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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JEFFREY WOOD AND ANNA WOOD, husband and wife; MILIONIS
CONSTRUCTION, INC., a Washington corporation; STEPHEN
MILIONIS, an individual,

Respondents

v.

CINCINNATI SPECIALTY UNDERWRITERS
INSURANCE COMPANY,

Appellant (Intervenor Below)

INTERVENOR CINCINNATI SPECIALTY UNDERWRITERS
INSURANCE COMPANY'S APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal demonstrates how critically important it is for trial courts to skeptically examine settlement agreements involving stipulated covenant judgments before approving them as “reasonable,” and for trial judges to confine their review to evidence that pertains to the nine “reasonableness” elements set forth in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). Substantial evidence in the record below demonstrated that the \$1.7 million stipulated judgment and settlement between plaintiffs Jeffrey and Anna Wood (collectively, the “Woods”) and defendants Stephen Milionis and Milionis Construction, Inc. (collectively, “Milionis”) was inflated and was the product of bad faith and collusion. The trial court, however, refused to allow Intervenor Cincinnati Specialty Underwriters Insurance Company (“Cincinnati”) the opportunity to take discovery into negotiations leading up to the \$1.7 million settlement, thereby depriving Cincinnati of any meaningful opportunity to obtain information critical to the issue of reasonableness.

Then the court erroneously required Cincinnati to show that the settlement was not reasonable, when the law clearly assigns the burden of proving reasonableness to the settling parties. The court then concluded that the \$1.7 million stipulated settlement was reasonable even though there was substantial evidence that the settlement was the product of bad

faith and collusion, that Milionis had potentially dispositive defenses to liability and damages, that Milionis had little or no assets to pay any judgment or settlement, and that any damages the Woods could recover would be far less than the stipulated amount.

Then, piling error upon error, the court ignored its obligation to protect Cincinnati from inflated and collusive settlements through careful application of the *Chaussee* factors. Instead, the court entertained and considered the Woods' improper "insurance bad faith" arguments, and it used those arguments as a basis for applying the *Chaussee* factors in a way that would punish Cincinnati.

Had the court below permitted Cincinnati to take discovery into the inflated settlement and the settling parties' bad faith and collusion, and had the court properly performed its role in the reasonableness process and fully and fairly applied the *Chaussee* "reasonableness" factors, and had the court properly confined its review to evidence relevant to the *Chaussee* factors, it would have readily concluded that the reasonable value of the Woods' claims was nowhere near the \$1.7 million stipulated amount. The trial court ignored its legal duty to provide a full and fair hearing on reasonableness, and untainted by of irrelevant and extraneous evidence. The trial court should therefore be reversed, and this case should be remanded with instructions permitting Cincinnati to take discovery into

the settlement negotiations and to conduct a new reasonableness hearing within the proper bounds established by law.

II. ASSIGNMENTS OF ERROR

The trial court erred in the following respects:

A. In entering its July 13, 2018 order denying Cincinnati's request to take discovery into the facts and circumstances that led to the inflated settlement, despite the clear indications of bad faith collusion by the Woods and Milionis.

B. In requiring Cincinnati to prove that the settlement was not reasonable, when the settling parties bore the burden to show that the settlement was reasonable. *Water's Edge Homeowners Ass'n v. Water's Edge Assocs*, 152 Wn. App. 572, 594-95 ¶¶ 56-57, 216 P.3d 1110 (2009).

C. In entering its July 20, 2018 Order finding that the \$1,700,000 stipulated settlement was reasonable and in entering judgment on that amount, when proper consideration of the *Chaussee* factors would have led to a reasonable settlement value of approximately \$400,000.

D. In allowing and considering the Woods' improper and irrelevant "insurance bad faith arguments," and using those arguments as a basis for applying the *Chaussee* reasonableness factors to punish, rather than to protect, Cincinnati.

III. STATEMENT OF THE CASE

A. Nature Of The Case Below.

In 2015, the Woods hired Milionis as general contractor to build a new house in Newman Lake, Washington. (CP 4-5.) Disputes arose regarding the work, billing and other issues, and Milionis walked off the project on November 1, 2016. (CP 5-10.) The Woods then sued Milionis, alleging, *inter alia*, that Milionis failed to follow the designs of their structural engineer and architect, failed to properly construct parts of the home, changed parts of the home design without authorization, installed materials that were wrong or of lesser quality, and refused to provide backup for amounts paid under the contract. (CP 6, 9-10.) The Woods asserted claims for breach of contract, unjust enrichment, promissory estoppel, breach of contractual duties of good faith and fair dealing, negligence, negligent misrepresentation, and violation of the Consumer Protection Act. (CP 11-15.)

Milionis counterclaimed, seeking approximately \$200,000 in damages for amounts the Woods still owed under the contract. (CP 26-31,

Exhibit C-2 at p. 11.)¹ The suit was then stayed for arbitration pursuant to the parties' contract.

Cincinnati issued a policy of general liability insurance to Milionis that was in effect from November 23, 2015 to November 23, 2016. (CP 140.) Cincinnati retained attorney Shane McFetridge to defend Milionis against the Woods' claims in the underlying suit and arbitration, while also reserving the right to deny or limit coverage for the Woods' claims. (*See* CP 528-535.)

In addition, Cincinnati filed an action for declaratory relief, *Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr., Inc., et al.*, U.S. District Court for the Eastern District of Washington Case No. 2:17-cv-00341 (the "Coverage Suit"). (CP 138-147.) In the Coverage Suit, Cincinnati sought a declaration that it had no obligation to cover the Woods' claims because, *inter alia*, Milionis failed to comply with the requirements of the "Independent Contractors Limitations of Coverage" in the policy (the "ICL Endorsement"). (CP 141-143.) The ICL Endorsement states that the policy does not cover subcontracted work unless Milionis has obtained written contracts confirming that the subcontractors will indemnify Milionis for their work, and verifying that

¹ Exhibit C-2, Defendants/Counterclaim Plaintiffs' Arbitration Brief, was admitted into evidence at the reasonableness hearing. (*See* CP 624.) Cincinnati supplemented the Clerk's Papers to include this document on March 26, 2019.

Milionis was added as an insured on the subcontractors' insurance policies. (CP 141-142.)

