Agreements at issue bore some provisions different than “covenant judgments” described in previous cases, they unquestionably were “similar” to the agreements encompassed by RCW 4.22.060(1), triggering its mandatory reasonableness determination requirement.

insureds' assigned bad faith claims against Philadelphia, thus obviating the need for a reasonableness hearing or entry of judgment. But this argument fails for two reasons: (1) the Agreements' releases did not affect the Parents' liability for the *stipulated judgments*, the actual basis for a presumption of harm in any subsequent bad faith litigation; and (2) even if the Court concluded that the Agreements' release provisions precludes entry of stipulated judgments on the Parents' claims, the remedy was not dismissal of their claims; rather, the trial court was required to strike or otherwise modify the release provision to give effect to the entire agreement's intent.

First, covenant judgment settlements “typical[ly] . . . involve three features: “(1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff’s covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured’s coverage and bad faith claims against the insurer.” *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764–65, 287 P.3d 551 (2012). Such an agreement necessarily contemplates releasing the defendant-insured from liability for claims; indeed, the *Glover* factors utilized in determining the reasonableness of covenant judgment settlements are framed in terms of “the releasing party[.]” and “the released party[.]” *Bird*, 175 Wn.2d at 766; *see also Miller v. Kenny*, 180 Wn. App. 772, 795, 325 P.3d 278 (2014) (“assignment of a bad faith claim permits a settling defendant . . . to escape from the burdens of litigation and liability while giving an injured plaintiff . . . the opportunity to secure adequate compensation not

otherwise available from the settling defendant.”). And, as exemplified by doctrines such as collateral estoppel and res judicata, entry of a judgment (as required by a covenant judgment settlement) necessarily truncates—i.e., releases—the Parents’ asserted and potential claims arising from the same facts. *See Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (emphasis added) (under doctrine of collateral estoppel, entry of final judgment bars relitigation of issues litigated in case); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (doctrine of res judicata requires entry of a final judgment); *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (doctrine of res judicata bars relitigation of claims that were or could have been litigated in previous action).

However, a covenant judgment settlement does not release a settling defendant from liability for the *stipulated judgment itself*; rather, the covenant not to execute and assignment of the defendants’ bad faith claims operates to limit recovery to “the proceeds of the insurance policy and the rights owed by the insurer to the insured.” *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992). And, likewise, the covenant judgment settlement “does not extinguish the insurer’s liability for the judgment.” *Butler*, 118 Wn.2d at 398; *see also Steinmetz for benefit of Palmer v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741 P.2d 1054, 1056 (1987) (quoting *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 198, 698 P.2d 90 (1985)) (“[A] covenant not to execute

coupled with an assignment and settlement agreement is not a release permitting the insurer to escape its obligation.””).

*Steinmetz*, a case discussed at length with approval by our Supreme Court in *Butler*, is instructive. In the *Steinmetz* settlement, Palmer, the plaintiff, and Steinmetz, the defendant, agreed (1) to an assignment of Steinmetz’s claims against her insurance agent, Conway; (2) to ***a dismissal of Palmer’s claims against Steinmetz*** with prejudice; (3) to a covenant not to execute against Steinmetz’s other assets; and (4) that Palmer’s injuries had a potential verdict value of \$2,000,000 and a settlement value of \$600,000. *Steinmetz*, 49 Wn. App. at 225. When Palmer subsequently sued the agent’s insurance brokerage firm for malpractice under the assigned rights, the firm moved to dismiss the claims, arguing that the “settlement agreement relieved [the defendant] of any obligation to [the plaintiff] and therefor no damages [from the agent’s conduct] could be proven.” *Id.*

In rejecting this argument and reversing the trial court’s dismissal of the claims, the Court of Appeals observed that “[A] covenant not to execute coupled with an assignment and settlement agreement is not a release permitting the insurer to escape its obligation” and that “[t]he assignee’s rights are coextensive with those of the assignor at the time of the assignment.” *Steinmetz*, 49 Wn. App. at 227 (quoting *Kagele*, 40 Wn. App. at 198). Accordingly, it reasoned:

To avoid a potential jury exposure of \$2,000,000, Steinmetz settled with Palmer for \$600,000. At the time of settlement, Steinmetz had a claim against Conway for

damages owed to Palmer resulting from Conway's negligence in failing to obtain the proper insurance. In consideration of Palmer's agreement not to sue or execute, Steinmetz assigned to Palmer her right to sue Conway. Palmer, as the assignee, took those rights held by Steinmetz at the time of the assignment. ***The subsequent covenant did not act as a release against Conway. The fact that Steinmetz did not pay out of her own pocket and was not subjected to personal liability because of the covenant is immaterial. Steinmetz was forced to enter into a settlement agreement with Palmer because of Conway's negligence.***

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Therefore, because the trial court looked at the effect the covenant had on Steinmetz's personal liability rather than the right to sue possessed by Steinmetz when she assigned the right to Palmer, we conclude that the trial court erred when it concluded as a matter of law that Steinmetz was not damaged

*Steinmetz*, 49 Wn. App. at 227–28 (emphasis added) (internal citation omitted).

*Kagele* is also instructive. In *Kagele*, the plaintiffs and defendants reached a covenant judgment settlement agreement in which the plaintiffs agreed to dismiss their claims against the defendants with prejudice and without admitting any liability; in exchange, the defendants assigned their claims against their insurer to the plaintiffs. *Kagele*, 40 Wn. App. at 195. In reversing the trial court's dismissal of the plaintiffs' action against the insurer on the assigned claims, the Court of Appeals rejected the insurer's argument that, because the defendants "were not liable" to the plaintiffs under the settlement agreement and were not obligated to pay anything, the insurer was not obligated to pay anything. *Id.* at 196. In reiterating

that a covenant settlement does not release an insurer from its own liability, the *Kagele* court cited with approval a Florida case:

In *Steil v. Florida Physicians' Ins. Reciprocal*, [448 So. 2d 589, 591 (Fla. Dist. Ct. App. 1984)], the insurer denied coverage. The insured and injured party entered into a written settlement. The insured acknowledged he was obligated to the injured party and gave her a written assignment of all his rights and causes of action against the insurer, ***while the injured party released the insured and dismissed her claim against him.*** The insurer argued that since the insured had neither paid nor become obligated to pay and the insurer's policy obligations were predicated upon the insured's liability, it could not be held responsible. ***The court disagreed holding the insurer was not exonerated because the insured was able to obtain his own discharge from liability.*** The court pointed out it was clear from the settlement agreement that the insured and the injured party did not intend to release the insurer.

