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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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)

# WOODS' RESPONSE BRIEF

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## I. INTRODUCTION

The Trial Court properly exercised its discretion by finding the Wood/Milionis settlement was reasonable after considering the Chausee factors. Likewise, the Trial Court did not abuse its discretion by refusing to allow Cincinnati to conduct unnecessary and duplicative discovery. The record establishes the Court was presented evidence establishing the reasonableness of the settlement. Cincinnati asked the Trial Court, and now this Court, to ignore the discovery which was conducted over the months following the third mediation and to ignore the risks Defendant Milionis faced in arbitration. Cincinnati has not established the Court's decision was not a proper exercise of discretion. As a result, Cincinnati's appeal should be denied.

## II. ISSUES PRESENTED

1. Is a Trial Court allowed to exercise its discretion to deny a continuance and to deny additional discovery to a party who has participated in litigation, the prior settlement negotiations relating to the dispute and cannot articulate what evidence would be obtained?

2. Is a Trial Court's determination of reasonableness subject to an abuse of discretion standard?

3. Did the Trial Court properly exercise its discretion in determining that a $1,700,000 stipulated settlement was reasonable in a case where the evidence showed the potential exposure exceeded $2,600,000?

4. Was the intervener provided an opportunity to be heard and to offer evidence and argument to the Trial Court?

5. Since Cincinnati did not assign err to any of the Findings of Fact entered by the Court, are they Verities on appeal?

## III. STATEMENT OF THE CASE

### A. Factual Overview of The Underlying Wood/Milionis Dispute

In the summer of 2015, Jeff and Anna Wood hired a general contractor, Milionis Construction, Inc. to manage, supervise and provide administration services for the construction of their custom, single-family residence. The home was to be the fulfillment of a dream, and something Plaintiffs Wood had finally put themselves in a position to economically achieve through a lifetime of work, savings and having lived in the same home for more than 32 years.

Steve Milionis, and his sons, Scott and Sam, were each officers of MCI. MCI has no employees, and no relevant labor was performed by MCI. As the general contractor, MCI was responsible for executing and performing oversight, management, supervision and administration with use of the construction plans approved by Spokane County, and provided to MCI. MCI failed to make use of the proper construction plans in its oversight, management, supervision and administration of the construction project. Instead of a dream fulfilled, the incomplete house is a continuing hardship and burden on the Plaintiffs because of, among

other things, the failure by MCI to use the proper construction plans and negligently overdrawing lender funds from the construction loan. CP 35.

MCI began providing construction services in the summer of 2015 and ceased construction services on or about November 1, 2016. As of that time, the construction was not completed. Negligent actions and omissions by MCI caused the lender to discontinue further lending toward construction. Among other things, this has caused the home to remain in an unfinished state since November 1, 2016. In part, MCI's negligence included overdrawing of the construction loan by tens of thousands of dollars as compared to what phases of the project were actually and properly completed. This negligence was supported by the opinion of Plaintiffs' forensic accounting expert, Kemper Rojas of Fruci & Associates, P.S. Several months of construction work are yet to be completed. CP 35-36.

As a result of, among other things, the negligence of and by MCI, Plaintiffs have suffered irreparable delay in the completion of their home, and associated loss of use that has spanned more than 3 years. During the time the project has remained in a state of partial completion, the structure and associated materials comprising the partially-completed improvement have suffered damage, including weathering and warping of significant portions of the partially-completed improvement. CP 36.

Plaintiffs originally promised to pay MCI $1,356,000 for the completion of the subject residence. As of November 1, 2016, Plaintiffs had paid MCI, in total, in excess of $550,000 for construction manager, supervision and administration that was negligently undertaken. CP 36.

Plaintiffs' expert, Andy Smith of Edwards Smith Construction, LLC, was going to present the opinion MCI's actions and omissions relating to Plaintiffs' project fall below the standard of care for professionals providing construction management, supervision and administrative services relating to custom, single-family residences. The opinions Plaintiffs' architect for the project, Edward Champagne, and their structural engineer of record, Brian Hanson, likewise support the opinions and conclusions reached by Mr. Smith. Plaintiffs were able to prove, among other things, there are significant structural problems creating a risk of injury to both property and persons. CP 36-37.

