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

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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

On appeal, Respondent Philadelphia Indemnity Insurance Company's ("Philadelphia") own arguments for upholding the trial court's June 22, 2017 summary judgment order ("Summary Judgment Order") dismissing the adult Appellants' ("Parents") claims in lieu of entering the stipulated judgments required by the parties' covenant judgment settlement agreements repeatedly embraces the critical fact emphasized by Appellants: the presumption of harm in subsequent insurance bad faith litigation arising from a covenant judgment settlement agreement flows from the insured's "liability for the agreed *judgment*."¹ Philadelphia's concession is well-taken, as it is crystal-clear under Washington law that such a presumption of harm flows from an insured's liability for a judgment, even where (as here) the plaintiffs have covenanted to execute the judgment only against the proceeds of subsequent bad faith litigation.

Despite its concession, however, Philadelphia's myopic focus on a claims release provision in the covenant judgment settlement agreements at issue utterly fails to address that the Agreements, by their own plain language, *did not* release Philadelphia's insureds—defendants Olympia Early Learning Center ("OELC"), Stephen Olson and Rose Horgdahl (collectively, "defendants" or "insureds")—from liability for the stipulated *judgments*. To the contrary, it is undisputed that the Agreements expressly required entry of judgment against the defendants in an amount

¹ Respondents' Brief at 3 (emphasis added); *see also* 39 ("the insured was legally insulated from any exposure on the agreed judgments").

determined reasonable by the trial court as material consideration for the settlements. And it is undisputed that the agreements expressly stated that any dismissal of claims against the insureds would not impair the legal effect of those judgments in subsequent litigation. Thus, because the agreements did not release the insureds from liability for the agreed judgments, the trial court erred in ruling that the release provisions rebutted any presumption of harm in subsequent bad faith litigation and obviated any need for reasonableness determinations and entry of judgment.

Moreover, Philadelphia misguidedly relies on the trial court's general discretion in discovery matters in attempting to justify the extensive deposition discovery ordered by the trial court's June 22, 2017 discovery order ("Discovery Order"). But a trial court's discretion is not unbounded. Such discretion must correctly interpret the law, apply the correct legal standards, and be firmly supported by facts in the record.

Washington law is clear that a reasonableness determination is not a "mini-trial" requiring exhaustive, trial-like preparation by the parties as a prelude to the trial court conclusively determining the merits of legal issues in the case such as liability and damages. Instead, a reasonableness hearing should be a non-exhaustive, objective determination of whether, in light of the case's posture at the time of settlement, a settling plaintiff's claims were plausible, the defendant's liability was possible, and the settlement amounts were within the reasonable range of evidence.

At Philadelphia's urging, however, the trial court's Discovery

Order shatters these controlling limits on the nature and scope of reasonableness proceedings by ordering *17 post-settlement depositions* in this case—including liability and damages depositions of the Parents not taken before settlement. In doing so, the Discovery Order allows Philadelphia as an intervening insurer to completely reinvent the settlement posture in this case—in which the settling defendants had taken *no* liability or damages depositions at all—in challenging the Agreements’ reasonableness. The Discovery Order also allows Philadelphia to depose both defense counsel and the defendants on their subjective opinions regarding legal issues such as liability when Washington law is clear that such subjective evidence is irrelevant to the trial court’s objective reasonableness determination. The Discovery Order also permits Philadelphia to depose defense counsel regarding his trial preparations and the defendants regarding their ability to pay on the basis that it “needs” such discovery when the record demonstrates that Philadelphia already has received exhaustive discovery on these topics, including production of defense counsel’s entire litigation file and depositions of the defendants’ personal attorneys. Finally, despite Philadelphia and the trial court admitting the irrelevance of such testimony, the Discovery Order nonetheless permits the depositions of the settlement guardians *ad litem* (“SGALs”) regarding their reports in this case, all of which were created *after the parties already had settled*.

Respectfully, the trial court committed multiple errors of law in entering its Summary Judgment Order, and the Discovery Order lacks any

support in law or fact. Accordingly, the Court must reverse both orders and remand for further proceedings.

II. PHILADELPHIA’S REPEATED VIOLATIONS OF THE RULES OF APPELLATE PROCEDURE AND APPELLANTS’ RESTATEMENT OF THE CASE

Faced with a lack of support in the record for the trial court’s Summary Judgment and Discovery Orders, Philadelphia’s statement of the case veers wildly off-course into irrelevant, argumentative “factual” recitations directed at the ultimate issue of the Settlement Agreements’ reasonableness and casting aspersions regarding Appellants’ counsel. Appellants will waste neither the Court’s time nor their own responding to these deep forays into *non-sequitur* other than to point out their irrelevance to the issues actually before the Court in this interlocutory appeal.

Appellants also observe that throughout its brief Philadelphia makes scores of “factual” statements without any citation to the record, statements with citations to the record that do not support the statement’s substance, or statements with citations that support only a portion of the statement. Responding to the sheer number of uncited statements is impossible other than noting that this Court does not consider statements unsupported by citations to the record. RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *see also In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (appellate courts not obligated to “comb the record where counsel has

failed to . . . support arguments with citations to the record). The Court should not consider any statements lacking supporting citations to the record.

Moreover, many of Philadelphia's citations to "evidence" in the record actually consist of citations to Philadelphia's own trial court briefing. But citations to briefs are not citations to "evidence" in the record. *See Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 299, 914 P.2d 119 (1996) (distinguishing citations to a brief from citations to evidence in the record). Again, the Court should not consider these statements unsupported by citations to evidence in the record.

Further, Philadelphia attempts to support many of its numerous conclusory arguments throughout its brief with citations to its trial court briefing. But "Washington courts 'have consistently rejected attempts by litigants to incorporate by reference arguments contained in trial court briefs, holding that such arguments are waived.'" *Multicare v. State, Dep't of Soc. & Health Servs.*, 173 Wn. App. 289, 299, 294 P.3d 768 (2013), *as amended on denial of reconsideration* (July 2, 2013) (quoting *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499–500, 176 P.3d 510 (2008)). The Court should hold that Philadelphia has waived all issues supported only by conclusory arguments incorporating trial court briefing by citation.

