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No. 64291-0

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

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Appellant.

RESPONDENT'S BRIEF

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DIVISION I
2011/11/10 PM 4:22

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I. PRELIMINARY STATEMENT

More than five years ago, a Best Plumbing employee trespassed on James and Beverly Bird's hillside property, severed a pressurized sewage pipe in several places, and then left without fixing the line or telling anyone what he had done. Asked at deposition whether the employee had a plumber's license, Best Plumbing's owner could furnish no answer. The injury to the pipe led to frequent emissions over the next eight months, one of which engulfed Mr. Bird in a dramatic explosion of sewage, and all of which made the hillside dangerously unstable. The City of Seattle has decided what has to be done to repair the hillside. It will be expensive.

Mr. Bird sued Best Plumbing. Best Plumbing's liability insurer, Farmers Insurance Exchange, appointed defense counsel, one of whom concluded as trial approached that Best Plumbing stood a 100 percent chance of losing the trial. Farmers reacted not by sharing this conclusion with the insured, but by replacing the lawyer, hiding adverse expert testimony, and refusing to provide any monetary evaluation of the case to the insured. Exasperated by Farmers' refusal to settle within policy limits and deeply concerned about its exposure beyond those limits, Best Plumbing exercised its rights under Washington law. It hired independent counsel who negotiated a \$3.75 million covenant judgment with Mr. Bird. Six months later—after engaging in lengthy discovery, well over 3,000

pages of court filings, a live hearing lasting four days, and what Farmers' attorney described as a model of the "adversarial process"—the court conducted a methodical, exhaustive written analysis mandated by *Besel v. Viking Insurance Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002), and *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487 (1991), finding the settlement reasonable.

In its brief, Farmers writes of a "moral hazard" detrimental to the insurer. Farmers ignores the undeniable health and safety hazard on Mr. Bird's property, as well as the moral hazard that covenant judgments are meant to address—an insurer's elevation of its own financial interests over the interests of the insured in a manner that exposes the insured to a potentially devastating judgment in excess of insurance limits. The supreme court has spoken clearly and unanimously on this subject, holding that the amount of a pretrial covenant judgment, found by a judge to be reasonable, serves as the presumptive measure of harm in a subsequent bad-faith lawsuit. *Besel*, 146 Wn.2d at 738–39. "Insurers can avoid this result in the future," said the court, "by acting in good faith." *Id.* at 739–40. "By choosing to act in bad faith," the insurer accepts "that it would injure its insured and be held responsible for that injury." *Id.*

In attacking reasonableness hearings, Farmers portrays them as something they are not. Farmers' own experiences prove that insurers

have notice, discovery when needed, time to prepare, and a venue in which to “fight everything,” to borrow Farmers’ words. Sometimes the insurer wins, sometimes not. In *Water’s Edge Homeowners Association v. Water’s Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009), Farmers won just such a hearing. Farmers argued that the superior court ought to be afforded discretion and “should be applauded.” Intervenor Respondent’s Br. at 1, *Water’s Edge*, No. 3741-5-3 (Wash. Ct. App. Div. II Oct. 27, 2008), <http://www.courts.wa.gov/content/Briefs/A02/374153%20intervenor%20respondent.pdf>. Here, Farmers lost, so it argues on appeal that the court was “confused” and that the process is unconstitutional, e.g., Appellant’s Br. at 13. On May 7, 2010, faced with the same legal arguments Farmers makes here (voiced by the same lawyer, no less), the U.S. District Court for the Western District of Washington concluded: “[S]ome stipulated judgments will survive the hearing, and some will not.... [The insurer’s] attempts to litigate these issues yet again appear to be a tactic to stall payment and re-roll the dice.” *Encompass Ins. Co. v. Lennon*, No. C09-111JCC, slip op. at 6 (W.D. Wash. May 7, 2010) (attached). The district court’s analysis is as illuminating as it is timely.

Well-established case law dictates rejection of each of Farmers’ arguments.

II. STATEMENT OF ISSUES

1. Does Farmers have a constitutional right to a jury in an equitable reasonableness hearing? **No.** *Schmidt v. Cornerstone Invests., Inc.*, 115 Wn.2d 148, 161, 795 P.2d 1143 (1990).

2. Did the superior court deny Farmers due process, even though it allowed Farmers four months to prepare for the hearing; authorized discovery; and considered Farmers' evidence and voluminous arguments? **No.** *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 324, 116 P.3d 404 (2005).

3. Is there such a thing as "collusion as a matter of law" precluding a court from even undertaking the reasonableness analysis? **No.** *Chaussee*, 60 Wn. App. at 512 (holding that "evidence of bad faith, collusion, or fraud" is one of nine factors and that "[n]o one factor controls").

4. Does Farmers show that substantial evidentiary support is lacking for the superior court's findings regarding alleged collusion? **No.** *Water's Edge*, 152 Wn. App. at 584 (holding that "a reasonableness hearing necessarily involves factual findings which we will not disturb on appeal if substantial evidence supports them").

5. Does Farmers show that substantial evidentiary support is lacking for the superior court's finding regarding treble damages under RCW 4.24.630? **No.** *Water's Edge*, 152 Wn. App. at 584; *Clype v.*

Michels Pipeline Construction, Inc. 154 Wn. App. 573, 580, 225 P.3d 492 (2010) (interpreting statute in same manner as court below); *Allstot v. Edwards*, 114 Wn. App. 625, 632, 60 P.3d 601 (2002) (holding that punitive-damages statute need not be pleaded in the complaint).

6. Does Farmers show that substantial evidentiary support is lacking for the superior court's finding that the settling parties reasonably determined Mr. Bird stood a 100 percent chance of recovering repair costs? **No.** *Water's Edge*, 152 Wn. App. at 584.

III. STATEMENT OF THE CASE

Note: Mr. Bird understands that the superior court clerk transmitted certain exhibits from the reasonableness hearing (Hr'g Exs.) directly to this Court. *E.g.*, CP 2673.

A. Underlying Events

Mr. and Mrs. Bird live on a hillside waterfront property. 2 Tr. 215:12–21, 221:23–222:24. The residence is downhill, away from the street. *Id.* On April 20, 2005, Mr. Bird arrived home from work and walked down toward the house. *Id.* 233:9–234:7. As he neared the house, a sudden and unexpected blast of sewage shot at him from the ground. *Id.* The sewage went into Mr. Bird's eyes, ears, nostrils, and mouth. *Id.* The volume of sewage and the shock made Mr. Bird slip and hurt his elbow. *Id.* He recalls the eruption lasted about 20 seconds. *Id.* "I took another breath. I was scared to death. I really didn't understand what was going

on. ¶ I could smell sewage. So I could relate that to the sewage system. But I was just in another world. Totally shocked.” *Id.* Mr. Bird began vomiting and developed a migraine. *Id.* 234:8–16.

How did this happen? Earlier that day, a plumber (likely unlicensed, CP 234–35) from Best Plumbing traveled to the area to fix a sewer blockage on the property of Mr. Bird’s neighbor, Dr. Peggy Goldman. CP 160–61. The plumber knowingly went onto the Bird property, even though it is clearly demarcated from Ms. Goldman’s and both sewers are 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. A pump turns on throughout the day to push wastewater from a tank by the house. CP 3492–93. 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. He then 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.

The same afternoon, Dean Trenery, a tenant on the Goldman property, saw wastewater gushing out of the sewer line and onto the

outside of the Bird residence. CP 160–61. Mr. Trenery knew the plumber had been in the area, and he told Mrs. Bird. *Id.* Mr. Trenery then went with Mrs. Bird to check the inside of the residence, where they saw “brown oozing” wastewater coming into the basement through the wall cavity. *Id.* “The effluent had the distinct odor of sewage water,” said Mr. Trenery. *Id.*

After talking to Mr. Trenery and Mrs. Bird, 2 Tr. 234:17–235:4, Mr. Bird called Best Plumbing and demanded that it fix the sewage line, *id.* 254:3–14. Best Plumbing returned, *id.*, and assured Mr. Bird that it repaired the damaged line, CP 3493. This was not true because Best Plumbing only fixed the damage closest to the house, leaving the uphill cuts completely unrepaired. CP 3493–94. During the next days and weeks Mr. Bird noticed a “continual ooze seeping down the hillside above my property.” CP 3493. He learned from a different neighbor that the plumber was seen digging in the upper part of the hillside, too, not just downhill where Mr. Bird was soaked in sewage and where Best Plumbing made the repair. CP 3493–94; 2 Tr. 254:22–256:7.

Mr. Bird went to the steep upper hill area obscured by heavy vegetation, where he discovered that Best Plumbing had made a hole in the land and cut the sewer line in two other places Best Plumbing did not repair. *Id.* With every pump cycle, sewage continued to escape from the pipe. CP 3494. Mr. Bird again demanded that Best Plumbing return to fix

the line. *Id.*; 2 Tr. 255:5–256:7, 258:19–259:11. Best Plumbing came back and again assured Mr. Bird that it repaired the sewer line. CP 3494.

But ooze kept flowing downhill. *Id.* Best Plumbing said it had repaired the line, so Mr. Bird “assumed that this was just residual debris from the time frame before Best Plumbing had attempted to make the repairs to the sewer line they had cut.” *Id.* Then 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. *Id.*; 1 Tr. 97:23–98:7, 98:20–99:15; 2 Tr. 225:9–24, 229:23–230:3, 232:7–19. In late 2005, Mr. Bird went back to the steep upper part of the hill, and he realized that Best Plumbing used a rubber sleeve and metal clamps to connect the pressurized sewer pipe instead of making a rigid connection with glue. CP 235, 3494. “It was obvious to me,” said Mr. Bird, “that the sewer line was askew in the location wherein Best Plumbing attempted to do the repair.” CP 3494. It is a given that Best Plumbing improperly installed the joint. CP 212, 224. This time, in December 2005, Mr. Bird repaired the damage himself, without Best Plumbing. 2 Tr. 257:6–16.

It had been about eight months since Best Plumbing injured the sewage line. *Id.* 142:8–15. During that time, a dangerous slide continuously occurred on Mr. Bird’s property. *Id.* 232:7–19. The portion of the property surrounding the injured line experienced deterioration. *Id.*

269:17–270:15. Beside the danger of the unstable hillside, Mr. Bird’s home was damaged in several ways, such as the growth of toxic mold from moisture and sewage intrusion. *Id.* 235:20–236:10. Mr. Bird commenced efforts to confront the problem, including hiring a geotechnical engineering firm and contractors and including removing contaminated material using a bucket. 1 Tr. 97:10–98:7; 2 Tr. 265:21–266:6, 267:3–25; CP 3494–95. According to Mr. Bird, the contaminated material resembled a runny, sandy tapioca or wet beach sand that runs through the fingers. 2 Tr. 229:10–14, 229:19–230:3. Mr. Bird suffered a heart attack, which he attributed to the strenuous activity of removing the sewage-laden material from the property. *Id.* 237:10–238:4.

In January 2006, the City of Seattle ordered the mitigation stopped and required Mr. Bird to submit a proposal to stabilize the entire hillside for city review. 1 Tr. 99:19–100:10; 2 Tr. 240:3–6, 271:12–20, 271:18–1. The city ordered Mr. Bird to install a plastic sheet to prevent precipitation from worsening the problem. 2 Tr. 218:15–20. Mr. Bird submitted a series of proposals. 1 Tr. 99:19–100:10; 2 Tr. 241:1–3. He started with less extensive alternatives, which the city rejected. *Id.* 99:19–100:10, 100:23–101:6; 3 Tr. 492:22–496:22. The city required Mr. Bird to build concrete retaining walls supported by soldier piles. *Id.* A soldier-pile retaining wall is an industry-standard repair commonly used in Seattle. *Id.* The cost of

the city-approved fix will be at least \$851,176.78. *See* 2 Tr. 101:7–17. Mr. Bird testified the ordeal has been a nightmare and that he has spent about 500 hours addressing the problems with the property. *Id.* 236:11–20, 236:24–237:5. Mr. Bird’s homeowner’s insurer Allstate paid \$262,000 for home repairs and remediation, not including hillside stabilization or part of the mold remediation. 1 Tr. 101:18–102:6, 103:7–18; 2 Tr. 179:4–9.

