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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
STATE OF WASHINGTON  
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RSUI, Intervenor Below and Petitioner,

v.

VISION ONE, LLC, Plaintiff and Respondent,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
Defendant and Respondent,

and

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff, and  
Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party  
Defendant and Respondent

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REPLY BRIEF OF APPELLANT/INTERVENOR RSUI

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## I. INTRODUCTION

Fundamental due process requires that when one's legal rights are at risk, that party is entitled to (1) reasonable notice of the hearing at which its rights will be determined; (2) a reasonable opportunity to consider the allegations and evidence being asserted; (3) a reasonable opportunity to develop a response to the allegations and evidence; (4) a hearing at which the court considers all relevant evidence; and (5) a decision based on evidence presented at that hearing, not elsewhere in proceedings where that party was not present.<sup>1</sup> Respondents cannot establish that even one, let alone all five, of these due process requirements were satisfied in this matter.

The issue before this Court is whether a trial court violates these fundamental rights, or abuses its discretion, by deeming a settlement reasonable without granting a short, discovery-based continuance to the only party facing liability for a presumed measure of damages, when:

1. RSUI, the entity targeted by respondents' covenant judgment, is an excess insurer that owed no duties to its insured until all primary or underlying policies were exhausted and plaintiffs made no showing to the trial court that prerequisite was met;

2. The settlement participants refused to provide information to RSUI during the seven months they negotiated their settlement and

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<sup>1</sup> Const. Art. 1, § 3; *In re Mosley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983).

RSUI's insured agreed to a settlement that, as to RSUI, was over \$1 million higher than the last amount disclosed to RSUI;

3. The settlement participants delayed notifying RSUI of their pending settlement for several days after they reached agreement, thereby ensuring RSUI would have just three days to intervene and attempt to analyze the settlement;

4. At the hearing the settlement participants offered no explanation of the bases of liability and defenses thereto, no expert testimony explaining the settlement amount, no analysis of the effect of prior trial court rulings, and no explanation for their refusal to respond to RSUI's coverage-based inquiries throughout their settlement negotiations;

5. After notifying RSUI of the settlement, the settling parties stonewalled its attempts to acquire information about the settlement, refusing even to provide copies of settlement proposals preceding the final agreement;<sup>2</sup> and

6. The trial court erroneously placed on RSUI, the "high burden" of proving fraud or collusion and then compounded its error by refusing to allow RSUI sufficient time to acquire settlement-related information from the settling parties.

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<sup>2</sup> Indeed, only in subsequent litigation in federal court, because of mandatory discovery obligations, did the settlement parties produce the telling settlement history. When RSUI sought to supplement this record with that evidence respondents objected, and so neither this Court nor the trial court have ever been apprised of this critical evidence.

Respondents have no answer for these problems. They resort to justifying their settlement by citing evidence they did not submit or even reference at the reasonableness hearing (evidence RSUI had no opportunity to review or respond to), including post-hearing trial evidence this Court cannot consider.<sup>3</sup> They offer no admissible or credible explanation for their refusal to answer RSUI's counsel's letters or return his phone calls while they negotiated a settlement. And they still have presented no evidence explaining the fundamental differences between the settlement offer Berg presented to RSUI in February 2008 (to which RSUI promptly responded and which Berg rejected) and the one entered into seven months later that, as to RSUI, was 2.3 times greater.

Respondents' legal position is equally untenable. They cite not one reasonableness decision involving facts like those at issue. They ignore this Court's recent decision that a party in RSUI's position need not prove fraud or collusion, and recognizing that shifts from litigation to collaboration, such as occurred here, are highly suspect. *Water's Edge Homeowners Ass'n v. Waters Edge Assocs.*, 152 Wn. App. 572, 594-96, 216 P.3d 1110 (2009) (petition for review filed). And they ignore the adverse effect of the abbreviated reasonableness proceeding on RSUI's fundamental due process rights. RSUI therefore respectfully asks the Court to vacate the trial court's reasonableness determination and either

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<sup>3</sup> *E.g., Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 37-38, 935 P.2d 684 (1997) (noting rule that information acquired post-settlement cannot be considered in determining reasonableness).

hold that the settlement does not establish any presumptive harm or remand this matter for a reasonableness hearing at which the trial court considers all relevant evidence.<sup>4</sup>

## II. STATEMENT OF ADDITIONAL RELEVANT FACTS

Respondents bore the burden of establishing the reasonableness of their settlement. *E.g., Water's Edge*, 152 Wn. App. at 594-95. They sought to meet that burden with averments that were misleading, if not patently false, and which respondents later abandoned. Their resort to such measures excites suspicion about whether their September 2008 settlement was reasonable, and particularly whether it resulted from collusion.