Finally, Philadelphia grossly distorts the record in claiming that no liability evidence exists in this case, an absence it claims justifies the Discovery Order. But the record is replete with evidence demonstrating

the defendants' liability, including witness interviews with several OELC employees revealing that Eli Tabor, the OELC employee criminally convicted of sexually abusing two children who attended OELC, had access to all the child Plaintiffs in this case; several complaints of sexual abuse had been made involving "Eli"; supervision at OELC was nearly non-existent; staffing ratios were at dangerously inadequate levels; many employees complained about Tabor's unnatural relationship with the children at OELC; the OELC cook (Sonia Riley Clifton) thought Tabor likely molested girls who attended the center; and all of them saw or knew about Tabor kissing S.A. at OELC and leaving the grounds with him.² Moreover, in a post-conviction psychosexual evaluation, Tabor himself admitted to "struggl[ing] to control his impulse to urinate in diapers and masturbate in the work place" and to "being sexual" with a child at OELC.³ Tabor also admitted that he had sexually assaulted one of the child plaintiffs in this case, S.A., over 50 times, including fondling, giving and receiving oral sex, and anal sex.⁴

III. ARGUMENT

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

1. Philadelphia's conclusory arguments on appeal require reversal

In opposition to Appellants' arguments that neither CR 60(c) (the

² Clerk's Papers ("CP") at 3200-3241.

³ CP at 3316.

⁴ CP at 3321. 3323.

rule actually relied on by the trial court) nor CR 60(b)(11) (the rule Philadelphia urged it to rely on) authorized entry of the Summary Judgment Order, Philadelphia simply states, in conclusory fashion and without citation to any legal authority: “If [*Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, 756, 393 P.3d 786, *review denied*, 188 Wn.2d 1016, 396 P.3d 348 (2017)] is a clarification or change in the law, then CR 60(b)(11) and/or CR 60(c) apply and the trial court properly granted relief under that rule.”⁵

But this court does not consider conclusory arguments or arguments without citation to authority. RAP 10.3(a)(6), .4. “Such ‘[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.’” *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Philadelphia’s failure to comply with these bare minimum requirements of appellate procedure is particularly galling where Philadelphia utterly failed to respond to Appellants’ extensively supported arguments that: (1) CR 60(c) did not apply and did not authorize the trial court to enter the Summary Judgment Order; (2) the trial court’s November 28, 2012 order that Philadelphia sought to vacate was not a “final” order under CR 60(b); and (3) the *Day* case did not constitute a “change in law” under well-established Washington precedent interpreting that requirement for

⁵ Respondent’s Br. at 48.

granting relief under CR 60(b)(11). “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Because Philadelphia responds only with conclusory arguments lacking any citation to authority, the Court must reverse the Summary Judgment Order and remand for further proceedings.

2. CR 59(b) did not authorize the Summary Judgment Order’s Entry

Similarly, Philadelphia responds in conclusory fashion that the trial court’s entry of the Summary Judgment Order can be affirmed under CR 59 “because the trial court never entered a written order.”⁶

In so doing, Philadelphia completely fails to address the fact—pointed out by Appellants—that the trial court entered a November 28, 2012 memorandum opinion incorporating its earlier oral ruling that it would hold a reasonableness hearing.⁷ Specifically, the trial court’s November 9 oral ruling clearly and definitively stated: “So that was the matter that was to be decided this morning, whether or not a reasonableness hearing is required under the law. I conclude that it is.”⁸ In its November 28 memorandum opinion, the trial court incorporated this ruling, stating:

⁶ *Id.* The Court should note that Philadelphia asserted before the trial court that CR 59 authorized entry of the Summary Judgment Order. CP at 3898-99. However, the trial court implicitly rejected those arguments by relying only on CR 60(c) to enter that order. CP at 7852.

⁷ CP at 4909.

⁸ CP at 4744.

Bird [v. *Best Plumbing Group, LLC*] . . . makes certain a trial court’s duty to conduct a reasonableness hearing under RCW 4.22.060 for covenant settlements . . . *Bird* is the law that controls this case.”⁹

CR 59(b) requires motions for reconsideration to be filed and served “no later than 10 days after the entry of the judgment, order, or other decision.” Because Philadelphia fails to address whether the trial court’s November 22, 2012 memorandum opinion constituted a “judgment, order, or other decision” triggering CR 59(b)’s time limitations, thus rendering its March 9, 2017 motion untimely, the Court should not consider its arguments and reverse the Summary Judgment Order.¹⁰

⁹ CP at 4909.

¹⁰ Even if the Court reached the merits of Philadelphia’s conclusory CR 59 argument, it would still fail. Although some memorandum letter rulings may be too “tentative” to constitute a “judgment, order, or other decision” under CR 59(b)—*see Del Ray Properties, Inc. v. Elliot*, No. 49969-0-II, 2018 WL 2947939, at *3 (Wash. Ct. App. June 12, 2018) (holding trial court’s ruling was a “tentative letter ruling that did not trigger the 10-day deadline under CR 59”)—both the trial court’s oral ruling and its memorandum opinion clearly and definitively stated that a reasonableness hearing had to take place. The memorandum opinion was in no way, shape, or form “tentative” regarding the trial court’s ruling on whether to hold a reasonableness hearing, thus triggering CR 59(b)’s 10-day time limit for moving for reconsideration. Because Philadelphia did not move for relief until March 9, 2017, its motion was untimely.

Appellants acknowledge that in *In re Marriage of Tehat*, 182 Wn. App. 655, 672, 334 P.3d 1131 (2014), Division Three of this Court generally stated that “[e]ven a written memorandum opinion filed prior to the entry of a formal judgment or order does not deprive the trial court of the power to change its indicated ruling.” However, *Tehat* expressly limited its holding to the following: “in a superior court bench trial, a litigant has 10 days from the date of the entry of formal findings of fact, conclusions of law, and a judgment, a decree, or another final order labeled as such, to file a motion for reconsideration.” 182 Wn. App. at 674-75.