The Woods, Milionis, and Cincinnati participated in three mediations. Before the third mediation, Mr. McFetridge estimated the reasonable settlement value of the case at \$350,000, taking into account the merits of the Woods' claims and Milionis's defenses to liability and damages. (CP 414-415.). In the third mediation, on October 19, 2017, the parties reached an agreement to settle for \$399,514.58, contingent upon Cincinnati paying the entire amount. (CP 395-396.) Even though its policy did not appear to cover any of the Woods' claimed damages, Cincinnati offered to contribute \$100,000 toward the settlement. (*See* CP 303.). The settlement was never finalized because Milionis declined to make any contribution.²

The case proceeded to arbitration and, on May 18, 2018, Milionis's defense counsel filed a Motion for Partial Summary Judgment seeking dismissal of all but one of the Woods' claims. (*See* Exhibit C-1.)³ Had the motion been granted, the arbitration would have been limited to the

² In the reasonableness hearing, counsel represented that a judgment would likely force Milionis into bankruptcy. (RP at 55:17-19.)

³ Exhibit C-1, Motion and Memorandum in Support of Motion for Partial Summary Judgment, was admitted into evidence at the reasonableness hearing. (*See* CP 624.) Cincinnati supplemented the Clerk's Papers to include this document on March 26, 2019.

Woods' breach of contract claim and Milionis's counterclaim for amounts due under the contract. (See Exhibit C-1 at p. 14; RP at 85:20-25.) Defense counsel also filed an Arbitration Brief arguing, *inter alia*, that the Woods' actual damages were approximately \$350,000, after offsets for amounts they still owed to Milionis under the contract. (See Exhibit C-2 at pp. 11, 23.)

However, unbeknownst to its defense counsel, Milionis's personal counsel Brook Cunningham was secretly negotiating with the Woods to settle for a stipulated amount more than four times greater than what the Woods agreed to settle for in mediation. (See CP 388-89, 410. RP at 88:23-89:17.) The apparent intent of these discussions was to punish Cincinnati for filing the Coverage Suit and not funding the \$399,514.58 settlement reached in mediation, while giving the Woods an inflated number they could use against Cincinnati once they were assigned Milionis's bad faith claims in the settlement. (See, e.g., CP 38-39 ("despite an opportunity to settle Plaintiffs' claims for an amount lesser than or equal to the applicable \$1,000,000 policy limit, [Milionis's] insurer, Cincinnati Specialty Underwriters Insurance Company, has acted in bad faith and failed and refused to settle the claims made by Plaintiffs").)

On May 22, 2018, shortly before the arbitration, Mr. Cunningham told Milionis's defense counsel that a settlement had been reached and

instructed him to strike the arbitration. (CP 427.) The parties signed a Settlement Agreement, Release, Assignment, and Covenant Not to Execute, wherein Milionis waived its all of its defenses, admitted full liability for all of the Woods' damages, stipulated to entry of judgment for \$1.7 million, and assigned to the Woods its insurance claims against Cincinnati. (CP 351-359.)

B. The Reasonableness Hearing Below.

The Woods and Milionis then filed a Stipulation and Joint Motion for Entry of Judgment, asking the court to rule that \$1.7 million was the reasonable value of the Woods' claims against Milionis. (See CP 34-51.) The sole purpose of this motion was for the trial court to assess whether that number was objectively reasonable based on the nine *Chaussee* factors, as adopted in *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). Although not pertinent to the *Chaussee* factors, the parties spent most of brief arguing that Cincinnati's policy covered the Woods' damages, that Cincinnati had wrongfully denied coverage, that Cincinnati handled the claim in bad faith, and that the settlement should be found reasonable due to Cincinnati's "unethical, unreasonable, and bad faith conduct":

12. As set forth in detail below, despite an opportunity to settle Plaintiffs' claims for an amount lesser than or equal to the applicable \$1,000,000 policy limit, Defendant MCI's [Milionis's]

insurer, Cincinnati Specialty Underwriters Insurance Company, has acted in bad faith and failed and refused to settle the claims made by Plaintiffs. Consistent with Cincinnati's acts of bad faith, it has also commenced a declaratory judgment action wherein it claims, contrary to applicable insurance policy terms and Washington law, that (1) there is no insurance coverage for Plaintiffs' claims and losses, (2) no duty to defend, and (3) that it owes no duty to indemnify MCI for liability to Plaintiffs.

13. Cincinnati's claims investigation and handling practices and procedures have been unreasonable and conducted in bad faith, to including, but not limited to, Cincinnati's use of a single adjuster for liability issues that deceived and "spied" on MCI and MCI's legal counsel, who then later acted as coverage adjuster, using privileged and work-product information gathered while acting as the liability adjuster against MCI.

* * *

. . . As direct a result of Cincinnati's bad acts, its repeated failure to settle and pay, and its acts of bad faith, the mediation was not successful. Plaintiffs, Defendant MCI, and Defendant Stephen Milionis then commenced to prepare for an arbitration with a professional arbitrator, having each submitted arbitration briefs, witness lists, and arbitration exhibits. The parties' arbitration hearing was scheduled to commence on May 29, 2018, but was cancelled because the parties' agreed to settle and stipulate to a judgment against MCI.

* * *

. . . Cincinnati misguidedly claims there is no coverage under the policy because Defendant MCI failed to have written contracts with its subcontractors confirming their agreement to defend, indemnify, and hold Defendant MCI harmless for their work and failed to verify that such subcontractors listed them as additional insureds on their policies ("Independent Contractor Restriction").

* * *

. . . Cincinnati is wrongfully attempting to deny coverage on a theory unrelated to coverage. The Independent Contractor Restriction in the insurance policy at issue does not apply. Defendant MCI's alleged negligent supervision on the property,

among other claims, triggers coverage under its insurance policy at issue. Consequently, the parties' settlement agreement and stipulated judgment amount is reasonable based on Cincinnati's wrongful and erroneous bad faith attempts to deny coverage on a restriction that is inapplicable.⁴

* * *

Counsel Mr. McFetridge issued several reports and supplemental reports with recommended settlement authority to resolve the matter at mediation. . . . Personal Counsel for Defendants MCI and Stephen Milionis also repeatedly requested that Cincinnati at least come with the settlement authority requested by the counsel it hired, Mr. McFetridge. But such requests were ignored and were unsuccessful.