Plaintiffs were also going to prove MCI's negligence caused them extreme anxiety, grief, emotional distress and torment for more than one and one-half years which continued through litigation and this appeal. The Woods were promised their home would be completed by Labor Day weekend of 2016, in time for their plans and intentions to host their daughter's wedding at their new home – something they ended up not being able to do. CP 37.

While MCI disputed the amount of damages claimed by Plaintiffs, MCI's experts conceded Plaintiffs have been damaged. For example, for one component of the Plaintiffs' damages, they claim a value of approximately $760,000. As to that same category, MCI's expert provided a damage assessment of approximately $540,000. CP 37.

MCI's website presented many representations to potential customers relating to the quality of their work and expected home value, such as the provision of "*consistent attention to detail.*" It also represented, "*in the case of a custom home, value involves countless decisions, purchases and applications for skilled labor taking place over hundreds of days.*" Continuing, the website states "*received value in a custom home ultimately depends on both the level of expertise and personal character of the builder,*" with two of the stated traits being "*conscientious, and persistent.*" CP 37-38.

MCI failed to deliver Woods what was promised in MCI's marketing materials, and via representations by MCI to induce Plaintiffs to select MCI to build their home. This evidence established Plaintiffs would successfully prove their Consumer Protection Act claims under RCW 19.86. CP 38.

In total, Plaintiffs damages at trial, which were supported by expert opinions, were in excess of $2,600,000. It was highly likely the

fact-finder would likely find, significant damages which may and would be in excess of $1,700,000, plus reasonable attorney fees and costs, and exclusive of general damages. As a result, considering the risks to the Milionis Defendants, a settlement of $1,700,000 was reasonable. CP 38.

**B. Litigation History.**

On November 18, 2016, Plaintiffs ("Wood") filed suit alleging claims against Milionis Construction, Inc. and Stephen Milionis ("Milionis"). The Woods also alleged a bond claim against Cincinnati Insurance Company. On December 12, 2016, the case was placed under a stay so that the Woods and Milionis could pursue resolution under the terms of their contract, which provided for mediation and, if mediation failed, then arbitration. CP 3-17.

On May 19, 2017, mediation was formally commenced with a full day mediation conference held with the parties and professional mediator. CP 232. Cincinnati participated in the mediation conference, having opened a claim file on November 22, 2016. CP 238 – 249. The dispute was not resolved on May 19, 2017, and the parties agreed to continue to work toward a mediated settlement. CP 293. The mediation process continued with investigation and discovery. Each party further engaged with expert witnesses. Another mediation conference was held on September 18, 2017, and after a full day effort, the parties agreed to

reconvene, after further investigation and analysis, to continue the mediation on October 19, 2017.

On September 29, 2017, Cincinnati filed its Complaint ("Federal Case") in the U.S. District Court for the Eastern District of Washington (Case No. 2:17-cv-00341-SMJ) for declaratory relief against Milionis Construction and the Woods. In its Complaint, Cincinnati seeks a declaratory judgment that it does not owe Milionis a defense and does not owe any duty whatsoever to indemnify. Counterclaims were made against Cincinnati in conjunction with answering Cincinnati's Complaint, to include a claim for bad faith.

On October 9, 2017, the parties convened with the mediator for a final mediation conference and on that date reached a conditional agreement that was dependent on Cincinnati's agreement to fund payment to the Woods. Cincinnati refused to fund the settlement. CP 294-303.

After the failed mediation, and pursuant to the parties' contract, an arbitration hearing was scheduled to commence on May 29, 2018. After October 2017, and in the lead-up to the arbitration hearing, there was extensive additional discovery and case development by the Woods, to include additional expert analysis and reporting. This included, among other things, a forensic accountant hired by the Woods to further prove

liability (to include the personal liability of Stephen Milionis) and damages. Discovery after October 2017 also included a number of depositions of fact and expert witnesses, to include the depositions of Anna Wood, Jeff Wood, Steve Milionis, Scott Milionis, Sam Milionis, Nick Barnes (defense expert with "Construction Services"), and Brian Hanson (structural engineer with Eclipse Engineering).

