

NO. 3741-5-3
IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WATER'S EDGE HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation;
Plaintiff/Appellant,

v.

WATER'S EDGE ASSOCIATES, a Washington general partnership;
PAUL A. NELSON and "JANE DOE" NELSON, and their marital
community; LARRY PRUITT and "JANE DOE" PRUITT, and their
marital community; BURKE M. RICE and "JANE DOE" RICE, and their
marital community; SALMON CREEK DEVELOPERS, INC., and
Oregon corporation; KEY PROPERTY SERVICES, INC., a Washington
corporation,
Defendants,

And

FARMERS INSURANCE EXCHANGE, a foreign corporation; MID-
CENTURY INSURANCE COMPANY, a foreign corporation; and
TRUCK INSURANCE EXCHANGE, a foreign corporation,
Intervenors/Respondents.

INTERVENOR RESPONDENTS' BRIEF

Tyna Ek, WSBA #14332
Misty Edmundson, WSBA #29606
Attorneys for Intervenors/Respondents
Farmers Insurance Exchange, Mid-Century
Insurance Company and Truck Insurance
Exchange
SOHA & LANG, P.S.
701 Fifth Avenue, Suite 2400
Seattle, WA 98104
Telephone: (206) 624-1800

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I. INTRODUCTION

This case is a frightening example of how critically important it is that trial judges skeptically examine settlement agreements that involve stipulated covenant judgments before approving them as “reasonable.” The trial court in this case should not only be affirmed, but should be applauded. For the elaborate plotting and collusive scheming between “opposing” attorneys in this case—collusion that when exposed to daylight should turn the stomach of any reviewing court, but which unfortunately is becoming common within this State’s current legal framework—would never have been revealed but for this trial court permitting focused discovery into the circumstances of the settlement and then devoting extraordinary time and effort painstakingly reviewing and evaluating more than a thousand pages of documents and testimony. The effort the trial court invested into an examination of this settlement was extraordinary—and the very integrity of our legal system hinges on trial courts taking their responsibility this seriously.

II. STATEMENT OF ISSUES

- A. The trial court properly exercised its discretion in determining that the \$8.75 million stipulated judgment did not reflect the “reasonable” settlement value of plaintiff’s claims, and that the reasonable settlement value of plaintiff’s claims at the time of settlement was \$400,000.**
- B. The 2006 summary judgment orders were mooted by the parties’ subsequent final settlement of all claims, and should**

not be reviewed by this Court.

- C. If this Court chooses to provide an advisory ruling as to whether the 2006 summary judgment order would have been affirmed on appeal if the parties had not settled below, then the order should be affirmed because the condominium warranty claims were barred by the applicable statute of limitations.
- D. The trial court appropriately exercised its discretion when it refused to enter an \$8.75 million stipulated judgment after finding the proposed judgment to be “unreasonable” and the product of collusion.

III. STATEMENT OF THE CASE

- A. In Late November 2006, All Defendants Were Unified and Experienced Defense Counsel Estimated The Full Verdict Value If Defendants Lost At Trial To Be \$200,000-\$500,000.

Just three months prior to the February 20, 2007 scheduled trial of this condominium construction defect case, Defendants were vigorously presenting a unified defense through attorney Bruce White of Mitchell, Lang & Smith. The construction defect statutory warranty claims under the Washington Condominium Act, the heart and soul of Plaintiff’s case and the only claims for which cost of repair damages were recoverable, had been dismissed by summary judgment.¹ See CP 1288.

Mr. White had filed a supplemental motion for summary judgment that he was confident would successfully eliminate most of Plaintiff’s remaining claims. CP 1240. He had provided his clients with a claim-by-claim analysis of the Defendants’ chance of success on summary

¹ A claim for breach of the implied warranty of habitability remained in the case, but Mr. White was confident that claim too would be dismissed as a matter of law, and before the January 16, 2007 mediation, plaintiffs stipulated to the dismissal of this last remaining warranty claim. CP 1240.

judgment, ranging from 60% to 90%. CP 1245, 1258-61. Mr. White further reported to his clients that if the motion was decided as he expected, total damages available to Plaintiff under the few claim theories that would remain would be less than \$200,000. CP 1247. Even if defendants were *unsuccessful* in their supplemental summary judgment motion and plaintiff prevailed at trial, Bruce White estimated a total verdict range of \$200,000 to \$500,000.² CP 1248, 1261. Mr. White advised his clients that the chance of an adverse trial verdict of \$1 million was less than 20 percent, and this assessment never changed. CP 1248.

B. After The Heart of Plaintiff's Case Is Dismissed By Summary Judgment, Plaintiff Looks For Alternate Means To Recover Millions of Dollars—Persuades Defendants To Retain Attorneys Beal and Harper

Although Defendants' legal position improved as trial approached, the dynamics in the case, and Mr. White's relationship with his own clients, dramatically shifted in late 2006. As Mr. White explained, "there was a rather dramatic shift from taking a vigorous defense to these frivolous claims to settling at any cost." CP 1253, 1256. Unbeknownst to Mr. White, his clients had begun working with attorney Rick Beal, a Seattle attorney with a close working relationship with the law firm representing Plaintiff in this matter; an attorney to whom Bruce White's clients had been referred by *his opposing counsel* (i.e., Plaintiffs' counsel from the Barker, Martin law firm referred the Defendants to Mr. Beal).

² On November 9, 2006, Mr. White advised his clients that he had advised their insurance carrier that the settlement value of this case was \$250,000 to \$350,000. CP 1247, 1261.

CP 1295, 1636, 1637, 1650. Nor was Mr. White aware that, behind his back, Mr. Beal and his former associate Gregory Harper were doing everything they could to undermine Mr. White's defense strategy and Mr. White's relationship with his clients.

