

86109-9

Court of Appeals Case No. 64291-0

Case No. 86109-9

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Appellant.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 JUN 27 P 4: 34
BY RONALD R. CARPENTER
CLERK

RESPONSE TO PETITION FOR REVIEW

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IDENTITY OF RESPONDENT

Respondent James Bird opposes the petition for review.

ISSUES PRESENTED FOR REVIEW

- I. Whether there is a constitutional right to a jury in an equitable hearing to determine the reasonableness of a settlement.
- II. Whether the superior court denied Farmers Insurance Exchange due process, even though it allowed four months to prepare for the hearing, authorized discovery, and considered Farmers' evidence and voluminous arguments.
- III. Whether substantial evidence supports the superior court's decision regarding treble damages under RCW 4.24.630.

STATEMENT OF THE CASE

Mr. Bird lives on a hillside waterfront property. 2 Tr. 215:12–21, 221:23–224:24. His house is downhill, away from the street. *Id.* Mr. Bird's saga began more than six years ago, when, as he walked down to his house, a blast of sewage shot at him from the ground. *Id.* 233:9–234:7. The sewage went into Mr. Bird's eyes, ears, nostrils, and mouth. *Id.* The eruption lasted 20 seconds. *Id.*

How did this happen? Mr. Bird later learned that a plumber (likely unlicensed, CP 234–35) from Best Plumbing traveled to the area to fix a sewer blockage on a neighboring property. CP 160–61. The plumber

knowingly went onto the Bird property, even though it was clearly demarcated from the neighbor's and both sewers were clearly identified on City of Seattle side sewer cards. 2 Tr. 215:24–217:7; CP 2233–36, 2275, 3662–63. Mr. Bird's property has a pressurized sewage pipe that pumps effluent about 70 feet uphill from the house to the city sewer. CP 3492–93. A pump turns on throughout the day to push wastewater from a tank by the house. *Id.* The plumber intentionally cut the pipe in three places and removed parts of the line. 4 Tr. 640:6–10; 2 Tr. 218:22–220:21 (downhill); *id.* 226:14–25 (uphill); 3 Tr. 454:17–21.¹ One of the cuts occurred just two feet from Mr. Bird's stairs and 10 feet from his residence. 2 Tr. 219:8–220:1. The plumber then knowingly left without telling anyone what he did or trying to fix the damage. 3 Tr. 454:17–21. At the moment Mr. Bird passed the area downhill where the plumber cut the pipe, the sewer pump cycled, causing sewage to erupt from the pipe. 2 Tr. 233:9–234:16.

Mr. Bird demanded that Best Plumbing fix the line. 2 Tr. 254:3–14. Best Plumbing returned and assured Mr. Bird that it repaired the line. CP 3493–94. This was not true because Best Plumbing only fixed the damage closest to the house, leaving the uphill cuts completely unrepaired. *Id.* Best Plumbing later came back to do another repair, *id.*, but sewage

¹ Farmers speculates that the plumber believed the pipe was abandoned. The plumber no longer works for Best Plumbing and was not found. CP 2233. His testimony is nowhere in the record. The pipe was not abandoned. It was a live, pressurized sewage line.

continued to flow downhill over the next eight months, Slip Op. at 2. The hill above the house gave way, slumping downhill and depositing sewage, silt, and wastewater behind the house, where it seeped into the walls and lowest floor level and triggered the growth of toxic mold. CP 3494; 1 Tr. 97:23–98:7, 98:20–99:15; 2 Tr. 225:9–24, 229:23–230:3, 232:7–19, 235:20–236:10. Mr. Bird hired a geotechnical engineering firm, contractors, and others to determine the extent of the damage and the necessary repairs. Slip Op. at 2; 1 Tr. 97:10–98:7; 2 Tr. 265:21–266:6, 267:3–25; CP 3494–95. Mr. Bird suffered a heart attack, which he attributed to the strenuous activity of removing sewage-laden material from the property. 2 Tr. 237:10–238:4.