*Kagele*, 40 Wn. App. at 198-99 (emphasis added) (internal citations omitted).

Like the agreed dismissal of claims in *Steinmetz* and *Kagele* and the release in *Steil*, the Agreements in this case provide for a dismissal of and release from claims. However, the Agreements also call for entry of judgments against the defendants. The Agreements do not release the defendants from liability from those judgments, instead operating to limit any recovery to defendants' assigned bad faith claims. To the contrary, the Agreements expressly state that the dismissals "will not extinguish or in any way impede the legal effect" of the stipulated judgments required to be entered under the Agreements. And, as in *Steinmetz*, *Kagele*, and *Steil*, the Agreements do not release Philadelphia from liability for claims

arising from those judgments. Like *Steinmetz*, despite the fact that the Agreements insulate the defendants from personal liability, at the time of the assignment the defendants had a claim against Philadelphia for damages owed to the Parents and were forced to enter into a settlement agreement. Thus, as it was in *Steinmetz*, *Kagele*, and *Steil*, it would be reversible error to dismiss the Parents' claims under these facts.

The sole case relied on by Philadelphia before the trial court, *Day*, is inapposite to this line of well-established cases. In *Day*, the defendant-insured brought bad faith claims against her insurer after resolution of a personal injury lawsuit against her through a covenant judgment settlement. *Day*, 197 Wn. App. at 759-61. However, the critical fact in *Day* was that the covenant judgment settlements at issue provided the defendant, Day, with a "right to ***full satisfaction of the agreed judgment*** . . . unrelated to the resolution of any claims (retained or assigned) against Day's insurer." *Day*, 197 Wn. App. at 766 (emphasis added). The *Day* court observed that, "[a]s a consequence, Day was legally insulated from any exposure ***based on the agreed judgments***." *Id.* Accordingly, the *Day* court concluded, "Even assuming a presumption of harm applies, the presumption would be rebutted by Day's absolute right to a full satisfaction of the agreed judgments." *Id.* at 757.

Even accepting the *Day* court's reasoning *arguendo*, by its terms a satisfied judgment is no longer operative or enforceable and, thus, causes no harm to an insured against whom it is entered. Unlike in *Day*, the Agreements in this case do not provide the defendants with or entitle them

to a satisfaction of judgment, much less a satisfaction prior to resolution of the assigned bad faith claims; are contingent on a reasonableness hearing and entry of judgment; and expressly state that any dismissal of claims in this case will not extinguish or impair the legal effect of the judgments, such as their use in subsequent bad faith litigation. Thus, the defendants remain liable for those judgments (subject to the covenant not to execute them except against the assigned bad faith claims). More importantly, *Philadelphia* remains liable for any claims arising from that operative, unsatisfied judgment. Accordingly, *Day* simply is inapplicable to the Agreements at issue in this case.

Second, the Court reviews interpretations of settlement agreements de novo. *Aguirre v. AT&T Wireless Servs.*, 118 Wn. App. 236, 240, 75 P.3d 603 (2003). In construing a contract such as a settlement agreement, Washington courts give controlling weight to the parties' intent as expressed in the contract's plain language. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). Courts construe contracts as a whole, interpreting particular language in the context of other contract provisions. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014).

Here, the Agreements provided, "***Subject to the provisions of paragraphs 2, 3, and 4***, Plaintiff agrees to settle the claims against Defendants, for ***entry of a judgment . . .***." Emphases added. Thus, under this paragraph alone, entry of judgments against the defendants was a material term of the Agreements as a whole. Paragraph 2 reinforces this

material term and establishes a reasonableness hearing as another material term, qualifying the Agreements with the requirement that the defendants “shall” stipulate to judgments in the agreed amounts or the amount determined as reasonable by the Court and participate in a reasonableness hearing. Moreover, paragraphs 6 and 7 reiterate the materiality of a reasonableness hearing and entry of judgments, providing that the defendants must cooperate in participating in a reasonableness hearing and that the agreed dismissal of the lawsuits would not thwart the Court holding a reasonableness hearing or impede or extinguish the judgments entered. Accordingly, when read as a whole, the Agreements’ provisions required a reasonableness hearing and entry of fully effective, operable judgments; without satisfaction of those conditions, there was no enforceable Agreement (including the release provisions).

Therefore, even if the Court concluded that, as written, the release provision precluded a reasonableness hearing and entry of judgment, then the release provision was invalid or unenforceable because it invalidated the entire Agreement. Thus, pursuant to paragraph No. 11, the trial court should have replaced the release provision with one as similar to the original as possible that effectuates the parties’ intent as expressed in the Agreements’ plain language to conduct a reasonableness hearing and enter judgment but also insulate the defendants from personal liability.<sup>42</sup> By

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<sup>42</sup> One such potential modification would have been to modify the releases to be effective on resolution of the assigned bad faith claims; this would have continued to insulate the defendants from personal liability through the existing covenants not to execute against assets other than the assigned bad faith claims but nonetheless preserve any liability for Appellants’ claims necessary to conduct a reasonableness hearing and

instead entering the Summary Judgment Order dismissing the Parents' claims and precluding a reasonableness hearing, the trial court erred as a matter of law, requiring reversal.

**B. The Trial Court Erred in Entering the Discovery Order**

**1. Relevant Facts**

As this Court observed in its previous opinion in this case, [a]lthough trial was set for October 16 [2012], as of September 5, defense counsel hired by Philadelphia had conducted little discovery.”<sup>43</sup> Specifically, none of the Appellants had been deposed, none of Appellants' experts had been deposed, and none of the lay witnesses had been deposed.<sup>44</sup> Moreover, despite retaining defense counsel, Philadelphia admitted that it was ultimately responsible for managing defense preparations and for directing defense counsel to “make changes” if the prepared defense was inadequate.<sup>45</sup> Indeed, Philadelphia's claims notes state, “Need to contact . . . perhaps an expert to see what if anything else *we need to be doing* to protect our insureds in this matter.”<sup>46</sup> Yet, despite the severity of the claims against the defendants and defense counsel's dire warnings, Philadelphia did nothing to ensure discovery was being obtained regarding Tabor's actions, the defendants' liability, or Appellants' damages.<sup>47</sup>

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determine the presumptive measure of harm in any subsequent bad faith litigation.

