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NO. 96528-5

**SUPREME COURT OF THE
STATE OF WASHINGTON**

ZURICH AMERICAN INSURANCE COMPANY,

Appellant/Intervenor,

v.

BRIAN SYKES, ET AL.,

Respondents.

RESPONDENT SYKES' ANSWER TO PETITION FOR REVIEW

William D. Hochberg, WSBA # 13510
Rachel V. Hamar, WSBA # 43683
222 Third Avenue North
Edmonds, WA 98020
(425) 744-1220

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INTRODUCTION

Respondent Sykes (“Sykes”) opposes the petition of Appellant Zurich American Insurance Company’s (“Zurich”) for discretionary review of the published, unanimous decision of Division One of the Court of Appeals in *Sykes v. Singh*, No. 76009-2-I (2018).

This Court should decline review because no grounds for review under RAP 13.4(b)(3) or RAP 13.4(b)(4) exist. Contrary to Zurich’s argument, this case does not involve a significant question of law under Washington’s Constitution or an issue of substantial public interest that should be determined by the Supreme Court.

The Superior Court and Court of Appeals correctly applied the decisions of this Court as reflected in *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002) and *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012). This straightforward application of law need not be revisited by this Court.

ISSUES PRESENTED FOR REVIEW

Review is not merited in this case, and Respondent Sykes does not present any new issues for review.

STATEMENT OF THE CASE

On July 20, 2011, Brian Sykes was involved in a multi-vehicle automobile crash that resulted in the death of nine-year-old Rachel

Beckwith. CP 94-95. Mr. Sykes' work-truck was struck from behind by the Beckwith vehicle and flipped on its side. CP 95. It is undisputed Mr. Sykes suffered physical and psychological injuries resulting from the crash. CP 327-397; CP 591-609. The Washington State Patrol conducted an extensive investigation and determined AP Transport employee Richard Noble, an employee of Joginder Singh, was the sole proximate cause of the crash. CP 112-114.

On July 14, 2014, Mr. Sykes, his wife Nicole, and his children Riley, Jayden, and Mia (collectively "Sykes") filed suit against Mr. Singh and Mr. Noble. The Sykes family later amended their complaint to add Gillardi Logging and Construction, Inc., and its driver Michael Cullins as defendants. CP 11-15; CP 172-177. Sykes dismissed his claims against Gillardi because the statute of limitations had run. CP 52-54.

Mr. Singh, a Zurich insured, tendered the defense of the Sykes' lawsuit to Zurich. CP 129-130. Zurich denied coverage because it had tendered its policy limits to settle the Beckwith lawsuit. CP 129-130. A King County jury found Zurich's decision in the Beckwith lawsuit was a breach of its contract with Mr. Singh, negligent, and done in bad faith. Zurich appealed this decision; this case was decided in *Singh v. Zurich American Insurance Company*, No. 76479-9-I (2018), and has also been the subject of a Petition for Review to this Court by Zurich.

Without his insurance company providing a defense against Sykes, Mr. Singh was forced to hire a private attorney. Defense counsel propounded written discovery requests, gathered complete copies of all of Mr. Sykes' medical records and bills, and deposed Mr. Sykes. CP 74, 81, 130, 324-325, 592. Defense counsel also retained orthopedic surgeon Patrick Bays to perform a medical examination of Mr. Sykes. CP 589-590. After taking full discovery, due to Zurich's bad faith in the Beckwith lawsuit, Mr. Singh stipulated to binding arbitration of the Sykes' claims with Steve Toole, former President of the Washington State Bar Association. CP 129-130. Days before the arbitration hearing, the parties negotiated a stipulated judgment and covenant not to execute for \$250,000. CP 128-136. Singh agreed to make an unconditional payment of \$10,000 to the Sykes family, and Sykes agreed to limit all recovery and collection efforts of the remaining \$240,000 to a single asset – Mr. Singh's insurance misconduct lawsuit against Zurich.