On March 13, 2018, Cincinnati filed a motion for summary judgment in the Federal Case seeking the declaratory relief it had requested in its Complaint; namely, it did not owe any duty to Milionis, and it had no obligation to indemnify Milionis for the liability owing for the damages to the Woods. On June 21, 2018, Cincinnati's motion for summary judgment was denied in its entirety. A week earlier, on June 14, 2018, the Woods and Milionis entered into a settlement agreement, and consistent with that agreement, the pending stipulated motion for entry of a stipulated judgment was filed with a reasonableness hearing noted for July 13, 2018.

On July 9, 2018, Cincinnati filed its present motion to intervene in the present case for the purpose of participating in the reasonableness hearing – after receiving a week earlier, on July 2, 2018, the Stipulation and Joint Motion for Entry of Stipulated Judgment. Cincinnati's present

motion goes beyond just requesting to intervene; rather, it also requests a continuance and further discovery.

Instead of responding to the merits of the stipulated motion for entry of judgment, Cincinnati instead filed a motion seeking to unjustly and unnecessarily continue the reasonableness hearing. Cincinnati has had direct and ongoing involvement in the dispute between the Woods and Milionis since November 2016 when it opened a claim file and hired insurance defense counsel to represent Milionis. CP 238-249. Cincinnati participated extensively in the mediation process continuing up through October 2017. CP 232-306.

Cincinnati was made aware of the parties' intention to mediate their dispute as early as November 22, 2016 and they participated in the lengthy mediation process all the way up through October 2017 – which involved three full day, in-person rounds of mediation (on May 19, September 18, and October 19, 2017). Cincinnati participated directly in settlement negotiations for almost a full year – it just did so in bad faith and while acting unreasonably and unfairly.

Throughout the process, Cincinnati received evidence, reports, and evaluations. Cincinnati's counsel, Gary Sparling, personally participated in the mediation process from as early as May 2017, along with a number of other representatives of Cincinnati (i.e., Christy

Gollehon). CP 233-303. Mr. Sparling personally attended the final in-person mediation conference in Spokane on October 19, 2017. CP 294-303.

Correspondence dated October 23, 2017 to Cincinnati's counsel informed Cincinnati it had acted unreasonably, unfairly, and in bad faith. CP 294-296. In October 2017, it was made known to Cincinnati that the Woods' damages were "*well in excess of $1,000,000.00.*" Id. Counsel for Milionis also previously corresponded with Cincinnati's counsel in this regard. CP 297-299. As of October 2017, Cincinnati knew that Milionis's defense expert, Nick Barnes (hired by Cincinnati), estimated costs and damages relating to the subject structure at over $1.2 million. CP 345-359.

Subsequent to mediation failing because of Cincinnati in October 2017, Cincinnati continued its involvement in the dispute; including further discovery, to include the depositions of Jeff Wood, Anna Wood, Brian Hanson (structural engineer), Steve Milionis, Scott Milionis, Sam Milionis, and Nick Barnes (a defense expert paid for by Cincinnati). Cincinnati was provided, by the insurance defense counsel it hired to represent Milionis, evaluations, reports, recommendations, pleadings and deposition transcripts between November 2016 and up through May 2019. CP 304-306.

The arbitration hearing set to commence on May 29, 2018 was cancelled on May 22, 2018, because the parties reached a settlement agreement that was later executed on June 14/15, 2018 and as described in the pending joint motion for entry of the stipulated judgment in the principal amount of $1,700,000.

Cincinnati's characterization that it is and has been without access to the relevant information relating to the reasonableness of the settlement is false. CP 232-306. Cincinnati had access to all of the material information relating to the dispute between the Woods and Milionis Construction and the reasonableness of the stipulated judgment. Id. The evaluations and reports, to include expert reports, provided to Cincinnati by insurance defense counsel for Milionis Construction have kept Cincinnati apprised on the material issues from November 2016 up through May 2018. Id.

Cincinnati has been previously provided all material information relating to the Woods' damages and the reasonableness of the stipulated judgment. Even the defense experts paid for by Cincinnati agree the Woods have incurred significant damages caused by Milionis – and Cincinnati has this information. CP 345-359. Cincinnati has produced documents in the Federal Case showing that it has the very documents it has falsely represented to this Court it does not possess.

## IV. ARGUMENT

### A. Standard of Review

As Cincinnati admits, a trial court's determination of reasonableness is reviewed for abuse of discretion. Glover v. Tacoma Gen. Hospital, 98 Wn.2d. 708 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695 (1988). This discretion is far reaching.