<sup>43</sup> *Steel I*, 195 Wn. App. at 817.

<sup>44</sup> CP 1218, 1228.

<sup>45</sup> CP 1217-18, 1510.

<sup>46</sup> CP 2043 (emphasis added).

<sup>47</sup> CP 1207-08, 1218-21, 1228.

Despite failing to ensure its insureds received basic formal discovery, however, prior to settlement, Philadelphia regularly received information regarding the case, including liability and damages evaluations, from defense counsel Michael Bolasina. For example, on June 23, 2011, Mr. Bolasina sent correspondence to Philadelphia enclosing a new Court of Appeals opinion and stating, “Frankly, I did not think we had a chance on summary judgment in the case before, but this case law makes the prospect even dimmer.”<sup>48</sup> On February 21, 2012, Bolasina sent a status report to Philadelphia discussing each Appellant’s allegations, supporting and contradicting evidence, and Bolasina’s liability and damages evaluations.<sup>49</sup> On August 2, 2012, Mr. Bolasina sent to Philadelphia—at Philadelphia’s request—a “Summary of Allegations” for each Appellant in this case, including his defense theories based on available evidence.<sup>50</sup> And on September 18, 2012, Mr. Bolasina sent a letter to Philadelphia with recommended allocations of the \$1,000,000 policy limits claimed by Philadelphia to each Appellant.<sup>51</sup> The letter proceeded to discuss the liability and damages evidence underlying Appellants’ claims and the allocations.<sup>52</sup>

Moreover, the record demonstrates that Philadelphia (and its current counsel, Paul Rosner, of the Soha & Lang law firm) was

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<sup>48</sup> CP 7670.

<sup>49</sup> CP 7610-19.

<sup>50</sup> CP 7621-23.

<sup>51</sup> CP 2320-22.

<sup>52</sup> *Id.*

frequently and intimately involved in the case, particularly settlement discussions, months before the settlements actually occurred. For example, on May 18, 2012, Mr. Bolasina sent an email indicating that he had spoken to the Philadelphia Indemnity adjuster with a recommendation to mediate the insurance coverage dispute.<sup>53</sup> He also indicated that lawyers from Soha & Lang would be involved in the mediation on behalf of Philadelphia Indemnity.<sup>54</sup> However, by July, Philadelphia had done nothing to clarify coverage or mediate coverage issues in any way. In July 20, 2012 email correspondence between counsel in which Appellants' counsel inquired about a \$4 million policy limits demand made months ago, Mr. Bolasina stated: “[Paul] Rosner agrees that a mediation with Harris is a good idea. I am not sure how to get Phila.to move forward on this suggestion, except to take steps toward scheduling this. Are you still good with this?”<sup>55</sup> **That same day**, Philadelphia sent its insureds a letter notifying them for the first time that it was taking the position that their policies provided only \$1 million in coverage, that they faced the risk of excess verdicts, and that they should consider retaining personal counsel.<sup>56</sup>

On July 30, Appellants received a letter from Mr. Bolasina stating that Philadelphia had rejected the \$4 million settlement demand.<sup>57</sup> On August 1, Mr. Bolasina sent an email to Philadelphia stating that

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<sup>53</sup> CP 7625.

<sup>54</sup> *Id.*

<sup>55</sup> CP 7627.

<sup>56</sup> CP 7629-32.

<sup>57</sup> CP 7634.

“[Appellants] invite[] discussion on the [coverage] issues raised” and informing Philadelphia that Appellants’ counsel had recently obtained an \$8 million child sex abuse verdict that exceeded Mr. Bolasina’s own case evaluation by a factor of eight.<sup>58</sup> On August 21, 2012, personal counsel for defendant Olson sent Appellants’ latest settlement demand to Philadelphia, along with a request that Philadelphia accept it.<sup>59</sup> The next day, Mr. Rosner discussed the settlement demand with personal counsel for both Olson and OELC.<sup>60</sup>

On August 22, Mr. Rosner and Appellants’ counsel had an exchange regarding the settlement offer.<sup>61</sup> From August 23 to August 24, Mr. Rosner had multiple conversations and correspondences with the defendants’ personal counsel regarding settlement, particularly that Philadelphia should “treat [OELC’s] interests equally with its own” by accepting Appellants’ settlement demand and that Philadelphia’s decision to file an interpleader against its insureds on the eve of trial had left its insureds compromised.<sup>62</sup> On August 24, Mr. Rosner informed personal counsel that Philadelphia had rejected their requests to accept the settlement demand.<sup>63</sup>

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<sup>58</sup> CP 7636.

<sup>59</sup> CP 7638.

<sup>60</sup> CP 7640, 7642.

<sup>61</sup> CP 7644-45, 7647.

<sup>62</sup> CP 7649, 7651-52.

<sup>63</sup> CP 7654-55.

After Appellants moved for entry of the stipulated judgments and the trial court permitted Philadelphia to intervene to conduct “focused discovery”, as ordered by the trial court Appellants produced over 200,000 pages of materials to Philadelphia.<sup>64</sup> These materials included, among others: witness interview notes of OELC employees conducted by counsel; Appellants’ reports from their liability and damages experts; multiple psychosexual evaluations of Eli Tabor regarding his sexualized activities at OELC performed by Appellants’ liability experts; and multiple case evaluations of the insureds’ liability and damages drafted by defense counsel.<sup>65</sup>

After remand in *Steel I*, however, Philadelphia almost immediately resumed its attempts to obtain further discovery. For example, on January 13, 2017, Philadelphia brought a motion to compel the depositions of defendants, defense counsel, the Parents, and the SGALs.<sup>66</sup> On January 27, despite Appellants’ arguments that Philadelphia sought only irrelevant post-settlement and subjective opinion evidence through these depositions; arguments that the SGALs opinions, reports, and recommendations to the trial court under SPR 98.16W were not relevant to the trial court’s reasonableness determination under RCW 4.22.060; and clarification on the record that the SGALs would not testify at the reasonableness hearing, the trial court granted this motion.<sup>67</sup> Particularly, with respect to the

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<sup>64</sup> *Steel I*, 195 Wn. App. at 818; CP 1806.