Tehat’s limitation of its holding to the bench trial context makes sense. In a civil bench trial, CR 52(a)(1) specifically requires a trial court to enter written findings of fact and conclusions of law. Thus, in *Tehat*, a marriage dissolution proceeding, although the trial court’s letter ruling provided the trial court’s post-trial analysis for distribution of assets between the parties, it still did not “formally list the trial court’s findings of fact, or conclusions of law” nor “enter a decree of dissolution of marriage,” all of which were subsequently and formally entered by the trial court. *Id.* at 673. Indeed, it was specifically within this context—a bench trial requiring subsequent entry of formal

findings of fact and conclusions of law—that the *Tehat* court remarked that memorandum opinions are not sufficiently final for purposes of CR 54(b). *Id.* at 672 (“Although a trial court’s oral opinion or written memorandum of opinion may be considered in interpreting the court’s findings of fact and conclusions of law . . . the oral or written opinions have no final and binding effect unless formally incorporated into the findings, conclusions, and judgment.”). Thus, the *Tehat* court concluded that this earlier letter ruling in the bench trial—a mere prelude to entry of formal findings of fact, conclusions of law, and judgment—did not trigger CR 54(b)’s time limits. *Id.* at 673-74.

As the *Tehat* court recognized, other court actions “not specifically labeled ‘orders’ or ‘judgments’” can nonetheless be “examples of ‘decisions’” triggering CR 54(b)’s time limits. *Id.* at 671. Unlike the letter ruling that was necessarily a mere prelude to entry of formal findings and conclusions in *Tehat*, in this case the trial court definitively decided whether there would be a reasonableness hearing in its November 9 oral ruling, and it conclusively reduced that ruling to writing in its November 28 memorandum opinion. The memorandum opinion expressed no “tentativeness” regarding this decision and it bore the case’s formal caption and “a description of the pleading in the right hand corner of the caption,” all indicia of a CR 54(b) “judgment, order, or other decision” recognized by *Tehat*. *Id.* at 672.

Perhaps more importantly, the memorandum opinion’s features “lead the court, the parties, and the attorneys to accept [it] as final, not over which to quibble, but with which to comply.” *Id.* at 672. This fact is self-evident from the record as Philadelphia moved for reconsideration of the trial court’s “November 28, 2012 decision” on shortened time—but only regarding the trial court’s decisions regarding the scope of discovery in a reasonableness hearing, not whether a hearing should be held at all. CP 1425-26, 1429-32. After the trial court denied the motion to shorten time and took no further action on Philadelphia’s motion for reconsideration, Philadelphia months later urged the Court to hear its motion for reconsideration, expressly representing to the trial court that CR 59 applied to the trial court’s November 28 “order.” CP at 1423, 1829-30. Eventually, the trial court resolved the issues Philadelphia raised on reconsideration by entering an August 27, 2013 order appointing a special master to review documents in camera for whether they should be produced for the reasonableness hearing. *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 819, 381 P.3d 111 (2016) (“*Steel I*”). Thus, Philadelphia’s own actions and representations to the trial court acknowledged the November 28, 2012 memorandum opinion as a binding order on the issue of whether a reasonableness hearing would be held and to which CR 59(b) applied, making Philadelphia’s subsequent March 9, 2017 motion seeking reconsideration of this issue untimely. And, at the very latest, the trial court’s August 27, 2013 order resolving Philadelphia’s November 29, 2012 motion for reconsideration of the November 28 memorandum opinion was an “order” triggering CR 59(b)’s 10-day time limit.

Finally, to the extent that *Tehat*’s holding extends beyond its specific factual context of a civil bench trial, it was incorrect, harmful, and should not be followed by this Court. Washington interprets court rules in the same manner as statutes. *Jafar v. Webb*, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). This Court interprets court rules in context of other related provisions, gives effect to all language without rendering portions meaningless or superfluous, and avoids absurd results. *G-P Gypsum Corp. v. Dep’t of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010); *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020, 1026 (2007).

Tehat reasoned that a characteristic of a “judgment, order, or other decision” triggering CR 59(b)’s time limits is that they “resolve all claims in the suit,” and that the “law is served by having the same commencement date for a motion for reconsideration and an appeal.” 182 Wn. App. at 672, 674. But CR 59(a) expressly states that “a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues that are clearly and fairly separable and distinct, **or any other decision or order may be vacated and reconsideration granted.**” Emphasis added. Thus, CR

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 vacate its Summary Judgment Order vacating its earlier interlocutory order because "[t]he plain language of CR 60(b) applies only to *final* judgments, *orders*, and proceedings." *In re Detention of Mitchell*, 160 Wn. App. 669, 677, 249 P.3d 662 (2011) (emphases added).¹¹ Accordingly, the trial court lacked authority to enter the Summary

59(a) recognizes that the rule applies to two categories of events: (1) a verdict resolving the claims in a case and triggering a motion for a new trial or (2) any other decision or order triggering a motion for reconsideration. However, *Tehat's* reasoning, if taken out of context, would render CR 59(a)'s language meaningless and eliminate this distinction by requiring a trial court's decision to be one final for purposes of appeal and resolving all claims in a case (like a verdict or judgment giving rise to a motion for a new trial) in order to trigger CR 59(b)'s time limits for a motion for reconsideration. Moreover, if taken out of context *Tehat's* reasoning would render CR 60(b) superfluous, which authorizes vacation of a "final judgment, order, or proceeding." By its plain language, it does not apply to interlocutory decisions. *Washburn v. Beatt Equipment*, 120 Wn.2d 246, 300-01, 840 P.2d 860 (1992). However, if taken out of context, *Tehat's* reasoning would also remove interlocutory decisions from CR 59(a) and (b)'s ambit by imposing a requirement that the decision resolves all claims in a case or is otherwise final for purposes of an appeal.

Properly reading CR 59(a), 59(b), and 60(b) in tandem, CR 59(a) and (b) should apply to and be triggered by (1) a verdict, judgment, or order resolving all claims in a case challenged within 10 days of entry or (2) any other interlocutory order or similarly firm decision by the trial court challenged within 10 days of entry. In turn, CR 60(b) should apply to final judgments, orders, or other proceedings challenged outside of CR 59(b)'s 10-day time limit and subject to CR 60(b)'s specific time limitations and other specific requirements.