B. Mr. Bird’s Litigation Against Best Plumbing

1. Mr. Bird sues and wins partial summary judgment.

Represented by Rick Wathen of Cole, Lether, Wathen & Leid, Mr. Bird sued Best Plumbing for negligence and trespass. CP 1–7. Mr. Bird claimed damages, “including damage to real and personal property as well as general tort damages” and “such other and further relief as is just and equitable.” CP 7. Best Plumbing had liability insurance with Farmers. CP 12. Farmers appointed its in-house counsel, Mark Miller, to defend Best Plumbing. CP 8–11; Hr’g Ex. 27 at 1 (letterhead). Best Plumbing admitted its employee went onto Mr. Bird’s property without permission, *compare* CP 6, ¶ 2.1 *with* CP 8 ¶ 2, 9 ¶ 12, and that Best Plumbing cut the sewer line, CP 8 ¶ 3. Farmers later hired co-defense counsel to assist Mr. Miller, Pauline Smetka of Helsell Fetterman. Hr’g Ex. 31 at 5.

In July 2008, the court granted Mr. Bird partial summary judgment that Best Plumbing “trespassed as a matter of law” and that “said trespass

was a proximate cause of damage to the upper slope of Mr. Bird's property. The nature and extent of said damage remain issues of fact for trial." Hr'g Ex. 20 at 2. Mr. Bird's insurer Allstate separately asserted subrogation claims against Best Plumbing for the \$262,000 it paid. The court consolidated Allstate's case with Mr. Bird's. *See also* CP 107.

2. Mr. Bird wins the battle of experts.

William Chang and Susan Evans. Mr. Bird's case at trial would have included geotechnical engineer Mr. Chang, CP 162–63, and Ms. Evans, an industrial hygienist, CP 2136–37. Mr. Chang led the effort for city approval of a hillside repair, and he concluded that Best Plumbing's actions caused the damage to the Bird property. 3 Tr. 505:14–25, 507:17–509:1; CP 162–64. Ms. Evans inspected the Bird home and found three kinds of mold: *Stachybotrys*, *Acremonium*, and *Chaetomium*. CP 2140. Ms. Evans concluded that the mold needs to be remediated. CP 2142–43.

Martin Burck. Below, the court found that Best Plumbing's "experts' changing theories weakened their claims." CP 3467. This was largely true because, in their relentless attempts to save money for Farmers, the experts ignored the obvious, made assumptions backed by no evidence, and ignored the requirements of the City of Seattle. Farmers hired Mr. Burck, a geologist who first opined the property just needed spraying with chemicals to cure the bacteria from the sewage, 2 Tr.

134:16–135:7, and then issued a second opinion blaming Mr. Bird for the hill’s instability, Hr’g Ex. 45 at 5. In between the two opinions, Mr. Burck testified he had no opinion Mr. Bird did anything wrong in removing contaminated material. 2 Tr. 140:2–16; CP 264. At the same deposition, Mr. Burck assumed the leak lasted just 10 days because no one on behalf of Best Plumbing told him the line continued to leak for eight months. 1 Tr. 116:14–25; 2 Tr. 138:7–18, 138:25–140:1, 140:17–141:23; CP 265. This error persisted in his second opinion. Hr’g Ex. 45 at 2–3. Not long before trial, defense counsel produced yet another set of opinions for Mr. Burck. 2 Tr. 147:19–148:22. This time, he erroneously claimed Mr. Bird removed more than 100 yards of material, based on a purported 2006 survey by Mr. Chang’s firm. *Id.* 150:12–151:16. But there was no such survey; the premise for Mr. Burck’s comparison of topographical surveys was “false.” *Id.* 151:5–16, 152:7–153:2. A comparison of the true surveys from 1995 and 2006 showed that Mr. Bird only removed about 14, not 100, yards of contaminated material. *Id.* 153:10–154:16. That was within a few yards of what Mr. Bird had estimated. *Id.* 154:17–23.

Robert Pride. The defense also hired geotechnical engineer Mr. Pride. CP 269. Mr. Pride testified he did not calculate the volume of sewage because he had already concluded that the “areas of slope distress were related to the leaking sewer line ... to the extent of where I believe

the slope distress occurred.” CP 270–71. There was “no question” in Mr. Pride’s mind that the area of disturbed soils included the area immediately behind the house. CP 277–78. Mr. Pride advocated a cheaper repair than the one approved by the city, but he testified that he did not know the city’s requirements, CP 272, and that he could not and did not speak with the city engineer in charge of the project, CP 273–74.

Howard Clark. Mr. Clark, a contractor, was the defense witness who was supposed to support the defense’s monetary evaluations of Mr. Bird’s property loss. 1 Tr. 111:18–112:4. Despite proffers by the defense of dollar figures attached to Mr. Clark’s estimates, Mr. Clark testified that he would not be in a position to sign a contract until seeing a city-approved, final set of engineering plans, CP 297, 299–300. He had no idea whether the city would ever allow Mr. Pride’s proposal. CP 298–99. So Mr. Clark’s bid was “all still preliminary,” CP 297–98, and it was subject to change, CP 294–95. Mr. Clark refused to guarantee his work. CP 299. Mr. Bird would have to pay any cost overruns. CP 295–96.

Jon Jacobson. Then there was Mr. Jacobson, the “failure expert.” 3 Tr. 359:11–15. Mr. Jacobson tested the coupling that Best Plumbing put in the upper part of the hillside. Hr’g Ex. 9. The test showed that the pipe did, in fact, leak, and it did so in dramatic fashion. *Id.*; CP 212. Mr. Jacobson videotaped his test; when the pipe started spewing water, he is

seen rushing to conceal the evidence by covering up the camera lens. Hr'g Ex. 9 at 3:40; 2 Tr. 175:2–5. Defense counsel believed Mr. Jacobson's deposition testimony "was fairly damaging to our case." Hearing Ex. 33 at 3. Mr. Wathen believed it was devastating to the defense. 2 Tr. 178:13–16. Farmers' brief alleges Mr. Jacobson "would testify" that based upon the "residue" on the pipe, he could not conclude that it leaked. Appellant's Br. at 59. Whatever Farmers says Mr. Jacobson would have testified at trial, he did testify in deposition that the entire contents of the pipe uphill from the faulty repair would have leaked out onto the hillside on a daily basis. CP 224–25. Defense counsel testified that he did not plan to call this witness at trial. 3 Tr. 433:7–434:1. Mr. Bird surely would have.

3. Farmers rejects demands for policy limits. Meanwhile, Mr. Bird adds lawyers to his legal team.

Mr. Wathen wrote defense counsel a letter on February 11, 2009, explaining that Mr. Bird was "entitled to treble damages pursuant to RCW 4.24.630.... We are confident Mr. Bird will be awarded treble damages if this matter proceeds to trial." CP 2802. Mr. Wathen alerted defense counsel that Best Plumbing's exposure "clearly exceeds the available policy limits of \$2 million." CP 2811. Trebling just the property damage, not counting general damages or attorney's fees, resulted in exposure over \$3 million. CP 2802–03. Farmers rejected the demand. CP 13 ¶ 8.

As the trial date approached, Mr. Bird added lawyers to his legal team: William C. Smart of Keller Rohrback and Jeffrey I. Tilden of Gordon Tilden Thomas & Cordell. CP 2175, 2193. Mr. Smart, Mr. Tilden, and Mr. Wathen concluded that Mr. Bird should amend his complaint to add a claim for damages relating to his heart attack and that the superior court would likely permit the amendment. *Id.*; CP 2179–81. They also concluded that the original complaint already satisfied the pleading requirements for an award of damages under the trebling statute. CP 2176, 2179–91, 2195–97. Although Mr. Wathen initially viewed Mr. Bird’s treble-damages request with more uncertainty and expressed this in a confidential e-mail to his client, Appellant’s Br. at 6, he continued to research the issue and concluded that Mr. Bird in fact had a strong basis for treble damages, CP 2179 ¶¶ 2, 3(A), 2181 ¶ 3(H), 2183–90, 2195–97.

On February 26, 2009, Mr. Smart wrote a letter with an extensive review of the case, proposing a stipulated judgment. CP 2813–27. While the prior letter set out property damages, this one contained a more detailed explication of Mr. Bird’s damages, estimated at \$9.75 million. CP 2826. The damages included the cost of the city-approved repair; the repairs to the residence; loss of use; engineering and expert expenses; illness from the sewage spray; aggravation, lost time, and emotional distress; Mr. Bird’s heart attack; trebling under RCW 4.24.630; and

attorney's fees. *Id.* Even though Best Plumbing demanded that Farmers pay the policy limits, Farmers refused. CP 166. And when Farmers' hand-picked defense lawyer Mr. Kinstler ghost-wrote a letter proposing that Farmers agree to cover any excess judgment after trial in lieu of a settlement, the proposal was met with silence. CP 2278–81.

4. While Best Plumbing is extremely concerned about excess liability, Farmers replaces Ms. Smetka.

The court found that Mr. Miller and Ms. Smetka “assessed their chances at trial as worsening as of December, 2008.” CP 3444. In fact, Mr. Miller issued a report on October 24, 2008, that addressed the likelihood that Mr. Bird would prevail and that Best Plumbing would have to pay for the entire repair to the property. Hr’g Ex. 31 at 4. This was followed by a December 8, 2008 e-mail in which Ms. Smetka wrote: “Developments since the unsuccessful mediation have helped plaintiff and hurt us.” *Id.* Ex. 34 at 1. On December 15, 2008, Mr. Miller explained that Mr. Pride’s proposal for a cheaper repair was likely inadmissible at trial. *Id.* Ex. 35 at 2. Most telling was a report submitted to the insurer on January 13, 2009, which predicted “Insured’s Liability” would be “100%,” and “Plaintiff’s Liability” would be “0.00%.” *Id.* Ex. 37 at 3.

After being told by the lawyers that handled the litigation for well over a year that Best Plumbing had a 100 percent chance of losing, an

analysis that was withheld from Best Plumbing, CP 2009, 2261–62; Hr’g Ex. 37, in February 2009 Farmers replaced Ms. Smetka with another lawyer, Andrew J. Kinstler. CP 106. Best Plumbing’s owner William Lilleness became concerned because his exposure continued to escalate. CP 2217–18. With respect to property damages, Mr. Kinstler told Mr. Lilleness there was a probability a jury would award Mr. Bird the entire amount for the city-approved repairs to the hillside. CP 2227. But Mr. Kinstler did not give a statistical analysis for the other components of damage, *id.*, or even a range of possible damages awards, CP 2269. Mr. Kinstler said that Mr. Bird’s claims “could go either way,” including the claim for treble damages. CP 2230, 2231–32. Farmers developed a defense that centered on a solution that had never been approved by the city. *See* CP 2238–39. As a contractor, Mr. Lilleness knew Mr. Bird would never be able to build anything the city did not approve. CP 2245.

Throughout the development of the defense theory, Farmers and insurance defense counsel largely left Mr. Lilleness out of the loop. Farmers failed to share the negative case evaluations; at one point in his deposition, Mr. Lilleness remarked that he was “surprised I don’t have this” and that he felt “like a mushroom.” CP 2261, 2262–67. “All these documents that you’re producing, I should have had months ago, years ago. Mushrooms are kept in the dark” CP 2261. The defense continued

to litigate the case based on Mr. Pride's analysis knowing that the only feasible plan was the one the city approved. CP 2245. Mr. Lilleness was left with the inherent risks in the case, including the claims for emotional distress and treble damages relating to the trespass. CP 2226.