> *A trial court abuses its discretion if it applies an incorrect legal standard,* Dix v. ICT Grp., Inc., *160 Wash.2d 826,833, 161 P. 3d 1016 (2007), but the parties in this case briefed and argued the Glover factors and the trial court announced that it had applied them. Absent some showing that an incorrect standard may have been applied, we do not review a trial court's reasonableness determination for a sufficient explanation, but for substantial evidence.* Water's Edge Homeowners Ass'n v. Water's Edge Assocs., *152 Wash.App. 572, 585, 216 P.3d 1110 (2009) (a trial court is not required to specifically list, cite, or comment on the evidence it relied on);* Sharbono v. Universal Underwriters Ins. Co. *139 Wash.App. 383, 400, 161 P.3d 406 (2007). "Washington courts have found a trial court's reasonableness determination to be valid even when the trial court fails to list any of the [Glover]Chaussee factors and instead simply mentions that the parties addressed the factors in their briefs and the trial court considered the briefs."* Water's Edge, *152 Wash.App at 585, 216 P.3d 1110 (citing* Martin v. Johnson, *141 Wash.App. 611, 620, 170 P.3d 1198 (2007)).*

Hidalgo v. Barker, 176 Wn.App 527, 548-49 (2013).

> *In determining the reasonableness of a settlement, the trial court "must have discretion to weigh each case individually,"* Glover, *98 Wash.2d at 718, 658 P.2d 1230 and all of the factors are not necessarily relevant in every case.* Werlinger v. Warner, *126 Wash.App. 342, 351, 109 P.3d 22 (2005) citing* Besel, *146 Wash.2d at 739 n. 2, 49 P.3d 887). Even* Glover *was decided without assessing all nine factors.* Adams v. Johnston, *71 Wash.App 599, 605 n. 4, 860 P.2d 423, 869 P. 2d 416 (1993).*

The inquiry into reasonableness necessarily involves factual determinations which will not be disturbed on appeal when supported by substantial evidence. Bird v. Best Plumbing Grp., LLC 175 Wn. 2d 756, 774-75 (2012). No single factor controls, and all nine are not necessarily relevant in all cases. Besel v. Viking Ins. Co. of Wis., 146 Wn2d 730, 730 n.2 (2002).

As explained below, Cincinnati ignores the standard of review and instead asks this Court to ignore the evidence the Trial Court considered and second guess the Trial Court's proper exercise of discretion.

**B. Cincinnati Did Not Assign Err To The Court's Findings of Fact.**

Unchallenged findings of fact are verities on appeal. Robel v. Roundup Corp., 148 Wn.2d 35, 42 (2002). "An unchallenged conclusion of law becomes the law of the case." King Aircraft Sales, Inc. v. Lane, 68 Wn.App. 706, 716 (1993).

Here, the Stipulated Judgment entered with regard to the determination of reasonableness included findings of fact. See CP 649-652. Cincinnati did not assign err to any of the findings. As a result, among others the following findings are also verities on appeal:

1. *"Plaintiffs Wood have demonstrated they are likely to prove that a fact-finder will and would find that MCI has breached both tort and contract duties owing to Plaintiff's Wood and that MCI has proximately caused injuries to Plaintiffs."* CP 650 – Finding of Fact No. 3.

2. *"Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find the negligent actions and omissions by MCI have proximately caused Plaintiffs' anxiety, grief, emotional distress and torment for a period of more than one and one-half years."* CP 651 – Finding of Fact No. 7.

3. *"Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that MCI has violated the Consumer Protection Act, Chapter 19.86 RCW."* CP 651 – Finding of Fact No. 8.

4. *"Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find damages, to include both special and general damages, in Plaintiffs' favor in excess of $1,700,000."* CP 651 – Finding of Fact No. 9.

These Findings, combined with the evidence presented to the Court and the Court's analysis confirm the Court did not abuse its discretion and properly considered and decided the Settlement was reasonable. Cincinnati's disagreement with the result does not change the fact the Court's decision is supported by substantial evidence.

### C. Cincinnati Did Not Articulate Any Basis Establishing The Need for Additional Discovery.

The Trial Court provided Cincinnati with the opportunity to explain precisely what discovery it was seeking and why it would be necessary.