This reading is necessary to prevent absurd results. For example, if *Tehat's* reasoning was extended beyond its factual context, in this case the trial court could have held a reasonableness hearing and entered judgment and Philadelphia *still* could have moved 10 days after the fact for reconsideration of the trial court's decision to hold a reasonableness hearing and enter judgment.

¹¹ 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. Notably, Philadelphia did not seek interlocutory review of the trial court's decision to hold a reasonableness hearing during the first interlocutory appeal in this case.

Judgment Order under CR 60(b), requiring reversal.

4. As a matter of law CR 60(b)(11) did not authorize the Summary Judgment Order’s entry because no “change in law” occurred

Additionally and assuming *arguendo* that CR 60 generally applied to the trial court’s previous interlocutory order, CR 60(b)(11) did not authorize the Summary Judgment Order’s entry based on a “change in law.” Under controlling Washington precedent, “change in law” is a term of art in the context of CR 60(b)(11) with a very specific meaning that does not include “errors of law.” *In re Marriage of Furrow*, 115 Wn. App. 661, 673-74, 63 P.3d 821 (2003); *In re Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985). Philadelphia offers absolutely no response to this controlling case law other than its conclusory assertion that *Day* was a change in law.¹² Because Philadelphia fails to respond to these arguments, it has waived this issue on appeal, requiring reversal.

5. RCW 4.22.060(1) applies to covenant judgment settlement reasonableness hearings and mandated a reasonableness hearing in this case

Stunningly, Philadelphia conclusorily argues—again, without any citation to supporting authority—that RCW 4.22.060 “does not apply” to the covenant judgment settlements agreements at issue here because Washington courts only “adopted” reasonableness procedures under the

¹² Philadelphia claims that Appellants have argued that *Day* is an “aberration from long-standing case law,” suggesting a change in law. Respondents’ Br. at 48. But as discussed below, Appellants’ argument is that *Day* is not on-point because it is distinguishable from both previous Washington covenant judgment cases and this case based on a critically-distinguishable provision of the covenant judgment settlement agreement at issue in *Day*. Arguing that a case is legally and factual distinguishable from others is not an argument that it constitutes a “change in law.”

statute “to evaluate covenant judgments in the insurance context.”¹³

Even if the Court considered Philadelphia’s conclusory arguments, the distinction it posits—the statute applies only to settlement agreements “that resolve claims against some joint tortfeasors in the contributory fault context,” not “covenant judgments in the insurance context” completely ignores the statute’s plain language. As the Court already has held 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*.”¹⁴ *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 836, 381 P.3d 111 (2016) (emphasis added) (“*Steel I*”). Just as importantly, Philadelphia ignores our Supreme Court’s express rejection of an identical argument by insurers. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012) (rejecting insurer’s argument that “RCW 4.22.060 should not apply outside of the contribution context,” stating that covenant judgments “fit squarely” within RCW 4.22.060’s language, and expressly approving “the application of RCW 4.22.060 to reasonableness hearings involving covenant judgments”); *see also Martin*, 141 Wn. App. 611, 617 n.2, 170 P.3d 1198, 1201 (2007) (rejecting as meritless intervening insurer’s argument that RCW 4.22.060 did not apply to a covenant judgment settlement because “there were no

¹³ Respondent’s Br. at 47.

¹⁴ Notably, Philadelphia did not seek reconsideration of this Court’s opinion on this point. The fact that this Court once already has issued an opinion on interlocutory review *entirely premised on* RCW 4.22.060 requiring the trial court to hold a reasonableness hearing underscores the procedural absurdity of allowing Philadelphia to revisit this controlling point of law six years after it originally was decided by the trial court and two years after this Court’s opinion.

joint defendants with a right of contribution for joint and several liability”). Simply put, it should be beyond dispute that RCW 4.22.060 applies to the covenant judgment Settlement Agreements at issue and required a reasonableness hearing. Philadelphia’s assertions to the contrary demonstrate a fundamental ignorance or misrepresentation of the well-established, bedrock principles of covenant judgments and reasonableness hearings under Washington law.

Finally, Philadelphia repeatedly contends—in conclusory fashion—that the release provisions within the Settlement Agreements somehow rendered a reasonableness hearing and entry of judgment “moot,” rendered any entered judgment subject to “immediate vacatur,” or deprived the trial court of “jurisdiction” to hold a reasonableness hearing.¹⁵ But neither of the cases cited by Philadelphia offer any support. *U.S. Bancorp Mortgage Co. v. Bonner Mall P’Ship*, 513 U.S. 18, 25, 115 S. Ct. 386, 389, 130 L. Ed. 2d 233 (1994) is not even remotely on point. In *Bonner*, the parties settled pending review by the United States Supreme Court. 513 U.S. at 20. One party, arguing that the case was moot, then moved the Supreme Court under a federal statute to vacate the United States Court of Appeals’ opinion in the case. *Id.* The Supreme Court held that “mootness by reason of settlement does not justify vacatur of a judgment under review.” *Id.* at 29. Aside from merely using the terms “moot” and “vacatur,” *Bonner* lacks any relevance to the issues before the Court.

¹⁵ Respondent’s Br. at 42, 46-47.

Similarly, *Villas at Harbour Pointe Owners Ass'n ex rel. Constr. Assocs., Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 760-61, 154 P.3d 950, 954 (2007), *as amended on reconsideration* (May 3, 2007), actually **rejected** an insurer's argument that, because the parties a' entry into a covenant judgment settlement agreement "prior to the [reasonableness] hearing" deprived the trial court of a "justiciable case or controversy" necessary for jurisdiction. As in *Harbour Pointe*, in this case the fact that the parties entered into covenant judgment settlement agreements did not deprive the trial court of a "justiciable controversy" necessary for the trial court to hold a reasonableness hearing. Rather, as discussed below, the Settlement Agreements did not release the defendants from liability for the stipulated judgments or from the obligation to have judgments entered after the trial court's reasonableness determination. Because justiciable issues still existed between the parties—i.e., whether the stipulated judgment amounts were reasonable—the trial court erred in dismissing the Parents' claims without a reasonableness determination.