5. Best Plumbing hires personal counsel and negotiates a settlement with Mr. Bird.

Concluding he and his company faced exposure in excess of policy limits, Mr. Lilleness sent one of the policy-limits demands to A. Richard Dykstra, an attorney he had worked with in the past. CP 2146–47, 2214–15, 2217–18. Mr. Dykstra concluded Best Plumbing was certain to be found liable for trespass and faced a substantial risk of being assessed treble damages. CP 2151–53, 2160–61. He believed the jury would not find Mr. Bird comparatively at fault. CP 2155–56, 2164–65. He believed the jury's rulings on damages, including assessment of treble damages, would depend on the sympathy and credibility of witnesses, CP 2149, 2153, and Mr. Lilleness did not make a sympathetic witness, CP 2153–54. In contrast, defense counsel admitted that Mr. Bird would be a good witness. CP 2272–73. Mr. Dykstra was concerned that Mr. Bird would either increase his demand or demand an out-of-pocket financial concession from Best Plumbing. CP 2168–70.

Mr. Dykstra evaluated the draft settlement. CP 2218–19, 2147–48.

From his dealings with Mr. Kinstler, Mr. Dykstra perceived Mr. Kinstler was defensive and felt uncomfortable discussing negotiations because he did not want to seem disloyal to Farmers. CP 2167–68. Although Farmers suggests Mr. Dykstra prevented Mr. Kinstler from “talk[ing] with Farmers about the value of the case,” Appellant’s Br. at 6–7, this is incorrect. CP 3733. True, Mr. Dykstra discovered that Farmers had developed a conflict of interest with the insured, and so he instructed Mr. Kinstler not to participate in a so-called roundtable with Farmers. *Id.* At Mr. Kinstler’s request, however, Mr. Dykstra allowed him to go ahead with the roundtable, provided “Farmers promised not to use any of the information gained in such roundtable against the interests of Best Plumbing.” *Id.*

In any event, Mr. Dykstra went back and forth over the proposed settlement’s wording to determine accuracy. CP 2147–48. The terms changed multiple times. CP 166. Mr. Dykstra made revisions, and then Mr. Smart made revisions to those changes. CP 2167. Negotiated terms included the amount of the judgment, Best Plumbing’s obligations after settlement, factual recitations, and the scope of assigned claims. CP 166. Mr. Dykstra placed the range of damages on Mr. Bird’s claims between \$2.25 million and \$7.5 million. CP 2156–57, 2163–64. The final amount was the lowest amount Mr. Dykstra was able to negotiate. CP 2151.

Mr. Bird and Best Plumbing reached a Stipulated Judgment,

Settlement Agreement, and Covenant Not to Execute on or about March 13, 2009. CP 198–209. Among other things, the settlement assigned to Mr. Bird all of Best Plumbing’s claims against Farmers, CP 204–05; assigned “all rights, entitlements, and privileges relating to work product, expert witnesses, trial preparation materials, its attorney-client privilege and any other matter developed in conjunction with the above entitled case,” CP 205; directed Farmers to pay Mr. Bird the coverage of \$2 million, *id.*; *see also* CP 81; called for a stipulated judgment in the amount of \$3.75 million, CP 205; and had a covenant not to execute the stipulated judgment against Best Plumbing beyond the assigned insurance assets, CP 207.

Mr. Dykstra continued to advocate for his client. When, after settlement, Mr. Bird’s lawyers asked for copies of the defense files, Mr. Dykstra asked Mr. Smart to waive Mr. Bird’s right under the settlement to void it in the event the superior court found it unreasonable. CP 3413–15. No secret was made of Mr. Dykstra’s request, as he included insurance defense counsel Mr. Kinstler in the e-mail exchange. *Id.* It was Mr. Kinstler, indeed, who raised in the same e-mails a concern “that the agreement could be voided, leaving Best Plumbing liable to the plaintiff and, at the same time, the insurance coverage for Best Plumbing could be lost due to violation of the cooperation clause of the insurance policy.” CP

3413–14; *see also* 4 Tr. 711:1–25. At Mr. Dykstra’s request, Mr. Bird’s lawyers waived the voidability provision. *Id.* Though later filings failed to mention the change, this was due to unintentional error. *Id.* 712:3–19.

C. Reasonableness Hearing

Farmers received notice of the settlement on March 19, 2009. CP 81–93. Before Mr. Bird filed a motion for a reasonableness determination, Farmers moved to intervene (granted), for a continuance (granted), for discovery (granted), and for a jury trial (denied). CP 107–24, 304–05, 307, 395. Other pertinent discovery orders included these: The superior court allowed Farmers to discover the entire files of attorneys Mr. Wathen, Mr. Dykstra, Mr. Miller, Ms. Smetka, and Mr. Kinstler. CP 307–08. It allowed Farmers to depose Mr. Wathen and Mr. Dykstra. CP 307. It ordered production to Farmers of the files of both Mr. Bird’s and Best Plumbing’s experts. *Id.* The court ordered a viewing of the property by Farmers’ attorneys. *Id.* It ordered witness disclosures in advance of the hearing. CP 308. It authorized the parties to depose each other’s reasonableness experts. *Id.* And it appointed a special master to review documents for which Farmers claimed privilege. CP 785.

Before the reasonableness hearing, Farmers filed three motions addressing (1) Mr. Bird’s request for treble damages under RCW 4.24.630, CP 396–408; (2) Mr. Bird’s claim for damages relating to his

heart attack, CP 409–19; and (3) Farmers’ request to exclude the testimony of attorney William J. Leedom, Mr. Bird’s reasonableness expert, CP 786–91. Mr. Bird responded to each, CP 1013, 2072–94, and Farmers then filed replies, CP 2616–36. The court ruled that it would consider Farmers’ arguments on treble damages and the heart-attack claim within the framework set out in, among other cases, *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). 1 Tr. 41:9–16. Under the authority of *Glover*, 98 Wn.2d at 718 n.3, the court ruled Mr. Leedom’s reasonableness opinions were admissible, although the court barred Mr. Leedom from testifying regarding Farmers’ alleged bad faith. CP 2671–72.

Mr. Bird filed his motion for a reasonableness determination on April 1, 2009. CP 176–96. He also filed declarations signed by Mr. Dykstra, CP 165–67; Mr. Chang, CP 162–64; Dr. Keith Dipboye, MD, MA, CP 168–75; and Mr. Trenergy, CP 160–61. Mr. Bird filed deposition excerpts for Mr. Jacobson, CP 210–25; Mr. Lilleness, CP 226–36; defense hygienist Michael Krause, CP 237–54; Mr. Burck, CP 255–67; Mr. Pride, CP 268–78; defense construction expert Matt Lawless, CP 279–90; and Mr. Clark, CP 291–300. Over three months later, on July 16, 2009, Farmers filed its opposition to the reasonableness motion. CP 1046–72.

Farmers' opposition incorporated the separate motions it filed regarding treble damages and the heart-attack claim. CP 1069. Mr. Bird filed a reply brief on July 20, 2009. CP 2095. Mr. Bird submitted additional declarations signed by Mr. Tilden, Mr. Wathen, and Mr. Smart, all regarding treble damages and the heart-attack claim, CP 2174–97; and Mr. Leedom, reflecting his reasonableness opinion, CP 2198–2211. Mr. Bird also submitted additional deposition excerpts for Farmers employee George Gnesda, CP 1960–2071; Mrs. Bird, CP 2116–2127; Dr. Dipboye, CP 2128–34; Ms. Evans, CP 2135–44; Mr. Dykstra, CP 2144–74; Mr. Lilleness, CP 2212–67; and Mr. Kinstler, CP 2268–85.

Farmers filed a motion to “strike certain deposition excerpts offered by Bird.” CP 2847. The motion included charts with literally hundreds of evidentiary objections. CP 2849–2940 (multiple objections per item). The court granted the motion in part and denied it in part. CP 3447–48. Farmers filed a motion to have the knowledge of Mr. Kinstler, the new attorney on Best Plumbing’s defense team, imputed upon Best Plumbing. CP 3142–48. The court granted it. CP 3448. Farmers filed additional briefs regarding the “Definition of ‘Collusion,’” CP 3198–3237, and the “Legislative History of RCW 4.24.630,” CP 3238–77.

A four-day reasonableness hearing started July 2009, more than four months after Farmers received notice, and ended in September. The

court permitted live testimony from Mr. Wathen, Mr. Bird, Mr. Kinstler, and Mr. Chang. The parties presented lengthy oral arguments. On October 2, 2009, the superior court entered its reasonableness ruling. CP 3433. It rejected Farmers' argument that the court should not undertake a reasonableness analysis because of alleged collusion. CP 3435–40. The court worked methodically through each reasonableness factor. CP 3434–3446. It found that damages relating to Mr. Bird's heart attack should not be considered in arriving at a total reasonable settlement figure. CP 3440–42. It found that “the inclusion of some calculation for treble damages is reasonable,” although it reduced those damages by 25 percent to reflect uncertainty. CP 3443, 3446. The court found that “the settlement reflecting 100% recovery” for repairs to the hillside “was reasonable.” CP 3444. As it went through each separate damages item, the superior court found that the \$851,176.78 cost to fix the slope was reasonable “because it was provable at trial and because the Defense's alternative number was speculative and relied upon Mr. Bird serving as his own general contractor.” CP 3445. It found that the \$261,819.33 in repair costs already paid by Allstate was reasonable. *Id.* It reduced Mr. Bird's proposed loss-of-use figure to \$96,000. *Id.* It found that \$64,299.37 in past and future engineering expenses was reasonable. *Id.* And it reduced Mr. Bird's claimed damages for illness from sewage spray, aggravation, lost time,

and emotional distress to \$500,000. CP 3446. The superior court trebled the amounts, discounted them by the 25 percent “trebling claim risk” and arrived at \$3,989,914.83. *Id.* The superior court therefore concluded that the parties’ \$3.75 million settlement was reasonable. *Id.*

The court’s order was the result of a fiercely contested reasonableness hearing. 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. You’ve been a part of it. You’ve got first-hand knowledge of it. We [Farmers] 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. The more than 3,000 pages in the record bear this out.

IV. ARGUMENT

A. The superior court correctly denied the jury demand.

1. Reasonableness hearings under RCW 4.22.060 are an entrenched part of this state’s insurance law.

Besel 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. 146 Wn.2d at 736. That right includes a settlement calling for entry of a stipulated judgment, a covenant not to execute that judgment against the insured, and an assignment to the plaintiff of the insured’s claims against the liability insurer. *Id.* at 736–38. The amount of a covenant judgment will be the presumptive measure of

harm in a later bad-faith or coverage case, provided the settlement is found reasonable under the nine-factor test in *Glover*, 98 Wn.2d at 717–18, and *Chaussee*, 60 Wn. App. at 512. See *Mut. of Enumclaw Ins. Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 266–67, 199 P.3d 376 (2008). The trial court in the underlying case conducts a hearing to determine whether a covenant judgment is reasonable. *Besel*'s exact words: “[T]he *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. Subsequent appellate cases have followed *Besel*, as they must. *E.g.*, *Water’s Edge*, 152 Wn. App. at 584–85; *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 378, 89 P.3d 265 (2004).

The legislature gave birth to reasonableness hearings in 1981 with the passage of RCW 4.22.060. *Glover*, 98 Wn.2d at 714–15. In the days when joint and several liability was the rule, not the exception, the legislature envisioned reasonableness hearings as a way to evaluate settlements involving tort victims and fewer than all tortfeasors, with the result of the hearing being the exact amount a nonsettling tortfeasor could offset from a damages award at trial. *Id.* at 716. But, just as the legislature intended, it has been the judiciary, starting with *Glover*, which has cultivated the substantive and procedural law making up the

reasonableness hearing we know today. *Id.* (observing that, on this matter, the legislature defers to courts). Since 1991, Washington courts have recognized the propriety of conducting the same kind of reasonableness hearing for covenant judgments. *Chaussee*, 60 Wn. App. at 512. In the almost two decades that followed, the legislature addressed the subject of unfair insurance claims handling (2007's Insurance Fair Conduct Act is an example). But the legislature has left untouched the courts' application of RCW 4.22.060 to covenant judgments, *e.g.*, *Howard*, 121 Wn. App. at 377–79, thus signaling its approval of the manner in which courts have developed this area of the law. *See 1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006) (“If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval.”); *id.* at 181 n.8.