*MR. SPARLING: So despite Cincinnati attending mediations, despite Cincinnati getting reports from Mr. McFetridge, getting defense counsel*

*were cut out and this $1.7 million was negotiated essentially in secret. So what we would ask is upon intervention, that we be granted some limited discovery as to how $399,000 became $1.7 million.*
*THE COURT:* ***Can you tell me exactly what discovery you think you would need? You hired an expert and your expert gave an opinion.***

ROP p. 13, ll. 19-25; p. 14, ll. 1-3 (emphasis added).

However, Cincinnati was unable to describe for the Court what discovery would produce that was relevant. Instead, it continued to focus on the fact there was a difference of settlement proposals between the third mediation in October, 2017 and the settlement reached in June, 2018 right before the arbitration. ROP p. 21, ll. 7-11. Cincinnati ignores and wanted the Court to ignore that over those 8 months significant discovery and expert disclosures occurred confirming the range of damages for the case ranged between at least $1,200,000 to $2,600,000. ROP p. 2. See also ROP p. 29, ll. 18-25 (evidence was of over $2,000,000 in damages plus additional damages for other claims).

Cincinnati even admitted to the Judge that the defense expert's opinion was $1,200,000 in damages. ROP p. 22, ll. 10-11. The settling parties both confirmed the settlement was based on the reports and evidence that Cincinnati had in their possession which came about over the 7-8 month period between the third mediation and the Settlement. ROP p. 24, ll. 21-25; ROP p. 25.

The Court properly considered all this and correctly pointed out the standard on which she was basing her discretion for whether to continue the hearing and allow additional discovery. *"Should I give you an opportunity to continue this and do some discovery, but discovery is to the reasonableness of it."* ROP p. 46, ll. 20-22. After explaining all of the information and involvement by Cincinnati, the Court indicated that in her discretion, *"I don't believe you need anymore discovery to argue against the reasonableness."* ROP p. 48, ll. 13-14.

Given the overwhelming evidence the settlement fell within the range of the damages and risk for trial, combined with Cincinnati's active involvement in litigation, Cincinnati has not established the Court's denial was an abuse of discretion. Therefore, the Court's decision to deny the continuance and request for additional discovery should be affirmed.

### D. The Trial Court Properly Exercised Her Discretion In Determining A Settlement for Nearly $1,000,000 Less Than the Damages At Issue Was Reasonable.

At the heart of Cincinnati's argument is its comparison of what the Woods would have accepted in October, 2017 to what was agreed upon in June, 2018. However, Cincinnati asks this Court to review that one fact and ignore all the evidence and reality of litigation that followed the October mediation. Over the 7-8 months, following the third mediation,

the parties engaged in substantial discovery and their experts were able to produce and supplement reports with regard to the scope of damage. As explained by the evidence, and Counsel at the hearing, this left a potential range of damages between $1,200,000 (without consideration of emotional distress etc.) - $2,600,000. The Trial Court correctly considered all of the evidence and determined that a settlement of $1,700,000 was reasonable regardless of what settlement would have been reached 7 months prior and without the benefit of discovery and expert reports.

The Chaussee factors are well established. However, a Trial Court need not consider every factor. [Infra.] Instead, the Trial can weigh these factors in deciding whether a settlement is reasonable.

**1. The Trial Court did not "assign" Cincinnati the Burden of Proof.**

Cincinnati takes the Court's comment at the end of granting Cincinnati's Motion to Intervene and claims the Court did not apply the proper burden. However, a review of the actual transcript of the hearing establishes this is not an accurate statement. The reality is that prior to the Motion to Intervene being granted, the Court had heard substantial argument by Cincinnati about why Cincinnati believed the settlement was not reasonable. See ROP, pps. 6-24 and 41-46. Most importantly, the

Court explicitly advised Mr. Sparling "*I don't believe you need anymore discovery to argue against the reasonableness.* ***I know it's not your burden…***" ROP p. 48, ll. 13-16 (emphasis added). For Cincinnati to suggest otherwise simply isn't supported by the record.