Thus, the parties' settlement agreement and stipulated judgment amount is beyond reasonable in light of Cincinnati's failure to follow the recommendations of its own counsel on settlement authority. Cincinnati inexplicably and repeatedly ignored its counsel⁵ by authorizing only a fractional amount of the settlement authority requested. Such settlement amount was within policy limits and would have avoided potential personal liability by Defendant Stephen Milionis.

* * *

On October 19, 2017, at the parties' third mediation, the parties reached a settlement in the amount of \$399,514.58 that was contingent on Cincinnati funding the same. Cincinnati claimed it was attending the mediations in good faith. Instead, Cincinnati appeared at the mediations with only a fraction of the settlement authority recommended by its own counsel and instead attempted

⁴ In the Coverage Suit, Judge Mendoza ruled that Cincinnati's policy does not cover any of the Woods' claimed damages because Milionis failed to comply with the ICL Endorsement. *See Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr., Inc., et al.*, 352 F. Supp. 3d 1049 (E.D. Wash. 2018).

⁵ The suggestion that Cincinnati somehow disregarded the recommendations of "its counsel" is false. Mr. McFetridge was retained to defend Milionis against the Woods' claims below. He did not—and could not—also represent Cincinnati. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986) (retained defense counsel must represent only the insured).

to induce and coerce Defendant MCI into using its own funds to settle the case. With no other choice, as part of that settlement, Defendant MCI even agreed to dismiss its counterclaims for monies it alleged were owed in excess of \$200,000. Cincinnati refused to participate in a settlement in good faith, leaving Defendants MCI and Stephen Milionis no other option but to agree to a settlement independently.

* * *

Despite that, Cincinnati continued disregarding the risk to its insured and Defendant Stephen Milionis, who was subject to personal liability as a named Defendant in the matter, Cincinnati confirmed its refusal to fund the settlement amount. In that regard, Cincinnati failed to follow the advice of its own counsel⁶ hired in the matter and did so to the detriment of its insured and at the risk of personal liability against Defendant Stephen Milionis. Moreover, Cincinnati placed Defendant MCI at risk of a verdict in excess of its One-Million Dollars (\$1,000,000) insurance coverage limits by failing in bad faith to settle the matter. Accordingly, the parties' settlement agreement and stipulated judgment amount herein is reasonable in light of the recommendations of its own counsel which Cincinnati repeatedly ignored, and the risks Cincinnati exposed its insured to, including the risk of personal liability against Defendant Stephen Milionis individually. . . .

* * *

Cincinnati's claims investigation and handling practices and procedures have been inherently unethical, unreasonable, and conducted in bad faith[.] Such actions by Cincinnati further support the parties' warranted settlement agreement and stipulated judgment, the amount of which is reasonable[.]

* * *

Cincinnati [sic] actions placed Defendant Stephen Milionis at risk for personal liability. Plaintiffs asserted personal liability against Defendant Stephen Milionis for claimed representations

⁶ See footnote 5, *supra*. In addition, Mr. McFetridge testified that he represented only Milionis, and that his defense reports to Cincinnati did not touch on insurance matters. (RP at 62:19-63:3, 71:25-72:2.)

made outside of the contract and for mixing personal and business funds, among other reasons. Thus, in addition to placing Defendant MCI at risk of a verdict in substantial excess of its policy limits, Cincinnati placed Defendant Stephen Milionis' personal assets at risk of judgment. As a result, Defendant Stephen Milionis was forced to hire personal counsel and incur significant attorney's fees because of Cincinnati's actions. Accordingly, the parties' settlement agreement and stipulated judgment amount is reasonable as the only avenue in which Defendant Stephen Milionis can avoid potential personal liability.

(CP 38-47 (emphasis and footnotes added).)

With their joint motion, the parties submitted a proposed Stipulated Judgment asking the court to make the following findings:

1. Cincinnati Insurance has taken the clear and unequivocal position that it does not and will not cover any of the claims made by Plaintiffs, it does not owe a duty to defend, and does not owe any duty to indemnify, and has refused to consider any reasonable settlement of the claims brought in this action against the repeated recommendations of its own counsel hired to defend MCI and Stephen Milionis[.]

* * *

10. Despite an opportunity to settle Plaintiffs' claims for an amount lesser than or equal to the applicable policy limit, Defendant MCI's insurer, Cincinnati Specialty Underwriters Insurance Company, failed and refused to do so, against the repeated advice of defense counsel hired, instead commencing a declaratory judgment action in federal court wherein it claims, contrary to applicable insurance policy terms and Washington law that there is no insurance coverage for Plaintiffs' claims and losses, that it owes no duty to defend, and that it owes no duty to indemnify MCI for its liability to Plaintiffs.

(CP 122, 124.)

Cincinnati moved below to intervene and participate in the reasonableness hearing. (CP 173-187.) Cincinnati also requested leave to take limited discovery into the parties' final negotiations leading up to the settlement, due to, among other things, concerns that the parties had deliberately excluded defense counsel from their discussions, the inflated \$1.7 million damages amount, and other indicia of bad faith and collusion. (CP 183-187.) In response, the Woods claimed Cincinnati was not entitled to discovery because it had defended Milionis and participated in mediations in the underlying case. (*See, e.g.*, CP 220-224.)

On July 13, 2017, the court granted Cincinnati's motion to intervene. (CP 431-434.) However, it declined Cincinnati's request for discovery, dismissing it as a "fishing expedition" having nothing to do with whether the settlement was reasonable under the *Chaussee* factors:

THE COURT: Isn't all that discovery that's not really to see whether or not it's reasonable . . . it's more of a fishing expedition for collusion among the attorneys? It's not really the whole point of discovery is to say what did you consider to make this reasonable.

This to me sounds more like a fishing expedition to see if there was collusion among the attorneys and not whether or not this is really reasonable.

* * *

All of the discovery that you're requesting isn't really going to the reasonableness of the settlement. It's more of is there a collusion against Cincinnati? I haven't heard anything at all that says this is totally unreasonable. . . .

(RP at 20:8-15, 47:11-15 (emphasis added).)