Farmers errs when it claims that reasonableness hearings create a moral hazard tilted against insurers. Farmers makes no mention of the moral hazards that covenant judgments are designed to address, insurers who in bad faith elevate their own interests over those of the insured. *See Besel*, 146 Wn.2d at 739–40. Here, Farmers hired litigation experts who relied on unsubstantiated assumptions and who advocated a hillside repair plan that the city did not approve and was therefore inadmissible at trial. *E.g.*, CP 1965 (hiring of Mr. Burck); Hr'g Ex. 35 at 2. Farmers did not

share case evaluations with Best Plumbing. *See, e.g.*, CP 2261–67. After defense lawyer Ms. Smetka told Farmers that the insured stood a 100 percent chance of losing, Hr’g Ex. 37 at 3, Farmers replaced her with Mr. Kinstler, 3 Tr. 407:16–408:3. Mr. Kinstler never discussed the worst-case scenario with Mr. Lilleness as it affected his business, his life, his family, and his house. *Id.* 399:5–8. Mr. Kinstler did not know how many children Mr. Lilleness had, how much equity Mr. Lilleness had in his house, or whether Mr. Lilleness had any assets other than his plumbing business. *Id.* 399:22–400:7. Best Plumbing 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).

So there are interests on both sides. The body of law dealing with reasonableness hearings is the result of the judiciary’s careful and deliberate balancing of those interests. *Glover* holds that the trial court should, in evaluating reasonableness, consider (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. 98 Wn.2d at 717. No one factor controls, and the "trial judge faced with this task must have discretion to weigh each case individually." *Id.* at 718. *Glover* explained that RCW 4.22.060 "does not specify how a hearing on this issue should be conducted," but the supreme court was "confident that trial judges will develop their own procedures for handling these cases." 98 Wn.2d at 718 n.3. For example, when "the issues are complex and the case substantial, a trial judge may require the assistance of expert witnesses." *Id.* The court therefore wrote approvingly of the trial court's reliance on "expert testimony from a well known and respected plaintiff's attorney." *Id.* at 718. In *Pickett v. Stephens-Nelson, Inc.*, the court of appeals stated: "[W]e note the procedures for handling evidence at [reasonableness] hearings are within the trial court's discretion. Thus, the trial judge may require the assistance of experts or less traditional evidence depending upon the complexity of the issues." 43 Wn. App. 326, 335, 717 P.2d 277 (1986).

In fashioning rules for reasonableness hearings, *Glover* considered and rejected several alternatives that would have tilted the scales in favor of either the settling or nonsettling parties. At one extreme, the settling plaintiff had argued that "the only real issue as to reasonableness is whether the parties acted in good faith." 98 Wn.2d at 716-17. The court

rejected that argument because there was a “legitimate concern that the parties would enter into sweetheart deals.” *Id.* at 717 (quotations omitted). At the other extreme, the nonsettling defendant demanded that the trial judge either “conduct a mini-trial” or “postpone approval of the settlement until sometime during or after the litigation between the plaintiff and nonsettling defendant.” *Id.* A mini-trial, said *Glover*, would be “cumbersome.” *Id.* And postponing the reasonableness determination until after the litigation imposed “a potential hardship on plaintiffs” because “plaintiffs would be forced to litigate without the benefit of knowing how much of the judgment would be lost to an offset.” *Id.*

This careful balancing continued in *Chaussee*: “[T]he factors identified by the Supreme Court in *Glover* would logically apply to a determination that a settlement was reasonable in the context of a failure to settle [a] claim.” 60 Wn. App. at 512. *Chaussee* rejected the settling plaintiffs’ argument that “unless the [insurer] can show unreasonableness, bad faith or collusion, the consent judgment is presumptively reasonable.” *Id.* at 510. As in *Glover*, the court of appeals did so because it perceived the possibility “that an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement.” *Id.* Addressing that risk head-on, *Chaussee* held that the settling plaintiff bears the burden of proving reasonableness, *id.* at 512, and it explained:

We see little difference between a determination of reasonableness in the context of the contribution statute and the present claim. In both settings similar concerns exist regarding the impact of a settlement on other parties and the risk of fraud or collusion. Because the *Glover* factors address these concerns and will likely result in a fair resolution, we hold that these factors should be weighed in determining a reasonable settlement in an action for bad faith. A court, using the *Glover* factors, can suitably determine whether a consent judgment is reasonable.

Id. A decade later, the supreme court in *Besel* agreed with *Chaussee*.

Besel, 146 Wn.2d at 738. The *Besel* court thought the moment appropriate, though, to touch upon the countervailing interests of the tort victim and the insured, noting that it is in the insurer's "power to limit its liability by acting in good faith." *Id.* at 740. Having acted in bad faith, the insurer in *Besel* "accepted that it would injure its insured and be held responsible for that injury." *Id.* On the subject of possible fraud and collusion, *Besel* explained that the reasonableness-hearing approach:

promotes reasonable settlements and discourages fraud and collusion. Furthermore, using the amount of a covenant judgment to measure tort damages in this context makes sense in light of our long standing requirement that such settlements be reasonable. If a reasonable and good faith settlement amount of a covenant judgment does not measure an insured's harm, our requirement that such settlements be reasonable is meaningless. Finally, 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.

Id. at 738–39. In the subsequent bad-faith case, the insurer can rebut the presumption arising from a reasonableness-hearing determination by demonstrating that the settlement was the product of fraud or collusion. *Id.* at 739. Contrary to Farmers’ argument, the perceived risk of fraud or collusion in settlement does not warrant departure from settled practice; it is a *raison d’être* for it. This Court has already, post-*Besel*, considered and rejected the arguments attacking RCW 4.22.060 in the covenant-judgment context. *E.g., Howard*, 121 Wn. App. at 377–79. To hold otherwise, as Farmers proposes, would upset Washington courts’ carefully calibrated balance between the interests of insurers and insureds.

In attacking RCW 4.22.060, Farmers zeros in on the statutory text, which in isolation permits a hearing on five days’ notice and does not mention discovery. But the legislature, in passing it, left a major role for judicial craftsmanship, the result of which is nowhere near the inflexible procedure portrayed by Farmers. Contrary to Farmers’ portrayal, the notice received here was four months, not five days, in a case that Farmers had already defended with in-house counsel for over a year. Farmers’ own experiences here and in the recent *Water’s Edge* case demonstrate that the practice Farmers complains about is not what actually occurs. In both *Water’s Edge* and in the present case, Farmers became a party by voluntarily 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 in the present case did. *Water's Edge*, 152 Wn. App. at 582 n.4. In *Water's Edge*, the court ruled in favor of the insurer. *Id.* at 583. In the present case, the court ruled in favor of the settlement. CP 3446. The great care that the superior court below took in discharging its duties under *Glover*, *Chaussee*, and *Besel* is evident from the fact that it diverged significantly from the settling parties’ calculus in nonetheless concluding the overall settlement amount was reasonable. *Id.* In practice, reasonableness hearings are thorough, adversarial, and meaningful exercises in which the settling plaintiff bears the burden of proof. Counsel for Farmers called the proceedings a venue in which to “fight everything,” a model of the “adversarial process.” 4 Tr. 692:11–17. Actual experience with reasonableness hearings is fatal to Farmers’ theoretical fairness claim.

2. 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). In *Schmidt*, the unanimous supreme court held more than 20 years ago that reasonableness hearings are equitable, so there is no right to a jury. 115 Wn.2d at 160. Two years ago, the unanimous supreme court recognized a settlement “judged reasonable **by a judge**” serves as “the presumptive damage award for purposes of coverage.” *T&G Construction*, 165 Wn.2d at 267 (emphasis added). The superior court correctly denied the jury demand.

Farmers calls *Schmidt*’s holding dicta. Not so. Obiter dictum is a statement that does not relate to an issue before the court and is unnecessary to decide the case. *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009). When the statement is in response to the appellant’s urged disposition of the case, that “discussion is not dictum.” *Id.* The important thing about *Schmidt* is that the court decided the issue urged by appellant, “whether RCW 4.22.060 is unconstitutional because it allows the trial court to reduce the total sum of an injured party’s damage award by an amount determined by the trial court rather than by a jury.” 115 Wn.2d at 159. The court’s discussion was not off the cuff. The court devoted an entire section of the opinion to it. Only after examining out-of-state authorities did the supreme court hold: “As both of these cases indicate, the right to jury trial does not extend to procedures in equity such

as whether the amount of a proposed settlement is reasonable. Such questions are properly within the province of the trial court to decide.” *Id.* at 161. This holding was in direct response to the appellant’s urged disposition, so it is not dictum. *Pierson*, 149 Wn. App. at 305. No case in Washington has ever disagreed with *Schmidt*’s holding that “whether the amount of a proposed settlement is reasonable” is a “procedure[] in equity.” *Schmidt*, 115 Wn.2d at 161. The cases uniformly say that reasonableness is determined by the “court” or “judge.” *E.g.*, *Besel*, 146 Wn.2d at 739 (“trial court”); *Glover*, 98 Wn.2d at 718 (“trial judge”).

On May 7, 2010, faced with the same arguments Farmers makes here, the U.S. District Court for the Western District of Washington abstained from ruling whether the Washington Constitution requires a jury in a reasonableness hearing involving a covenant judgment. *Encompass*, slip op. at 10. The court abstained because federal intervention would have been inappropriate regardless of the merits of the insurer’s argument. *Id.* at 9. But, in abstaining, the district court rejected the premise that *Schmidt* was somehow dicta. According to the district court’s opinion, the *Schmidt* case “**held** that the right to jury trial does not extend” to “whether the amount of a proposed settlement is reasonable.” *Id.* at 9 (emphasis added, quotation omitted). And the court recognized that RCW 4.22.060 “does not create a right to a jury in a reasonableness hearing.” *Id.* at 5.

3. *Sofie* does not lead to a different result.

Relying principally on *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), *opinion amended by* 780 P.2d 260 (1989), Farmers contends that the “issue of damages must be decided by the jury.” Appellant’s Br. at 15. The unanimous supreme court decided *Schmidt* a year after *Sofie*, so it could not have agreed with Farmers’ interpretation of the case. Unlike *Sofie*, the present appeal is not from the imposition of damages. Whether damages are awarded against the insurer will depend on whether the claimant proves contract or bad-faith liability in a later lawsuit against the insurer. 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). If the insurer proves that fraud or collusion produced the covenant judgment, the judgment loses its presumptive nature. *Besel*, 146 Wn.2d at 739.

Farmers says differences between a reasonableness hearing in the contribution setting and one in the insurance setting make *Sofie* controlling and *Schmidt* inapplicable. See Appellant’s Br. at 19. But the situations are the same in all material respects. First, in both settings, a reasonableness

hearing is contested and adversarial. The settling parties seek a determination of reasonableness, while the nonsettling party seeks the opposite. Second, in both settings, the result of the reasonableness hearing directly impacts the amount that can theoretically be entered as a judgment in the future. In the contribution setting, the reasonable settlement figure is subtracted from a later damages verdict. In the insurance setting, the settlement figure is added to any other damage found by the jury. Third, 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. Fourth, in both settings, a reasonableness hearing promotes settlement, efficiency, certainty, and compensation of tort victims. And fifth, both settings present a matrix of legal and factual considerations that a trial judge, not a jury, is best suited to evaluate.