### 1. Respondents' Misleading Assertions About RSUI

For example, respondents now assert the reason they stopped communicating with RSUI in March 2008 was that RSUI had denied coverage at the February 2008 mediation. *See* Vision Bf. at 1; Berg Bf. at 1.<sup>5</sup> But respondents initially told the trial court that RSUI had denied

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<sup>4</sup> As RSUI explained in its opening brief, discovery in the federal court coverage/bad faith action has yielded significant evidence about the September 2008 settlement. As a result, a reasonableness remand would not impose substantial burdens on the parties or the trial court, but will allow the trial court to make a fully informed reasonableness determination. RSUI Bf. at 2 n.1.

<sup>5</sup> Respondents attempt to justify their impermissible repeated use of confidential communications by claiming "mediation communications" do not include statements that indicate a lack of intent to participate in a settlement. Vision Bf. at 22. Their attempt fails. Mediation communications include any statement "that occurs during a mediation." RCW 7.07.010(2). Respondents have made no effort to establish that RSUI's statements "during [the] mediation" fall within an exception to the mediation privilege codified in RCW 7.07. For respondents to refuse to acknowledge this statutory privilege and continue to

coverage in April 2007, more than a year earlier, and that despite the coverage denial, respondents continued providing RSUI with information.<sup>6</sup> CP 329, 337. In fact, respondents sent RSUI information even after the mediation. Specifically, Berg sent Vision One's February 19, 2008 settlement proposal to RSUI, after the mediation at which the alleged coverage denial occurred. CP 447-51. RSUI did not respond by denying coverage; it inquired whether Berg would agree to Vision One's proposed terms and was told Berg would not:

After the February 2008 mediation the insured (Berg Equipment & Scaffolding Co., Inc.) informed RSUI of a settlement demand dated February 19, 2008....On RSUI's behalf, I called insured's counsel and asked if the insured were interested in settling for those amounts. He said "no."

CP 448.

The evidence establishes that even after denying coverage, RSUI continued to participate in settlement discussions when given the opportunity, and was interested in Berg's desires. It was false for respondents to inform the trial court that RSUI both

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assert *inaccurate and privileged* statements as support for their decision to keep RSUI in the dark about ongoing settlement negotiations, is further "troubling" evidence of their bad faith. *Water's Edge*, 152 Wn. App. at 595; *see infra* at 20-23. In any event, at the Court's request, RSUI would be pleased to disclose what was actually said during the mediation by the parties and the mediator about RSUI's position, participation, and conduct.

<sup>6</sup> Although irrelevant, respondents also make much of alleged misstatements by RSUI's attorney at the reasonableness hearing as to his knowledge of the case. Prior to the mediation, that associate spent approximately two hours identifying documents to be copied so RSUI's lead counsel could review and analyze them. CP 427, 430-33. His limited involvement did not equate to knowledge of what occurred at the mediation, what subsequently transpired, and certainly not of respondents' secret settlement negotiations.

refused to participate in post-mediation negotiations and never sought additional information, to “justify” its stipulated judgment. CP 333 (emphasis added). Both statements are untrue, and neither acknowledges that RSUI had a right to assume Berg would continue its practice of keeping RSUI informed of settlement negotiations despite RSUI’s coverage denial. *See* CP 337, 448-51.

In this regard, Mr. Mullin (Berg’s attorney) in fact spoke directly with RSUI’s counsel about Berg’s failure to respond to RSUI’s requests for information. CP 448-49. And Berg now concedes that RSUI repeatedly sought coverage-related information after February 2008, that Berg chose not to respond or even return phone calls, and that Berg did not inform RSUI of ongoing settlement negotiations, let alone offer RSUI an opportunity to participate in several months of discussions that respondents claim – without citing any supporting evidence – addressed significant new developments. Berg Bf. at 5-6; *see* CP 447-51, 12369-75. Berg tries to explain its failure to respond or invite RSUI to participate in the ongoing settlement negotiations by asserting it had no duty to do so. Berg Bf. at 5-6. But true or not, that explanation ignores the issue: whether Berg and Vision One were more interested in manufacturing a multi-million dollar bad faith claim against RSUI than in obtaining coverage under RSUI’s \$1 million excess policy.

## **2. Respondents’ Settlement-Related Misconduct**

That respondents intended to create a bad faith claim is a near inescapable conclusion given respondents’ post-settlement conduct. First,

respondents waited five days before advising RSUI of their agreement. Specifically, although respondents reached an agreement on Thursday, September 4, 2008, Vision Bf. at 12; CP 127, they did not tell RSUI until the afternoon of Tuesday, September 9, 2008, CP 122, 125-26. Since the settlement reasonableness hearing was set for Friday, September 12, 2008 at 2:30 pm, CP 126, respondents' wholly unexplained delay left RSUI with less than three days to intervene in the underlying action and attempt to investigate the settlement.