<sup>65</sup> *Steel I*, 195 Wn. App. at 818; CP 3194-97, 3200-3242, 3330-447.

<sup>66</sup> CP 3062.

<sup>67</sup> CP 3610-11; RP (Jan. 27, 2017) at 8-13.

SGALs, the trial court ordered their depositions despite acknowledging the irrelevancy of their testimony: “The court is not convinced that the settlement GALs will have anything to offer the court as it relates to reasonableness at the reasonableness hearing.”<sup>68</sup>

On March 17, the trial court denied Philadelphia’s motion to compel production of the same attorney-client privileged and attorney work product documents at issue in *Steel I*.<sup>69</sup> Although the trial court stated that it was “not changing any ruling” it previously had made, it also reasoned:

It is clear to this court, based on the decision from the Court of Appeals, that any further discovery would not be appropriate.

The court finds, in the instant case, there is no civil fraud exception that would apply so as to allow Philadelphia Indemnity to conduct any further discovery or request production of documents. At the risk of repeating myself, the decision from the Court of Appeals is pretty clear to this court.<sup>70</sup>

The trial court also agreed to Appellants’ request to move for a protective order regarding the deposition discovery Philadelphia sought to conduct.<sup>71</sup>

On March 23, 2017, Appellants filed a motion for a protective order ending discovery, to set a reasonableness hearing, and to hold a show cause hearing on other discovery requests.<sup>72</sup> On April 7, 2017, the

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<sup>68</sup> RP (Jan. 27, 2017) at 17-18.

<sup>69</sup> CP 5286-88; RP (Mar. 17, 2017) at 4, 18-19.

<sup>70</sup> RP (Mar. 17, 2017) at 19.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> CP 5325-340.

trial court entered a protective order prohibiting Philadelphia from deposing defense counsel, reasoning:

There is no rationale, no basis to depose the attorneys. Philadelphia has by my recollection the entire file, and any other information is either protected by attorney-client or would be irrelevant to the factors to consider when establishing reasonableness.<sup>73</sup>

Startingly, Philadelphia admitted at this hearing that the SGALs' testimony about the Agreements was irrelevant to the trial court's reasonableness determination: "[W]e don't disagree that the GAL's [sic] opinion about the settlement is not relevant . . . ."<sup>74</sup> On April 17, Philadelphia moved for reconsideration of this order.<sup>75</sup>

Ultimately, on May 5, the trial court reversed its earlier April 7 order and entered an order asking the parties to submit briefs regarding individuals Philadelphia sought to depose, including the Parents; the insureds; defense counsel; and the SGALs appointed to represent the Children during any SPR 98.16W proceedings.<sup>76</sup> Specifically, Philadelphia sought to depose the Parents regarding facts substantiating the Children's sexual abuse and damages and their subjective reasons for settling.<sup>77</sup> Similarly, Philadelphia sought to depose the defendants regarding the factual bases for their liability, their subjective rationales for

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<sup>73</sup> RP (April 7, 2017) at 11; CP 6687-88.

<sup>74</sup> RP (April 7, 2017) at 7.

<sup>75</sup> CP 6869.

<sup>76</sup> CP 7307-10.

<sup>77</sup> CP 7524-26, 7528.

settling the case, and their ability to pay a potential verdict rendered by a jury.<sup>78</sup> Moreover, Philadelphia sought to depose defense counsel regarding his opinions about the risks of continuing litigation, his preparation for trial, and the insureds' potential liability.<sup>79</sup> Finally, despite conceding that the SGALs' testimony was irrelevant to the trial court's reasonableness determination, Philadelphia nonetheless sought to depose them regarding the facts of their retention, the information on which they relied in drafting their written reports and from whom it was provided; where they were asked to opine about the reasonableness of the settlements; and any involvement of Appellants' counsel's office with the SGALs' reports.<sup>80</sup>

Appellants opposed all such discovery, arguing that: (1) Washington precedent regarding reasonableness hearings prohibited Philadelphia from attempting to create and the trial court from considering post-settlement evidence on the merits of the case, such as liability and damages; (2) Philadelphia's proposed depositions of the parties and defense counsel sought subjective opinion evidence irrelevant under Washington law to the trial court's reasonableness determination; and (3) Philadelphia's proposed depositions of the SGALs sought testimony regarding post-settlement events immaterial to and improper for the trial court's reasonableness determination.<sup>81</sup>

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<sup>78</sup> CP 7524-29.

<sup>79</sup> *Id.*

<sup>80</sup> CP 7529-31.

<sup>81</sup> CP 7594-99.

Ultimately, on June 22, the trial court entered its Discovery order in which it ordered that the defendants, defense counsel, the Parents, and the SGALs could be deposed on the following topics:

1. Defendants John Masterson (as representative of Olympia Early Learning Center), Rose Horgdal, and Steve Olson, may be deposed with respect to 1) defendants' ability to pay or contribute to a settlement or judgment, and 2) in their opinion, the veracity of the factual confessions signed by those individuals.
2. [Defense counsel] Michael Bolasina may be deposed with respect to 1) the risks of continuing litigation, 2) preparation for trial, and 3) his opinions regarding liability.
3. The [Parents] may be deposed with respect to the facts necessary to evaluate both liability and damages known by plaintiffs at the time of settlement (for example, the [P]arents' observations regarding their children). Due to dismissal of the [Parents'] claims, Philadelphia may not depose the [Parents] with respect to the [Parents'] loss of consortium claims.
4. Settlement Guardians ad Litem may be deposed with respect to 1) the circumstances regarding their retention, 2) how they were retained and by whom, 3) the process of their retention, 4) what information was provided to them and by whom, and 5) whether they were influenced by any counsel regarding their reports. Philadelphia may not depose them regarding their understanding of the reasonableness hearing as separate coverage litigation.<sup>82</sup>
2. **Under Washington law, post-settlement and subjective opinion evidence is irrelevant to a trial court's reasonableness determination**

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<sup>82</sup> CP 7849-851.