Farmers contends that a reasonableness-hearing result should not affect what happens in a later damages action involving a jury. The supreme court considered and rejected that line of argument almost ten years after *Sofie*, in *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998). *Neilson* involved two malpractice cases—one in federal court against the United States as owner of the

Madigan Army Medical Center, the other in state court against a private clinic and physician. *Id.* at 259. The federal case went first and, because it involved the United States, was tried without a jury. *Id.* The federal court found damages in the total amount of \$3,333,202. *Id.* at 260. Then, in the remaining state-court case, the superior court ruled the plaintiffs were “collaterally estopped from relitigating the issue of the amount of damages that would fully compensate them for their injuries.” *Id.* at 261. The supreme court affirmed. Like Farmers, the *Nielson* plaintiffs relied heavily on *Sofie*, but the supreme court refused to read the case so broadly. 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. “Although the factual issue of damages is a jury question in Washington, there must be an issue of fact to resolve in order for that right to arise. Where the issue has been resolved in a prior proceeding, no fact-finding duty remains for a jury on that issue.” *Id.* at 269. *Nielson* is not alone in so holding. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333–37, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

4. Authorities from other states agree with *Schmidt*.

Farmers cites *Hamilton v. Maryland Casualty Co.*, 117 Cal. Rptr. 2d 318, 41 P.3d 128 (Cal. 2002), for the proposition that a reasonableness

hearing is inappropriate for determining the measure of damages caused by an insurer's bad faith. To accept *Hamilton's* analysis, however, would be tantamount to upending the foundational principles governing pretrial covenant judgments, as appears to be Farmers' intent, not just the role that reasonableness hearings play in our system. In Washington, an insured defendant may independently negotiate a pretrial covenant judgment if his insurer refuses in bad faith to settle the plaintiff's claims, with the amount of the reasonable settlement serving as the presumptive measure of harm in a subsequent bad-faith case. *Hamilton's* holding is not that a jury should decide reasonableness—the word *jury* appears in the opinion just once, in a different context—but that a covenant judgment entered before trial does not create a presumption of damages, period. 41 P.3d at 133. It was in the context of that holding that the court said it made no difference if the covenant judgment was confirmed under California Code of Civil Procedure § 877.6. *Hamilton* is incompatible with Washington law, which *Hamilton* itself acknowledged in citing *Chaussee. Id.* at 138 & n.3.

More analogous is *American Casualty Co. v. Kemper*, Nos. CV-07-1149-PHX-GMS, CV-07-1520-PHX-GMS, 2009 WL 1749388 (D. Ariz. June 18, 2009), which holds that the Seventh Amendment does not guarantee a jury in a hearing in which the insurer opposes a settlement's reasonableness. *See also S.S. v. Alexander*, 143 Wn. App. 75, 93, 177 P.3d

724 (2008) (“We will apply the majority approach and cite to unpublished federal court decisions where appropriate.”). Applying a “historical test,” the court held “the claims and issues underlying the reasonableness hearing are essentially equitable,” 2009 WL 1749388, at *2.

The underlying claim at issue is [the insurer’s] request for a declaratory judgment that the settlement amount was unreasonable, and declaratory judgments are generally creatures of equity. Additionally, the type of determination to be made—the reasonableness of an award decided between two parties to be imposed on another—rests on traditional concerns of fairness that lie at the heart of a court’s equitable powers.

Id. (citations omitted). “Indeed, the persuasive authority of which the Court is aware either directly holds or strongly suggests that reasonableness determinations are the province of trial court judges.” *Id.*

The Minnesota supreme court reached the same conclusion that reasonableness hearings are equitable in *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990):

[The insurer] argues this case is no different than a historically “legal” action for the recovery of money. We believe, however, this case is more accurately portrayed as an action to enforce an agreement against an indemnifier who was not a party to the agreement. The decisionmaker is being asked to apply its sense of fairness to evaluate a compromise of conflicting interests, a characteristic role for equity. In short, this action is more like an action in equity, which traditionally is tried to the court.

Id. The court explained that a judge sitting in equity is best equipped to make the reasonableness determination.

[T]he nature of the evidence does not lend itself well to appraisal by a jury. The ultimate issue to be decided is the reasonableness of a settlement which avoids a trial. Reasonableness, therefore, is not determined by conducting the very trial obviated by the settlement. Consequently, the decisionmaker receives not only the customary evidence on liability and damages but also other evidence, such as expert opinion of trial lawyers evaluating the “customary” evidence. This “other evidence” may include verdicts in comparable cases, the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried, and other factors of forensic significance.

Id. Thus the *Alton M. Johnson* case correctly concluded, “The evaluation of this kind of proof is best understood and weighed by a trial judge.” *Id.*

5. The court exceeded the requirements of due process.

Farmers contends that a non-jury reasonableness determination violates due process. But Farmers did not argue this below. As a result, Farmers waived the argument unless it proves “manifest error,” which it cannot do. Farmers’ due-process argument fails because it depends on the existence of a right to a jury in reasonableness hearings. *See* Appellant’s Br at 21–22. *Schmidt* holds there is no such thing.

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). In *Red Oaks*, the court held that a reasonableness hearing comported with due process even though there was no discovery and the superior court denied the insurer’s request for a continuance. 128 Wn.

App. at 321. *Red Oaks* forecloses Farmers' argument. As discussed above, the present case was a fiercely contested matter spanning half a year, involving discovery and thousands of pages of court filings. In comparison to *Red Oaks*, the reasonableness proceedings below exceed due-process minimums by orders of magnitude.

In the new *Encompass v. Lennon* opinion, the Western District of Washington dismissed the same due-process argument (albeit under the U.S. Constitution) Farmers makes here. Slip op. at 5–6. *Encompass* claimed that denying a jury in a reasonableness hearing violates due process because the settlement amount serves as an irrebuttable amount of damages. *Id.* Rejecting the argument, the district court reasoned:

This argument does not hold water. To claim that the amount of the settlement is irrebuttable is to pretend that the reasonableness hearing does not exist. ... There was no presumption in favor of the settlement amount in the reasonableness hearing. As [the settling parties] point out, some stipulated judgments will survive the hearing, and some will not. The settlement was approved, and it operates with the normal preclusive effect of a final state judgment. *Encompass'* attempts to litigate these issues yet again appear to be a tactic to stall payment and re-roll the dice.

As a matter of law, *Encompass* has failed to show that it was not afforded due process.

Id. at 6. The same is true here.

B. This Court should affirm the reasonableness determination.

Appellate courts give great deference to superior courts'

reasonableness determinations. To prevail in this appeal, Farmers must show that the superior court abused its discretion in finding the covenant judgment reasonable. *Water's Edge*, 152 Wn. App. at 584. "A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons." *Id.* "[A] reasonableness hearing necessarily involves factual findings which we will not disturb on appeal if substantial evidence supports them." *Id.* Farmers contends that (1) the settlement was "collusive as a matter of law," (2) the superior court erred in including treble damages under RCW 4.24.630, and (3) the superior court erred in finding that the settlement value of the property-damage claim was 100 percent of the repair cost. Each of the arguments is unavailing.

1. Farmers' collusion argument fails.

a. There is no such thing as "collusive as a matter of law" in reasonableness hearings.

Farmers contends the settlement was "collusive as a matter of law," Appellant's Br. at 39, such that the superior court erred by even undertaking the reasonableness analysis. "Collusion as a matter of law" is a concept foreign to Washington law. *Glover*, *Chaussee*, and *Besel* say the opposite of what Farmers advocates. They require trial courts to consider nine reasonableness factors, only one of which involves any evidence of bad faith, collusion, or fraud. *Glover*, 98 Wn.2d at 717; *Chaussee*, 60 Wn.

App. at 512; *Besel*, 146 Wn.2d at 738. The cases caution that no one factor controls and that the “trial judge faced with this task must have discretion to weigh each case individually.” *Glover*, 98 Wn.2d at 718; *Chaussee*, 60 Wn. App. at 512. Because it is contrary to these authorities, Farmers’ argument is easily rejected. The superior court acted within the confines of Washington law. It could not possibly have abused its discretion by undertaking the nine-part reasonableness analysis.

Farmers’ argument, evident from both the text and the tenor of its brief, seems directed against the very notion of an independently negotiated covenant judgment. Under *Besel*, an insured defendant has the right to negotiate a pretrial settlement, independent of his liability insurer, if the insurer refuses in bad faith to settle the plaintiff’s claims. 146 Wn.2d at 736. That is what occurred here. Best Plumbing independently negotiated a settlement with Mr. Bird, and it hired attorney Mr. Dykstra to assist. Farmers says that Mr. Bird wanted to “create as big a pie as possible” and that Best Plumbing’s “only incentive was to secure its release with an assurance that the financial burden would fall on Farmers.” Appellant’s Br. at 43. But both *Chaussee* and *Besel* took a realistic view of the incentives facing parties negotiating a covenant judgment and fashioned a carefully calibrated rule that addresses Farmers’ concerns. In its written analysis leading up to *Besel*’s adoption of *Chaussee*, the

supreme court reasoned:

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

Id. at 737–38. The “specter of collusive or fraudulent settlements” is a motivating force behind the nine-factor reasonableness analysis for covenant judgments, not a reason to refuse to conduct the analysis. Farmers' argument cannot be reconciled with Washington law.

Water's Edge, cited by Farmers, actually supports continued adherence to *Chaussee* and *Besel* because that case demonstrates that superior courts are quite capable of considering evidence of collusion within the nine-factor reasonableness-hearing framework. Nothing in the opinion discusses the concept of “collusion as a matter of law.” To the contrary, *Water's Edge* repeats the settled rule that “evidence of bad faith, collusion, or fraud” is one out of the nine reasonableness factors to be considered, that no single factor controls the analysis, and that the superior court has discretion to weigh each case individually. 152 Wn. App. at 584–85. Only after weighing the factors did the court conclude that \$400,000—not \$8.75 million as the settling parties proposed—was the

reasonable amount of settlement that the plaintiff could use as the presumptive measure of damages in a subsequent bad-faith case if the settling parties so chose. *Id.* at 576, 603.

Water's Edge did not define collusion in the manner proposed by Farmers but merely observed that the trial court found the circumstances troubling. *Id.* at 595. There, plaintiff's counsel contacted defendants without notice to their insurer-appointed defense counsel; ghost-wrote a letter critical of defense counsel for the defendants to send their insurer; and hand-picked the lawyers who would negotiate the covenant judgment on the defendants' behalves. *Id.* The hand-picked lawyers then actively undermined insurance defense counsel's litigation work, including the withdrawal of a defense summary-judgment motion. "[T]he parties appeared to have a joint venture type relationship in which [plaintiff] agreed to kick back some of the proceeds from any recovery" from a bad-faith case against the insurer and a malpractice case against insurance defense counsel. *Id.* The troubling facts in *Water's Edge* are absent here.

b. Farmers' reliance on *Continental Casualty v. Westerfield* is misplaced.

Farmers takes the concept of "collusion as a matter of law" from *Continental Casualty Co. v. Westerfield*, a case in which a district court clearly hostile to covenant judgments, 961 F. Supp. 1502, 1505–06

(D.N.M. 1997), held that the evidence of collusion was so grave and one-sided that the judgment from the prior proceeding was “not entitled to any *res judicata* or collateral estoppel effect,” *id.* at 1509. *Westerfield* is different from our case in decisive ways. *Westerfield* was not an appeal from the underlying proceeding in which the settlement occurred, but was the subsequent coverage case between the plaintiff assignee and the insurer. The underlying case in *Westerfield* did not involve a contested reasonableness hearing at which the insurer had notice and an opportunity to contest reasonableness. It involved, literally, a fake trial at which the plaintiff and defendant pretended to be adverse to each other when in fact they had already settled and agreed to split any future judgment against the insurer. *Id.* at 1506–07. Although the trial court knew about the settlement, it “believed the proceedings before him were truly adversarial” and “did not then comprehend” that the settling insured “actually retained a 10 percent stake in the amount of any judgment entered against him.” *Id.* at 1507–08. Before the fake trial, plaintiff’s counsel entered into last-minute settlements with other defendants to prevent “any evidence or argument contrary to that presented by [plaintiff] in his *prima facie* case on liability and as to damages.” *Id.* at 1509. The settling insured then failed to present any of his available meritorious defenses and failed to oppose any of the evidence or argument put on by the plaintiff. *Id.* at 1508–09. It was under

these circumstances that the *Westerfield* court held that the result of the fake trial was entitled to zero preclusive effect in the later coverage case:

To fail to find collusion in fashioning an unreasonable settlement under these circumstances would be to authorize manipulation which compromises the integrity of the adversary system. A stamp of judicial approval must be more than a rubber stamp of a one-sided presentation when it is presented under the guise of a dispute.