C. **Beal And Harper Work Behind The Scenes To Derail Defense And Sabotage Defense Counsel**

(1) **Beal and Harper Derail Defense**

Attorneys Beal and Harper kept their retention by Defendants secret from defense counsel for months while, behind the scenes, they did everything they could to further Plaintiff's case and derail the defense. A more complete description of these collusive activities may be found at CP 1547 to 1554, but highlights include:

- Bruce White is instructed to withdraw pending summary judgment motions that he predicted would eliminate most of the remainder of Plaintiff's case. CP 1337;
- Bruce White is instructed he may not use the expert witness he had retained; an expert who had compelling impeachment evidence against Plaintiff's expert. CP 1221, 1487 - 1489;
- Beal and Harper wait until right before mediation, with trial in two months, to assert that Bruce White has a conflict of interest and must be replaced as defense counsel—then, on the business day before mediation, Harper asserts each partner in Water's Edge Associates (even those not named in the suit) requires independent counsel. CP 1339–1340, 1359, 1399–1400, 1404;

- Beal and Harper interfere with the insurers' efforts to retain counsel to replace Bruce White, including extraordinary efforts to force the retention of attorneys who will play along with their on-going collusion with Plaintiff's counsel.³ CP 1339 – 1397.

(2) Beal and Harper Sabotage Defense Counsel

Plaintiff's counsel and attorney Beal colluded to force Defense counsel Bruce White off the case right before trial in order to cripple the defense, and to manufacture a legal malpractice claim against defense counsel that could then be "traded" in their settlement agreement, like a commodity, for mutual gain. A more complete description of these collusive activities may be found at CP 1543-1568, but highlights include:

- *Plaintiff's counsel* ghost-writes a letter *for defendants'* signature complaining to the insurers about defense counsel. CP 1649;
- Beal and Harper tell Defendants that Bruce White has a conflict of interest representing Water's Edge Associates and Key Properties, Inc., but keep this "concern" secret from Bruce White. CP 1244, 1252;
- Beal and Harper file suit on behalf of Defendants alleging the Intervening Insurers are in bad faith for having retained incompetent defense counsel who is unethically representing the Defendants with a conflict of interest—yet delay serving this lawsuit until right before the

³ Beal even attempted to force the insurers to retain his own prior law firm to serve as defense counsel after first getting assurances from his former partner that he would subordinate defense efforts to Beal's and Plaintiff counsel's collusive plans to set up an insurance bad faith and legal malpractice action. CP 1366 -67.

mediation; CP 1326 - 1335;

- Bruce White is forced to withdraw as defense counsel, so he signs a notice of substitution of counsel. But *Rick Beal instructed replacement counsel to delay filing the notice of substitution* so that Bruce White unknowingly remained counsel of record for Defendants after being told he had a conflict. CP 1390 - 1397;
- Plaintiff's counsel emails Beal about their joint plot to set up a legal malpractice claim, concerned that replacement counsel had begun to defend the case as Bruce White had and this "completely undermines any legal malpractice claim against ML&S." CP 1402, 1552;
- The manufactured legal malpractice claim against defense counsel became yet another commodity for mutual profit that Plaintiff and Defendants agreed to share. CP 744; CP 758 to CP 762.

D. Rick Beal And Barker Martin Negotiate Fictitious \$8.75 Million Settlement Agreement Over Lunch

As part of their settlement of this condominium construction defect case in January 2007, Defendants agreed to stipulate to entry of an \$8.75 million judgment on the express condition that they would only pay \$215,000 of that amount.⁴ CP 742, 758-60. Defense counsel was left out of the negotiation of the \$8.75 million covenant judgment, which was negotiated solely by Rick Beal and the Barker Martin firm, as they had done many times before. CP 1226, 1230, 1250, 1436 – 1440.

⁴ The Intervening Insurers paid the \$215,000 settlement on behalf of the defendants, so the Defendants have been fully released from all liability and were not required to pay any money out of their own pocket to achieve this final settlement. CP 1557.

Plaintiff admits that the sole purpose of the stipulated covenant judgment was to create “presumptive damages” for the bad faith claim Defendants filed against the Intervening Insurers and then assigned to the Plaintiff as part of the settlement deal. CP 637-38. A stipulated covenant judgment will only serve as the presumptive measure of damages in a subsequent bad faith case if a trial court finds that the covenant judgment represents the “reasonable” settlement value of the case at the time of settlement.⁵ The parties’ settlement agreement required Defendants to acknowledge the “reasonableness” of the fictitious \$8.75 million settlement and to “cooperate” with Plaintiff in its pursuit of a bad faith claim against the insurers and a legal malpractice action against defense counsel for the parties’ mutual financial benefit. CP 741-769.

Although the parties spent several days negotiating the \$215,000 cash settlement amount that Defendants would be collectively obligated to pay, Mr. Beal and the Barker Martin attorneys reached agreement on the \$8.75 million stipulated judgment over lunch. CP 1314-17. Negotiation of the stipulated judgment was rather simple because the merits of the case and true case value were not the issue.⁶ There were just two deal-

⁵ See *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002); *Werlinger v. Warner*, 126 Wn. App. 342, 350-351, 109 P.3d 22 (2005) (“the sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.”).