Generally, the Court reviews discovery orders for an abuse of discretion. *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305 (2013). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Similarly, a “[c]ourt necessarily abuses its discretion when basing its decision on an erroneous view of the law or applying an incorrect legal analysis.” *Dana*, 173 Wn. App. at 769. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.* Here, neither the correct legal standards nor the record support the reasons for the Discovery Order’s entry, constituting an abuse of discretion requiring reversal.

The irrelevance of post-settlement discovery to the trial court’s reasonableness determination is consistent with both an insurer’s permissive, limited, and tertiary presence in a reasonableness hearing and the general nature of reasonableness hearings under Washington law. RCW 4.22.060 requires and governs reasonableness hearings in the covenant judgment context, and only requires five days’ notice (which may be further shortened by the trial court) of settlement and a reasonableness hearing to the original *parties* (i.e., the settling parties) in the lawsuit. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 407, 161 P.3d 406 (2007) (insurer not entitled to statutory

notice of settlement because it was not a party to the suit between the settling parties), *review denied*, 163 Wn.2d 1055, 187 P.3d 752 (2008).<sup>83</sup> As a result, reasonableness hearings may proceed without the defendants' insurer participating *at all*. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 320-21, 326, 116 P.3d 404 (2005) (trial court properly held reasonableness hearing on six days' notice to insurer even where insurer choose not to participate in hearing when denied additional discovery). Indeed, as the Court of Appeals expressly has held, "Regardless of whether the insurer disputes the amount of the settlement, the trial court must make an objective finding . . . that the settlement is reasonable." *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 378, 89 P.3d 265 (2004).

Accordingly, when a trial court permits an insurer to intervene in a reasonableness proceeding, the insurer does so only (and literally) as a tertiary participant. To be sure, the outcome of a reasonableness hearing

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<sup>83</sup> Even as to the original parties, our Supreme Court has explained how the mere 5-day notice required under the statute reflects the intended summary nature of the proceedings:

"The requirement for 5 days' notice to all parties of the reasonableness hearing is obviously for the purpose of giving all parties the opportunity to appear and be heard at that hearing and to do their best to insure that the settlement is in fact a reasonable one—a matter of obvious importance to all nonsettling parties because the claim of a settling plaintiff against a nonsettling party is ordinarily reduced by the amount of the settlement. The 5-day written notice to parties requirement of the statute, RCW 4.22.060(1), is much the same as the requirement for a 5-day notice of presentation for findings of fact (CR 52(c)) and the 5-day notice of presentation for judgments (CR 54(f)(2))."

*Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995) (quoting *Zamora v. Mobil Oil, Corp.*, 104 Wn.2d 211, 222, 704 P.2d 591 (1985)).

may affect the interests of an insurer in any subsequent bad faith litigation, as “the determination directly affects the amount of damages recoverable in subsequent tort cases.” *Bird*, 175 Wn.2d at 770. Nonetheless, Washington appellate courts repeatedly have rejected arguments by intervening insurers (such as the one made by Philadelphia before the trial court) that post-settlement discovery in reasonableness hearings is necessary because, as insurers contend, such proceedings are “essentially the damages phase of the bad faith action.” *Howard*, 121 Wn. App. at 379. Instead, Washington courts have observed that such arguments are not well-taken because an insurer “will have a full opportunity to defend itself in the bad faith action by arguing that it did not act in bad faith and is therefore not liable for any of the settlement amount.” *Id.* at 380.

Thus, consistent with this permissive, tertiary, limited presence of an insurer in reasonableness proceedings, even where an insurer chooses to participate in the hearing, trial courts properly allow such hearings to proceed on only a few days’ notice to the insurer and without any further discovery. *Red Oaks*, 128 Wn. App. at 320-21; *see also Howard*, 121 Wn. App. 372, 379-80, 89 P.3d 265 (2004) (trial court properly held reasonableness hearing after one months’ notice to insurer and declining to reopen discovery). This is so because an insurer permitted to intervene in a reasonableness proceeding is entitled only to a reasonable time to appear and opportunity be heard. *Red Oaks*, 128 Wn. App. at 324; *Howard*, 121 Wn. App. at 380.

“Reasonableness is measured by the particular circumstances.”

*Red Oaks*, 128 Wn. App. at 324. For example, in *Howard*, the Court of Appeals observed regarding the insurer, Royal: “Royal was not a complete ‘stranger to the case.’ Royal provided counsel for its insured Cascade, and Cascade had the opportunity to participate in discovery.” *Howard*, 121 Wn. App. at 379. The *Howard* Court further observed that “Royal had access to all of [the plaintiff’s] medical records and copies of the correspondence between the settling parties.” *Id.* Finally, the *Howard* court observed that the insurer was permitted to cross-examine live witnesses at the reasonableness hearing and present its own evidence. *Id.* Under those circumstances, *Howard* held that the trial court properly declined to permit additional discovery to the insurer. *Id.*

Likewise, in *Red Oaks*, the insurer, MOE, argued that it needed further discovery to for the reasonableness proceedings because, pre-settlement, “attempting to avoid conflicts of interest,” had split its case file “between defense and coverage issues”; under this proper split of the file, the “defense file was kept by the [defendant’s] appointed defense attorney, who had the duty to keep any information that might jeopardize [the defendant’s] coverage confidential.” *Red Oaks*, 128 Wn. App. at 324-25. But the Court of Appeals observed that MOE, was “not a stranger to the case” because it had been notified of the claims against its insured almost a year before the reasonableness hearing, had defended under a reservation of rights, had paid for an investigation into the claims, and was aware of ongoing settlement negotiations. *Id.* at 326. Under those circumstances, the *Red Oaks* court held that the trial court properly declined to permit

additional discovery to the insurer. *Id.*

Perhaps more importantly, the very nature of the Court’s inquiry in a reasonableness hearing demonstrates why the post-settlement fact discovery Philadelphia seeks is irrelevant and impermissible. Our Supreme Court has flatly rejected the proposition that a reasonableness hearing should devolve into a “mini-trial” on liability issues. *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). This is so because Washington law strongly favors settlement over litigation. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007); *Martin v. Johnson*, 141 Wn. App. 611, 622, 170 P.3d 1198 (2007) (applying this policy in the reasonableness hearing context).