Id. at 1509. The present case could not be more different.

The lawyers representing Mr. Bird and Best Plumbing negotiated the settlement; disclosed its terms to the insurer and the court; and then participated in an adversarial reasonableness hearing in which the insurer voluntarily intervened, obtained discovery, fought “everything,” and had ample opportunity to expand upon available defenses. To conclude that the court “rubber stamped” a “one-sided presentation” would require ignoring the entire, voluminous record (well more than 3,000 pages) of the reasonableness proceedings. As the court found, “there was no fraud, no kickback to the released party, and no sham proceeding for determination of reasonableness.” CP 3436. “Here, the parties had the opportunity to explore fully what did and did not occur in the formulation of the covenant judgment.” *Id. Westerfield* never would have occurred had the settling parties given notice of the settlement to the insurer and had the trial court conducted a contested hearing with the insurer afforded a full and fair

opportunity to participate—as Washington wisely requires.

c. The superior court correctly disposed of Farmers' collusion argument.

Each of the superior court's findings on the issue of collusion is supported by substantial evidence. In the following discussion, citations to the findings are followed by citations to substantial supporting evidence in the record. The superior court found that a turning point occurred when both Mr. Bird and Best Plumbing retained new counsel. CP 3437; *see* CP 2193–97; 2 Tr. 324:10–326:6. Mr. Bird hired Mr. Smart to assist Mr. Wathen, and Farmers replaced Ms. Smetka with Mr. Kinstler. CP 3437; *see* 2193–97; 2 Tr. 324:10–326:6. “Each of these gentlemen breathed new life into their clients' claims and defenses and projected to their respective clients great enthusiasm toward the merits of their cases.” CP 3437; *see* CP 2178–81, 2193–97. Best Plumbing, of its “own volition,” then hired Mr. Dykstra “for a second opinion.” CP 3437; *see* CP 2146–47, 2214–15, 2217–18. Mr. Smart's valuation of Mr. Bird's case was more optimistic than Mr. Wathen's. CP 3438; *see* CP 2178–81, 2193–97. As the superior court found, Mr. Smart concluded that

- 1) a personal injury claim based on Mr. Bird's heart attack
- and 2) a claim for treble damages under the intentional trespass statute RCW 4.24.630 would be allowed, would go to the jury, and would prevail despite a stipulation and order regarding no new claims and witnesses.

CP 3438; *see* CP 2178–81, 2193–97. On the other side, although Mr. Kinstler said Best Plumbing was “enthusiastic about the prospects for showing at trial that Mr. Bird had grossly inflated his claims in order to get Best Plumbing to finance improvements to his property and home,” the court found that “[t]his view is in direct contrast to that held by Defendant’s previous trial counsel, who opined that Best would lose on liability.” CP 3438; Hr’g Ex. 37 at 3. “Mr. Lilleness was aware that Plaintiff’s trial demand would be in the \$9.7 million range.” CP 3439; *see* CP 2826; 4 Tr. 609:22–610:9. When Mr. Dykstra came on board, he worked on Best Plumbing’s behalf “to limit his client’s exposure by negotiating the covenant judgment.” CP 3439; *see, e.g.*, CP 2151.

Farmers criticizes Mr. Dykstra’s work in negotiating the settlement. Although the court found that Mr. Dykstra did not do as thorough an analysis as “one might do in preparation for trial,” it also found that he “negotiate[d] and evaluate[d] the claims prior to settlement and the terms of the agreement changed during those negotiations with regard to amounts, post settlement obligations of the defendant, factual recitations, scope of participation of counsel appointed by Farmers, and assignment of experts and privileges.” CP 3439; *see* 166–67, 2147–48, 2167. Mr. Dykstra “review[ed] drafts of the Motion in Limine and trial briefs.” CP 3439; *see* CP 1086, 2148–50. “Based on these facts this Court

concludes that Mr. Dykstra did evaluate the case to determine the risk of an excess judgment against his client.” CP 3439. The evidence plainly supports the court’s finding.

2. The trial court correctly ruled that Mr. Bird was likely to prevail on his request for treble damages.

Farmers contends that the trial court “misconstrued RCW 4.24.630 and erroneously concluded” that Mr. Bird’s “claim for statutory trespass had substantial settlement value.” Appellant’s Br. at 49. To the contrary, the superior court’s finding is compelled by the plain language of the statute, the evidence, and controlling case authorities.

a. Mr. Bird did not have to amend his complaint.

Farmers says Mr. Bird failed to plead RCW 4.24.630 and so could not have recovered treble damages. But Mr. Bird did not confine his pleadings to “negligent trespass” as Farmers says. The complaint asserted separate negligence and trespass claims. CP 7. The trespass claim alleged:

4.1 Best Plumbing intruded onto the property of Mr. Bird without the permission of Mr. Bird. Best Plumbing’s intrusion interfered with Mr. Bird’s rights and possession of his property.

4.2 Mr. Bird has been damaged as a result of Best Plumbing’s trespass in an amount to be proven at trial.

Id. Important to note, common-law trespass incorporates intentional / unreasonableness concepts, just as the statute does. *See Brutsche v. City of Kent*, 164 Wn.2d 664, 673–74, 193 P.3d 110 (2008). Mr. Bird’s

allegations met the Civil Rules' notice-pleading requirements. CR 8(a). Under CR 9(i)–(j), a plaintiff need only plead ordinances and private statutes, not public statutes like RCW 4.24.630.

RCW 4.24.630 does not create a substantive action but provides a civil remedy. As a result, Farmers errs in claiming it constitutes a separate “cause of action” that had to be pleaded. Civil Rule 54(c) provides: “Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, **even if the party has not demanded such relief in his pleadings**” (emphasis added). In *Allstot*, the court held that the trial court should have allowed plaintiff to seek statutory double damages even though the applicable statute was not pleaded in the complaint and was not raised until the trial brief. 114 Wn. App. at 632. The same applied here, so the superior court correctly found Mr. Bird would be allowed to seek treble damages. Finally, Farmers also errs when it says the superior court found Mr. Bird “could have amended his complaint.” Appellant’s Br. at 56. The superior court actually hinged its finding on CR 8(a)’s liberal pleading requirements, CR 54(c), and *Allstot*. CP 3442.

b. The superior court correctly found a 75 percent likelihood of damages under RCW 4.24.630.

RCW 4.24.630 authorizes treble damages and attorney’s fees for

instances of wrongful trespass:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party’s reasonable costs, including but not limited to investigative costs and reasonable attorneys’ fees and other litigation-related costs.

RCW 4.24.630(1). Based on the plain text, 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.

Below, Farmers argued that “inclusion of treble damages and attorney fees based on an alleged claim for statutory trespass under RCW 4.24.630—requiring that Best Plumbing commit an intentional act with some element of malice—is the product of collusion and entirely without justification.” CP 397. Farmers now drops the malice part of its argument

and states that the statute requires “an intent to cause harm.” Appellant’s Br. at 50. But the term *harm* is not 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 speaks for itself: Once the plaintiff proves the three elements identified above, 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).

Three key facts pertinent to RCW 4.24.630 are undisputed: The plumber went onto Mr. Bird’s land. Appellant’s Br. at 3. The plumber injured the land and improvements by cutting the sewer line in several places. *Id.* And the plumber intended to cut the sewer line. 4 Tr. 640:6–10. These facts substantiate the court’s finding, uncontroverted on appeal, that “[u]ncontradicted evidence at trial would show the first two elements of the claim: 1) Defendant’s employee going onto Bird’s property and 2) causing waste or injury to the land or improvements.” 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.* Best Plumbing apparently sent an unlicensed plumber to the area. CP 234–35. The plumber knew or had reason to know that he did not have authority to cut the sewer line. CP 2234–36. Even Mr. Kinstler testified that he went to the location and found “there is a straight line that divides Goldman and Bird’s property.” CP 2275. Furthermore, a side sewer card—available at the touch of a button on the City of Seattle website, showed exactly the location of each homeowner’s live sewer pipe. CP 233, 3662–63. And although the superior court said the defense theory conceivably might have had merit with a jury sympathetic to Mr. Lilleness, CP 3443, Best Plumbing’s lawyer Mr. Dykstra had concluded that Mr. Lilleness would not be a sympathetic witness for his company, CP 2149, 2153–54. In contrast, the defense believed Mr. Bird would make a sympathetic witness. *See, e.g.*, CP 2272–73.

c. Case law supports the superior court’s ruling.

Nothing in *Standing Rock Homeowners Association v. Misich*, 106 Wn. App. 231, 23 P.3d 520 (2001), lends Farmers support. There, the defendant intentionally removed a gate, *id.* at 237; here, the plumber intentionally cut a sewer pipe and removed a portion of it. The correctness of the court’s ruling below was confirmed in *Clipse*, a new case interpreting RCW 4.24.630. Absent from *Clipse* is anything requiring an intent “to cause harm.” The intent requirement applies to the act, not the

proximately caused damages claimed by the plaintiff. *Clipse* holds: “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.* at 580 (first emphasis added). This is what the court below held, so its inclusion of treble damages in the reasonableness analysis could not possibly have been an abuse of discretion.

d. Farmers’ due-process argument is a red herring.

Farmers briefly asserts the court’s interpretation of RCW 4.24.630 violates due process because it would authorize “punitive damages when the level of culpability is no greater than negligence.” Appellant’s Br. at 54. Not so. First, RCW 4.24.630(1) requires more than bare negligence; it requires an intentional act of injury or waste. Truly, the plumber in this case acted in a reprehensible manner. He 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 Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

Second, in the case cited by Farmers, *Campbell*, the 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 muster. 538 U.S. at 425 (“Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in range of 500 to 1”); *see also Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009). The statute here easily meets due-process requirements.

3. The trial court correctly included 100 percent of repair costs in the reasonableness analysis.

Mr. Bird demolished the defense experts and theories. Did Best Plumbing cause all the slope distress? Did the disturbance include the area right behind the house? The answer to both these questions, said Mr. Pride, was yes. CP 270–71, 277–78. Did the defense have an alternative to the city-approved repair? Absolutely not. The city is requiring walls on the upper and lower parts of the hill. Hr’g Ex. 31 at 4. Mr. Pride had a cheaper fix, but he testified he did not know the city’s requirements. CP 272. Mr. Clark, the contractor, could not put a price on it. CP 294–95, 297–98. Mr. Kinstler admitted “it would be illegal to perform a repair the City will not approve.” 3 Tr. 405:21–23. Mr. Miller said the proposal was inadmissible. Hr’g Ex. 35 at 2. Did the pipe leak for the eight months? Yes, as shown

stunningly in Mr. Jacobson's videotaped demonstration. *Id.* Ex. 9. Mr. Jacobson testified the entire contents of the pipe uphill from the faulty repair would have leaked onto the hillside daily. CP 224–25. No surprise, Mr. Kinstler was not going to call Mr. Jacobson at trial, 3 Tr. 433:7–434:1, as no seasoned trial lawyer would.