The parties were then instructed to commence the reasonableness hearing, so that Cincinnati could “be heard about why this settlement is not reasonable.” (RP at 49:1-2.) Cincinnati objected to counsel’s improper attempts to inject insurance coverage and bad faith issues into the reasonableness proceeding. (See RP at 7:4-13, 56:17-23.) The court, however, allowed and considered the following argument from Milionis’s counsel Brook Cunningham:

Cincinnati put [Milionis] in this position. They put them in a position where we had to take a stipulated judgment because they were trying to deny coverage, and they were ignoring the advice of their own defense counsel. Cincinnati acted in bad faith.

* * *

[Milionis] had no choice. He’s faced with potential judgments exceeding \$2 million. Their own experts over \$1 million. [Cincinnati] won’t settle within a fraction of what’s requested by their own counsel, and [Milionis] gives up his own counterclaims in effort to try to resolve this, and they still don’t do it.

What do they do instead of that? They go out and file declaratory judgment action. You don’t have insurance and shouldn’t have any insurance because they were so confident they were going to get Summary Judgment on that. [T]heir own insurance counsel, Shane McFetridge,⁷ in his reports told them that there were covered claims here, and that you should settle this matter, and that you should authorize the

⁷ Again, this representation is false. See footnotes 5 and 6, *supra*.

\$400,000 that was requested by Shane, and that you should, also, pay the settlement amount. . . .

(RP at 26:18-22, 28:10-25 (footnote added).) The court entertained similar arguments from the Woods' counsel, Ryan Poole:

Meanwhile, set against [Mr. Milionis's exposure to the Woods], he's got an insurance company saying sir, you're blowing in the wind. We're not covering any of this. In fact, we have a pending Motion for Summary Judgment [in the Coverage Suit] trying to completely get out and be done.

(RP at 36:17-21.)

Cincinnati opposed the joint motion and explained, in detail, why the proposed settlement was collusive and did not satisfy the *Chaussee* factors. (See CP 435-457.)

The reasonableness hearing concluded after a second session on July 20, 2018. At the conclusion of the hearing, the court expressed concerns regarding Cincinnati's conduct:

THE COURT: If it became clear along the way, though, that no matter what number they threw out, Cincinnati wasn't going to agree to it because you made it clear on the stand that no matter what authority [defense counsel McFetridge] asked for, he wasn't going to get it.

What good would it be to have [defense counsel] at those negotiation tables then if he has no authority to settle anything?

MR. SPARLING: It's important because he can vigorously represent Milionis's interest rather than just [roll over]. That's why the October negotiations are so important now.

(RP at 137:21-138:5.)

The court then issued an oral ruling again stating that the potential for collusion in the underlying settlement negotiations was immaterial because Cincinnati would not have paid anyway:

Is there evidence of bad faith, collusion and fraud? The Court's concerned when Mr. McFetridge is involved in the three prior mediations and then they get to this new one and he's cut out of that, but the Court has some concerns where he testified that he asked Cincinnati for additional authority, and that wasn't forthcoming. He didn't ask for additional authority because he knew it wasn't going to come.

That concerns the Court on whether or not his ability to actually negotiate the case at that point on behalf of Cincinnati concerns the Court. If you're going in and there's no authority to settle the case, you already know numbers have gone up. . . .

(RP at 143:14-144:1 (emphasis added).) Based on this and other improper reasoning, the court entered an order granting the parties' motion for entry of judgment expressly incorporating its oral ruling. (CP 616-619.) The court also entered judgment for \$1.7 million, plus attorneys' fees and costs. (CP 625-633.) This appeal followed. (CP 634-656.)

IV. ARGUMENT

A. Standard of Review.

A trial court's ruling on reasonableness is reviewed for abuse of discretion," and the "trial judge faced with this task must have discretion to weigh each case individually." *Glover v. Tacoma Gen. Hospital*, 98

Wn.2d 708, 718, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). “A court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs*, 152 Wn. App. 572, 584 ¶24, 216 P.3d 1110 (2009).

A trial court’s ruling on reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 925 n. 22, 169 P.3d 1 (2007).

B. The Nature and Purpose of Reasonableness Hearings.

The sole purpose in evaluating the reasonableness of the parties’ \$1.7 million stipulated settlement was to establish the “presumptive” measure of damages the Woods could recover from Cincinnati if they prevailed on a bad faith claim they received by assignment from Milionis.⁸ *Besel v. Viking Ins. Co.*, 146 Wn.2nd 730, 738, 49 P.3d 887 (2002); *Werlinger v. Warner*, 126 Wn. App. 342, 350-351 ¶ 21, 109 P.3d 22 (2005). For this very reason, Washington appellate courts repeatedly caution trial courts to be aware that stipulated judgments provide the

⁸ At the time of the hearing below, Milionis’s bad faith claim was already being litigated in the Coverage Suit. (*See* CP 167.)

settling parties with a financial incentive for bad faith, fraud, collusion, and inflated settlements designed to obtain windfalls from insurance companies. *Besel* expressly recognizes this concern:

We are aware that an insured's incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount. Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important.

Besel, 146 Wn.2d at 737-38. This concern is echoed in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991): “[A]n insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement. We share this concern about consent judgments coupled with a covenant not to execute.”

Therefore, when examining the reasonableness of a stipulated judgment and settlement, the trial court must very carefully scrutinize the available information bearing on the claim's settlement value; the court must also affirmatively look for “any evidence” of bad faith, collusion or fraud by the settling parties. *See Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 766, 287 P.3d 551 (2012) (reasonableness hearing protects insurers against excessive judgments, and the trial court must evaluate whether there is any evidence of bad faith, collusion, or fraud). As these and other cases make clear, the trial court's role in the reasonableness

hearing process is to protect insurers from inflated, bad faith, fraudulent, and/or collusive settlements. Given this concern, the Washington Supreme Court in *Besel* adopted the following nine factors from *Chaussee* to assess whether a settlement is reasonable:

1. The releasing person's damages;
2. The merits of the releasing person's liability theory;
3. The merits of the released person's defense theory;
4. The released person's relative faults;
5. The risks and expenses of continued litigation;
6. The released person's ability to pay;
7. Any evidence of bad faith, collusion, or fraud;
8. The extent of the releasing person's investigation and preparation of the case;
9. The interests of the parties not being released.

Besel, 146 Wn.2d at 738.

The burden is on the settling parties to affirmatively prove that the amount of their stipulated settlement is reasonable. *Water's Edge, supra*, 152 Wn. App. at 594-95 ¶¶ 56-57.