The City of Seattle issued a stop-work order because of concerns about the hillside's stability. 1 Tr. 99:19–100:10; 2 Tr. 240:3–6, 271:12–20, 271:18–272:1. Mr. Bird's geotechnical engineer, William Chang, made several less expensive proposals until the city finally approved a soldier-pile retaining wall. 1 Tr. 99:19–100:10, 100:23–101:6; 2 Tr. 241:1–3; 3 Tr. 492:22–496:22. Mr. Chang concluded the sewage leak caused the damage to the hillside and residence. *Id.*; 3 Tr. 505:14–25, 507:17–509:1; CP 162–64.

The settlement—and the reasonableness determination—are the result of a long, hard-fought battle with Best Plumbing's liability insurer,

Farmers. In May 2007, after Farmers failed to resolve the claim, Mr. Bird filed suit alleging trespass and negligence. CP 5–8. This was two years after the plumber knowingly trespassed, intentionally cut the live sewer line, and knowingly left without telling anyone. Farmers appointed its in-house counsel to defend the case. CP 8–11; Hr’g Ex. 27 at 1. Things did not go well for Best Plumbing. In July 2008, Mr. Bird won partial summary judgment on liability and proximate cause. Hr’g Ex. 20. Defense experts had “changing theories,” which “weakened their claims.” CP 3467. The original trial date passed in October 2008. CP 129. Mediation failed. Slip Op. at 3. Farmers rejected Mr. Bird’s policy-limits demands. *Id.* at 3–4. Defense counsel assessed Best Plumbing’s chances as worsening. *Id.* at 19–20; Hr’g Ex. 34 at 1; Hr’g Ex. 35 at 2; Hr’g Ex. 37 at 3. Farmers’ strategy hinged on a cheaper repair to the hillside that had never been approved by the city, *e.g.*, CP 2238–39, and that defense counsel believed would be inadmissible at trial, Hr’g Ex. 35 at 2. Farmers’ own expert concluded the sewage leak caused the damage to the hillside, CP 270–71, 277–78.

Worried over his exposure beyond the limits of his Farmers policy, CP 2217–18, Best Plumbing’s owner, William Lilleness, consulted A. Richard Dykstra, an attorney with whom he had worked in the past. Slip Op. at 4; CP 2146–47, 2214–15, 2217–18. Mr. Dykstra concluded Best

Plumbing would be found liable for trespass and faced a substantial risk of being assessed treble damages under RCW 4.24.630. CP 2151–53, 2160–61. Mr. Bird and Best Plumbing negotiated a settlement, which assigned Best Plumbing’s claims against Farmers to Mr. Bird and called for a \$3.75 million stipulated judgment against Best Plumbing with a covenant not to execute against noninsurance assets. CP 198–209, 2413–14. By this time, Farmers already had a years-long involvement with the case.

Farmers received notice of the settlement on March 19, 2009.

CP 81–93. The superior court found the settlement reasonable on October 2, 2009. CP 3433–46. In between:

- Farmers intervened, and the superior court granted it the right to conduct discovery, including discovery of the files of defense counsel and Mr. Bird’s original trial counsel. CP 304–05, 307.
- The court ordered production to Farmers of files from experts in the underlying case and the reasonableness proceedings. CP 307.
- The court ordered the parties to disclose witnesses in advance of the reasonableness hearing. CP 308.
- Farmers retained an expert to give an opinion about the reasonableness of the settlement. CP 2466.
- The court received and considered three motions in limine filed by Farmers. CP 396–419, 786–91, 2671–72; 1 Tr. 41:9–16.
- The court received and considered literally hundreds of evidentiary objections from Farmers. CP 2849–2940.
- The court received and considered additional briefing, including briefing on the trespass statute, RCW 4.24.630. CP 3198–3277.

- The court entertained lengthy oral arguments.
- The court received live and deposition testimony.
- The reasonableness hearing occurred over four days. Slip Op. at 4.