The defense was left grasping at straws. Farmers faults Mr. Bird for not calling to report ongoing sewage emissions, but it leaves out that Best Plumbing said it fixed the problem and that Mr. Bird justifiably, in retrospect erroneously, assumed it did. CP 3494. Mr. Bird did not discover the continuing leak until months after, and then he fixed it right away. 2 Tr. 257:6–16. Farmers says other properties have had instability problems, but it has no evidence of pre-existing instability on **this** property. CP 3444; 2 Tr. 223:21–224:9. Farmers says that Mr. Chang attributed the instability to Mr. Bird's "excavation," but Mr. Chang, like Mr. Pride, said sewage caused the instability. 3 Tr. 505:14–25, 507:17–509:1. Mr. Chang explained that "stability was decreased further when Mr. Bird began excavating on the slope **in an attempt to remove contaminated soils**"—*i.e.*, mitigating the problem Best Plumbing caused. *Id.* 508:9–509:1 (emphasis added). Mr. Kinstler had "no plan at all" to show that Mr. Bird had some other motive for removing the material. *Id.* 437:13–438:8. Farmers says, in response to Mr. Jacobson's embarrassing videotape and

deposition testimony, that he had a new idea involving pipe “residue” and that he would tell the jury he did not know whether the pipe leaked or not. This no-opinion opinion, besides contradicting the video and deposition, was undisclosed and inadmissible. *Detwiler v. Gall, Landau & Young Construction Co.*, 42 Wn. App. 567, 572, 712 P.2d 316 (1986).

Such was the landscape of the case that caused Mr. Lilleness to become extremely concerned about excess-liability risk and retain independent counsel for a second opinion. He was not alone in his concern. Defense counsel submitted a report to Farmers on January 13, 2009, assessing “Insured’s Liability” to be “100%,” and “Plaintiff’s Liability” to be “0.00%.” Hr’g Ex. 37 at 3. Mr. Kinstler testified that the defense lawyers who issued the pretrial assessments are great lawyers with seasoned judgment. 3 Tr. 403:13–20. The record evidence gave the superior court every reason to find:

The damage done to Mr. Bird’s property and to his and his wife’s enjoyment of life because of the slide damage were stunningly depicted both by his own testimony and by the exhibits prepared for trial. No persuasive evidence emerged that there were historical problems with respect to the stability of the property. The assertions that Mr. Bird himself caused the slides and resulting damage lacked a theory as to intent. Furthermore, ample expert testimony supported Plaintiff’s theory that a pipe leaking over time caused the devastating damage. On the other hand, Defense experts’ changing theories weakened their claims, and Defendant’s original trial counsel asserted their chances at trial as worsening as of

December, 2008. Therefore, the settlement reflecting a 100% recovery on this issue was reasonable.

CP 3444.

V. CONCLUSION

This Court should have little difficulty discerning what is occurring here. After more than five years, in case in which liability was determined on summary judgment, Mr. Bird's property remains unrepaired. Farmers' practice of "fighting everything" is not limited to reasonableness hearings. In this case, where Farmers lost, it complains that the procedure is unconstitutional. In *Water's Edge*, where Farmers won, its praise for the trial court for following the procedure it attacks here was effusive. Settled Washington case law dictates the answer to each issue raised by Farmers. Therefore, a single conclusion can be drawn from analysis of Farmers' efforts. It simply wants to "stall payment and re-roll the dice." *Lennon*, slip op. at 6.

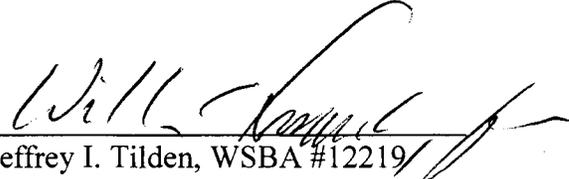
Mr. Bird respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

KELLER ROHRBACK L.L.P.

By 
William C. Smart, WSBA #8192
Isaac Ruiz, WSBA #35237

GORDON TILDEN THOMAS &
CORDELL LLP

By 
Jeffrey I. Tilden, WSBA #12219

Attorneys for Respondent James Bird

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of May, 2010, I caused the within document to be served to the following:

Via Hand Delivery

Mr. Matthew J. Sekits
Mr. Jerret E. Sale
Ms. Deborah Carstens
Ms. Janis Puracal
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Seattle, WA 98101-1618

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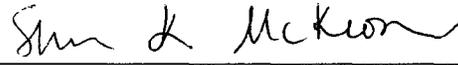
Mr. A. Richard Dykstra
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Via U.S. Mail

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Portland, OR 97204

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAY 10 PM 4:22

DATED May 10, 2010, at Seattle, Washington.

A handwritten signature in cursive script, reading "Shannon K. McKeon".

Shannon K. McKeon

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JAMES BIRD,)	
)	
Respondent,)	No. 64291-0
v.)	
)	DECLARATION OF ISAAC
BEST PLUMBING GROUP, LLC,)	RUIZ IN SUPPORT OF
)	RESPONDENT'S BRIEF
Respondent,)	
v.)	
)	
FARMERS INSURANCE)	
EXCHANGE,)	
)	
Appellant.)	

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAY 10 PM 4:22

ISAAC RUIZ declares:

1. I am the attorney for the respondent herein, over the age of 18, and competent to make the statements herein from personal knowledge.
2. Attached hereto is a true and correct copy of the following:

ORIGINAL

Exhibit A: Opinion dated May 7, 2010, in the case of
*Encompass Insurance Company of America v. Lennon and
Wright*, United States District Court, Western District of
Washington, Cause No. C09-0111JCC.

**I certify under penalty of perjury under the laws of
Washington that the foregoing is true and correct.**

Executed this 10th day of May, 2010, in Seattle, Washington.



Isaac Ruiz

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of May, 2010, I caused the within document to be served to the following:

Via Hand Delivery

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Via U.S. Mail

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Portland, OR 97204

FILED
COUNTY OF KING
2010 MAY 10 PM 4:23

DATED May 10, 2010, at Seattle, Washington.



Shannon K. McKeon

EXHIBIT A

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ENCOMPASS INSURANCE COMPANY
OF AMERICA,

Plaintiff,

v.

LACY LENNON and DEIRDRE WRIGHT,

Defendants.

NO. C09-0111JCC

ORDER

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Dkt. No. 21), Defendants' preliminary response (Dkt. No. 38), Plaintiff's reply (Dkt. No. 47), Defendants' supplemental response (Dkt. No. 70), Plaintiff's motion to strike the supplemental response (Dkt. No. 72), Plaintiff's motion for protective order (Dkt. No. 74), Defendant Wright's response (Dkt. No. 78), Plaintiff's reply (Dkt. No. 80), and Plaintiff's motion to strike declaration. (Dkt. No. 77.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motions and DISMISSES Encompass' federal and state constitutional claims for the reasons explained herein.

1
2 **I. BACKGROUND**

3 This case involves a constitutional dispute over an insurer's right to have a jury
4 review settlement amounts when those settlements have been reached without the direct
5 participation of the insurer. Encompass Insurance Company of America issued Lacy Lennon
6 a vehicle insurance policy with limits of \$100,000 per person and \$300,000 per occurrence.
7 (Mot. 1 (Dkt. No. 21).) On February 15, 2006, Lennon rear-ended the car in which Deirdre
8 Wright was a passenger. Lennon later admitted liability for the accident. (Resp. 5 (Dkt. No.
9 38).) Following the accident, Wright complained of a range of cognitive and visual problems
10 and sought treatment from multiple doctors. (*Id.* at 5–6.)

11 In November 2006, Wright filed suit in King County Superior Court for damages
12 arising from the accident. (Mot. 3 (Dkt. No. 21).) Wright offered to settle for the policy limit
13 on two occasions, but received no reply from Encompass. (Koplin Decl. Exs. A & G (Dkt.
14 No. 39).) In addition to Lennon and Encompass, Wright filed suit against American
15 Commerce Insurance Co., the provider of her underinsured motorist coverage policy. (*Id.*)
16 According to Wright, ACIC's preparation for trial was far more rigorous than that of
17 Encompass, and included retention of a neuropsychologist, otolaryngologist, neurologist,
18 and neuro-ophthalmologist. (Resp. 7 (Dkt. No. 38).) Confronted with ACIC's phalanx of
19 experts, Wright settled with ACIC for \$100 and moved to strike the use of their experts at
20 trial. (*Id.*; Mot. 3 (Dkt. No. 21).)

21 On January 13, 2009, a week before trial, Lennon retained her own counsel. (Resp. 7
22 (Dkt. No. 38).) Lennon and Wright's counsel entered into settlement negotiations, and on
23 January 15, 2009, Lennon and Wright agreed to a prospective settlement for \$1.2 million,
24 subject to a court's determination of the reasonableness of that amount. (*Id.* at 8.)

25 On January 16, 2009, Wright brought the judgment to the Honorable Laura Gene
Middaugh for a reasonableness hearing, and provided notice to Encompass so that they

1 could participate in the hearing. (Mot. 4 (Dkt. No. 21).) On April 17, 2009, Judge Middaugh
2 denied Encompass' requests for: a jury trial, a stay pending this Court's decision, and a civil
3 case schedule. (Mot. 5 (Dkt. No. 21).) However, Judge Middaugh granted Encompass a stay
4 to conduct limited discovery to depose Lennon's attorneys as to whether the \$1.2 million
5 settlement had been the product of collusion. (*Id.*) Judge Middaugh reviewed over 400 pages
6 of documents and in December 2009, ruled that the settlement had been reasonable. (*Id.* at 8;
7 Koplin Decl. Ex. M at 2 (Dkt. No. 39).) Encompass promptly filed a notice of appeal to the
8 Washington Court of Appeals, Division I. (*Id.*)

9 On January 26, 2009, Encompass filed this action. (Compl. (Dkt. No. 1).) Encompass
10 now moves for a determination of whether Judge Middaugh's decision violated the federal
11 Constitution or Encompass' right to a jury trial under article I § 21 of the Washington
12 Constitution.

13 **II. REASONABLENESS HEARINGS**

14 Under Washington law, when a claimant brings a claim against an insured and the
15 insurance company declines to settle the claim or defend the case, the insured and the
16 claimant may negotiate a settlement in which the insured assigns its coverage rights and
17 bad-faith claim against the insurance company to the claimant. *See, e.g. Besel v. Viking Ins.*
18 *Co.*, 49 P.3d 887 (Wash. 2002). In order to promote reasonable settlements and minimize
19 collusion between the insured and the claimant, the amount of a settlement will be the
20 presumptive measure of an insured's harm in the subsequent bad-faith action only if the
21 settlement is approved in a reasonableness hearing, as specified in Wash. Rev. Code. §
22 4.22.060(1).¹ *See id.* at 891–892.

23
24 ¹ A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or
25 similar agreement with a claimant shall give five days' written notice of such intent to all other
parties and the court. The court may for good cause authorize a shorter notice period. The notice
shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the
reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence.
A determination by the court that the amount to be paid is reasonable must be secured. . . .

1 In the reasonableness hearing, the judge weighs nine *Chaussee* factors to determine
2 whether to approve the settlement: (1) the releasing person's damages; (2) the merits of the
3 releasing person's liability theory; (3) the merits of the released person's defense theory; (4)
4 the released person's relative faults; (5) the risks and expenses of continued litigation; (6)
5 the released person's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the
6 extent of the releasing person's investigation and preparation of the case; (9) and the
7 interests of the parties not being released. *Chaussee v. Md. Casualty Co.*, 803 P.2d 1339,
8 1343 (Wash. Ct. App. 1991).

9 **III. DISCUSSION**

10 **A. Federal Constitutional Claims**

11 Encompass argues that Wash. Rev. Code § 4.22.060, as applied, violates both the
12 Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United
13 States Constitution. (Mot. 21 (Dkt. No. 21).)

14 **1. Due Process**

15 The Due Process Clause prohibits a state from depriving a person of property
16 without due process of law. To determine how much process is due, the Court turns to the
17 familiar *Mathews* test, which balances (1) the private interest at stake, (2) the risk of
18 erroneous deprivation and the value of additional process, and (3) the government's interest
19 and the cost of additional process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews*
20 does not require a full trial before a state deprives a person of property, merely "some form
21 of hearing." *Id.* at 333.