C. The Trial Court Erred In Denying Cincinnati's Motion To Take Discovery Into The Stipulated Settlement.

In evaluating whether a settlement with a stipulated judgment and covenant not to execute is “reasonable” in dollar amount, the court must affirmatively look for “any evidence of bad faith,⁹ collusion or fraud.” *Water’s Edge*, 152 Wn. App. at 595 ¶ 57 (emphasis and footnote added). For example, fraud or collusion potentially exists when there is an absence of serious arms-length negotiations on damages. See, e.g., *Mutual of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn. 2d 255, 267 ¶ 18 , 199 P.3d 376, 382-83 (2008). See also *Copeland v. Assurance Co. of Am.*, 2005 WL 2487974, at *4 (W.D. Wash. 2005); *MacLean Townhomes, LLC v. Charter Oak Fire Ins. Co.*, 2008 WL 2811161, at *4 (W.D. Wash. 2008). Collusion may also be shown by an insured’s failure to assert defenses or rebut claims, e.g., *Fireman’s Fund Ins. Co. v. Imbesi*, 826 A.2d 735, 752-58 (N.J. App. Div. 2003); concealment, *id.*; an insured’s agreement to an unsupportable amount of damages, *Andrew v. Century Surety Co.*, 134 F. Supp. 3d 1249, 1268 (D. Nev. 2015); or an agreement to inflate the claimant’s damages so as to artificially increase the damages to be claimed against the insurer, *Safeco Ins. Co. v. Parks*, 170 Cal. App. 4th 992, 88 Cal. Rptr. 3d 730, 748 (2009).

⁹ As the insured on Cincinnati’s policy, Milionis owed a duty to act “in good faith, abstain from deception, and [to] practice honesty and equity” in all matters relating to its insurance. RCW 48.01.030.

The undisputed evidence presented below demonstrated that:

- » Prior to the third mediation, Milionis's defense counsel estimated the reasonable settlement value of this case at \$350,000. (CP 414-415.)
- » In the third mediation, the Woods agreed to settle for \$399,514.58, based upon the evaluation and recommendations of a mediator-appointed construction expert. (CP 419-420.)
- » Prior to the arbitration hearing, Milionis's defense counsel filed a motion for partial summary judgment which, if granted, would have left only the Woods' breach of contract claim against Milionis, subject to a substantial offset for amounts Milionis was still owed under the contract. (*See* Exhibit C-1 at p. 14, Exhibit C-2 at pp. 11, 23.)
- » At the same time, Milionis's personal counsel was secretly negotiating the stipulated settlement with the Woods; these negotiations were concealed from defense counsel McFetridge. (*See* CP 388-389, CP 427.)
- » Even though the reasonable value of the Woods' claims was less than \$400,000, and despite the strength of its defenses and counterclaim, Milionis waived its defenses, admitted full

liability, and stipulated to damages of \$1.7 million, knowing it would never have to pay a cent. (*See* CP 201-209.)

Despite these clear indications of bad faith and collusion, the trial court denied Cincinnati's request to conduct discovery into the final settlement discussions. This deprived Cincinnati of the *only* way to determine whether the Milionis acted in bad faith or colluded with the Woods in the negotiations that led to the \$1.7 million stipulated number.

Had Cincinnati been permitted to take discovery into Milionis's negotiations with the Woods, it would have obtained evidence to show, *inter alia*, whether the negotiations were truly "arms-length," whether Milionis acted bad faith or colluded with the Woods,¹⁰ whether any consideration was given to Milionis's defenses, and – perhaps most importantly – how a \$400,000 case suddenly ballooned into a \$1.7 million case. In light of the evidence indicating that the stipulated settlement was indeed inflated and the product of bad faith and/or collusion, the trial court abused its discretion by denying Cincinnati's request for discovery.

¹⁰ In *Water's Edge*, the trial court allowed the insurer to take discovery, which revealed that the settlement in that case was collusive and, therefore, not reasonable. *See* 152 Wn. App. at 582 ¶ 20, 595-96 ¶¶ 58-60.

D. The Trial Court Erred In Finding That The \$1.7 Million Stipulated Settlement Was Reasonable.

On July 20, 2018, the court below granted the parties' joint motion and ruled that the \$1,700,000 stipulated settlement was reasonable; the court's order expressly incorporates the court's oral ruling. (CP 616-619). The court also entered the parties' Stipulated Judgment. (CP 625-633.) This was error for the following reasons.¹¹

1. The Trial Court Erred In Assigning Cincinnati The Burden To Show Why The Settlement Was Not Reasonable.

As a preliminary matter, the burden to establish the reasonableness of a settlement rests with the settling parties. *Water's Edge, supra*, 152 Wn. App. at 594-95 ¶¶ 56-57. The court below impermissibly shifted this burden to Cincinnati, thereby requiring it to prove "why this settlement is not reasonable." (RP at 49:1-2.) This alone requires reversal.

2. The Trial Court Failed To Properly Consider Or Apply Chaussee Factor 7: Whether There Was Any Evidence Of Bad Faith, Fraud, Or Collusion.

Chaussee Factor 7 requires the trial court to scrutinize whether there is any evidence of bad faith, fraud or collusion by the settling parties. This factor is key to the *Chaussee* analysis because it protects insurers from inflated, bad faith, and/or collusive settlements by an insured whose

¹¹ Cincinnati incorporates, by this reference, its briefing, evidence and arguments presented below.

sole concern is to extricate itself from a potentially uncovered liability. Bad faith or collusion can be shown by the absence of serious, arms-length negotiations on damages, *e.g.*, *T & G Const.*, *supra*, 165 Wn. 2d at 267 ¶ 18; by the insured's waiver of or failure to assert defenses, *e.g.*, *Imbesi supra*, 826 A.2d at 752-58; by concealment, *id.*; or by the insured's agreement to an unsupportable amount of damages, *Andrew, supra*, 134 F. Supp. 3d at 1268.

For example, in *Water's Edge* the court found it significant that defense counsel was cut out of settlement negotiations and that strong defenses available to the insured were ignored:

...The trial court indicated that the way that the case shifted abruptly from litigation to collaboration was highly suspect and troublesome. The trial court was clearly bothered by the overall structure of the settlement here; that of a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor.