The parties filed a joint motion for determination of reasonableness. CP 73-79. Zurich was notified of the reasonableness hearing and the parties stipulated to an agreed order to allow Zurich to intervene to dispute the reasonableness of the settlement on September 8, 2016. CP 420-422. The trial court allowed intervention on September 15, 2016. *Id.* As an intervening party, Zurich was empowered to subpoena witnesses, conducted

discovery and was a full participant in the hearing. Zurich was fully aware of the Sykes lawsuit two years before in 2014 because it had previously denied Mr. Singh's tender of the Sykes' lawsuit. CP 48-50. Zurich could have intervened after first receiving notice, or after it was sued for bad faith by Mr. Singh on October 6, 2015. Zurich took the deposition of Sykes' attorney in August 2016 as part of Singh's bad faith lawsuit, and later submitted this deposition in the Sykes' case. CP 558-559. Zurich was aware, pursuant to *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 865, 287 P.3d 551 (2012), that the amount of any covenant judgment deemed reasonable in the Sykes case would become the presumptive measure of damages in the bad faith case.

On September 16, 2016, the trial court heard live testimony from Brian and Nicole Sykes; Zurich participated in the hearing and cross-examined the Sykes. The trial court allowed the parties time to submit additional briefing and continued the hearing a week to September 23, 2017. RP 1 from 9-16-16 hearing: 10:15-11:7 (allowing Zurich to submit additional briefing), 14:15-41:19 (Sykes testimony); 41:1-49:9 (Nicole testimony), 52:7-14 (setting hearing over to 9-23-16). Zurich was given the opportunity to respond to late-filed witness declarations and to recall witnesses if desired but did not do so.

On September 23, 2016, the trial court found the settlement was reasonable, issued its oral ruling, and asked the parties to submit a proposed written order. RP 2 from 9-23-16 hearing: 25:25-28:20 (oral ruling), 29:20-23 (requesting proposed order). On October 7, 2016, the trial court entered its written findings of fact and conclusion the settlement was reasonable. CP 558-564. Its order confirmed it heard testimony from Plaintiffs Brian and Nicole Sykes, and argument from their counsel William D. Hochberg, Defendant Singh's counsel George A. Mix, and Zurich's counsel, Jacquelyn Beatty. It also identified that it had reviewed multiple documents, including Zurich's opposition to the parties' joint motion for determination of reasonableness, the declarations of Zurich's attorney, Zurich's Motion to Strike/Sur-Reply, Zurich's Sur-Response on Determination of Reasonableness, Zurich's deposition designations and Zurich's proposed order and objections after the trial court issued its oral ruling. CP 558-559.

In all, the trial court considered live testimony, oral argument, and several hundred pages of written briefing and supporting evidence. In the trial court's oral ruling, it announced its application of the *Chaussee* factors, and its written findings of fact addressed all nine factors. RP 2: 25:25-28:20 (oral ruling), CP 561-564. The trial court's findings of fact and analysis of the *Chaussee* factors were supported by substantial evidence from the record.

The Court of Appeals carefully reviewed the trial court's factual determinations, noting Zurich was aware of the Sykes's lawsuit in 2014, was sued for bad faith by Singh in 2015, took the deposition of Sykes' attorney to explore whether collusion or fraud had occurred (it had not and no evidence of such was found), was provided with notice of the reasonableness hearing in the Sykes' case and fully participated in that hearing. *Sykes v. Singh*, Slip Opinion No. 76009-2-I (2018) at 6. It was also noted that Zurich had access to documents, was familiar with the case, cross-examined witnesses and was given a continuance and an opportunity to recall witness and additional time for briefing. *Id.* at 6-7. The Court of Appeals found the trial court correctly applied Washington law, and found no abuse of discretion by the trial court, recognizing that "the trial judge faced with this task must have discretion to weigh each case individually." *Sykes v. Singh*, Slip Opinion No. 76009-2-I (2018) at 5, citing *Glover for Cobb 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).