Second, respondents refused to provide a single document to RSUI during the two-day weekend discovery continuance allowed by the trial court. Berg claims its "records [were] available for review over the weekend," Berg Bf. at 8, but that is not what occurred. Berg's counsel (Mr. Petrich) at first imposed impossible time constraints on RSUI's counsel, CP 458, 464; *see* 9/15 RP 33; then told RSUI he had only "a handful of earlier drafts of the settlement agreement," CP 471; and then decided that because "from [his] point of view," his files contained nothing RSUI did not already have, he would not give any documents to RSUI. 9/15 RP 35. Given Mr. Petrich's admission he spent over 60 hours negotiating the settlement, his claims regarding the contents of his files were dubious, at best. CP 329.

Berg's other attorney, Mr. Mullin, achieved the same result – complete nondisclosure – by failing to respond to RSUI's follow-up request for office access or emailed copies of relevant materials. CP 467; 9/15 RP 33-34, 40-41. Vision One simply failed to respond at all. 9/15

RP 33. As a result, RSUI received nothing, *id.*, not even copies of the motions and trial court rulings that respondents now allege establish the reasonableness of their settlement.

**3. The Trial Court Failed to Consider Evidence Warranting Denial of a Reasonableness Determination or at Least a Continuance**

Suspicious, “troubling” circumstances such as those detailed above are reason to refuse to find a settlement reasonable. *See Water’s Edge*, 152 Wn. App. at 594-96. Here, however, the trial court had additional reason to do so because neither Berg nor Vision One submitted evidence supporting their \$3.3 million settlement or any other factor relevant to a reasonableness determination. Respondents tacitly admit they failed to meet their burden, as they rely in this appeal on pre-trial motions and trial testimony. Berg Bf. at 6; Vision Bf. at 3-6, 8-11. Post-settlement information is irrelevant to a reasonableness determination,<sup>7</sup> and respondents’ pre-trial motions involve materials not cited to the trial court at the reasonableness hearing, proceedings RSUI did not attend (and, as an excess insurer, had no duty to attend), and documents never provided to RSUI.

In any event, the materials now relied on by respondents provide no evidence of the process by which respondents arrived at a \$3.3 million settlement, as those materials do not reflect the parties’ negotiations. Nor do they establish that \$3.3 million was a reasonable figure, particularly

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<sup>7</sup> *E.g., Mavroudis*, 86 Wn. App. at 37-38 (recognizing rule that court cannot consider post-settlement information in determining reasonableness).

given Berg's admissions that Vision One's damage claims totaled \$5.5 million, that Berg had a "solid" defense to those claims, and that Berg could be found to be just 25 to 33 percent at fault; in short, that Berg was only at risk for sums potentially covered/paid by other insurers to which RSUI's policy was excess.<sup>8</sup> CP 329. Indeed, although respondents make much of Berg's potential liability for personal injury claims, the settlement establishes that other insurance policies (policies to which RSUI was excess) covered those claims. CP 128 (settlement references to Philadelphia, Gemini and ICSOP policies); CP 130 (settlement sections absolving Berg of liability for personal injuries and referencing the Gemini and ICSOP policies).

Given these indicia of bad faith and/or collusion, the dearth of evidence supporting the settlement, and respondents' discovery stonewalling, at a minimum the trial court should have granted a short continuance so RSUI could analyze the bases for the \$2.3 million

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<sup>8</sup> RSUI's policy is a true excess policy. It provides in relevant part: "This insurance is excess over any other valid and collectible insurance whether primary, excess, contingent or any other basis, except other insurance written specifically to be excess over this insurance." CP 12384. Thus RSUI's policy was excess to the \$12.5 million All Risk Builders policy issued by Philadelphia, as well as to the Gemini and ICSOP policies referenced in the settlement agreement. *See* Vision Bf. re Philadelphia's App. at 6, CP 128, 130. Thus unless and until all other policies were exhausted, RSUI's policy was not implicated, entry of a stipulated judgment against RSUI was premature, and the stipulated judgment affords a potential windfall to Vision One. How can a court evaluate the risks to an insured without considering how much insurance is available to the insured? Put differently, how can a court determine what constitutes a reasonable stipulated judgment against an excess insurer without evaluating or knowing the scope and extent of the primary or underlying insurance policies? Yet, the record at the reasonableness hearing and the trial court's ruling are silent as to these issues.

stipulated judgment about to be entered against it. The trial court, however, refused to do even that. For several reasons, its denial of RSUI's fundamental right to reasonable notice affording it a meaningful opportunity to be heard, was untenable and warrants reversal.