⁶ Mr. Beal did not consult with defense counsel handling the case or defense experts before negotiating this deal. CP 1226, 1230, 1250; CP 1487–1489. Mr. Beal even confessed that during lunch Plaintiff’s counsel asked whether they should throw a few numbers back and forth so “it would look like I tried to negotiate with them.” Mr. Beal, to his credit, declined this invitation. CP 1317.

breakers: Defendants would not agree to have their release from liability contingent on the trial court finding the \$8.75 million amount reasonable, and Plaintiff insisted that attorney Rick Beal testify that \$8.75 million was the reasonable settlement value of the case. CP 1317-18. Mr. Beal and the Barker Martin firm had a long history of negotiating deals whereby one of the negotiating chips was Mr. Beal's testimony in support of the reasonableness of the inflated covenant judgment. As Mr. Beal explained:

Bo Barker [founder of Barker Martin] is one of my closest professional friends. . . . I met him in the early '90s. I was representing a builder; he was representing a client. And I sold him a stipulated judgment and assignment of rights against an insurance company. And he said – when we made the deal he basically said, how do I know, now that your guy has this “get out of jail” card, that you won't abandon me. And I looked him right in the eye and I said, ‘cause I service what I sell. . . . And from that point forward I joint ventured matters with Bo. . . . I was joint ventured with Bo for six and a half years.

CP 1439, 1318. Mr. Beal followed through with his commitment, providing the 20-page declaration with voluminous exhibits the parties submitted as “expert”⁷ testimony at the reasonableness hearing. CP 679-1207. Mr. Beal went even further, intimidating Bruce White by threatening a legal malpractice claim and/or Bar Complaint if he testified “against the client;” *i.e.*, if he truthfully testified that \$8.75 million was unreasonable. CP, 1237, 1238-40.

⁷ Mr. Beal has never tried a construction defect case in his life, and has not appeared in court in eight years. CP 1297-99. Instead, he works behind the scenes to set up insurers for bad faith, and then “sells” those bad faith claims to plaintiffs. CP 1230, 1439. As the trial court acknowledged, this typically results in a very favorable financial outcome for his clients.

E. Plaintiff's and Defendants' Interests Are Completely Aligned For Mutual Financial Gain At Intervening Insurers' Expense

The alignment of Plaintiff's and Defendants' interests is clearly evidenced by Defendants advocating for the entry of an \$8.75 million judgment to be entered *against them* after the trial court ruled that this was more than 20-times the reasonable settlement value of this case. CP 1775-1806. The collusion between the parties is also the only explanation for Defendants/Respondents not filing any opposition to Plaintiff's current appeal, even as to the underlying summary judgment motions on which Defendants alone prevailed. Due to the collusion between the parties, it is in Defendants' financial interest to lose to Plaintiff and lose big.

Under the terms of the Settlement Agreement, Plaintiff and Defendants financially gain at the expense of their insurers by artificially inflating Plaintiff's claims. Plaintiff receives \$215,000 in cash; an \$8.75 million stipulated judgment; "opposing" counsel's commitment to testify that \$8.75 million is the "reasonable" settlement value, and a cooperation agreement whereby the Defendants will help set up and forward the bad faith claim they assigned to Plaintiff. CP 741-767. In return, Defendants' collective exposure is capped at \$215,000, attorneys Beal and Harper work with the Barker Martin firm to secretly set-up defense counsel for legal malpractice, and Plaintiff and Defendants agree to split the profits from the legal malpractice action. In short, the facts reveal that Plaintiff's counsel and newly retained counsel for Defendants conspired to artificially inflate the value of this case and interfere with the defense of

this case on the eve of trial, to manufacture a bad faith claim against the Intervening Insurers and a legal malpractice action against Mitchell Lang & Smith, all in a collusive effort to justify a stipulated judgment amount more than twenty times the full verdict value of this case.

F. Following A Fact-Intensive Reasonableness Hearing, Trial Court Finds Reasonable Value of Settlement in January 2006 Was \$400,000; Settling Parties Refuse To Stipulate to “Reasonable” Judgment, So Case Is Dismissed

Following execution of their settlement agreement—whereby Defendants were released from all liability regardless of the outcome of the anticipated reasonableness hearing--Plaintiff and Defendants filed a joint motion asking the trial court to rule that the \$8.75 million stipulated covenant judgment represented the “reasonable” settlement value of the case in January 2006. CP 625-78. The parties’ insurers were permitted to intervene and conduct very limited discovery related to the “reasonableness” of the \$8.75 million settlement. CP 1541.⁸

The trial court reviewed more than 1,000 pages of testimony, documents and legal briefing; conducted an all-day hearing where counsel presented argument and responded to questions from the bench, and then took this matter under advisement for five months before issuing the well-reasoned Ruling on Reasonableness Hearing. CP 1753-54, 1586, 1757-74.

⁸ To appreciate how deep this collusion runs, one of the insurers the parties were trying to set up for bad faith was the Plaintiff Homeowners’ Association’s *own insurer*. Yes, the developer was uninsured so the parties were claiming that the developer defendant’s liability to the Homeowners’ Association should be paid under the Homeowners’ Association’s own insurance policy. CP 710 - 19, 724.

The trial court ruled that considering all of the applicable *Glover/Chaussee* factors, including evidence of collusion, the proposed \$8.75 million stipulated judgment was “unreasonable” and the “reasonable” settlement value of the case in January 2006 was approximately \$400,000. At this point, the settlement between the parties was final and all liability against the Defendants had been released. Ordinarily, a case would simply be dismissed by the court following settlement, but the trial court gave the settling parties the option of stipulating to a “reasonable” covenant judgment (*i.e.*, \$400,000 or less) as approved in *Meadow Valley Owners Assoc. v. Meadow Valley L.L.C.*, 137 Wn. App. 810, 820, 156 P.3d 240 (2007). When the parties refused to stipulate to any judgment less than \$8.75 million, the trial court recognized that it did not have authority to *order* the parties to stipulate to a judgment and therefore correctly dismissed the case pursuant to settlement. CP 1891-93.

IV. ARGUMENT

Assignment of Error A: The Trial Court Correctly Found That The \$8.75 Million Settlement Amount Was Unreasonable.