The trial court found the following circumstances troubling: (1) counsel for the HOA contacted Associates and KPS, adverse parties, without notice to [defense counsel], wrote a ghost letter for Associates and KPS to send to Farmers critical of [defense counsel], and recommended that Associates and KPS contact Beal and Harper for independent representation; (2) coverage counsel undermined [defense counsel]'s efforts to reduce [defendant's] exposure, presumably by withdrawing [defense counsel]'s pending summary judgment motion regarding the HOA's remaining claims; (3) the parties realigned their interests by stipulating that Associates and KPS could recover their \$215,000 contribution if the HOA prevailed in its malpractice and bad

faith case; (4) the parties appeared to have a joint venture type relationship in which the HOA agreed to kick back some of the proceeds from any recovery from Farmers or [defense counsel]'s firm; (5) [Personal counsel] insisted that the settlement be binding, regardless of the trial court's reasonableness determination; and (6) neither [defendant] had any reason to care what dollar amount they agreed to, so long as they could sell it to the trial court as reasonable.

152 Wn. App. at 595-96, ¶¶ 58-59 (emphasis added).

The court also considered defense counsel's settlement evaluations to be relevant on the issue of reasonableness:

[Defense counsel] estimated that there was a less than 20 percent chance of a jury verdict in excess of \$1 million. [Defense counsel] concluded that if the parties took the case to trial, the damages would likely be in the \$300,000 range, not the \$3 million range. Accordingly, he advised Associates and KPS that the case had a verdict range of between \$200,000 and \$500,000 and he advised [the insurer] that there was a likely settlement value of between \$250,000 and \$350,000.

* * *

[T]he trial court gave great weight to [Defense counsel]'s analysis, concluding that if this were an arm's length negotiation between the parties, with the parties having to spend their own money to pay damages, the settlement amount would not come close to \$8.75 million and, instead, would be closer to [Defense counsel]'s exposure estimate of \$500,000 The trial court properly considered the [Plaintiff's] potential damages award and did not abuse its discretion by failing to adopt the [Plaintiff's] arguments that they could possibly recover more.

Id. at 588-89 ¶¶ 38, 40. Based on this and other evidence, the Court of Appeals affirmed the trial court's determination that the parties' \$8.75

million stipulated settlement was collusive and unreasonable, and it ruled that the trial court did not abuse its discretion in finding a reasonable settlement value of \$400,000. *Id.* at 576-577 ¶ 1, 582 ¶ 20.

As set forth in Section IV.C., *supra*, the record in this case is rife with evidence demonstrating that the parties' \$1.7 million settlement amount was the product of bad faith and collusion. While Cincinnati was barred from taking discovery into negotiations leading to the \$1.7 million settlement, the record below nonetheless shows that Milionis's defense counsel Shane McFetridge estimated Milionis's exposure to be \$350,000, that the parties agreed to settle in mediation for just under \$400,000, that Milionis had asserted strong defenses to liability and damages in the arbitration, that and that the parties concealed their settlement negotiations from Mr. McFetridge. Nonetheless, Milionis admitted full liability, waived all of its defenses, and agreed to settle for \$1.7 million – more than four times the amount of defense counsel's evaluation and the parties' prior agreement.¹²

Despite these strong indications of bad faith and collusion, the trial court merely dismissed this factor as either irrelevant to its reasonableness

¹² Neither the Woods nor Milionis provided the trial court with any information about their final settlement negotiations – much less any evidence to show that the negotiations were truly at “arms-length” or included any consideration of Milionis's defenses or counterclaim.

analysis (*see* RP at 20:8-15, 47:11-15), or immaterial because Cincinnati would not have paid anyway (RP at 143:14-144:1).¹³ The trial court should therefore be reversed because its reasonableness determination is manifestly unreasonable and based on untenable grounds and reasons.

3. The Court Failed To Consider *Chaussee* Factors 2 And 3: The Merits Of The Woods' Liability Theories, And The Merits Of Milionis's Defense Theories.

Chaussee Factors 2 and 3 require the trial court to carefully weigh the merits of the Woods' liability theories and the merits of Milionis' defense theories. These factors provide a critical counterbalance to the danger that a settling plaintiff will submit a purely self-serving and one-sided presentation of its claims, while the settling defendant has been released and no longer has any incentive to assert its defenses. For example, in *Water's Edge*, the trial court and Court of Appeals carefully analyzed the legal and factual bases for the plaintiff's claims and damages, and they also weighed the merits of the defendants' affirmative defenses and anticipated motions *in limine*:

The record supports that White's firm [the insured's initial defense counsel] asserted the economic loss rule in its March 3, 2006 answer to the HOA's complaint. When Todd took over as defense counsel for Associates and KPS, he wrote a letter [to the insured and the insurer] expressing his belief that legal defenses existed as to the HOA's remaining

¹³ The trial court's fundamental failure to recognize the importance of this factor is also reflected in its decision to deny Cincinnati's request for discovery.

tort claims for misrepresentation and breach of fiduciary duties, including the economic loss rule, which precluded damages.

Todd again asserted this defense in his brief in opposition to the reasonableness of the settlement. Todd planned to file a motion in limine to exclude the HOA's repair estimate, and he believed a "strong judge" would find that the affirmative defense barred the HOA's claimed damages. . . .

Washington's economic loss rule prohibits plaintiffs from recovering purely economic damages in tort when the plaintiff's entitlement to damages is based in contract. * * * But the economic loss rule does not apply when there is no contract. Accordingly it appears that the economic loss rule would not apply to any claim against KPS. Regardless, even if KPS had some type of implied contract with the HOA, the HOA had no evidence of what, if any, damages arose from KPS's alleged failure to repair.

In contrast, it appears that the economic loss rule would likely apply to the HOA's misrepresentation and fiduciary duty claims, which sound in tort. Because the trial court had not ruled on Todd's planned motion at the time of settlement, it is possible that the trial court could have ruled either way. If it ruled that the economic loss rule applied, the HOA's provable damages would have diminished greatly because they would be precluded from any damages on the misrepresentation and fiduciary duty claims. If the trial court denied application of the rule, Todd planned to rely in impeachment evidence to discredit Charter Construction's \$10 million cost of repair estimate. . . . As we discussed above, even if the trial court allowed the cost of repair estimates, the HOA would be entitled to the lesser of costs of repair or diminution of value. Again, the HOA cannot show diminution in value because it was undisputed that every condominium owner who sold his or her unit had made a profit.