The superior court worked methodically through each of the factors bearing on a settlement's reasonableness. CP 3434–46. It adopted the analysis of neither party. On one hand, the court found that damages for Mr. Bird's heart attack should not be considered in arriving at a total reasonable settlement figure. CP 3440–42. On other hand, it rejected Farmers' argument that the court should not undertake a reasonableness analysis because of alleged collusion. CP 3435–40. On one hand, the superior court found that "the inclusion of some calculation for treble damages is reasonable." CP 3443. On the other, it reduced those damages by 25 percent to reflect uncertainty. CP 3446.

The superior court found that "the settlement reflecting 100% recovery" for the repairs to the hillside "was reasonable." CP 3444. The court calculated a reasonable settlement figure of \$3,989,914.83. CP 3446. It therefore concluded that the \$3.75 million settlement was reasonable. *Id.* All told, the reasonableness-hearing record is well over 3,000 pages. Farmers received more than 60,000 pages of documents in discovery. 4 Tr. 643:18–21. Farmers fiercely contested the settlement's reasonableness. Farmers' lawyer captured the atmosphere:

Your Honor, over the last few months and the last few days or the days of this reasonableness hearing, you've seen the adversarial process. ... We fight about everything, and we agree on almost nothing. We file motions. We object to motions. We fight everything. That's the adversarial process.

4 Tr. 692:11–17. Farmers has now availed itself of the appellate process as well. The court of appeals affirmed the case in its entirety. Slip Op. at 20. It affirmed the superior court's disposition of Farmers' collusion arguments, *id.* at 15–16, and affirmed the superior court's finding that it was reasonable to include 100% of the hillside repairs in the settlement, *id.* at 19–20. Farmers does not challenge those holdings.

ARGUMENT

Review is unwarranted. The court of appeals adhered to the prior decisions of this Court, other panels of the court of appeals, and the letter of RCW 4.24.630. RAP 13.4(b)(1), (2). And while this case involves an important area of the law, just as many other cases do, Farmers presents no unsettled questions for this Court to address. RAP 13.4(b)(3), (4).

I. THERE IS NO RIGHT TO A JURY IN AN EQUITABLE REASONABLENESS HEARING.

A. Reasonableness hearings are entrenched in this State's insurance law.

This Court in *Besel v. Viking Insurance Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002), unanimously recognized that an insured defendant may independently negotiate a pretrial settlement if his liability insurer

refuses in bad faith to settle the plaintiff's claims. That right includes a settlement calling for entry of a stipulated judgment and a covenant not to execute that judgment against the insured. *Id.* at 736–38. The amount of a covenant judgment is the presumptive measure of harm in a later bad-faith or coverage case, but only if the settlement is first found reasonable under the nine-factor test in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717–18, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), and *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991). See *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 266–67, 199 P.3d 376 (2008).² The trial court in the underlying case conducts a hearing to determine whether a covenant judgment is reasonable.

During closing at the reasonableness hearing, counsel for Farmers stated, “I want to be clear that there’s no question that under Washington

² *Besel, T&G Construction*, and *Chaussee*, which involved settlements by insured defendants that were opposed by the insurer, adopted the reasonableness factors set out in *Glover*, a case involving RCW 4.22.060. In the days when joint and several liability was the rule, not the exception, the legislature envisioned reasonableness hearings under RCW 4.22.060 as a way to evaluate settlements by a tort victim and fewer than all tortfeasors, with the result being the exact amount of money a nonsettling tortfeasor could offset from a damages award at trial. *Glover*, 98 Wn.2d at 716. The reasonableness factors are (1) the claimant’s damages; (2) the merits of the claimant’s liability theory; (3) the merits of the settling party’s defense theory; (4) the settling party’s relative faults; (5) the risks and expenses of continued litigation; (6) the settling party’s ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the claimant’s investigation and preparation of the case; and (9) the interests of the parties not being released. *T&G Constr.*, 165 Wn.2d at 264; *Besel*, 146 Wn.2d at 738.