First, to the extent the trial court was concerned about a trial continuance, it imposed a penalty on RSUI and deprived it of its rights due to a situation entirely of respondents' creation. *See* 9/12 RP 10-11. Had respondents promptly informed RSUI of their settlement instead of waiting five days, RSUI could have intervened sooner and begun discovery before the reasonableness hearing. Had respondents not waited to inform the trial court of their settlement until the jury selection process began, the short continuance RSUI sought would not have interfered with trial. *See* CP 321. (Notably, trial did not get underway until Tuesday, September 22, 2008. *Vision Bf. re Philadelphia App.* at 18).

Second, the trial court misapprehended the parties' burdens in reasonableness determinations and imposed on RSUI a "pretty high" burden of showing "some kind of fraud or collusion." 9/12 RP 53-54, 56. As shown below, that was legal error.

Third, the trial court compounded its burden of proof error by refusing to require respondents to respond in good faith to RSUI's requests for information. It is difficult enough for a party to obtain discovery over a weekend – it is impossible to do so when the opposing parties refuse to cooperate. Yet despite being advised of respondents' failure to give RSUI a single document, the trial court held that RSUI had

not met its burden of proof and entered its reasonableness order. 9/15 RP 32-41, 52-53.

### III. LEGAL AUTHORITY

**A. Respondents Cite No Case Sanctioning Rulings Denying an Insurer Any Meaningful Opportunity to Obtain Information About a Settlement That They Claim Establishes Presumptive Damages for Which the Insurer May Be Liable**

Rather than addressing the fundamental due process violations at issue in this appeal, respondents argue that RSUI is somehow to blame for their lack of cooperation and refusal to provide discovery, and that they had every right to refuse RSUI's information requests since it had denied coverage. To support these arguments, respondents cite just one case, *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005). That case is readily distinguishable as it involved an insurer which had been fully involved in that case, received full discovery on the parties' claims and defenses, was aware of the ongoing settlement negotiations, and was not surprised by the settlement. 128 Wn. App. at 322-26. Thus, unlike the instant case, the insurer in *Red Oaks* was not prejudiced by the minimal notice it received. *Id.*

The situation is different when the settling parties exclude the affected insurer from their settlement negotiations and thereby put it at a disadvantage. *See Water's Edge*, 152 Wn. App. at 592-93. That is particularly true when the excluded party is an excess insurer with no duty or reason to be involved in the underlying case until all underlying

insurance is exhausted. *See Rees v. Viking Ins. Co.*, 77 Wn. App. 716, 719, 892 P.2d 1128 (1995).

Presumably the reason respondents cite no relevant case law supporting their position is that they found none. In contrast, numerous decisions indicate that when, as here, the target of a proposed settlement and stipulated judgment lacks information demonstrating reasonableness, it is entitled to a meaningful opportunity to acquire such information.

“The requirement for 5 days’ notice to all parties of the reasonableness hearing is obviously for the purpose of giving all parties the opportunity to appear and be heard at that hearing and to do their best to insure that the settlement is in fact a reasonable one – a matter of obvious importance to all nonsettling parties....”

*Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 927 (1995) (citation omitted). Due process requires that such notice be meaningful, i.e., that it be “reasonably calculated to reach all interested parties, ***reasonably conveys all the required information, and permits a reasonable time for a response.***” *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 198, 165 P.3d 4 (2007) (emphasis added; internal quote marks and citations omitted); *see also* Const. Art. 1, § 3; *In re Mosley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983).

While respondents cite no cases sanctioning the abbreviated proceeding that occurred here, numerous decisions support RSUI’s right to a meaningful opportunity to conduct discovery.<sup>9</sup> *Water’s Edge* is a recent

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<sup>9</sup> RSUI previously cited as examples: *Green v. City of Wenatchee*, 148 Wn. App. 351, 190 P.3d 1029 (2009); *Meadow Valley Owner’s Ass’n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007); *Howard v.*

example. There, as here, the settling parties excluded the insurer (Farmers) from their settlement negotiations. Upon receiving notice of the settlement, “[t]he trial court allowed Farmers to intervene *and conduct limited discovery.*” 152 Wn. App. at 582 (emphasis added). It did so because Farmers “was at a disadvantage from the start.” *Id.* at 592; *see also id.* at 593. Significantly, that discovery opportunity allowed Farmers to acquire from the settling parties evidence of their plan to, among other things, set up manufactured claims against those excluded from the settlement negotiations. *Id.* at 578-83. In this case, an equivalent opportunity would have allowed RSUI to depose Vision and Berg’s attorneys, or to at least review their correspondence files and email.