6. The Settlement Agreements did not release the defendants from liability for the stipulated judgments, giving rise to a presumption of harm in subsequent bad faith litigation

Philadelphia repeatedly concedes that a presumption of harm in bad faith litigation arises from liability for the stipulated *judgments* in a covenant judgment settlement agreement.¹⁶ As Appellants have argued

¹⁶ Respondent's Br. at 38 ("*MOE v. Day* held that a stipulated judgment agreement that fully insulates the insured from liability **for the agreed judgment** is not effective for the purpose of establishing damages for a later bad faith action") (emphasis added); 39 ("the *Moe* [sic] *v. Day* court held that the trial court erred when it

before the trial court and this Court, the Settlement Agreements at best only released the defendants from liability for Appellants' claims, a distinction also conceded by Philadelphia.¹⁷

Perhaps due to these inescapable concessions, Philadelphia offers no response whatsoever to the fact that the Agreements' plain language in no, way, shape, or form released the defendants from liability for the *judgments* required under the Agreements. Indeed, Paragraph 1 of the Agreements expressly stated that Appellants agreed "to settle the *claims* against Defendants" in exchange for "entry of a judgment."¹⁸ Consistent with this provision, Paragraph 5—the actual release provision—stated

applied the stipulated settlement amount as a measure of damages for bad faith, since the insured was legally insulated from any exposure *on the agreed judgments*") (emphasis added).

Despite its repeated concessions, however, Philadelphia then disjointedly tries to argue that the three cases cited by Appellants— *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)), and *Steil v. Florida Physicians' Ins. Reciprocal*, 448 So. 2d 589, 591 (Fla. Dist. Ct. App. 1984)—for the proposition that the presumption of harm in subsequent bad faith litigation arising out of a covenant judgment settlement flows from the judgments themselves, claiming that those cases "stand for the unremarkable proposition that an insured may assign a claim she possesses against an insurer or an insurance agent, and they simply do not apply to the matter at hand." Respondent's Br. at 41.

But our Supreme Court extensively relied on *Steinmetz* and *Kagele* (that in turn relied on *Steil*) in holding that a covenant judgment settlement does not preclude a finding of harm in insurance bad faith litigation and rejecting the insurer's argument that "*the judgment* cannot be the basis for alleging harm." *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 396-400, 823 P.2d 499 (1992). And our Supreme Court again relied on *Steinmetz* and *Kagele* in holding that the amount of a covenant judgment determined reasonable by the trial court serves as the presumptive measure of harm in subsequent bad faith litigation. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 736, 738, 49 P.3d 887 (2002). Clearly, our Supreme Court believed that *Steinmetz* and *Kagele* stood for far more than the proposition that an insured may assign bad faith claims and, indeed, provided the foundation for the presumption of harm arising from covenant judgment settlements.

¹⁷ Respondent's Br. at 38 ("The Release Agreements at issue in this appeal . . . release the Defendants from liability for the claims brought against them.")

¹⁸ CP at 4350.

only that Appellants released the defendants from any and all “claims, causes of action” and other similar items “based on acts or omissions *which are alleged or could have been alleged in the lawsuit.*”¹⁹ By its own terms, this was a *claims* release, not a judgment release.

The remainder of the Settlement Agreements only bolsters that conclusion, as the entire settlement was “[s]ubject to the provisions of paragraphs 2, 3, and 4,” which in turn required: defendants to stipulate to judgments in an amount determined reasonable by the trial court (thus necessarily requiring a reasonableness determination); Appellants not to execute the stipulated judgments against defendants (thus requiring a judgment as a necessary predicate of this provision); and defendants both to assign any bad faith claims against Philadelphia to Appellants and to represent “that they have done nothing and will in the future do nothing to impair or otherwise adversely affect the Assigned Claims” (which necessarily precluded any release for liability from the judgments, as that would adversely affect the assigned bad faith claims by eliminating a presumption of harm in that litigation). Finally, as discussed in Appellants’ Opening Brief—and without response from Philadelphia—Paragraph 7 of the Settlement Agreements expressly provided that any “dismissal of all claims” would not deprive the trial court “of jurisdiction for the purposes of conducting a [reasonableness] hearing,” would “not extinguish or in any way impede the legal effect of the judgment[s],” and

¹⁹ CP at 4351.

that the judgments would “remain active subject to the covenant not to execute.” Accordingly, reading the Settlement Agreements’ plain language as a whole as an expression of the parties’ intent, the Agreements unambiguously released the defendants only from liability for claims, not the stipulated judgments, and in fact required the defendants to stipulate to entry of judgments after a reasonableness determination. Thus, given Philadelphia’s own concessions regarding the covenant judgment Settlement Agreements at issue, the trial court erred in entering the Summary Judgment Order, requiring reversal.

7. **Unlike *Day*, the Settlement Agreements did not entitle the defendants to a satisfaction of judgment rebutting a presumption of harm in subsequent bad faith litigation**

Confusingly, despite its concessions, Philadelphia nonetheless argues that “when the insured is fully insulated from liability under the terms of the covenant judgment settlement agreement, as here, any presumption of harm is rebutted.”²⁰ In doing so, it misrepresents the holding of *Day*.²¹ The *Day* court actually concluded that the defendant

²⁰ Respondent’s Br. at 40.

²¹ Philadelphia also misrepresents *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005), when it states that “the Court of Appeals held that an insured could not establish harm when the insured and his spouse were shielded from personal liability by their bankruptcy status.” Respondent’s Br. at 39. In *Werlinger*, the insured obtained a personal bankruptcy discharge of liabilities, including any liability to the plaintiffs, *prior* to settling with the plaintiffs. 126 Wn. App. at 345-46. Subsequently, the parties entered into a covenant judgment settlement agreement and assignment of bad faith claims for \$5 million despite the insured having policy limits of only \$25,000. *Id.* The trial court subsequently denied the parties’ motion to have \$5 million approved as a reasonable settlement amount, instead ruling that it would enter judgment for the policy limits of \$25,000. *Id.* at 347. The trial court reasoned that settlement for any amount in excess of the policy limits was inherently unreasonable because, at the time of the settlement, the insured already had received a discharge of liability to the plaintiffs through bankruptcy. *Id.* at 351. On review, Division One agreed and held that, under those facts, the trial court did not abuse its discretion in determining the \$5 million settlement amount was unreasonable. *Id.* at 351-52.

was “legally insulated from any exposure *based on the agreed judgments*” because the covenant judgment settlement at issue provided 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). 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 (emphasis added).