A. The Standard of Review Is Abuse of Discretion

Washington courts have clearly stated that the standard of review for a trial court’s reasonableness decision is abuse of discretion. *Martin v. Johnson*, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007); *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005), *citing Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)), *review denied*, 155 Wn.2d 1025 (2005). Despite this clearly articulated standard,

Plaintiff argues a *de novo* review standard should be applied because there were no disputes of fact and the reasonableness hearing did not involve live testimony. Neither argument alters the standard of review.⁹

When arguing for a *de novo* review standard, Plaintiff maintains that there were no factual disputes below. Yet throughout the remainder of its Opening Brief, Plaintiff argues the trial court improperly accepted certain evidence and disregarded conflicting evidence, or gave some evidence too much weight and conflicting evidence too little weight. *See e.g.*, Opening Brief at 24, 25. Plaintiff argues on page 19 that “[b]oth of the trial court’s findings were factually wrong and provide grounds for reversal” (emphasis added). In coming to a factual determination of the reasonable settlement value of the underlying case, the trial court was required to weigh substantial conflicting evidence, as well as the credibility and motivation of various witnesses. This is the very reason Washington courts have clearly held that an abuse of discretion standard of review will be applied to this fact-intensive inquiry.

Whether a witness testifies live or not does not determine the standard of review. Washington appellate courts have given trial courts complete discretion concerning the procedures they should employ in

⁹ None of the cases cited by Plaintiff say that a *de novo* review standard should be applied to a trial court’s reasonableness determination under any circumstances. These cases just generally state that a *de novo* standard applies when there are no factual disputes, and the basis of the trial court’s decision is purely a question of law. *See Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 2 P.3d 968 (2002); *Deatherage v. State Examining Bd. of Psychology*, 134 Wn.2d 131, 948 P.2d 828 (1997), Plaintiff’s Opening Brief at 13-14.

conducting a reasonableness hearing, holding “we are confident that trial judges will develop their own procedures for handling these cases.” *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 159, 795 P.2d 1143 (1990); *Pickett v. Stephens-Nelsen, Inc.*, 43 Wn. App. 326, 335, 717 P.2d 277 (1986) (“the procedures for handling evidence at these hearings are within the trial court's discretion.”). Again, the appellate courts acknowledge that the trial court is in the best position to know the case, and therefore should be given wide latitude in how it evaluates the reasonableness of a settlement. Contrary to this intended framework, Plaintiff asks this Court to adopt a new rule whereby the trial court’s conclusions will be reviewed for abuse of discretion if live witness testimony is offered at the reasonableness hearing; but if no live testimony is taken the trial court’s conclusions will be reviewed *de novo*. There is neither precedent nor justification for the creation of this double standard. As the Washington Supreme Court has clearly stated: “The trial judge faced with this task must have discretion to weigh each case individually.” *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 529, 901 P.2d 297 (1995).

B. It Was Within The Trial Court’s Discretion To Conclude That The Settlement Did Not Represent The Reasonable Value Of The Case In January 2007.

(1) The trial court rightfully viewed the \$8.75 million covenant judgment skeptically

Plaintiff argues that the trial court’s conclusion that the \$8.75 million covenant judgment did not reflect a reasonable settlement value

should be disregarded because the trial court's decision shows a "personal bias" or "distaste" for covenant judgments. On the contrary, the trial court viewed Plaintiff counsel's referral of Defendants to counsel with whom he then agreed to an exorbitant covenant judgment and to help set up a legal malpractice action against defense counsel, with appropriate skepticism.

Washington appellate courts have warned that using covenant judgments as a settlement mechanism invites collusion and therefore covenant judgments should be viewed skeptically. "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." *Besel*, 146 Wn.2d at 738. "*Besel* recognizes that the reasonableness of a settlement with an insured who is not personally liable for a settlement is open to question because the insured will have no incentive to minimize the amount." *Werlinger v. Warner*, 126 Wn. App. 342, 351, 109 P.3d 22 (2005).

Covenant judgments were intended to be a last resort for the insured whose interests were abandoned by its insurer. If an insurer refused to extend coverage that was owed or refused to make a reasonable effort to settle a suit when the claims were covered, Washington law permitted the insured to settle the suit by stipulating to a judgment in exchange for a covenant not to execute against the insured's personal assets. As part of the deal, the insured would assign his/her bad faith claim against the insurer to the plaintiff, who could in turn pursue a claim against the insurer for its unreasonable behavior in refusing to pay what

was owed under the insurance policy. But the author of the Texas law review article relied upon by the Plaintiff provides a poignant glimpse into the way in which this settlement tool of last-resort has been perverted by a cottage legal industry into a means of obtaining millions from insurers on claims that lack merit or are uninsured:

The assignment-covenant not to execute may be used aggressively . . . to induce the carrier to commit a tort and thereby access insurance funds that would otherwise be unavailable The final result is that neither party is motivated to seriously negotiate over issues of damages and liability because the end goal is to structure the deal so that the carrier, a nonparty to the agreement, pays.

Chris Wood, Assignment of Rights and Covenants not to Execute in Insurance Litigation, 75 Tex. L. Rev. 1373, 1385-1387 (1997).