law as it currently stands Your Honor has authority to evaluate the reasonableness of the settlement. That's a given in Washington." 4 Tr. 656:4-9. In *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009), Farmers argued, "This case is a frightening example of how critically important it is that **trial judges** skeptically examine settlement agreements that involve stipulated covenant judgments before approving them as 'reasonable.'" Intervenor Respondent's Br. at 1, *Water's Edge*, No. 3741-5-3 (Wash. Ct. App. Div. II Oct. 27, 2008) (emphasis added). Now Farmers proposes a revisionist reading of *Besel*, but *Besel's* exact words are that "the *Chaussee* criteria protect insurers from excessive judgments especially where, as here, the insurer has notice of the reasonableness hearing and has an opportunity to argue against the settlement's reasonableness." 146 Wn.2d at 739. This rule is repeated in *T&G Construction*, another unanimous decision holding that a settlement "judged reasonable by a **judge**" serves as "the presumptive damage award" against an insurer "for purposes of coverage." 165 Wn.2d at 267 (emphasis added).

Farmers, in making a public-interest argument, attempts to discredit covenant judgments in general. But Farmers makes no mention of the evil that covenant judgments are designed to address, insurers who in bad faith elevate their own interests over those of the insured. *Besel*,

146 Wn.2d at 739–40. Here, the superior court awarded Mr. Bird partial summary judgment. *Supra* p. 4. One of the defense lawyers told Farmers that the insured stood a 100 percent chance of losing. Hr’g Ex. 37 at 3. Farmers’ litigation strategy relied on a cheaper repair to the hillside that the city never approved and that defense counsel believed would be inadmissible at trial. *Supra* p. 4. Farmers still failed to resolve the case, and Mr. Lilleness thus faced the prospect of a devastating excess judgment. Needless to say, “An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away.” *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002).

B. *Schmidt*, a unanimous decision of this Court, holds that there is no right to a jury in a reasonableness hearing.

The right to a jury trial extends only to actions that are purely legal, in contrast to equitable, in nature. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). The case of *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160–61, 795 P.2d 1143 (1990), held that reasonableness hearings are equitable, so there is no right to a jury. As mentioned above, this Court again spoke unanimously two years ago in holding that a settlement “judged reasonable by a judge” is the “presumptive damage award” against an insurer. *T&G Constr.*, 165 Wn.2d

at 267 (emphasis added). Washington cases all say that reasonableness is determined by the “court” or “judge.” *Besel*, 146 Wn.2d at 739; *Glover*, 98 Wn.2d at 718. Out-of-state cases, which involve insurers who oppose the reasonableness of a settlement, are in accord with Washington law on this subject. *Am. Casualty Co. v. Kemper*, Nos. CV-07-1149-PHX-GMS, CV-07-1520-PHX-GMS, 2009 WL 1749388, at *2 (D. Ariz. June 18, 2009); *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990).

It makes no difference that *Schmidt* deals with a reasonableness hearing in the contribution setting while the present case deals with one in the insurance setting. First, subsequent cases state that reasonableness in the insurance setting is decided by a judge. Second, in both settings, a reasonableness hearing is contested and adversarial. Third, in both settings, the result of the reasonableness hearing directly impacts the amount that can theoretically be entered as a damages judgment in the future. In the contribution setting, the reasonable settlement figure is subtracted from a later damages verdict. *Schmidt*, 115 Wn.2d at 159. In the insurance setting, the settlement figure is added to any other damage found by the jury. Fourth, in both settings, a court does not enter a money judgment against the party opposing reasonableness until a later proceeding, if ever. In the contribution setting, the plaintiff must still prove liability against the nonsettling tortfeasor. In the insurance setting,

the plaintiff must still prove liability against the insurer. Fifth, in both settings, a reasonableness hearing promotes settlement, efficiency, certainty, and compensation of tort victims. And sixth, both settings present a matrix of legal and factual considerations that a trial judge, not a jury, is best suited to evaluate.