Unlike in *Day*, the Settlement Agreements at issue here contained no provisions regarding a satisfaction of judgment, a critical distinction Philadelphia fails to address. Moreover, Philadelphia fails to offer any authority or support for its implicit argument that a release of claims—as opposed to a release for liability from the stipulated judgments—is the equivalent of a right to satisfaction of judgment. For all these reasons, its arguments fail.

8. The trial court’s interpretation of the release provisions required reformation of the Settlement Agreements in order to effectuate their intent as expressed through their plain language as a whole

Finally, even if the Court concluded that the release provision of the Settlement Agreements precluded a reasonableness determination and entry of judgment, this provision was unenforceable in light of the

Unlike in *Werlinger*, in this case the defendants were not insulated from liability at the time the parties settled and defendants assigned their bad faith claims to Appellants. See *Steinmetz*, 49 Wn. App. at 227 (“[t]he assignee’s rights are coextensive with those of the assignor at the time of the assignment.”). Moreover, the defendants were not insulated from liability for the stipulated judgments *even after* the parties settled. Accordingly, *Werlinger* has no application to this case.

settlement agreement as a whole. As discussed above, Paragraph 1 expressly included “entry of judgment” as the consideration for and a material term of the Agreements. Consistent with this provision, Paragraphs 2, 3, 4, and 7 expressly contemplated the parties obtaining a reasonableness determination and entry of judgment and expressly stated the parties’ intent that they had done nothing to “negatively affect” the assigned bad faith claims or impair the “legal effect” of the judgments. Accordingly, any interpretation of Paragraph 5 to the contrary would require reformation of the Settlement Agreements under Paragraph 11 to fully effectuate the parties’ intent.

B. The Trial Court Erred in Entering the Discovery Order

1. Under Washington law, post-settlement and subjective opinion evidence is irrelevant to a trial court’s reasonableness determination

The only case Philadelphia cites in support for its proposition that post-settlement liability and damages discovery is relevant to a trial court’s reasonableness determination under the *Glover* factors is *Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009). But the citation is not well-taken. The only issue before the *Water’s Edge* court concerning reasonableness determinations was the trial court’s finding that the settlement amount in that case was unreasonable. 152 Wn. App. at 576. The Court was not asked, as it is here, to decide the proper scope and nature of discovery in covenant judgment reasonableness hearings.

Moreover, the evidence referenced by *Water’s Edge* consisted of:

(1) damages estimates from various experts created *before* the parties settled, 152 Wn. App. at 586-87; (2) pre-settlement motions and orders limiting claims and the types of damages recoverable, *id.* at 587; (3) pre-settlement claims and damages analyses written by the insured's defense attorney at the time, *id.* at 587-88; (4) the pleadings in the case, *id.* at 589; and (5) pre-settlement letters, emails, and other correspondence between the parties' attorneys related to the circumstances surrounding the covenant judgment settlement, *id.* at 578-82, 595-96. Although the intervening insurer in *Water's Edge* may have *obtained* that discovery after the covenant judgment settlements were executed, *none* of it was *created* after the covenant judgment settlements were reached in that case.

Thus, even *Water's Edge* supports the proposition that liability and damages evidence sought for the first time after execution of a covenant judgment settlement is irrelevant to the trial court's reasonableness determination. Such a conclusion is consistent with a trial court's limited inquiry during a reasonableness hearing. The trial court is not required to "conduct a mini-trial" in determining whether a settlement is reasonable. *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). "The trial court's role at a settlement hearing is not to exhaustively analyze any one *Chaussee* factor in determining whether a settlement is reasonable; rather, it is to weigh each relevant factor as necessary to the case before it." *Justus v. Morgan*,

199 Wn. App. 1039, 2017 WL 4277678, at *5 (2017).²² In applying the relevant reasonableness factors, the trial court’s ultimate inquiry is whether the parties “deci[ded] to settle for an amount within the range of evidence.” *Martin*, 141 Wn. App. at 620.

Consistent with the limited, non-exhaustive nature of a reasonableness determination, “[t]he law does not require settling parties to prepare for a reasonableness hearing as exhaustively and expensively as if they were preparing for trial,” such as engaging in new post-settlement merits discovery. *Sykes v. Singh*, 2018 WL 3844350, at *5 (Wash. Ct. App. Aug. 13, 2018). Instead, Washington law limits the basis for such a determination to “the facts and law at the time of settlement,” *Harbour Pointe*, 137 Wn. App. at 762, 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).

2. Post-settlement liability and damages depositions are irrelevant to the trial court’s reasonableness determination

Permitting Philadelphia to conduct post-settlement liability and damages depositions of the Parents in this litigation completely contradicts Washington’s standards for reasonableness hearings. Rather than limiting the trial court’s inquiry to a non-exhaustive evaluation of whether the parties settled for an amount within the reasonable range of evidence,

²² Pursuant to GR 14.1(a), Appellants cite this and all other unpublished Washington decisions in this brief only as nonbinding authorities accorded such persuasive value as the Court deems appropriate.

acceptance of Philadelphia's arguments in this case would open the floodgates to intervening insurers completely reopening discovery post-settlement. Under Philadelphia's rationales embraced by the Discovery Order, any time an intervening insurer identifies alleged "relevance" to one of the reasonableness factors, it should be permitted to conduct new depositions of witnesses on the case's merits, issue new interrogatories or document requests to the settling parties regarding the case's merits, or otherwise supplement the pre-settlement merits discovery conducted by the parties. Thus, contrary to Washington law, Philadelphia's arguments and the trial court's Discovery Order sanction a complete "do over" of merits discovery as part of an exhaustive, trial-like preparation for the reasonableness hearing.