ARGUMENT AGAINST REVIEW

Zurich contends that two bases for review exist under RAP 13.4(b). The first is that Zurich's petition "implicates" Article I, Section 21 of Washington's Constitution, trial by jury. Pet. at 5. This Court has explicitly stated there is no right to a jury trial under RCW 4.22.060. *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012).

The second is that the current procedural and evidentiary standards existing under Washington law for reasonableness hearings are insufficient to protect insurance companies and therefore Zurich's petition involves an issue of substantial public interest which warrants review of the Court of Appeals' opinion in this case. Pet. at 7. On the contrary, the reasonableness hearing, as it currently exists in Washington, is a "settled and appropriate means of balancing the multiple interests of plaintiffs, insureds, and insurers." *Id.* at 773.

A. THERE IS NO CONSTITUTIONAL ISSUE IN THIS CASE WARRANTING REVIEW BY THE SUPREME COURT

In *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 767, 287 P.3d 551 (2012), this Court held "there is no right to a jury determination of reasonableness under RCW 4.22.060 because that statute creates an equitable proceeding." This Court further held "We also affirm that a

reasonable covenant judgment establishes the presumptive damages against the insured in a subsequent bad faith action; there is no constitutional right to have that amount decided by a jury.” *Id.* at 767-768. This case does not implicate the right of trial by jury protected in Section 21, Article I of Washington’s Constitution.¹ The Court of Appeals properly applied the law in rejecting Zurich’s argument that a jury trial to determine damages is the only adequate protection for an insurance company against an inflated judgment.

**B. A SUBSTANTIAL PUBLIC INTEREST IS NOT AT ISSUE
HERE**

The current procedural and evidentiary standards existing under Washington law for reasonableness hearings are sufficient to protect the rights of all parties involved in the proceedings, including insurance companies, and do not constitute a matter of interest to the public, substantial or otherwise.

This Court has long held that the standard for any Washington trial court in determining whether a settlement is reasonable is evaluating whether the settlement is consistent with the nine *Chausee* (also called the *Besel* or *Glover*) criteria, where no single criterion controls and all nine are

¹ Zurich references “basic notions of due process” but does not rely upon the Due Process Clauses of either the state or federal Constitutions. Zurich also did not raise due process before the trial court or the Court of Appeals or conduct any kind of analysis per *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

not necessarily relevant in all cases. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739 n. 2, 49 P.3d 887 (2002); *Chausee v. Md. Cas. Co.*, 60 Wn.App. 504, 512, 803 P.2d 1339, as modified by 812 P.2d 487 (1991). “Washington law has shaped and approved this process as a settled and appropriate means of balancing the multiple interests of plaintiffs, insureds, and insurers.” *Bird*, 175 Wn.2d at 773.

The trial court in this case weighed each of these factors and explicitly addressed the *Chausee* factors in its determination, both orally and in its written findings of fact, although an explanation of how the trial court weighed the *Chausee* factors is not required by law. RP2:25:25-28:20 (oral ruling); CP 561-564; *see also Martin v. Johnson*, 141 Wn.App. 611, 620, 170 P.3d 1198 (2007) and *Hidalgo v. Barker*, 176 Wn.App. 527, 548-549, 309 P.3d 687 (2013). Contrary to Zurich’s statement otherwise, trial courts have been instructed by this Court on what procedure to follow in reasonableness hearings, and that procedure was followed in this case.

Sykes and Singh, as the settling parties, met their burden of proving the settlement was reasonable and there was no evidence of bad faith, collusion or fraud, and after the settling parties made this showing, Zurich did not present evidence sufficient to controvert the parties’ evidence, despite having opportunity to do so. *Pickett v. Stephens-Nelsen, Inc.*, 43 Wn.App. 326, 332-333, 717 P.2d 277 (1986)(“It is incumbent upon a party

having a significant interest in seeing that the settlement is found to be unreasonable to present some evidence to controvert the settling parties' evidence.") Having failed before the trial court and the Court of Appeals to show a factual basis for its allegations the reasonableness of the settlement was not supported by substantial evidence, Zurich has abandoned its claims of factual error and instead argues the reasonableness hearing process as it exists is inherently flawed. However, there is nothing in the record in this case which would justify overturning decades of well-established Washington law.