*Besel v. Viking Ins. Co.* also supports RSUI’s right to meaningful discovery. 146 Wn.2d 730, 738-40, 49 P.3d 887 (2002). It involved an insurer that acted in bad faith regarding settlement. Its insured settled with the injured party pursuant to an agreement that included a covenant not to execute and a stipulated judgment against the insurer. 146 Wn.2d at 733-35. The *Besel* trial court afforded the insurer an “*ample opportunity to respond*” after it received notice of the reasonableness hearing. 146 Wn.2d at 739 (emphasis added).

*Independent Sch. Dist. 197 v. Accident & Cas. Ins.*, a decision cited by Vision One, is in accord. 525 N.W.2d 600 (Minn. App. 1995). Indeed, the appellate court in that case rejected the trial court’s

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*Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (2004). RSUI Bf. at 19-20.

reasonableness determination in part because it declared the settlement reasonable before the settling parties complied with discovery obligations. 525 N.W.2d at 608.

As explained in RSUI's opening brief, court rules and statutes also support its right to reasonable notice of respondents' settlement and the reasonableness hearing. RSUI Bf. at 19. Not only does RCW 4.22.060 require five days notice of intent to settle and Pierce County Local Rule 7 require six court days notice of a hearing, *see* RSUI Bf. at 19; absent an emergency, a court cannot enter findings of fact or a proposed judgment unless the opposing party receives at least five court days notice. CR 52(c), 54(f)(2). At a minimum, an insurer about to be subjected to a stipulated judgment for \$2.3 million should receive an equivalent warning, particularly when, as here, no emergency exists. *See Brewer*, 127 Wn.2d at 524 (analogizing five-day notice requirement of RCW 4.22.060 to notice requirements for judgments and findings of fact).

In short, as a result of respondents' tactics and the trial court's refusal to grant a short continuance so RSUI could conduct a meaningful investigation and respond to respondents' reasonableness assertions, RSUI faces potential liability for \$2.3 million (an amount respondents sought to increase to \$6.9 million). No precedent supports this result. A party in RSUI's position is, at a minimum, entitled to a reasonable opportunity to obtain information and defend its interests. *See, e.g., Red Oaks*, 128 Wn. App. at 324. If it is unable to do so, the trial court must continue proceedings for a sufficient time to permit that party to acquire relevant

information and prepare an informed response. By failing to do so here, the trial court violated RSUI's fundamental rights and committed reversible error.

**B. Respondents Failed to Meet Their Burden of Establishing the Reasonableness of Their Settlement**

When parties enter into a settlement hoping to establish the presumptive harm (a disputed issue) for which an absent third party can be held liable, it is the settling parties' burden to establish that their settlement is reasonable. *Besel*, 146 Wn.2d at 738-40; *Water's Edge*, 152 Wn. App. at 594-95. To do so the settling parties must submit evidence on the *Chausee*<sup>10</sup> factors. *Id.* Applied here, those factors include Vision One's damages; the merits of Vision One's liability theory; the merits of Berg's defense theory; Berg's relative fault; the risk and expense of any continued litigation; Berg's ability to pay (and presumably what primary, underlying, or other insurance is available); any evidence of bad faith, collusion, or fraud; the extent of Vision One's investigation and preparation of the case; and the interests of the parties not being released. *Id.* Further, when an excess insurer is the intended subject of a covenant judgment, the court should consider whether the judgment requires the exhaustion of other policies. If the settling parties fail to meet their burden, the trial court should not declare the settlement reasonable, as

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<sup>10</sup> *Chausee v. Md. Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991).

doing so could expose the insurer to an excessive or inflated assessment of harm. *Besel*, 146 Wn.2d at 737-78; *Red Oaks*, 128 Wn. App. at 322.

Respondents utterly failed to meet their evidentiary burden, and what little evidence they provided was submitted far too late for analysis by RSUI or the trial court. Less than 24 hours before the reasonableness hearing – and only after RSUI moved on shortened time to intervene – Vision One filed its “reasonableness” evidence. CP 206-08. That evidence consisted of: (1) its attorney’s declaration describing the settlement negotiations as difficult (but providing no information about any of the various settlement proposals), complaining about RSUI, making a conclusory assertion that “at no time has there been any collusion between Berg and Vision,” and stating he “believe[d]” the settlement was fair and reasonable; (2) a declaration from Vision One’s principal stating that he relied on his experts to determine damages, which he understood to be “4.5 to 5 million dollars;” and (3) a declaration from a D&D, Inc. representative, who sought approval because the settlement called for dismissal of all claims against D&D. CP 206-28. That was it. No expert assessment of damages. No indication of Vision One’s assessment of Berg’s or D&D’s comparative fault. No indication of the strength of Vision One’s claims, Berg and D&D’s defenses, and no citation to prior trial court rulings or their effect on Berg’s potential liability. *See also* CP 187-201 (Vision One’s reasonableness brief).