Perhaps more importantly, the trial court's Discovery Order creates a reasonableness proceeding in which reasonableness is determined based on an *entirely different* posture than the one that existed for the parties at the time of settlement. At that time, *none* of the Parents had been deposed. No such testimony had been created, and no such evidence was available to the parties when they settled. It is through this lens—the posture of the case at the time of settlement—that the trial court must apply the relevant reasonableness factors, such as Appellants' damages, the merits of Appellants' liability theory, the defendants' relative fault, the merits of the defense's theory, and the risks and expenses of continuing litigation. Again, the trial court's task in determining reasonableness is not to engage in an exhaustive inquiry into evidence that *could have been*

discovered before the settlement; it is simply to apply the reasonableness factors to the pre-settlement corpus of evidence developed by the parties and determine a reasonable settlement amount. As a result, the post-settlement liability and damages evidence authorized by the Discovery Order is irrelevant to the trial court’s reasonableness determination, requiring reversal.

Philadelphia nonetheless contends on appeal—again in unexplained, conclusory fashion—that “for five of the six children,” multiple reasonableness factors “will depend upon whether [Appellants] can show that police and DSHS investigators were wrong, and that it was unreasonable for Defendants to rely upon background checks and police and DSHS reports.”²³ Likewise, it argues that for “the sixth child,” the reasonableness determination “will turn on what the child’s mother knew and when she knew it.”²⁴

Even if the Court considered these conclusory, unexplained arguments, Philadelphia’s arguments flow from false premises predicated on a misrepresentation of the nature of a trial court’s reasonableness determination. In determining reasonableness, the trial court does not “ultimately conclude the merits of any legal theory,” such as determining whether evidence conclusively negated or established Appellants’ claims. *Justus*, 2017 WL 4277678, at *7. Rather, the trial court’s role is to determine the “plausible merit” or “possibility of the legal claims.” *Id.* at

²³ Respondent’s Br. at 34.

²⁴ *Id.*

*6, 7 (citing *Bird*, 175 Wn.2d at 775-76; *Martin*, 141 Wn. App. at 621). In doing so, “[a] potential problem with the . . . sufficiency of evidence is certainly something a trial court can consider at a reasonableness hearing.” *Sykes*, 2018 WL 3844350, at *5.

Thus, conclusively establishing or defeating Appellants’ claims or damages is not a valid reason supporting the trial court’s Discovery Order, as it misapplies Washington law regarding reasonableness hearings. And, although the trial court may properly weigh merits and damages evidence developed by the parties before the settlement, consider the absence of such evidence, or otherwise consider the sufficiency of such evidence, Philadelphia fails to cite a single authority that holds that post-settlement merits and damages discovery is relevant or necessary to the trial court’s reasonableness determination. Accordingly, because the trial court misapplied Washington legal standards regarding reasonableness hearings, it abused its discretion in authorizing the Parents’ depositions, requiring reversal of the Discovery Order.

3. **Post-settlement depositions of the defendants regarding their opinions on the legal issue of their own liability and their ability to pay a verdict are irrelevant to objective reasonableness and unnecessary given the extensive existing record**

Philadelphia next contends that the trial court did not abuse its discretion in ordering post-settlement depositions of the defendants regarding the basis of the “confession” provisions in the Settlement Agreements they signed and their ability to pay a verdict against them.

But both arguments fail.

First, by its own terms the Discovery Order only authorized depositions regarding the defendants’ “opinion[s]” regarding the veracity of the defendants’ admissions to liability for Appellants’ claims.²⁵ Philadelphia argues that such an inquiry is necessary under the “bad faith, collusion, or fraud” reasonableness factor to determine, in the defendants’ opinions, the facts that supported their admissions of liability. But the defendants’ opinions on their own legal liability necessarily are subjective evidence, whereas the trial court’s reasonableness determination is *objective* in nature and does not depend on whether a party’s subjective opinions. *Dana v. Piper*, 173 Wn. App. 761, 776, 295 P.3d 305 (2013). Thus, the defendants’ personal opinions regarding whether sufficient evidence existed at the time of settlement to establish their legal liability for Appellants’ claims are irrelevant.²⁶ Instead, as discussed above, the trial court’s reasonableness determination will examine such evidence to determine whether it was objectively “plausible” or “possible” that a jury could have found defendants liable. *Justus*, 2017 WL 4277678, at *6, *7.

Contrary to the Discovery Order’s express terms, Philadelphia also argues that such depositions are relevant to “explore the basis of the

²⁵ CP at 7849-51.

²⁶ Further removing the defendants’ opinions from any degree of relevance is the fact that they are non-attorney laypeople. Both Philadelphia’s arguments and the trial court’s Discovery Order create an absurd process where Philadelphia will present the defendants with its views regarding the evidence—or lack thereof—and solicit essentially a legal opinion from the defendants whether their confessions to liability were consistent with such evidence. The proper forum and audience for Philadelphia’s legal arguments regarding the evidence and its relation to the defendants’ liability is the trial court at the reasonableness hearing, not the party witnesses at a deposition.

factual confessions” under the “bad faith, collusion, or fraud” reasonableness factor.²⁷ If Philadelphia seeks new fact discovery as opposed to defendants’ opinions regarding their own liability, however, it seeks new, post-settlement liability depositions contrary to Washington law and irrelevant to the reasonableness determination.

Second, Philadelphia contends that it needs to depose the defendants regarding their ability to pay a judgment against them, as the record contains no evidence on that point. But the record actually establishes that defendant Olson’s coverage counsel testified that he advised Olson to accept the Settlement Agreements because they were “necessary” to protect him “from potentially jeopardizing his personal assets in an excess judgment situation.”²⁸ Moreover, Olson’s coverage counsel testified in his deposition that he had only between \$100,000 and \$200,000 in assets with which to pay a judgment.²⁹ Likewise, OELC’s coverage counsel testified that it only had assets of \$150,000 at the time of settlement.³⁰ Thus, because the facts in the record did not support the necessity of deposing the defendants regarding their ability to pay, the trial court abused its discretion in entering the Discovery Order, requiring reversal.

4. Post-settlement depositions of defense counsel regarding his legal opinions and trial preparation are irrelevant to

²⁷ Respondent’s Br. at 35.

²⁸ CP at 504-05.

²⁹ CP at 7683.

³⁰ CP at 7730-31.