C. *Sofie* and *Endicott* do not change the analysis.

Farmers cites *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761 (2010), and *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), *opinion amended by* 780 P.2d 260 (1989), when arguing that the right to a jury “encompasses the ability to have a jury decide the measure of damages in a tort case.” Pet. at 5–6. *Endicott* was a seaman’s negligence and unseaworthiness claim brought against his employer. 167 Wn.2d at 876. This Court applied *Sofie* and concluded that “[a]n action ‘centered on negligence’ is analogous to the ‘basic tort theories’ that existed when the constitution was adopted, and the constitutional jury trial right applies.” *Endicott*, 167 Wn.3d at 884–85 (quoting *Sofie*, 112 Wn.2d at 649–50). *Sofie* found a constitutional defect in a statute that automatically limited the amount of noneconomic damages recoverable in a negligence trial for personal injury or wrongful death, 112 Wn.2d at 638 & n.1. Neither *Endicott* nor *Sofie* involved a reasonableness hearing.

The present case was not a negligence trial, and it did not result in

a judgment against Farmers. The trial court issued an equitable determination that the settlement was reasonable. Whether damages are awarded against the insurer will depend on whether the claimant proves contract or bad-faith liability in a later lawsuit. In the later case, the jury receives instructions about the various elements of damages, including the reasonable settlement, *Besel*, 146 Wn.2d at 738, the insured's general damages, *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 333, 2 P.3d 1029 (2000), and the insured's costs of investigation, *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933 (1998). This Court unanimously decided *Schmidt* a year after *Sofie*, so it could not have agreed with Farmers' interpretation of that case.

Farmers in essence contends that a judge's reasonableness determination should not affect what happens in a later damages action. This Court considered and rejected that analysis in *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998). The Court held that the result of a nonjury, federal malpractice case on the issue of damages precluded the plaintiffs from relitigating the same issue in a subsequent, state-court jury trial. *Id.* at 269. Like Farmers, the *Nielson* plaintiffs relied heavily on *Sofie*, but this Court refused to read the case so broadly. *Id.* at 265–69. The Court rejected plaintiffs' argument that preclusion in the second case “would work an injustice by depriving them

of their state constitutional right to have a jury determine the issue of damages.” *Id.* at 264.

II. THE PROCEEDINGS BELOW EASILY PASS DUE PROCESS MUSTER.

A. The court of appeals addressed the issue before it.

Farmers suggests that the court of appeals gave short shrift to its due-process argument when the court held, “Because the trial court properly denied Farmers’ jury trial demand, we do not address its due process challenge.” Slip Op. at 13 n.6. Farmers did not make its due-process argument before the superior court. And the contention before the court of appeals went like this: “Because Farmers has the right to have a jury determine civil damages in Washington State, violation of that right is a due process violation as well as the violation of the right to a jury trial.” *Id.* at 22. Because there is no right to a jury in an equitable reasonableness hearing, the court of appeals’ disposition was correct.

B. Reasonableness hearings are thorough and evenhanded.

The requirements of due process are notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994). Due process is built into the reasonableness-hearing procedure. *Besel* holds that “the *Chaussee* criteria protect insurers from excessive judgments especially where, as here, the insurer has **notice** of the reasonableness hearing and an **opportunity to argue** against the

settlement's reasonableness." 146 Wn.2d at 739 (emphases added). This is evident from Farmers' experiences here and in *Water's Edge*.

In both *Water's Edge* and in the present case, Farmers became a party by intervening. *Water's Edge*, 152 Wn. App. at 582; CP 304–05. In each case, the court authorized the insurer to conduct discovery. *Water's Edge*, 152 Wn. App. at 582; CP 304–05. In each case, the "trial court reviewed a considerable amount of testimony, documents and briefing, heard argument from both the parties and Farmers, and then took the case under consideration ... before issuing its ruling." *Water's Edge*, 152 Wn. App. at 582; CP 3433–46. One difference is that the court in *Water's Edge* apparently did not allow live testimony, while the court here did. *Water's Edge*, 152 Wn. App. at 582 n.4. In the present case, the court ruled in favor of the settlement. CP 3446. In *Water's Edge*, both the trial and appellate courts ruled in the insurer's favor. 152 Wn. App. at 583. Farmers cites the trial court's ruling in *Water's Edge* in an attempt to discredit covenant judgments in general. Pet. at 11 n. 22. To the contrary, *Water's Edge* is the best evidence that reasonableness hearings are well equipped to evaluate the reasonableness of a settlement in a fair and efficient manner. In this case, the care that the superior court took in discharging its duties is evident from the fact that it diverged significantly from the settling parties' calculus in nonetheless concluding the overall settlement

was reasonable. CP 3446.