At approximately the same time, Berg filed its supportive “evidence.” Its effort consisted of the attorney declaration described

above, which offered nothing but unsupported conclusory opinions that Vision One's total claims approximated \$5.5 million dollars, that Berg had solid defenses, and that Berg might be found to be only 25 to 33 percent at fault. CP 328-330. No analysis, no expert damages report, not even a mention of the other potentially at fault parties.

That was the extent of the liability and damages evidence submitted to the trial court.<sup>11</sup> Such conclusory materials could not defeat even a summary judgment, and certainly were insufficient to support a \$2.3 million judgment against RSUI. Thus while respondents have cited many cases to this Court, they do not cite a single case in which a trial court found the settling parties met their reasonableness burden with so little information.

In *Water's Edge*, for example, the record contained evidence describing each attorney's role in the settlement and their various settlement proposals and counter-proposals. 152 Wn. App. at 579-82. The settling parties submitted multiple damage reports and analyses of the effect of various summary judgment rulings on the likely result at trial. *Id.* at 585-91. The trial court thus was able to base its reasonableness determination on "a considerable amount of testimony, documents and briefing, [and] argument[.]" 152 Wn. App. at 582.

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<sup>11</sup> On September 15, Berg's chairman submitted a declaration stating the company lacked "sufficient liquid assets" to cover Vision One's claims. CP 492-95. He did not mention the existence of other insurance policies that might cover those claims and over which RSUI's policy was excess. *Id.*

In *Martin v. Johnson*, 141 Wn. App. 611, 620-23, 170 P.3d 1198 (2007), a case cited repeatedly by respondents, the record included evidence of actual damages, evidence relevant to the relative fault of the involved parties, and a legal liability analysis contained in “extensive briefing.”

*Sharbono v. Universal Underwriters Ins. Co.*, a case Vision One emphasizes, also involved extensive evidentiary submissions. 139 Wn. App. 383, 161 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008). Included in the reasonableness hearing record were an economist’s report, liability assessments, an admission the insured was “at least partially at fault,” contemporaneous correspondence showing the financial risk to the insured’s family and their limited ability to pay, and “correspondence between ... attorneys” that provided proof of a good faith, arms-length negotiation. 139 Wn. App. at 402-06.

Both respondents cite *Besel v. Viking Ins. Co.*, *supra*; *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983); and *Chausee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339, 812 P.2d 487 (1991). None of these decisions even suggests that the evidence of reasonableness presented by respondents here was adequate. In *Besel*, the parties provided sufficient evidence to establish that the victim would be able to prove he suffered “severe injuries;” and that the insured’s “liability was clear, absolute, and indefensible[.]” 146 Wn.2d at 739. In *Glover*, the evidence included “expert testimony from a well known and respected plaintiff’s attorney that suggested that the plaintiff stood a significant risk

of losing at trial.” 98 Wn.2d at 718. And in *Chausee*, the court had before it the insurer’s written evaluation of its insured’s liability and the likelihood of a verdict against the insured (80 to 90 percent); a comparative fault analysis, and a determination of a verdict range of \$2 to 7.5 million. 60 Wn. App. at 513-14. Even that was insufficient to support a reasonableness determination, however, because the report did not assess the risks or costs of going to trial, or the insured’s ability to pay. *Id.*

The import of these cases – and those cited in RSUI’s opening brief<sup>12</sup> – is clear. A trial court cannot just rubber-stamp a settlement. It must consider evidence of the negotiation process and evidence analyzing the settling defendant’s potential liability (i.e., evidence analyzing probable success of the parties’ claims and defenses and the effect of comparative fault), as well as the legal bases for liability. That is particularly true when, as here, the issues are complex and the case is substantial. *Glover*, 98 Wn.2d at 718 n.3. Respondents submitted no such evidence or analysis at the reasonableness hearing, and on appeal fail to point to anywhere in the pre-reasonableness hearing record where such evidence (particularly evidence pertaining to the negotiation process) could be found. That dearth of evidence renders the trial court’s reasonableness determination wholly unreliable and requires that it be vacated. *Green v. City of Wenatchee*, 148 Wn. App. 351, 369, 190 P.3d

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<sup>12</sup> *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008); *Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.3d 306 (2008), *review denied*, 165 Wn.2d 1029 (2009); *Howard*, 121 Wn. App. at 376-83. RSUI Bf. at 22-23.