152 Wn. App. at 589-91 ¶¶ 42-45 (internal citations omitted). The Court of Appeals approved the trial court's thorough analysis and concluded:

The trial court clearly weighed [the] evidence as both parties briefed it extensively in preparation for the reasonableness hearing. . . . The trial court concluded that an objectively reasonable settlement process would have placed more emphasis on the strength of [the defendants'] case and less emphasis on the strength of the best case scenario of the [plaintiff's] case. We agree and hold that the trial court did not abuse its discretion in considering these two *Chaussee* factors.

Id. at 591 ¶ 46.

At the time of the settlement in this case, Milionis's defense counsel McFetridge had filed a motion seeking to dismiss all but one of the Woods' claims, on the following grounds:

- That the Woods had no legal or factual basis for imposing personal liability on Steven Milionis by "piercing the corporate veil" (Exhibit C-1 at pp. 3-6);
- That the Woods' negligence claims were not supported by Washington law, and their construction defect claim sounded only in contract (Exhibit C-1 at pp. 6-9);
- That the Woods could not maintain their claim for unjust enrichment because the parties had a written contract (Exhibit C-1 at p. 10);
- That the Woods' promissory estoppel/detrimental reliance claim could not be maintained because the parties had a written contract (Exhibit C-1 at pp. 10-11);

- That there was no evidence supporting the Woods' claim for breach of the duties of good faith and fair dealing (Exhibit C-1 at pp. 11-12); and
- That the Woods' had produced no evidence to support their Consumer Protection Act claim (Exhibit C-1 at pp. 12-13).

In the reasonableness hearing, Mr. McFetridge confirmed there were sound legal and factual bases for Milionis's motion, and he believed some or all of the Woods' claims would be dismissed. (*See* RP at 83:15-85:19.) Had the motions been granted, the Woods would have been left with only a claim for breach of contract, which would have been subject to a substantial offset for the roughly \$200,000 Milionis was still owed. (*See* CP 43, Exhibit C-2 at pp. 11, 23.) Neither Milionis nor the Woods presented any competent evidence to the contrary.

The trial court, however, performed no analysis at all regarding the merits of Milionis's summary judgment motion:

When you look at the motions that were filed by Mr. McFetridge, I'm not sure from reading the case that those would have all succeeded. They may have reduced some of the liability down, but without having actually heard all the evidence, the Court's only speculating on whether or not those theories would have been successful.

(RP at 142:8-13.)

As *Water's Edge* makes abundantly clear, it was the trial court's duty to determine whether the settlement was objectively reasonable, by carefully weighing the relative merits of each side's claims and defenses, and then rendering a decision based upon a principled analysis of the applicable law and relevant facts. *Cf., e.g.*, 152 Wn. App. at 589-91 ¶¶ 42-46. The court below, however, declined to “actually hear all of the evidence” or perform any analysis of “whether or not [the parties'] theories would have been successful.”¹⁴ The court weighed nothing at all. It merely shrugged its shoulders and concluded that the Woods would probably prevail on all of their claims. In so doing, the court manifestly abused its discretion. This likewise compels reversal.

**4. The Trial Court Misapprehended And Misapplied
Chaussee Factor 6: Whether Milionis Had Any Assets
To Pay The Settlement.**

Factor 6 of the *Chaussee* factors requires the court to consider the released party's ability to pay. *See, e.g., Werlinger, supra*, 126 Wn. App. at 351 ¶¶ 22-23 (\$5 million stipulated judgment following fatal auto

¹⁴ Among other things, Milionis moved to dismiss the Woods' “negligent construction” claim because Washington does not recognize such a cause of action. (*See* Exhibit C-1 at pp. 6-7.) Milionis also moved to dismiss the Woods' tort claims because the Woods could not show the existence or breach of an “independent duty” outside of the contract. (*See* Exhibit C-1 at pp. 7-9.) Despite concluding that the Woods were entitled to tort damages, the trial court failed to perform any analysis of these issues, nor did it make any finding as whether an “independent duty” could have existed. (*See* RP at 141:12-145:5.)

accident was not reasonable because, *inter alia*, trial court failed to consider the fact that “not a penny could ever be collected from [the insured] personally”). *See also Aspen Grove Owners Ass’n v. Park Promenade Apartments, LLC*, 842 F. Supp. 2d 1298, 1303 (W.D. Wash. 2012) (insured’s lack of significant assets to satisfy a judgment was “strong indication of unreasonableness,” and “[t]he final settlement amount must be discounted to reflect that reality”). An insured’s inability to pay indicates that the settlement may not be reasonable, because a “judgment-proof” insured does not care whether a settlement is for \$100 or \$1 million. *Cf. ibid.* Accordingly, Milionis and the Woods had the burden to show that Milionis did have “skin in the game” because it had assets that could go toward the settlement.

The only evidence presented below on *Chaussee* Factor 6 was a statement by the settling parties that a judgment would likely bankrupt Milionis. (*See* RP at 55:17-19.) This suggests that Milionis could never have settled for anything near \$1.7 million, and this factor weighed strongly against the reasonableness of the settlement.

Again, however, the trial court improperly assigned Cincinnati the burden of proof and concluded that Milionis still had assets because it had not yet filed for bankruptcy:

On the released persons ability to pay on the other case involving the bankruptcy, Mr. Milionis and the company have not filed bankruptcy. There hasn't been any testimony about his ability to pay other than he doesn't have – he isn't in bankruptcy.

His liability, his personal liability with the additional claims, as well as the business, Cincinnati's argument is it looks like he could end up in bankruptcy, but at this point, I only have that he hasn't filed bankruptcy, and there still would be assets at this time.

So if there was a \$2 million judgment, that would probably push him into bankruptcy if he doesn't have enough assets to cover that.

(RP at 143:1-13 (emphasis added).) In effect, the court found that there was no evidence of what Milionis could pay. However, Milionis and the Woods had the burden on this issue, and they represented that a judgment would likely bankrupt Milionis. Hence the court's opinion that "there still would be assets at this time" squarely contradicts the uncontroverted evidence and turns *Chaussee* Factor 6 on its head. Based on the only evidence presented below, the court should have found that Milionis had little or no ability to pay, and it should then have used that fact in analyzing this factor.