Requiring settling parties to incur the costs and expenses of repeating fact discovery and other litigation components—or, as Philadelphia seeks to do here, perform them for the first time—completely undermines the cost-avoidance incentive of settlement, among others. Thus, RCW 4.22.060 and Washington precedent on reasonableness hearings narrow any inquiry regarding liability—i.e., the merits of the plaintiffs’ claims or the defense’s theory of the case—to “the *provable* liability of the released party.” *Glover*, 98 Wn.2d at 716 (quoting the Senate Select Committee on Tort and Product Liability Reform Final Report, at 54) (emphasis added). But the Court’s inquiry ultimately is one of *objective* reasonableness. *Dana*, 173 Wn. App. at 776. That is, the

Court’s inquiry is whether reasonable persons in the same circumstances could reach the same result. As such, the quantum of proof considered by the Court is substantial evidence—evidence sufficient “to persuade a fair-minded person of the truth of the stated premise.” *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 158, 795 P.2d 1143 (1990). In other words, does sufficient exist to persuade a fair-minded person that a reasonable person under the same circumstances as the settling parties conclude there was a potential for liability justifying the particular settlement?

Moreover, where, as here, a case “turns on a complicated issue of statutory construction and jury questions, a decision to settle for an amount within the range of the evidence is reasonable.” *Martin*, 141 Wn. App. at 621. Indeed, Division Three recently observed:

[I]t is important to focus on what the hearing is supposed to address. The statute does not speak of a hearing on all of the terms of the settlement agreement but, instead, of a hearing “on the issue of the reasonableness of the amount to be paid.” Case law, including in the contribution context, has construed this language to ***narrowly confine the trial court’s evaluation of a settlement agreement to a stand-alone reasonable settlement amount.***

*Hidalgo v. Barker*, 176 Wn. App. 527, 543–44, 309 P.3d 687 (2013) (emphasis added). Accordingly, in a case such as this, the trial court’s “narrowly confined” inquiry primarily is one of whether evidence existed at the time of settlement sufficient to convince a reasonable person similarly situated to the parties that the settlements were within the range

of the evidence.

As a necessary corollary, because the trial court’s “narrowly confined” reasonableness determination seeks to determine what an objectively reasonable person could have done under the same circumstances, it narrows the scope of evidence relevant to that determination: “the facts and law at the time of settlement,” *Villas at Harbour Pointe Owners Ass’n ex rel. Constr. Assocs., Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 762, 154 P.3d 950 (2007), and “the posture of the case at the time the settlements were reached,” *Mavroudis v. Pittsburgh–Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997).<sup>84</sup> Thus, allowing factual discovery or information post-settlement is improper, as it premises a reasonableness determination on a different litigation posture than the parties had at the time of the settlement. *See Mavroudis*, 86 Wn. App. at 38. For example, allowing and considering post-settlement damages and liability depositions of the

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<sup>84</sup> Indeed, the majority view in Washington’s sister jurisdictions is that the reasonableness of settlements amounts is determined by the information about the case available to parties at the time of the settlement. *See, e.g., Isaacson v. California Ins. Guarantee Assn.*, 44 Cal. 3d 775, 793, 750 P.2d 297, 309 (1988) (determination of reasonableness of amount of proposed settlement is “based on the information available to” party at the time of the proposed settlement); *Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois*, 323 Ill. App. 3d 121, 136, 751 N.E.2d 104, 118 (2001), *aff’d as modified and remanded*, 203 Ill. 2d 141, 785 N.E.2d 1 (2003) (reasonableness of settlement, including insured’s potential liability and possible damages, based “on the facts known . . . at the time of settlement”); *see also Cont’l Ins. Co. v. McAuliffe*, No. FSTCV054006778S, 2008 WL 282758, at \*1 (Conn. Super. Ct. Jan. 11, 2008) (reasonableness of the settlement is evaluated from position of the party at the time of entering into the settlement); *D.E.M. v. Allickson*, 555 N.W.2d 596, 603 (N.D. 1996) (reasonableness of settlement must be determined from party’s position at the time of the settlement); *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982) (reasonableness of settlement based on whether “reasonably prudent person in the position of the defendant” at the time of settlement would have settled considering liability and damages facts as well as risks of proceeding to trial).

Parents in this case would determine reasonableness based on different circumstances than those under which the parties settled, as such depositions were not taken in the underlying litigation and the benefit of those depositions was not available either to Appellants or the defendants at the time of settlement or heading into trial.

Moreover, the limited nature of the trial court's "narrowly confined" reasonableness determination further limits the scope of relevant evidence because that determination is one of *objective* reasonableness and, thus, "none of these factors depends" on whether a party or their attorneys subjectively "considered the settlement reasonable." *Dana v. Piper*, 173 Wn. App. 761, 776, 295 P.3d 305 (2013). Accordingly, as the Court recently held in this case, "a reasonableness determination will primarily rely on objective evidence." *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 829, 381 P.3d 111 (2016) and, where the trial court can determine whether a settlement was objectively reasonable by comparing the strength of a plaintiff's claims to the terms of the settlement, inquiry into the subjective beliefs of a party or their attorneys is improper. *Dana*, 173 Wn. App. at 773 (citing *Fischel & Kahn, Ltd. v. van Straaten Gallery*, 189 Ill.2d 579, 590, 244 Ill.Dec. 941, 727 N.E.2d 240, 246 (Ill. 2000); *1st Sec. Bank of Wash. v. Eriksen*, No. CV06-1004RSL, 2007 WL 188881, at \*3 (W.D. Wash. Jan. 22, 2007).