The temptation to collusively misuse covenant judgments rather than litigate claims on their merits is heightened in this State due to the “presumptions” and paucity of procedural safeguards built into Washington’s evolving bad faith law. Under Washington bad faith law:

- **Insurance coverage need not be proven** – Even when the insurance policy clearly would not cover the claim, an insurer who is found to be in bad faith is estopped from denying coverage. *See Safeco v. Butler*, 188 Wn.2d 383, 392, 823 P.2d 499 (1992); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 735, 49 P.3d 887 (2002);
- **Insurance coverage is limitless** – An insurer may be estopped from enforcing policy limits. *Id.*;
- **Harm is presumed** - Washington courts presume that the insurer’s

bad faith caused harm to the insured even when the insured has a covenant guaranteeing that he/she will pay nothing. *Safeco v. Butler*, 188 Wn.2d at 390; *Besel v. Viking Ins. Co.*, 146 Wn.2d at 737;

- **Damages need not be proven** - Bad faith damages are presumed to be the amount of a stipulated judgment if the trial court finds the covenant judgment “reasonable.” *Besel v. Viking Ins. Co.*, 146 Wn.2d at 738;
- **Defendants bear no risk in stipulating to an unreasonably high judgment** – Even when a covenant judgment is “unreasonable,” settlement is unaffected and defendants are released from liability. RCW 4.22.060(3);
- **Insurers have no meaningful procedural safeguards** – Even though Washington courts have recognized that the “sole purpose” of a stipulated covenant judgment is to establish presumptive damages in a separate bad faith action against an insurer, insurers have no meaningful procedural safeguards in a reasonableness hearing:
 - Insurer is not entitled to meaningful notice – RCW 4.22.060(1) states parties must receive five days notice before a covenant not to execute is effectuated, but an insurer is not a party and therefore is not entitled to notice under RCW 4.22.060(1). *Villas at Harbour Pointe Owners Assoc. v. Mutual of Enumclaw Ins. Co.*, 137 Wn. App. 751, 761, 154 P.3d 950 (2007);
 - An intervening insurer may be allowed no discovery - See *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn.

App. 372, 379-80, 89 P.3d 265 (2004) (Div. I approved trial court's denial of insurer's request for discovery);

- Insurer, on minimal notice and with minimal information, bears the burden of proving "reasonable" settlement value – *See Villas at Harbour Pointe Owners Assoc. v. Mutual of Enumclaw Ins. Co.*, 137 Wn. App. at 758 ("RCW 4.22.060(2) requires the court to determine whether the settlement amount is reasonable and, if not, set forth the amount that is reasonable."); *Meadow Valley Owners Assoc. v. Meadow Valley L.L.C.*, 137 Wn. App. 810, 820, 156 P.3d 240 (2007).

Washington appellate courts have repeatedly warned of the incentive for collusion and abuse when parties settle a case using a covenant judgment. *See e.g., Besel v. Viking Ins. Co.*, 146 Wn.2d at 738. This danger has exponentially increased in recent years with the above-described developments in Washington's bad faith law and some attorneys have begun to "specialize" in setting up bad faith claims that can then be "sold" to claimants for the parties' mutual benefit.

In this context and legal climate, a reasonableness hearing is the only mechanism available to check the collusive shift of millions of dollars of fictitious liability to insurers, and ultimately to their rate payers. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 401, 161 P.3d 406 (2007) (ensuring reasonable settlements protects insurers from liability for excessive judgments). But busy trial courts have little

incentive to dedicate precious time and resources to questioning the reasonableness of a settlement to which all litigants have stipulated. And any incentive for a trial court to perform more than a perfunctory review of a proposed stipulated settlement was substantially decreased when Division I of this Court recently advised that insurers need not be given any opportunity to conduct discovery to determine whether the agreement was the product of collusion, and any trial court that does not find the settlement to be “reasonable,” must proceed with the foreboding task of independently determining the *real* settlement value of the case.¹⁰

Before issuing its Reasonableness Order, the trial court in this case reviewed over 20 declarations; more than a thousand pages of briefing, documentary exhibits and deposition testimony; and conducted an all-day hearing to hear oral argument and pose questions to counsel.¹¹ The trial court then took this matter under advisement for five months, at one point reopening the hearing to take additional evidence from Plaintiff. CP 1753-

¹⁰ See *Villas at Harbour Pointe Owners Assoc. v. Mutual of Enumclaw Ins. Co.*, 137 Wn. App. at 758; *Meadow Valley Owners Assoc. v. Meadow Valley L.L.C.*, 137 Wn. App. at 820. Although trial courts should be given broad discretion in making factual determinations of reasonableness, the Intervening Insurers ask Division II of this Court to affirmatively encourage trial courts to permit intervening insurers reasonable time and opportunity to conduct discovery related to the reasonableness of a settlement based upon a stipulated covenant judgment. For the collusion that is so evident in this case would not have been uncovered if the trial court had permitted the reasonableness hearing to go forward on a week’s notice and with no opportunity for the insurers to conduct limited discovery. The lack of any procedural safeguards for insurers in the reasonableness hearing process when Washington courts have recognized that “the sole purpose of the covenant judgment” is to set the “presumptive measure of damages in a separate bad faith lawsuit” against an insurer, invites unfettered collusion. See *Werlinger v. Warner*, 126 Wn. App. at 342.

¹¹ Mr. Zimmeroff of the Barker Martin firm, who continues to represent Plaintiff in this matter, participated in the all-day reasonableness hearing and responded to questioning from the bench—thus providing the virtual equivalent of “live testimony.”

54, 1586, 1757-74. A review of the record and the trial court's Ruling on Reasonableness Hearing demonstrates the trial court properly exercised its discretion in its well grounded and reasoned decision that the \$8.75 million fictitious settlement was unreasonable, and that the real settlement value of this case in January of 2007 was approximately \$400,000.