1029 (2009) (vacating reasonableness order for reconsideration based on facts known at the time of the settlement, where trial court failed to specifically address the merits of the settling party's claims and defenses).

**C. The Trial Court's "No Evidence of Fraud" Finding is Premised on Legal Error**

Compounding the trial court's procedural/due process and evidentiary sufficiency errors, was its misapprehension of RSUI's burden of proof. At the first phase of the reasonableness hearing, the trial court made clear that – regardless of the lack of evidence presented and the wholly inadequate notice provided to RSUI – the court intended to find the proposed settlement reasonable unless RSUI met its "pretty high burden" of showing "some kind of fraud or collusion." 9/12 RP 54, 56.

Respondents (and the trial court) took the position that to meet that burden, respondents had to come forward with clear and convincing direct evidence that respondents inflated the settlement amount, some kickback is involved, or respondents acted with some other unlawful purpose. 9/15 RP 35, 54; *see* Vision Bf. at 33-35.

Imposing so heavy a burden on RSUI, particularly when RSUI's request for a two-week continuance in which to conduct discovery was denied, was error under *Water's Edge* and *Besel*.<sup>13</sup> As *Water's Edge*

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<sup>13</sup> It was also error under the non-Washington cases cited by Vision One. Not one of those cases imposes such a burden on an insurer excluded from settlement negotiations. And each indicates that when certain indicia are present – indicia such as deliberately excluding the insurer from settlement negotiations, a settlement higher than previously asserted claims or otherwise seemingly unreasonable, or one unsupported by evidence demonstrating good faith, arms length negotiations – must be viewed with caution. *Ayers v. C&D Gen.*

makes clear, *Besel* does not require a party in RSUI's position to prove that a settlement was the product of fraud, bad faith or collusion – and certainly does not require such a party to proffer clear, cogent and convincing evidence of such conduct. 152 Wn. App. at 594-95 (citing *Besel*, 146 Wn.2d at 739). Instead, the burden always remains on the settling parties to prove their settlement is reasonable. If the trial court finds “troubling” circumstances, it ought not declare a settlement reasonable, given the consequences that can result from that label. 152 Wn. App. at 595-96.

As detailed in RSUI's opening brief, there were a sufficient number of “troubling” circumstances present here to, at a minimum, require the trial court to give RSUI a meaningful opportunity to engage in discovery by granting a continuance. There is the circumstance that at the same time Berg began refusing to return RSUI's phone calls or answer its letters, Berg agreed to a settlement nearly \$1 million dollars higher than the figure it previously rejected and which more than doubled RSUI's potential exposure, and did so without warning RSUI of this dramatic

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*Contractors*, 269 F. Supp. 2d 911, 915, 917 (W.D. Ky. 2003) (settlement cannot be deemed reasonable when parties put forth no evidence of how or why their agreed upon amount is reasonable; burden shifts to insurer to show by a preponderance that the amount is unreasonable or the agreement results from collusion or bad faith only after settling parties make prima facie reasonableness showing); *Midwestern Indemn. Co. v. Laikin*, 119 F. Supp. 2d 831, 850 & n.8 (S.D. Ind. 2000) (courts must be concerned and cautious when parties enter into settlements in which all liability is imposed on an absent party; that such a settlement might have been the result of bad faith or collusion can be evidenced by the fact the settlement was reached behind closed doors without notice to the absent party); *Indep. School Dist. 197*, 525 N.W.2d at 607-08 (collusion defined not as fraud, but as a lack of circumstances assuring the settlement resulted from hard bargaining).

increase in its potential exposure. Until notified of the settlement, RSUI had no reason to believe its risk exceeded \$1 million. CP 129, 342-43, 448. There is the fact that while respondents now claim the increased settlement reflects significant developments, respondents did not make that claim to the trial court, describe those developments, or point to evidence confirming their existence. There is the fact Berg waited five days – until it could use the initiation of trial as an excuse for a hurried reasonableness determination – to notify RSUI of the settlement. CP 122, 125-27, 321. There is the fact that even after being told by the trial court to provide discovery to RSUI, Berg (and Vision One) refused to do so. 9/15 RP 33-35, 40-41. And given respondents’ arguments that evidence of a kickback is evidence of collusion, there is the “troubling” fact that the settlement agreement requires Vision One’s insurer, Gemini, to pay \$50,000 to Berg. CP 128 ¶ 1, 130 ¶ 5.