C. There is no irrebutable presumption in a reasonableness hearing.

Farmers contends it is the victim of an unconstitutional irrebuttable presumption as some form of "sanction." Not so. To begin with, *Besel* holds that an insurer can rebut a reasonableness determination with a showing of fraud or collusion. 146 Wn.2d at 739. More importantly, there is no presumption, much less an irrebutable one, at a reasonableness hearing. The burden is on the settling parties to prove reasonableness. *Chaussee*, 60 Wn. App. at 512. The insurer has a forum in which to contest reasonableness in a meaningful fashion, which sets this case apart from the cases cited by Farmers. *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (an unwed father was irrebuttably presumed to be an unfit parent); *Ware v. Phillips*, 77 Wn.2d at 879, 881, 883, 468 P.2d 444 (1970) (a garnishee's failure to respond to a writ of garnishment, which did not notify him that a judgment might be taken against him, rendered the garnishee liable for the debt); *City of Seattle v. Ross*, 54 Wn.2d 655, 658, 344 P.2d 216 (1959) (a person found in the proximity of illegal narcotics and who was not carrying an official authorization was irrebuttably presumed to be guilty of participating in narcotic traffic). The present case was a fiercely contested matter spanning

years, with discovery and thousands of pages of court filings. There is no comparison to *Stanley, Ware, or Ross*.

III. THE COURT OF APPEALS CORRECTLY APPLIED RCW 4.24.630.

A. Review is for abuse of discretion.

Farmers contends that the courts below misapplied RCW 4.24.630 in passing on the settlement's reasonableness. The superior court found that "the inclusion of some calculation for treble damages is reasonable," CP 3443, but it reduced those damages by 25 percent to reflect uncertainty, CP 3446. The court's determination is reviewed for abuse of discretion. *Glover*, 98 Wn.2d at 718; *Water's Edge*, 152 Wn. App. at 584.³

B. The court of appeals applied the statute as written and consistent with prior appellate cases.

RCW 4.24.630 is reproduced in Appendix D to Farmers' petition. Based on its plain language, the elements for treble damages are: (1) a person goes onto the land of another; (2) that person causes waste or injury to the land or improvements; and (3) the act is wrongful because it is intentional and unreasonable while knowing or having reason to know that he lacks authorization to so act. Farmers argues that the statute

³ Farmers calls Mr. Bird's demand for treble damages "belated" Pet. at 3, and states that Mr. Bird "did not file a motion to amend his complaint" to seek those damages, *id.* at 2. But the court of appeals held that whether Mr. Bird "could have amended his complaint is not material" because "[t]he trial court is directed by CR 54(c) to grant relief to a party entitled to relief even if the party has not demanded such relief in his pleadings." Slip Op. at 18. Farmers' petition does not challenge this holding.

requires “an intent to cause harm,” Pet. at 18, but the term *harm* appears nowhere in the statute. RCW 4.24.630 does not require a special intent to cause the precise form of damage that ensues; it requires an intent to commit the act of waste or injury that triggered the damage. The statutory text is crystal clear: Once the plaintiff proves the three elements, the defendant is liable for “treble the amount of the damages **caused by** the removal, waste, or injury.” RCW 4.24.630(1) (emphasis added).

Farmers does not challenge the superior court’s findings that the plumber went onto Mr. Bird’s property and caused waste or injury by cutting the sewer line in several places. CP 3443. With respect to the third element—that the act be wrongful because it is intentional and unreasonable while knowing or having reason to know that he lacks authorization to so act—the superior court concluded that the “facts would support a finding that the acts of cutting and attempting repair of the pipe were wrongful as that term is defined in the statute.” *Id.* The plumber knew or had reason to know that he did not have authority to cut the sewer line. CP 2234–36, 2275. He knowingly trespassed, intentionally cut the line, and knowingly left without telling anyone what he did. *Supra* p. 2.