A review of the Court's comments makes it clear that her statement was in the context of the Motion to Intervene. In that context, everyone understood that Cincinnati was intervening to argue against reasonableness. Recognizing that fact does not mean the Court did not apply the proper burden. A review of the evidence, the Court's analysis, comments and the findings confirm the proper burden was used and the decision is supported by substantial evidence.

**2. There Was No Evidence of Collusion.**

Without any analysis, Cincinnati continues to claim the Court did not apply or consider whether there was any evidence of collusion, an argument directly refuted by the Court's oral ruling. ROP pp. 143-144. However, the only argument that Cincinnati points to is the difference between the amount the case would have settled for during the Third-mediation and the amount the case settled for after extensive litigation, discovery and expert opinions were obtained. Unlike Cincinnati, the Court did analyze the evidence with regard to the reason why the amount

required to resolve the case would increase and also explained why she did not believe there was evidence of bad faith, fraud or collusion.

> *When you look at what Mr. Milionis and the liability to the corporation and the officers of the corporations and the damages, I look at it in October, but since October, they did a lot more negotiations. They did depositions. You got experts involved on the defense side, too, that gave a lot higher numbers than the $399,000 that happened in October.*
>
> *So the damages, especially with the defense conceding that there was liability on the defendant's part, the Court could see how the releasing person's damages could exceed even more than the settlement based on the Wood's liability and with them still, as my understanding today, still not in their home and coming up on another year, and the merits of their liability theory. So their liability stands out to be quite a bit.*

ROP pp. 141-142.

> *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 security, 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. There's been depositions done. There's been forensic experts hired, and when the defense's own experts are talking about $540,000, $674,000 and when Mr. McFetridge talks about I guess exposure, he's looking at okay, here's what our experts say without taking into consideration the defenses. We're already at a half a million dollars or more.*

ROP pps. 143-144.

The Court's analysis is supported by the evidence and shows the Court properly exercised her discretion in denying a continuance for

discovery and considering the factor as to whether there was evidence of fraud or collusion. At the hearing, the Court allowed Cincinnati to call witnesses. Cincinnati provided testimony by Mr. McFetridge. In response to the Court's questioning, Mr. McFetridge testified consistent with the Court's analysis.

*THE COURT: Hang on just a second. ...Did your recommendations to Cincinnati go up?*
*THE WITNESS: Within that timeframe, my recommendation went up, but I tried to be as specific as I could by my answer. It did go up immediately following the October mediation because we had learned some additional information in terms of expenses that were claimed to have been paid. So that's how we got the to the 399 number as opposed to my prior recommendation that they fund up to 350.*

***Beyond the 399 number to tell your Honor my complete thinking, I didn't ask for anymore - - I did not at that point in time ask for any increase in settlement authority once I knew that the 399 settlement number was not going to be funded by the carrier.***

ROP p. 120, ll. 19-25; p. 121, ll. 1-11.

This testimony is telling when overlaid with the Court's analysis of the evidence. Mr. Cunningham, the Milionis personal Counsel, initiated the final settlement to protect his client who was facing a potential Judgment of more than $2,600,000. Mr. McFetridge's testimony explained why he was not included in this final settlement discussion. He knew Cincinnati had made the decision not to fund the prior settlement and made the decision not to ask for more authority or pursue settlement. This left the Milionis' relying on Mr. Cunningham.

Cincinnati's claim of prejudice is also undermined by the fact the Court allowed it to call witnesses. Mr. Cunningham was present and at the hearing. Cincinnati made the decision not to call him to the stand and ask him about the settlement discussions. There was nothing to prevent Cincinnati from doing so. The Trial Court had denied a request for a continuance to conduct depositions. There is nothing in the record indicating Cincinnati tried to call Mr. Cunningham. It cannot now claim the Trial Court abused its discretion by considering only the evidence before it.

**3. The Hearing At Issue Is Readily Distinguishable From Water's Edge.**

Cincinnati's appeal is based almost entirely on trying to compare the present reasonableness hearing to that in Water's Edge Homeowner's Ass'n. v. Water's Edge Assocs., 152 Wn. App. 572 (2009). However, the facts of that case were very different from those here.

Unlike the present case, in Water's Edge there was actual evidence of bad faith, fraud and collusion. These included adverse parties working together to create a ghost letter to the carrier, a pending Summary Judgment Motion being withdrawn, and the settlement being drafted in a way that it essentially operated as a joint venture where the

parties would share in any proceeds recovered from the carriers. Id. at 596.