C. Substantial Evidence Supports The Trial Court's Determination That The Fictitious \$8.75 Million Settlement Was The Product Of Collusion

Plaintiff claims that the trial court erroneously reversed the order in which it evaluated the reasonableness of the underlying settlement, arguing that the trial court is required to first evaluate the settlement under "each of the nine *Glover/Chaussee* factors" and then examine whether the settlement was fraudulent or collusive.¹² Opening Brief at 15-16. But plaintiff misses the point—the Intervenors are not seeking to avoid the legal application of a settlement that had been found "reasonable" by the trial court under the nine *Glover/Chaussee* factors by demonstrating fraud. Rather, the trial court initially found that this settlement was *unreasonable* based upon its consideration of the nine *Glover/Chaussee* factors, including *factor number seven*--whether or not there is: "any evidence of bad faith, collusion or fraud." *Glover*, 98 Wn.2d at 717; *Chaussee*, 60 Wn. App. at 512 (emphasis added). There was substantial evidence presented at the reasonableness hearing to support the trial court's finding

¹² There is no basis in the record to determine the order in which the trial court considered various reasonableness factors simply because the trial court addressed the collusiveness of the settlement first in its written order. The trial court clearly indicated that it considered all of the *Glover/Chaussee* factors briefed by the parties below. CP 1765.

that the \$8.75 million fictitious settlement was the product of collusion.¹³

(1) The Seventh *Glover/Chaussee* factor does not require proof of fraud

*“Any negotiated settlement involves cooperation to a degree. It becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer”*¹⁴

Washington State courts have not formally defined the parameters of a collusive settlement in a published appellate decision.¹⁵ However, courts elsewhere have found what circumstances render a settlement involving a covenant judgment collusive. *See Continental Casualty Co. v. Westerfield*, 961 F. Supp. 1502 (D.N.M. 1997), *Andrade v. Jennings*, 54 Cal. App. 4th 307 (1997). *See also Spence-Parker v. Maryland Casualty Group*, 937 F. Supp. 551 (E.D. Va. 1996).

In *Westerfield*, an insured attorney and a malpractice claimant entered into a settlement agreement insulating the attorney from personal liability in exchange for a stipulated judgment and assignment of claims against the malpractice insurers. Citing to case law and a “comprehensive

¹³ Washington law does not require the trial court to consider the reasonableness factors in any particular order, nor to consider each factor in every case. On the contrary, Washington courts have consistently stated that the trial court has discretion to weigh each case individually, that “[n]o single criterion controls, and all nine are not necessarily relevant in all cases. *Chaussee*, 60 Wn. App. at 512, *citing Glover*, 98 Wn.2d at 717; *Martin v. Johnson*, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007), *citing Besel*, 146 Wn.2d at 739 n.2.

¹⁴ *Continental Cas. Co. v. Westerfield*, 961 F. Supp. 1502, 1505 (D.N.M. 1997).

¹⁵ Though in the context of holding that legal malpractice claims may not be assigned to adversaries within the same litigation, the Washington Supreme Court has cited to the same collusion concerns that plague the settlement agreement in this case. *See Kommavongsa v. Haskell*, 149 Wn.2d 288, 307, 67 P.3d 1068 (2003).

article” on the subject,¹⁶ the court identified the following indicators of collusion: the unreasonableness of the settlement amount, concealment, lack of serious negotiation on damages, profit to the insured, and attempts to harm the interest of the insurer. All factors have the common thread of unfairness to the insurer, “which is probably the bottom line in cases in which collusion is found.” *Id.*

Plaintiff’s argument that a trial court may only consider the seventh *Glover* factor (“any evidence of bad faith, collusion or fraud”) where an insurer has proven fraud by “clear, cogent and convincing evidence” should be rejected. The settling parties bear the initial burden of proving that a reasonable settlement has been reached, and the Washington Supreme Court has directed trial courts to consider all applicable *Glover/Chaussee* factors in weighing whether the settling parties have met that burden. *Besel v. Viking Ins. Co.*, 146 Wn.2d 739. Only after a settlement has been found “reasonable” by a trial court, does the burden shift to the insurer to prevent its legal application based upon proof of fraud. *Id.* In this case, considering all of the relevant initial reasonableness factors, the trial court determined that the settlement amount was “unreasonable.”

In discussing the nature of a “collusive” suit, the United States Supreme Court noted that a finding of collusion does not require evidence of an intentional misrepresentation to the court.

¹⁶ Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994).

The Government does not contend that, as a result of this cooperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment. . . . *Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated--a safeguard essential to the integrity of the judicial process* [citations omitted]. . . . Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured. . . .

United States v. Johnson, 319 U.S. 302, 304-05, 87 L. Ed. 1413, 63 S. Ct. 1075 (1943) (italics supplied). In this case, there was substantial evidence from which the trial court could infer that the settling parties' \$8.75 million fictitious settlement was the product of collusion.¹⁷

(2) **Plaintiff counsel's direct contact with Defendants suggesting they retain attorneys Beal and Harper supports the trial court's inference of collusion**

Whether or not it was a disciplinary violation of the Rules of Professional Conduct, when Plaintiff's counsel contacted the Defendants without defense counsel's knowledge to suggest Defendants retain counsel *of Plaintiff counsel's choosing*, this raised a strong inference of improper purpose. Plaintiff suggests that its counsel by-passed defense counsel because defense counsel would not be able to address insurance coverage

¹⁷ Plaintiff argues that a court may not find collusion based upon speculation, citing *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007), but in *Martin*, the only "evidence" of collusion was that the settlement agreement was signed just five months after the case was filed. It was in this factual context that the court said a finding of collusion could not be based on speculation or innuendo alone. *Id.* at 623. Factual inferences do not equate to "speculation."

issues. But nothing in the record supports a conclusion that the Barker Martin attorneys, Mr. Beal and Mr. Harper ever discussed what was or was not covered under any party's insurance policy—overwhelming evidence demonstrates that Mr. Beal and Mr. Harper injected themselves into the defense and settlement of the underlying case that was being successfully handled by Mr. White prior to their collusive interference. When a party retains separate counsel to legitimately address insurance coverage issues, there is no reason to keep this retention secret from defense counsel.