**objective reasonableness and unnecessary given the
extensive existing record**

Philadelphia further argues, in conclusory fashion and with no citation to the record, that the trial court properly ordered defense counsel's deposition regarding his "evaluation of the true settlement value of Appellants' claims" because "Defense Counsel is a very experienced attorney" who "is in the best position to advise the trial court regarding the reasonableness of the settlements."³¹ Philadelphia further contends, again in conclusory fashion, that it needs to depose defense counsel "about relevant objective facts that are not contained in his files" regarding "his preparation for trial."³²

Even if the Court considered these unsupported, conclusory arguments, the subjective opinions of the parties' attorneys are irrelevant to the trial court's objective reasonableness determination.³³ *Dana*, 173

³¹ Respondent's Br. at 32-33. Philadelphia also cites *Bird*, 175 Wn.2d at 774, and *Water's Edge* for the proposition that it is "hardly novel for insurers to depose counsel concerning the reasonableness of a covenant judgment settlement. But those citations are not well-taken. For one, the scope of relevant discovery and evidence in a covenant judgment reasonableness hearing was not at issue in either case. Moreover, Philadelphia's citation to *Bird* states nothing about such depositions being permissible or even taken, and its citation to *Water's Edge* actually is a general citation to *Bird*. Finally, as discussed above, the evidence in *Water's Edge* regarding defense counsel's valuation of the claims in that case originated from pre-settlement file materials and correspondence, not a post-settlement deposition.

³² Respondent's Br. at 30.

³³ Philadelphia argues that *Steel I* already rejected the proposition that "an attorney's subjective opinions are not relevant." Respondent's Br. at 30. But this mischaracterizes *Steel I*. There, Appellants argued that "attorney-client communications are only ever subjective." 195 Wn. App. at 826-27. This Court disagreed, reasoning: "the *Dana* court did not declare a sweeping rule that attorney-client communications *always* contain only subjective information that could never be placed at issue within the evaluation of a settlement's reasonableness." *Id.* Emphasis in original. The Court's reasoning makes sense, as attorney-client communications can and do sometimes contain objective facts not shielded by privilege. See *Youngs v. Peacehealth*, 179 Wn.2d 645, 653, 316 P.3d 1035, 1039 (2014). Thus, the Court correctly declined to fashion a bright-line rule stating that attorney-client communications are always subjective and therefore never discoverable for purposes of a reasonableness proceeding.

Wn. App. at 773. Like the parties' own opinions, their attorneys' opinions are irrelevant where the trial court will examine the liability and damages evidence existing at the time of settlement to determine whether the settlements were objectively reasonable. And as this Court already has held, that objective determination will "will primarily rely on objective evidence." *Steel I*, 195 Wn. App. at 829. The only "opinion" evidence the trial court will potentially rely on is "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 I*, 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"). Although the

As opposed to attorney-client communications, however, the issue in this case is whether *the opinions of a party's attorney* are relevant to an objective reasonableness determination. Such attorney opinions are by definition subjective and categorically irrelevant. Even if the Court was still hesitant to expressly recognize such a bright line rule, however, at a minimum *Dana* held that the subjective opinions of the parties and their attorneys are irrelevant to a trial court's reasonableness determination where reasonableness can be determined by comparing the strength of a plaintiff's claims to the terms of the settlement. *Dana*, 173 Wn. App. at 773. As discussed throughout Appellants' briefing, where Philadelphia already possesses hundreds of thousands of pages of objective evidence, including all parties' ordinary work product and coverage counsel's and defense counsel's entire files, and reasonableness experts will provide any expert "assessment" of the settlements desired by the trial court, inquiring into defense counsel's subjective opinions would be improper, irrelevant, and unnecessary.

reasonableness expert witnesses may reference defense counsel's opinions regarding the settlement value into their testimony, it is ultimately their opinions, not those of defense counsel, that the trial court will consider in evaluating the other objective evidence. Moreover, the pre-settlement file materials already produced to Philadelphia already contain two case evaluations by defense counsel. Thus, neither the law nor the record support Philadelphia's alleged "need" to depose defense counsel regarding his evaluation of the case.

Similarly, Philadelphia fails to explain what "relevant objective facts" regarding defense counsel's trial preparation may exist that would not be in his entire file that already has been produced to Philadelphia. Depositions transcripts, notes from witness interviews, filed motions, draft motions, legal research, communications with potential experts, retention agreements with experts, indeed, the *entire corpus* of defense counsel's trial preparations should be and are evident from his file materials. Indeed, Philadelphia's claims adjuster for this case, Jaqueline Holeman, testified that Philadelphia could "see that [defense counsel] was participating in the depositions, and also could see that he was conducting searches and interviews for experts" even before the settlement.³⁴ Post-settlement, Philadelphia now possesses his entire litigation file. Accordingly, neither the law nor the record supported the Discovery Order, requiring reversal.

5. Depositions of the SGALs regarding their post-settlement reports are irrelevant to the trial court's

³⁴ CP at 1217.

determination of objective reasonableness at the time of settlement

Finally, Philadelphia contends that the trial court properly ordered the SGALs' depositions because, under the "bad faith, collusion, or fraud" reasonableness factor, Philadelphia needs to inquire into whether "plaintiff [sic] counsel provided the SGALs inaccurate information in order to improperly influence the recommendations in their reports."³⁵ But as Philadelphia necessarily admits, the trial court determines reasonableness based on the evidence available at the time of settlement. Here, the parties executed the Settlement agreements between September 19, 2012 and September 27, 2012.³⁶ In contrast, the SGALs' reports were dated October 20 through October 25.³⁷ Thus, because the SGAL reports did not exist and were not available to the parties at the time of the settlement, they are entirely—including the circumstances regarding their creation—irrelevant to the trial court's reasonableness determination. Accordingly, the trial court's Discovery Order requiring the SGALs' deposition was not supported by the law or facts and was an abuse of discretion, requiring reversal.

IV. 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

³⁵ Respondent's Br. at 36.

³⁶ See, e.g., CP at 4349-4355, 4376, 4397.

³⁷ CP at 512, 523, 537, 547, 556, 578.

entry of judgment.

RESPECTFULLY SUBMITTED this 15th day of October 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 October 15, 2018, I personally delivered, a true and correct copy of the above document, directed to:

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