In contrast, in this case the parties, including Cincinnati, participated in three mediations. After the third mediation, the parties did not "*shift to collaboration.*" Instead, they spent months and substantial expense litigating the dispute. Unlike Water's Edge, it was only on the eve of arbitration the settlement was entered into, when everyone knew the risk they were facing.

The Water's Edge settlement also had other evidence that supported a finding the settlement was not reasonable. For example, a majority of the Plaintiff's claims had been dismissed. The Court found this had effectively "*gutted the case*". Id. at p. 578. The parties also had only one mediation, did not fully share information with the carrier, and had aligned against the carrier prior to the mediation. In contrast, here there was no such evidence of collusion or bad faith. Nor was there evidence contrary to that presented showing the settlement was reasonable. The Milionis' provided Cincinnati complete access to the expert reports and discovery. They also allowed Cincinnati to participate in the mediation. Finally, in this case, Cincinnati's defense counsel did not attempt to pursue settlement after the discovery and expert reports were provided because he understood that Cincinnati would not fund a

settlement. All of this supported the reasonableness of the settlement and confirms the facts present in Water's Edge simply did not exist in this case.

**4. The Trial Court Properly Considered Liability and Defenses.**

Cincinnati's claim that liabilities and defenses were not considered is directly contrary to the Court's findings which are verities in this appeal and the Court's analysis in its oral ruling. Cincinnati's argument is to disagree with the Court rather than to identify any evidence that is absent from the Court's exercise of discretion. In fact, the Court specifically addressed these factors and cited evidence that she relied upon. See ROP 142. Cincinnati has not established that the Court abused its discretion in analyzing the evidence with regard to liability and defenses.

**5. The Court Properly Considered The Position of The Milionis.**

Without any evidence, Cincinnati asks the Court to take the leap to find the Milionis' were judgment proof. The Court properly reviewed the amount of damages involved and the risk based on the other factors. There is no evidence that this factor would result in the settlement being unreasonable. ROP 143.

As with all the factors, Cincinnati ignores the fact a trial Court does not have to consider or put weight on every factor. Instead, the inquiry necessarily involves factual determinations which will not be disturbed on appeal when supported by substantial evidence. Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 774-75 (2012). No single factor controls, and all nine are not necessarily relevant in all cases. Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 739 n.2 (2002).

6. **The Trial Court Had Ample Evidence To Support Damages in Excess of $2,600,000.**

As with all of the factors, Cincinnati claims the trial court gave "*little or no consideration.*" Not only is this not true, but it also ignores the standard on review. The only question is whether the Court considered the factors, and whether the decision is supported by evidence. Supra. With regard to damages, the Trial Court had substantial evidence of the damages, including a defense report that admitted partial damages of $1,200,000. See CP 34-120. There was substantial evidence to support Plaintiff's position that a fact-finder may award in excess of $2,600,000.

**E. The Trial Court Did Not Consider The Evidence of Bad Faith In Entering Her Decision.**

Cincinnati's claim the Court somehow considered its bad faith in ruling upon the reasonableness of the settlement is not supported by the

record. It's telling Cincinnati does not cite to any evidence in the record supporting its conclusory assertion. In fact, the record establishes the Court specifically excluded from the Stipulated Judgment any findings or conclusions relating to bad faith. See CP 649 and 651.

Cincinnati's argument also ignores the fact that in order to provide the Court with context for it to understand the settlement negotiations and the reasonableness of it, there necessarily has to be evidence of the bad faith since it relates to the settlement and why settlement was necessary.

## V. CONCLUSION

Cincinnati has failed to establish the Trial Court abused its discretion. The record confirms the Trial Court properly considered the necessary factors when it decided the settlement was reasonable and its decision is supported by substantial evidence. Accordingly, the Trial Court's rulings should be affirmed.

DATED this 26th day of August, 2019.

ROBERTS | FREEBOURN, PLLC

*/s/ Kevin Roberts*
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of August, 2019, I caused to be served a true and correct copy of the foregoing document to the following on the Appellants via counsel of record using the Washington State Appellate Courts' Portal:

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Dated this 26th day of August, 2019.

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