While settlements are favored, stipulated settlements with covenants not to execute are viewed more as a “necessary evil,” and treated with caution. *Water’s Edge*, 152 Wn. App. at 594; *see also* *Midwestern Indem. Co. v. Laikin*, 119 F. Supp. 2d 831, 850 n.8 (S.D. Ind. 2000). Such agreements raise the specter of collusive or fraudulent settlements resulting in an excessive or inflated stipulated judgment. *Besel*, 146 Wn.2d at 737-38; *Red Oaks*, 128 Wn. App. at 322.

Here, there was sufficient “troubling” evidence before the trial court to warrant caution and to warrant giving RSUI an opportunity to conduct meaningful discovery, before it sanctioned respondents’

settlement as reasonable. *Green*, 148 Wn. App. at 368-69 (vacating reasonableness order where trial court abused its discretion by employing an incorrect legal analysis as well as by failing to specifically address the merits of the settling party's claims); *see also Water's Edge*, 152 Wn. App. at 592-93 (noting that Farmers had been "disadvantaged" by its exclusion from settlement negotiations); *Red Oaks*, 128 Wn. App. at 323-24 (recognizing that insurers in RSUI's position are entitled to basic due process protections). That is additional reason to vacate the trial court's reasonableness determination

**D. The Trial Court's Highly Prejudicial Reasonableness Determination Must Be Vacated Because the Proceeding Violated Fundamental Due Process Protections, the Determination Is Based on Legal and Factual Error, and the Trial Court Abused Its Discretion**

The purpose of a reasonableness hearing is to ensure the underlying settlement is reliable and will not expose non-settling parties to an excessive judgment. *E.g.* *Red Oaks*, 128 Wn. App. at 322. As detailed above, the procedure here did not satisfy those requirements. RSUI faces liability for \$2.3 million of a \$3.3 million settlement, even though neither RSUI nor the trial court had a meaningful opportunity to determine whether that is a reasonable assessment of Berg's liability to Vision One. To the extent the trial court penalized RSUI for having denied coverage, the propriety of that decision and whether it involved bad faith, were not

before the trial court and should not have played any role in its reasonableness determination.<sup>14</sup>

The prejudice to RSUI cannot be overstated. Respondents have argued in the federal court action that their “reasonable” settlement is binding and seek to preclude RSUI from arguing it was not afforded a fair reasonableness hearing. Unless this court vacates the trial court’s reasonableness determination and holds either that the settlement does not establish Berg’s loss/damages or remands this matter for an evidence-based assessment that includes evidence RSUI obtained through discovery in the federal court action, RSUI faces potential liability for an untested figure agreed upon through a negotiation process that no court has examined. No case, statute or court rule permits such a miscarriage of justice.

#### **IV. CONCLUSION**

For all of the reasons stated herein and in its opening brief, RSUI respectfully asks the Court to vacate the trial court’s reasonableness determination and either hold that the settlement does not establish

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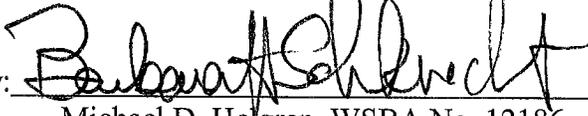
<sup>14</sup> Some of these issues have since been determined by the federal court. Should the Court and respondents agree to this Court taking judicial notice of the federal court’s rulings, RSUI would be pleased to submit copies of the federal court’s rulings to this Court.

presumptive harm or remand this matter to the trial court for a  
reassessment of the reasonableness of respondents' settlement.

Respectfully submitted this 22nd day of January 2010.

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OF THE STATE OF WASHINGTON  
STATE OF WASHINGTON  
DEPUTY

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VISION ONE, LLC, Plaintiff and Respondent,

v.

RSUI, Intervenor and Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
Defendant and Appellant,

v.

D&D CONSTRUCTION, INC.; Defendant, Third-Party Plaintiff, and  
Respondent, and

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party  
Defendant and Respondent

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CERTIFICATE OF SERVICE

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I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of January, 2010, I caused a true and correct copy of Reply Brief of Appellant/Intervenor RSUI to be delivered by email and U.S. Mail, postage prepaid, to the following counsel of record:

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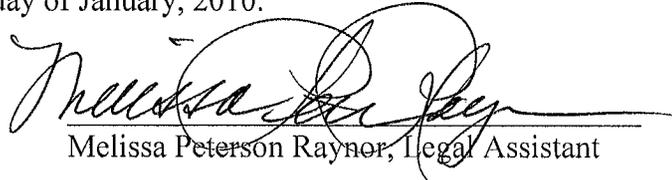
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