Consistent with these governing legal principles, the Court recently held in this case, "proof of reasonableness is ordinarily established through expert witness testimony about matters like the extent of

defendants' liability, the reasonableness of the damages amount in comparison with awards in other cases, and the expense that would have been required for the settling defendants to defend the lawsuit." *Steel*, 195 Wn. App. at 838 (citing *Chomat v. Northern Ins. Co. of New York*, 919 So. 2d 535, 538 (Fla. Dist. Ct. App. 2006)); see also *PETCO Animal Supplies Stores, Inc. v. Ins. Co. of N. Am.*, No. CIV. 10-682 SRN/JSM, 2011 WL 2490298, at \*20 (D. Minn. June 10, 2011) (proof of settlement's reasonableness is "customary evidence on liability and damages, expert opinion of trial lawyers evaluating this 'customary' evidence; [and] verdicts in comparable cases"). Thus, reasonableness is determined through the lens of post-settlement expert testimony regarding the "snapshot" of fact evidence created up to the time of settlement as well as extrinsic matters within the expert's expertise as an attorney, including comparable jury verdicts and the expenses of litigating similar lawsuits.

**3. The depositions and deposition topics permitted by the trial court are irrelevant to any reasonableness determination**

When considering both the scope and nature of reasonableness hearings under Washington law and an intervening insurer's limited, tertiary role in such proceedings, neither law nor the record supports the trial court's entry of the Discovery Order.

Before the trial court, Philadelphia represented that the Children's damages will be assessed based upon "evidence of psychological damage" and the Parents' damages will be assessed based upon "evidence of damage to the parent/child relationship due to the alleged or actual

abuse.”<sup>85</sup> But *Red Oaks* and *Howard* illustrate why further discovery by Philadelphia on these generalized “areas of interest” would be improper and irrelevant. Like the insurer in *Howard*, Philadelphia provided counsel for its insureds, and its insureds had the opportunity to participate in discovery. Moreover, *Philadelphia itself* has admitted that it ultimately bore the responsibility to ensure its insureds were obtaining discovery and otherwise provide a proper defense. Thus, Philadelphia cannot now complain of deficiencies (for purposes of minimizing its own liability) in the evidence developed pre-settlement.

Moreover, the record demonstrates that Philadelphia was in no way, shape, or form a stranger to the case. Defense counsel Bolasina provided multiple status reports to Philadelphia before the settlement, including multiple assessments of the Appellants’ claims, possible defenses, potential motions, and damages. Indeed, unlike the insurer in *Red Oaks* who attempted to avoid conflicts of interest by splitting its files, Philadelphia did not split its files until **16 days** before the parties executed the covenant judgment settlements, despite informing its insureds of a coverage dispute nearly two months earlier; additionally, it received defense counsel’s entire file.<sup>86</sup> Like the insurer in *Red Oaks*, however, Philadelphia paid for (and received the benefits of) investigations into Appellants’ claims through defense counsel and was aware of settlement negotiations; in fact, Philadelphia’s own counsel, Paul Rosner, was an

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<sup>85</sup> CP 7523.

<sup>86</sup> CP 1638-39.

extensive *participant* in settlement discussions. Finally, as in *Howard*, Philadelphia possesses Appellants’ medical records (as well as over 200,000 pages of other objective, trial-ready evidence in this case, such as Appellants’ expert reports detailing the psychological harms to the Appellants and necessary life care plans with corresponding valuations; extensive pre-settlement liability depositions of defendants Horgdahl and Olson; extensive post-settlement depositions of personal coverage counsel; and defense counsel Bolasina’s entire file. Moreover, the parties’ reasonableness experts can and will use such evidence, as well as comparable jury verdicts and their own experience, to testify regarding whether the settlement amounts for Appellants’ claims fell within a reasonable range. Thus, even more so than in *Howard* and *Red Oaks*, depositions of the Parents on this broad subject matter is unnecessary because Philadelphia already possesses all the *relevant* pre-settlement evidence on these issues.

Nonetheless, Philadelphia claimed before the trial court that it needed to depose the Parents regarding the first *Glover* factor because, with one parent, “Philadelphia is not privy to evidence of any . . . harm to the parent-child relationship” and Philadelphia wants to ask her “about any concerns she had about her son at the time of the settlement” because the evidence indicated her son “was doing well in school and was well adjusted.”<sup>87</sup> Even accepting *arguendo* Philadelphia’s characterizations,

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<sup>87</sup> CP 7525.

such post-settlement fact evidence is *irrelevant* to the trial court's reasonableness determination. Neither party had the benefit of such damages depositions heading into trial or settlement; neither party had to factor them in to settlement considerations; accordingly, they would play no role in determining what a reasonably objective person under *the same circumstances* might do because the case was settled without such depositions being taken.<sup>88</sup>

Moreover, Philadelphia, referring without any explanation to factors 2, 3, and 4, further contended before the trial court that depositions of the Parents were necessary because Appellants need to “show that police and DSHS investigators were wrong, that it was unreasonable for Defendants to rely on background checks and police and DSHS investigator reports, as well as issues pertaining [sic] *Tegman* . . . .”<sup>89</sup> But Philadelphia utterly failed to explain before the trial court how it can even depose the Parents on those subjects or what questions it might ask, similar to its failure to explain why such discovery was necessary in *Steel I*. See *Steel I*, 195 Wn. App. at 837 (“Philadelphia . . . does not explain . . . why, given these four points, plaintiffs’ attorney-client communications are integral to making that reasonableness determination.”); 837-38 (“Philadelphia fails to explain why these communications are integral to

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<sup>88</sup> Additionally, Philadelphia’s claim before the trial court that evidence in the record did not exist to support some elements of damages did not justify further discovery because it is *the settling parties’* burden to produce evidence to support the reasonableness of the settlement amounts. *Bird*, 175 Wn.2d at 766. Should the parties fail to produce sufficient evidence to support these amounts, Philadelphia has a ready-made argument for adjusting the amounts downward

<sup>89</sup> CP 7524.

assessing the *Glover* factors when in addition to the other significant discovery they already conducted, they have all communications between plaintiffs and the former defendant insureds, they have deposed two of the insureds' attorneys, and they have documentation that OELC's former employee only confessed to sexually abusing two of the children at OELC." 840 ("Philadelphia does not explain *why* plaintiffs' attorney client communications are vital to its defense or *why* the discovery already exchanged is insufficient to evaluate the settlement's reasonableness."). Accordingly, because the record—namely, the “reasons” proffered by Philadelphia—do not support this discovery, the trial court abused its discretion in entering the Discovery Order.