22 In this case, the private and governmental interests at stake are not in dispute; it is the
23 adequacy of the existing procedural protections that is at issue. Encompass claims that the
24 reasonableness hearing was deficient in two ways.

25 The burden of proof regarding the reasonableness of the settlement offer shall be on the party
requesting the settlement. Wash. Rev. Code. § 4.22.060(1).

1 First, Judge Middaugh permitted only limited discovery on fraud and collusion in the
2 negotiation of the settlement. The examples of “severely truncated” discovery Encompass
3 provides are: a) it was not permitted to obtain the settlement agreement between Wright and
4 ACIC, and b) it cannot engage in discovery on the unreasonableness or collusive nature of
5 the settlement agreement between Lennon and Wright in the later coverage/bad faith action.
6 (Mot. 24 (Dkt. No. 21).) The Court is not convinced.

7 Encompass offers no support for the proposition that Judge Middaugh offended the
8 requirements of due process by shielding a single confidential settlement between the
9 claimant and her insurer from discovery. The effect of the agreement is known to all parties:
10 ACIC had a liability of \$250,000 and settled with Wright for \$61,000 (\$100 and forgiveness
11 of recovery of medical bills paid) and withdrawal of its experts. (Koplin Decl. Ex. M at 9
12 (Dkt. No. 39).) Judge Middaugh found that this appeared to be a “very beneficial and
13 reasonable deal to both sides,” (*id.*) and Encompass has failed to allege how additional
14 process in the form of further discovery could have reduced the risk of erroneous
15 deprivation.

16 With respect to discovery in the later coverage/bad faith action, Encompass again
17 fails to establish the value of further process. Encompass does not deny that it was granted
18 discovery on the issue of whether Lennon and Wright colluded in the reasonableness
19 hearing. (Mot. 5 (Dkt. No. 21).) Rather, Encompass is arguing that it should be granted a
20 *second* round of discovery on this same subject. Encompass fails to explain—and the Court
21 does not see—how a second round of discovery will reduce the possibility of error.

22 Second, Encompass protests that Judge Middaugh denied its request for a jury trial.
23 Wash. Rev. Code § 4.22.060 does not create a right to a jury in a reasonableness hearing.
24 Encompass’ argument is that a) the settlement amount is, “irrebuttably, the damages
25 experienced by the insured” and b) an irrebuttable presumption offends due process as it

1 arbitrarily deprives a party of a meaningful opportunity to rebut the presumption. (Mot. 22–
2 23 (Dkt. No. 21).)

3 This argument does not hold water. To claim that the amount of the settlement is
4 irrebuttable is to pretend that the reasonableness hearing does not exist. Encompass was
5 given a meaningful opportunity from 2006 to 2009 to rebut all of Wright’s experts and
6 evidence through discovery in the state-court action, meaningful opportunity to rebut the
7 circumstances of the Wright-Lennon settlement through discovery in the reasonableness
8 hearing (Koplin Decl. Ex. M at 2 (Dkt. No. 39)), and meaningful opportunity to rebut the
9 terms of the settlement during the reasonableness hearing in which Judge Middaugh
10 received and considered over 400 pages of documents. (*Id.*) There was no presumption in
11 favor of the settlement amount in the reasonableness hearing. As Defendants point out, some
12 stipulated judgments will survive the hearing, and some will not. The settlement was
13 approved, and it operates with the normal preclusive effect of a final state judgment.
14 Encompass’ attempts to litigate these issues yet again appear to be a tactic to stall payment
15 and re-roll the dice.

16 As a matter of law, Encompass has failed to show that it was not afforded due
17 process. Its motion for summary judgment on its due process claims is DENIED.

18 **2. Equal Protection**

19 “The purpose of the equal protection clause of the Fourteenth Amendment is to
20 secure every person within the State’s jurisdiction against intentional and arbitrary
21 discrimination, whether occasioned by express terms of a statute or by its improper
22 execution through duly constituted agents.” *Village of Willowbrook v. Olech*, 528 U.S. 562,
23 564 (2000) (citations and quotation marks omitted). In cases that do not involve a suspect or
24 quasi-suspect classification, Washington law comports with the Equal Protection Clause so
25 long as it is “rationally related to a legitimate state interest.” *E.g., Pennell v. City of San
Jose*, 485 U.S. 1, 14 (1988). Under this standard, a “State may not rely on a classification

1 whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary
2 or irrational.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446, 105 S. Ct.
3 3249, 87 L. Ed. 2d 313 (1985). In an equal-protection action, those attacking the rationality
4 of the legislative classification have the burden “to negative every conceivable basis which
5 might support it.” *FCC v. Beach Communications*, 508 U.S. 307, 315 (U.S. 1993) (quoting
6 *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

7 “The first step in equal protection analysis is to identify the [defendants’]
8 classification of groups.” *Country Classic Dairies, Inc. v. State of Montana, Dep’t of*
9 *Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). “To accomplish this, a
10 plaintiff can show that the law is applied in a discriminatory manner or imposes different
11 burdens on different classes of people.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187
12 (9th Cir. 1995). Encompass argues that Wash. Rev. Code. § 4.22.060 treats insurers
13 differently from other civil litigants by depriving them of the usual discovery rights afforded
14 all other civil litigants. (Mot. 26 (Dkt. No. 21).) Wright and Lennon respond that the statute
15 does not single out insurers, and applies to all who enter indemnity agreements. (Resp. 22
16 (Dkt. No. 38).) Encompass concedes this point, but argues that only insurers are subject to
17 the irrebuttable presumption of the amount of damages in a subsequent coverage/bad faith
18 action. (Reply 12 (Dkt. No. 47).)

19 Even if Wash. Rev. Code. § 4.22.060 does treat insurers differently from other
20 litigants, Encompass fails to show that such a classification is irrational. Washington courts
21 have repeatedly found that there is a rational basis for the type of preclusive effects to which
22 Encompass objects. The Supreme Court of Washington has held that, generally speaking,
23 “an insurer will be bound by the ‘findings, conclusions and judgment’ entered in the action
24 against the tortfeasor when it has notice and an opportunity to intervene in the underlying
25 action.” *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 199 P.3d 376, 380 (Wash. 2008)
(citing *Fisher v. Allstate Ins. Co.*, 961 P.2d 350 (Wash. 1998)). The court proceeds to

1 explain that such preclusion avoids inconsistent judgments, delay, additional expense, and
2 the creation of a perverse incentive for carriers to wait until liability and damages have been
3 established before deciding whether it is cost-effective to intervene. *Id.*

4 This Court agrees with the State Supreme Court. There is ample rationale to support
5 Wash. Rev. Code. § 4.22.060, and Encompass has failed to meet its burden to negative that
6 rationale. Encompass' motion for summary judgment on its equal-protection claims is
7 DENIED.

8 **3. Dismissal of Federal Claims**

9 Rule 56 does not provide for situations where the non-moving party, rather than the
10 movant, is entitled to summary judgment, but no cross-motion has been made. *See Cool*
11 *Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982); Wright, Miller & Kane, *Federal*
12 *Practice and Procedure: Civil* 3d § 2720; "The weight of authority, however, is that
13 summary judgment may be rendered in favor of the opposing party even though the
14 opponent has made no formal cross-motion under rule 56." *Id.* When the court believes that
15 the non-moving party is entitled to judgment, "great care must be exercised to assure that the
16 original movant has had an adequate opportunity to show that there is a genuine issue and
17 that the opponent is not entitled to judgment as a matter of law." *Id.*

18 After careful review, the Court is satisfied that Encompass was given the opportunity
19 to brief fully its constitutional claims. Encompass' constitutional claims present no factual
20 disputes for trial, and the Court has concluded that these claims are meritless. Dismissal in
21 this case is in keeping with the spirit and purpose of Rule 56: expediting the disposition of
22 actions in which there is no genuine issue of fact requiring a trial.

23 **4. Washington Constitutional Claims**

24 Encompass asks this Court to decide whether the rule on presumptive damages
25 arising from a reasonableness hearing without a jury violates Article I, § 21 of the
Washington Constitution. (Mot. 14 (Dkt. No. 21).) The Supreme Court of Washington has

1 addressed similar questions in the past. In *Schmidt v. Cornerstone Investments*, 795 P.2d
2 1143, 1149 (Wash. 1990), the court held that “the right to jury trial does not extend to
3 procedures in equity, such as whether the amount of a proposed settlement is reasonable.
4 Such questions are properly within the province of the trial court to decide.” In *Mutual of*
5 *Enumclaw Insurance Company v. T&G Construction, Inc.*, 199 P.3d 376 (Wash. 2008), the
6 court held that coverage defenses available to the insurer must be litigated in the
7 reasonableness hearing or they are waived in subsequent litigation. *Id.* at 380. Summarizing
8 these cases, Encompass concludes that “the application of the Wash. Rev. Code § 4.22.060
9 reasonableness hearing in the insurance context stacks the deck against the insurer, and,
10 contrary to the *Chausee* court’s intent, actually promotes collusive settlements.” (Mot. 14
11 (Dkt. No. 21).)

12 Either the past jurisprudence of the Supreme Court of Washington applies to the
13 present case, or it does not. If it does apply, Encompass is asking this Court to find that the
14 Supreme Court of Washington has improperly interpreted the Washington Constitution in its
15 consideration of a Washington statute. If it does not apply, Encompass is asking this Court
16 to decide, as a matter of first impression, whether a Washington statute is consistent with the
17 Washington Constitution. Neither of these actions would be proper.

18 With respect to consideration of this issue as a matter of first impression, this Court
19 invokes *Burford* abstention:

20 Although a federal equity court does have jurisdiction of a particular proceeding,
21 it may, in its sound discretion, whether its jurisdiction is invoked on the ground of
22 diversity of citizenship or otherwise, refuse to enforce or protect legal rights, the
23 exercise of which may be prejudicial to the public interest; for it is in the public
24 interest that federal courts of equity should exercise their discretionary power
25 with proper regard for the rightful independence of state governments in carrying
out their domestic policy.

26 *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-318 (U.S. 1943) (quotations omitted). Efficient
resolution of insurance disputes is an important area of domestic policy, and this Court

1 will not employ the state constitution to intrude on the province of the state courts and the
2 state legislature.

3 With respect to challenging the state supreme court, the Supreme Court of
4 Washington's interpretation of Washington law is binding on this Court. *See, e.g., United*
5 *States v. Manning*, 527 F.3d 828, 840 (9th Cir. Wash. 2008). This Court is powerless to
6 challenge the Supreme Court of Washington's interpretation of its own laws.

7 In *Burford*, the U.S. Supreme Court asked the question: "Assuming that the
8 federal district court had jurisdiction, should it, as a matter of sound equitable discretion,
9 have declined to exercise that jurisdiction here?" *Burford*, 319 U.S. at 318. The Court
10 found that the district court should have declined to exercise jurisdiction. *Id.* at 334. For
11 the same reason, respect for the independence of state action, this Court now declines to
12 exercise jurisdiction over Encompass' state constitutional claims, and such claims are
13 DISMISSED.

14 **5. Other Motions**

15 Encompass has filed two motions to strike submissions of the Defendants. Motions
16 to strike are prohibited by CR 7(g). Plaintiff's motions are DENIED. (Dkt. Nos. 72 & 77.)
17 Patrice Cole has filed a motion for protective order concerning the completion of her
18 deposition. This motion is DENIED. (Dkt. No. 74.) Counsel for Wright is entitled to an
19 additional two hours to depose Ms. Cole.

20 ///

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff's motion for partial summary judgment is
3 DENIED. (Dkt. No. 21.) Plaintiff's federal and state constitutional claims are DISMISSED.
4 Encompass' motions to strike and Ms. Cole's motion for a protective order are DENIED.
5 (Dkt. Nos. 72, 74 & 77.)

6

7 DATED this 7th day of May, 2010

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A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

13

John C. Coughenour
UNITED STATES DISTRICT JUDGE

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