Zurich was aware of Sykes' lawsuit in 2014, declined to defend Singh, and did not intervene in the Sykes' lawsuit (even though it could have done so at any time), even when Singh filed its bad faith suit against Zurich in October 2015. CP 129-130. Zurich took the deposition of Sykes' attorney in August 2016 to explore whether Sykes had colluded with Singh and succeeded only in creating a record that no fraud had occurred. CP 558-559. Zurich had copies of Mr. Sykes' medical records, bills and doctors' declarations before it intervened in September 2016, an intervention to which neither Sykes nor Singh objected. RP 1: 18:22; CP 420-422. Zurich was provided the documents in the case, fully participated in the reasonableness hearing and was given an opportunity to recall witnesses but did not do so. RP 13:22-14:4. Having had opportunity to participate as

early as 2014 and many later opportunities to challenge the reasonableness of the settlement reached, including in 2015 when Singh sued Zurich for bad faith, Zurich failed to make a factual showing that the settlement reached was unreasonable, and has failed to preserve any factual or constitutional issues in its Petition for Review. Zurich now complains fault lies with the procedures established by this Court to determine reasonableness but does not explain how the abuse of discretion standard applied by the Court of Appeals is faulty. In Washington, a determination of reasonableness is reviewed for abuse of discretion, because trial courts must have discretion to weigh each case individually. *Glover*, 98 Wn.2d at 718. Zurich has not established a factual record or legitimate legal basis for overturning the Court of Appeals' decision in this case or long-established Washington law.

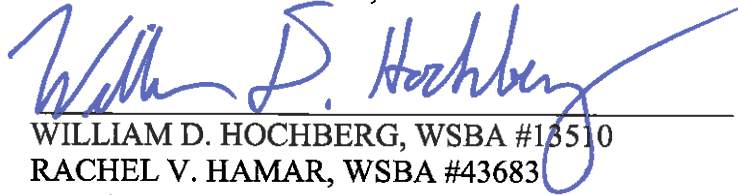
Washington jurisprudence in this area, as thoughtfully developed by this Court over decades, sufficiently protects the rights of all parties without requiring a "fully adversarial proceeding" as in Texas or the insurance industry wish list of additional burdens (like a "clear and convincing" standard for reasonableness) advocated for by Zurich, to be placed squarely on innocent parties like the Sykes family, who were harmed through the negligence of others. *Great Am. Ins. Co. v. Hamel*, 60 Tex.Sup.Ct.J. 1257, 525 S.W. 3d. 655, 670 (2017).

CONCLUSION

For the foregoing reasons, Respondent Sykes respectfully requests that this Court deny Zurich's Petition for Review to this Court.

RESPECTFULLY SUBMITTED this 17 day of December, 2018.

HOCHBERG & HAMAR, PLLC



WILLIAM D. HOCHBERG, WSBA #13510

RACHEL V. HAMAR, WSBA #43683

222 Third Avenue North

Edmonds, Washington 98020

(425) 744-1220

Attorneys for Respondent Sykes

CERTIFICATE OF SERVICE

Zurich American Ins. Co. v. Sykes, et al.
Supreme Court No. 96528-5

ORIGINAL RESPONDENT SYKES' BRIEF VIA EFILING TO:

Susan L. Carlson, Clerk of the Supreme Court
Washington State Supreme Court, Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

COPY OF RESPONDENT'S BRIEF BY EMAIL AND MAIL TO:

Jacquelyn A. Beatty, Esq.
Barbara J. Brady, Esq.
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
jbeatty@karrtuttle.com; bbrady@karrtuttle.com

George Mix, Esq.
Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101-1346
george@mixsanders.com

COPY OF RESPONDENT'S BRIEF BY MAIL TO:

Mr. Brian Sykes

I certify that a copy of the document(s) attached hereto was mailed or otherwise transmitted as indicated above, to the parties referenced above this 17th day of December, 2018.

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HOCHBERG & HAMAR, PLLC

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