There is no divergence of authority. *Clipse v. Michels Pipeline Construction, Inc.*, 154 Wn. App. 573, 580, 225 P.3d 492 (2010), holds that the intent requirement applies to the act, not the proximately caused

damages claimed by the plaintiff. “Given the context of related statutes, legislative history, and the statute’s interpretation by other courts, we hold that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts and knew or had reason to know that he or she lacked authority.” *Id.*

Borden v. City of Olympia, 113 Wn. App. 359, 53 P.3d 1020 (2002), and *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001), say no different. In *Borden*, the city approved permits for a project to discharge water into a wetland that neighbored the Bordens. The Bordens’ property flooded, and they sued the city. The discharge water did not itself flood the property, but the city’s actions “supercharged” the ground so that water that would otherwise drain from the Bordens’ property failed to do so. *Borden*, 113 Wn. App. at 373. RCW 4.24.630 did not apply because the city did not intentionally cause waste or injury to the Bordens’ land. *Id.* at 374. In *Misich*, the court found RCW 4.24.630 satisfied because the defendant intentionally removed a gate. 106 Wn. App. at 237. Here, the plumber went directly onto Mr. Bird’s property and intentionally cut a live sewer pipe. He meant to do this, as counsel for Farmers admitted. 4 Tr. 640:6–10. The courts below correctly applied the statute. There is no abuse of discretion.

C. Farmers' due-process argument is a red herring.

Farmers argues that “the imposition of treble damages for negligent conduct constitutes a violation of the constitutional right to due process.” Pet. at 19. But the statute requires more than bare negligence; it requires an intentional act of injury or waste. Truly, the plumber acted in a reprehensible manner. He knowingly trespassed and intentionally cut a live, pressurized sewer pipe in three places, creating a hazard to health and property. The plumber then left without fixing the pipe and without telling anyone, in what can only be described as “indifference to or reckless disregard of the health or safety of others.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Finally, in the case cited by Farmers, *Campbell*, the United States Supreme Court said a punitive-damages award that is a single-digit multiple of a compensatory damages award—like statutory treble damages here—is likely to pass constitutional scrutiny. *Id.* at 425. Farmers’ argument would upset a century’s worth of law authorizing treble damages for willful trespass. *See Luedinghaus v. Pederson*, 100 Wash. 580, 584, 171 P. 530 (1918) (discussing the predecessor timber-trespass statute). RCW 4.24.630 easily passes due-process scrutiny.

CONCLUSION

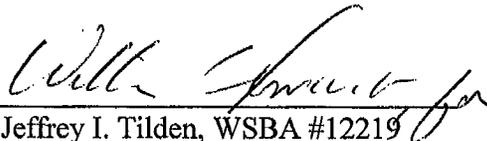
Mr. Bird respectfully requests that this Court deny the petition.

RESPECTFULLY SUBMITTED this 27th day of June, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th day of June, 2011, I caused to be served the within document to:

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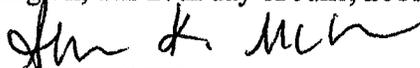
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I declare under penalty of perjury under the laws of the State of Washington, this 27th day of June, 2011.



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SUPREME COURT OF THE STATE OF WASHINGTON

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2011 JUN 27 P 4: 34

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STATE OF WASHINGTON

BIRD

Plaintiff/Petitioner

vs

No. 86109-9

BEST PLUMBING; ET AL.

DECLARATION OF
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(DCLR)

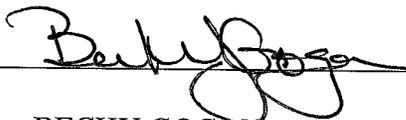
Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 120 Pear Street NE, Olympia, WA 98506
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 28 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: June 27, 2011, at Olympia, Washington.

Signature: 

Print Name: BECKY GOGAN