**5. The Trial Court Give Little Or No Consideration To
Chaussee Factor 1: The Woods' Damages.**

Chaussee Factor 1 required the trial court to evaluate the reasonableness of the \$1.7 million settlement in light of the damages the Woods may actually have been able to recover under their claims against

Milionis. Evaluations by defense counsel are of particular relevance to this analysis. In *Water's Edge*, for example, the Court of Appeals affirmed the trial court's finding that an \$8.75 million stipulated settlement was unreasonable where defense counsel had predicted a verdict between \$200,000 and \$500,000. *Water's Edge*, 152 Wn. App. at 588 ¶ 38. The court concluded that the settlement was unreasonable because, *inter alia*, it ignored the defense attorneys' evaluations and, instead, embodied the plaintiff's self-serving view of the case without any realistic discount.

The same is true here. Prior to the third mediation, defense counsel McFetridge estimated that the case had a reasonable settlement value of \$350,000. (CP 414-415.) After the parties agreed to settle for \$399,514.58 in the third mediation, Mr. McFetridge agreed that this latter number would be a reasonable settlement value. (CP 419-420.) He continued to value the Woods' damages at that number as the case proceeded to arbitration. (CP 423-24.) And, in Milionis's Arbitration Brief, Mr. McFetridge stated that their construction expert estimated it would cost \$540,341 to repair the Woods' alleged construction defects, and that after reducing this number to account for amounts Milionis was still owed under the contract, the Woods' damages would be approximately \$353,235, a number well within Mr. McFetridge's

estimated settlement range of \$350,000 to \$400,000. (See Exhibit C-2 at pp. 11, 23.)

Thus here, as in *Water's Edge*, the parties' proposed \$1.7 million settlement far exceeds any of defense counsel's evaluations, fails to account for any of Milionis's defenses, and comes nowhere near the true settlement value of the Woods' claims against Milionis. The trial court's oral ruling, however, shows that little or no consideration was given to how the \$1.7 million number was computed or whether that number was even supportable under Washington law. (See RP at 141:12-145:5.) This complete failure to consider *Chaussee* Factor 1 was error and requires reversal.

E. The Trial Court Improperly Used Its Reasonableness Determination To Punish Rather Than To Protect Cincinnati.

As the Supreme Court has made clear, the sole purpose of the reasonableness hearing process is to protect insurers from bad faith, fraud, collusion, and inflated settlements: "Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important." *Besel*, 146 Wn.2d at 738. The trial court's sole role in this process is to determine whether the parties' agreed settlement amount objectively and reasonably reflects the claimant's damages, by closely evaluating and

carefully applying the *Chaussee* factors applicable to a given case. *E.g.* *Besel, supra*. It is therefore the interests of the insurer – the only party that may ever be responsible for payment – that must be considered in determining reasonableness. *Werlinger, supra*, 126 Wn. App. 351 ¶ 23; *Water’s Edge, supra*, 152 Wn. App. at 585-96 ¶¶ 28-60. A reasonableness determination must therefore be based only upon the applicable *Chaussee* factors, and any alleged act or omission by the insurer is completely irrelevant. *See id.*

The Woods, however, devoted a large portion of their briefing and argument claiming that Cincinnati’s policy covered the damages they were seeking from Milionis, that Cincinnati had denied coverage, and that Cincinnati had handled the claim in bad faith. (*See, e.g.*, CP 38-47.) The Woods asked the court to use Cincinnati’s alleged “bad” conduct as a basis for finding that the \$1.7 million stipulated amount was reasonable. (*See ibid.*) Counsel further argued in the reasonableness hearing that Cincinnati ignored defense counsel’s evaluations, acted in bad faith, and left Milionis “blowing in the wind.” (RP at 26:18-28:25, 36:17-21.) In essence, this transformed a hearing limited to reasonableness of the settlement into a referendum on Cincinnati’s alleged conduct, as self-servingly presented by Milionis and the Woods.

The trial court disregarded its limited role in the reasonableness proceeding and, instead, allowed and considered these improper arguments. The court also gave short shrift to perhaps the most important *Chaussee* factor in this case: Whether there is “any evidence” of bad faith, fraud or collusion.” *E.g., Bird, supra*, 175 Wn.2d at 766 (reasonableness hearing protects insurers against excessive judgments, and the trial court must evaluate whether there is any evidence of bad faith, collusion, or fraud). Instead, the court erroneously believed that this issue “isn’t really going to the reasonableness of the settlement.” (*See* RP at 47:11-15.) The court also ignored the manifest evidence of bad faith and collusion by simply stating that Cincinnati would not have given defense counsel any additional settlement authority anyway. (*See* RP at 143:14-144:1.)

By deliberately evaluating and applying the *Chaussee* factors as a means to “punish” Cincinnati for its alleged bad faith, the trial court manifestly abused its discretion and flouted its obligation to protect Cincinnati from bad faith, collusion, and inflated settlements, as mandated by *Bird, Besel, Werlinger*, and other cases. This impermissibly tainted the proceedings below and likewise requires reversal.

V. CONCLUSION

For the foregoing reasons, the trial court manifestly abused its discretion by depriving Cincinnati of any opportunity to take discovery

into the final negotiations that led to the \$1.7 million stipulated settlement, when there was substantial evidence indicating that the settlement was inflated, in bad faith and collusive. The trial court also erred in ruling that the Woods' claimed damages had a reasonable settlement value of \$1.7 million, when there was substantial evidence demonstrating that the reasonable value of the Woods' claims was \$400,000 or less. Lastly, the trial court erred by entertaining and considering the Woods' improper "insurance bad faith" arguments and then applying the *Chaussee* "reasonableness" factors in a manner designed to punish Cincinnati.

Cincinnati, therefore, requests that the trial court be reversed and that this case be remanded with instructions that Cincinnati be granted leave to take discovery into the settlement negotiations leading to the settlement, and that a new hearing be conducted regarding the reasonableness of the stipulated amount.

DATED this 29th day of March, 2019.

SOHA & LANG, P.S.

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CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On MARCH 29, 2019, a true and correct copy of INTERVENOR CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY'S APPELLANT'S BRIEF was served on parties in this action Via Court of Appeals E-Filing Portal:

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Dated this 29th day of March, 2019

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