The timing of Plaintiff counsel's contact with Defendants supports an inference of collusion—Plaintiff's counsel contacted Defendants to suggest they retain different counsel one week after Mr. White succeeded in having Plaintiff's statutory warranty claims dismissed by summary judgment. CP 1650. Subsequent defense counsel Steve Todd later referred to this victory as the “death knell of plaintiffs' case.” CP 1286.

A strong inference of collusion is supported by the evidence presented to the trial court about the particular attorneys Plaintiff's counsel suggested Defendants retain. Attorney Beal is known for “creating” bad faith claims in order to “sell” such claims during settlement negotiations in exchange for a covenant judgment, whereby his defendant clients usually escape all personal liability. In describing Mr. Beal's use of covenant judgments in this fashion, attorney Steve Todd testified: “It's not an uncommon approach when particularly in Mr. Beal's case he thinks he can generate a claim that gives the assigned bad faith claim value.” CP 1230.

Plaintiff counsel knew Mr. Beal well, and had “joint ventured” with him many times when they were ostensibly on “opposite” sides of a case.

CP 1436-40; CP 1318.

As he had in the past, Mr. Beal “serviced” what he “sold” to the Barker Martin firm. Mr. Beal agreed to provide testimony in court supporting Plaintiff’s position that \$8.75 million was the reasonable settlement value of this case, and Mr. Beal delivered by filing a 20-page declaration with over 500 pages of attachments in which he, after-the-fact, attempted to explain how the *Glover/Chaussee* factors were addressed in their collusive settlement agreement. CP 679-1207.

There was direct evidence before the trial court that Mr. Beal’s cozy history with Plaintiff’s counsel and his reputation for making collusive deals for joint financial benefit at the expense of an insurer were the express selling points Plaintiff’s counsel used to persuade Defendants to retain Mr. Beal and Mr. Harper. When recommending Mr. Beal and Mr. Harper to Defendants, Mr. Zimberoff stated:

Both attorneys have had substantial success squeezing every possible nickel out of insurance companies on behalf of their clients. I know of multiple instances where counsel was even able to obtain thousands of dollars paid to their client, the insured, in addition to full indemnity to the plaintiff.

CP 1650. Mr. Zimberoff’s email sets forth the virtual definition of collusion, recommending Defendants retain Mr. Beal and Mr. Harper for Plaintiff’s and Defendants’ mutual profit at the expense of insurers.

(3) **Beal and Harper's efforts to derail and sabotage the defense support the inference of collusion**

From the moment Mr. Beal and Mr. Harper were retained, they went to great lengths to derail and sabotage Mr. White's defense efforts, all the while keeping their involvement in the case a secret. Suddenly, Mr. White was instructed to withdraw a second summary judgment motion on which he expected to prevail. CP 1301-02. Mr. White was told that he could not use the expert witness that he had retained and who had damning impeachment evidence against Plaintiff's expert. CP 1221, 1487-89. Then Beal and Harper manufactured a conflict of interest in order to force Mr. White to withdraw as defense counsel on the eve of mediation and trial. Mr. Beal's and Mr. Harper's interference with appointment of replacement defense counsel and efforts to force retention of attorneys who would cooperate in their collusion with Barker Martin further supports the trial court's inference of collusion. CP 1339 - 1397.

(4) **Beal's and Harper's set-up of legal malpractice claim supports the inference of collusion**

Evidence before the trial court supported the inference that attorneys Beal and Harper colluded with Plaintiff's attorney to set up a legal malpractice claim against defense counsel and to share the profits from that claim. CP 1326-31. Beal and Harper manufactured a conflict of interest between the Defendants even though the entities were all run by the same individuals and they had agreed up-front to present a united defense. CP 1244. Rather than address any legitimate conflict concerns

with defense counsel, Beal and Harper hid their “concerns” from Mr. White while they set him up, even going so far as to make a public record of their conflict allegations by filing a bad faith suit yet delay serving the lawsuit so Mr. White would find out right before the mediation—then instructing replacement counsel to delay filing the notice of substitution of counsel so that Mr. White was unwittingly still “counsel of record” at the mediation despite formal notice of a conflict. CP 1390-97.

The ink was scarcely dry on Beal’s and Harper’s letters ranting about the “unwaivable” conflicts of interest between the parties, when counsel circulated a draft joint defense agreement. CP 1415-22; CP 1315; and CP 1321.¹⁸ No defendant ever expressed any desire to assert a claim against another defendant. Interestingly, Mr. Beal apparently had no conflict in negotiating the covenant judgment on behalf of all the defendants, Mr. Harper had no problem negotiating the \$215,000 settlement payment on behalf of all defendants, and no one objected to Mr. Hughes continuing to serve as personal business counsel for all the defendants—yet right before trial Beal and Harper claimed an *irreconcilable* conflict existed between the defendants that required Mr. White’s withdrawal as counsel. CP 1339-40, 1359, 1399–1400, 1404.

(5) **Circumstances of settlement negotiations support the inference of collusion**

The facts and circumstances surrounding the settlement

¹⁸ Interestingly, although the insurers who were paying all of these separate attorneys were kept in the dark about this “joint defense agreement,” the draft joint defense agreement was circulated to plaintiffs’ counsel Dan Zimberoff. CP 1415.

negotiations in this case clearly demonstrated that the Defendants did not believe \$8.75 million was a reasonable settlement value, but rather they agreed to this inflated figure solely to effectuate their collusive plan. Water's Edge Associates is a general partnership, and the partners possess plenty of assets to cover the liability for this claim. CP 1523–26; 1319–1320. Yet mediation in this case was abruptly ended by the Defendants when Plaintiff demanded \$1.75 million because the Defendants thought this number was so outrageously high. CP 1313–14.