Even excusing this failure, however, the trial court ordered post-settlement liability fact depositions which, as explained above, were irrelevant to and improperly considered in the trial court's reasonableness determination.<sup>90</sup> At worst, Philadelphia planned to confront the Parents (who are not attorneys) with documents such as police and DSH reports and case law such as *Tegman* and ask them whether they knew about them and whether those facts would or should have affected their settlement decision (including valuation of their claims). But those would be

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<sup>90</sup> Philadelphia also claimed before the trial court that it simultaneously needed under factor 7 to depose the Parents regarding the defendants' factual confessions without actually asking them about those confessions, instead “focus[ing] on Factors 1-5 as outlined above.” CP 7528. As discussed, however, Philadelphia only spewed random “facts” it found relevant those factors without actually explaining what it actually intended to ask the Parents regarding those factors, “reasons” insufficient to support the Discovery Order. *See Steel I* at 837-38, 840. Moreover, these were once again demands for irrelevant post-settlement liability depositions.

inquiries into the Parents’ subjective opinions that are irrelevant to the trial court’s objective inquiry (as assisted by the reasonableness experts’ independent evaluations) into whether a *reasonable person* could have reached a settlement within that range under the same circumstances. Thus, the reasons proffered before the trial court did not support ordering this discovery.

For similar reasons, asking the Parents under factor 5 (the risks and expenses of continued litigation) “whether they considered Philadelphia’s \$1 million settlement offer before signing the stipulated settlements” would be irrelevant.<sup>91</sup> The Parents’ thought processes in what they considered in signing the settlements is irrelevant to the trial court’s objective inquiry of what *a reasonable person* might do when presented with the same circumstances.

Likewise, the same reasons demonstrate that Philadelphia’s proposed depositions of the defendants would be irrelevant. Philadelphia claimed before the trial court that it needed to ask them “whether the risk of a verdict in excess of policy limits was a key consideration when they stipulated to the settlements” and “to establish whether the expense of litigation was or was not a concern.”<sup>92</sup> Again, however, their subjective beliefs on these matters would be irrelevant to the trial court’s determination of what an objectively reasonable person could have been concerned about these issues under the circumstances.

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<sup>91</sup> CP 7526.

<sup>92</sup> *Id.*

Moreover, Philadelphia claimed before the trial court that it needed to depose defendants Horgdahl and Olson about their ability to pay.<sup>93</sup> However, Philadelphia already has had the opportunity to depose defendant Olson's and OELC's personal counsel on the *Glover* factors and, indeed, engaged in extensive depositions spanning multiple hours and hundreds of pages and specifically discussed the defendants' ability to pay.<sup>94</sup> Additionally, Philadelphia possesses the files of the defendants' counsel. Those files already provide ample evidence regarding the defendants' ability to pay, including a May 4, 2012 email from Olson to Bolasina in which Olson stated: "I guess [my wife's] understanding of the situation is that if Philadelphia digs in and says 'no more than \$1m' and the courts give more than this \$1m, that Rose [Horgdahl] and I would have to make up the difference. If this is true, then I am worried as well as [my wife]."<sup>95</sup>

Additionally, Philadelphia claimed before the trial court that it needed to depose the defendants under factor 7 regarding "why they signed factual confessions that appear to be inconsistent with all objective evidence and prior testimony under oath of Mr. Olson [sic], Ms. Horgdahl."<sup>96</sup> As discussed above, however, Philadelphia already possesses extensive, pre-settlement liability depositions of both

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<sup>93</sup> CP 7526-27.

<sup>94</sup> See, e.g., CP 7683 (deposition of Olson's personal counsel regarding his ability to pay).

<sup>95</sup> CP 7672.

<sup>96</sup> CP 7528-29.

defendants, as well as Appellant's counsel's and defense counsel's factual work product (as well as defense counsel's opinion work product, including liability assessments). Thus, depositions on these topics not only would be redundant but also irrelevant, as they would constitute post-settlement liability depositions. Moreover, asking the defendants "why" they signed the confessions is asking for their *subjective opinions and thought processes*, which is irrelevant to the trial court's objective inquiry. Under that standard, the trial court will ask (again, assisted by the reasonableness experts) whether an objectively reasonable person *could* believe that liability was within the range of the evidence.

Finally, Philadelphia admitted to the trial court that neither the SGALs' testimony nor their written reports are relevant to the Court's reasonableness determination under RCW 4.12.060. These concessions were proper and should have precluded deposing the SGALs, as a SGAL's opinions, report, and recommendations regarding approval of a settlement in the best interests of a minor under SPR 98.16W is an *entirely different and separate inquiry* than the trial court's determination of the parties' objective reasonableness into entering into a settlement under RCW 4.22.060.

Nonetheless, Philadelphia claimed that it needed to depose the SGALs regarding "their retention, what information was provided to the SGALs and how it was provided, for example"; "whether the SGALs were asked to opine regarding the reasonableness of the settlements and what information, if any, was provided to the SGALs [sic] provided regarding

OELC’s insurance”; and “whether Plaintiff’s counsel’s office drafted, edited, or otherwise influenced the content of the SGAL reports.”<sup>97</sup> However, Philadelphia completely failed to explain before the trial court how these areas of inquiry—extrinsic and subsequent to the Settlement Agreements—has any relevance to whether an objectively reasonable person in the position of the parties at the time of the settlement could have agreed to these settlement amounts. The evidence was what it was at the time of the settlements; either the settlements fell within the reasonable range of that evidence or they did not. What the SGALs knew after the fact, how they learned it, and from who—particularly when they will not be testifying at this reasonableness hearing—simply had no bearing on the Court’s objective reasonableness determination regarding *the parties’* settlement. Accordingly, for all these reasons, neither Washington law nor the record supported the trial court’s Discovery Order, constituting an abuse of discretion requiring reversal.

## V. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to reverse the trial court’s Summary Judgment and Discovery Orders and remand for further proceedings, including a reasonableness hearing and entry of judgment.

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<sup>97</sup> CP 7529-30.

RESPECTFULLY SUBMITTED this 11th day of May 2018.

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**CERTIFICATE OF SERVICE**

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on May 11th, 2018, I personally delivered, a true and correct copy of the above document, directed to:

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**May 11, 2018 - 4:03 PM**

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