Following mediation, there were protracted negotiations that resulted in an agreement by the Defendants that they would collectively pay \$215,000 to settle this case. CP 1314. This was the only arms-length negotiation. After the parties agreed to the \$215,000, Mr. Beal stepped into the negotiations and a deal for a stipulated covenant judgment was reached over lunch. Mr. Beal did not consult former or current defense counsel handling the case, did not consult the Defendants' retained expert, and did not do anything an attorney would do to attempt to assess the true value of the Defendants' risk. Nor did Defendants provide Mr. Beal with any monetary limit of authority for the stipulated judgment prior to this lunch. The only firm condition of Defendants was that the settlement must be final and they must be released from all liability even if a court found the settlement amount "unreasonable," while Plaintiff's precondition was that Defendants agree to "cooperate" in persuading the court that \$8.75 million was reasonable and Mr. Beal in particular agree to testify in support of the reasonableness of the settlement. CP 1316.

(6) **The terms of the settlement agreement support the trial court's inference of collusion**

The Settlement Agreement provides that: (1) Defendants waive their attorney-client privilege so that Plaintiff has full access to their confidential communications and files; (2) if the insurers take certain legal positions in the bad faith action Plaintiff intends to pursue, then Defendants must pursue a legal malpractice action against their defense counsel; (3) Defendants retain some of the profit from the legal malpractice action, but agree to permit Plaintiff to share in these profits. CP 741-52, 758-67. The Settlement Agreement specifically provides for defendants allowing "execution [by Plaintiff] against the proceeds of defendants' legal malpractice and CPA rights against ML&S for the unpaid portion of the Stipulated Judgment. . . ." CP 742.

Although Defendants assigned the insurer bad faith claim to Plaintiff, the Settlement Agreement explicitly provides that Defendants will share in the joint profit from that claim as well:

. . . . Defendants reserve their claim to recover the Partial Settlement Sum and their defense costs and other attorneys' fees from Farmers and/or ML&S

Notwithstanding any provision of this Agreement to the contrary, Defendants shall retain their claims against Farmers and ML&S to recover the \$215,000 cash payment made as part of the overall settlement, as well as their claim for attorney's fees and other defense costs and losses other than the unpaid portion of the Stipulated Judgment Sum The Plaintiff and Defendants agree, reasonably and in good faith, to cooperate with one another in pursuing the claims and causes of action referenced herein. The Plaintiff and the Defendants agree that claims of Defendants to recover the

\$215,000 cash payment made as part of the overall settlement, as well as their claims for attorneys' fees and other defense costs and losses, shall be jointly prosecuted by the parties

CP 744, 760.

D. The Trial Court Appropriately Considered Other *Glover/Chaussee* Factors In Determining The Reasonable Settlement Value Of The Underlying Case

Although the trial court concluded that the parties' \$8.75 million fictitious settlement was the product of collusion, the trial court appropriately considered the other *Glover/Chaussee* factors in making its reasonableness determination. The trial court clearly and explicitly stated that it based its reasonableness order on a consideration of all of the *Glover/Chaussee* factors. The trial judge wrote:

I want to emphasize that my decision herein is not based solely upon the collusion factor, but rather is based upon all the considerations required by law. Each side has briefed and argued their assessment of the *Glover/Chaussee* factors.

CP 1765. The court then spent the following nine pages of its opinion addressing the factors other than collusion. CP 1765-73.

The trial court's reasonableness ruling in this case is much more explicit in setting forth the *Glover/Chaussee* factors considered than this Court has ever required. For example, in *Martin v. Johnson*, the trial court did not specifically address the *Chaussee* factors at all:

The parties did, however, address the *Chaussee* factors in their briefs to the trial court. And the trial court stated that it had reviewed the parties' briefs twice before the reasonableness hearing. Given the parties' extensive

briefing on the issue and the trial court's statements that it considered the briefs and found nothing showing that the settlement was unreasonable, we cannot conclude that the trial court failed to weigh the *Chaussee* factors.

Martin, 141 Wn. App. at 620, citing *Werlinger*, 126 Wn. App. at 351. The *Martin* court emphasized that the trial court record contained sufficient evidence to support the trial court's conclusion that the settlement was reasonable. *Id.*, citing *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 407, 161 P.3d 406 (2007) (although "the trial court's considerations in weighing the factors are unclear," "sufficient evidence supports the court's conclusion that the settlement was reasonable."); *Werlinger v. Warner*, 126 Wn. App. 342, 351, 109 P.3d 22 (2005) (court cannot conclude "the trial court failed to weigh the *Glover* factors, given the extensive briefing and argument.").

In *Howard v. Royal Specialty*, when finding the trial court did not abuse its discretion, the appellate court found persuasive that (1) the trial court examined the *Chaussee* factors in its memorandum ruling, and that the evidence submitted and relied on by the trial court was voluminous, constituting over 800 pages, including numerous declarations. *Howard v. Royal Spec. Underwriting*, 121 Wn. App. 372, 383, 89 P.3d 265 (2004). The same is true here. The court reviewed over 20 declarations, more than a thousand pages of documents and voluminous briefing, listened to oral argument and questioned counsel for an entire day, reopened the reasonableness hearing at a later date to accept additional evidence from Plaintiff, and took the matter under advisement for five months before

issuing its Ruling on Reasonableness Hearing that explicitly examines the *Glover/Chaussee* factors. CP 1757 to CP 1774. There is simply no basis for this Court to conclude that the trial court reached its conclusion that the settlement amount was unreasonable, and that \$400,000 was the reasonable settlement value, by any method other than a careful consideration of the *Glover/Chaussee* factors.

The Intervening Insurers extensively briefed the remaining eight *Glover/Chaussee* factors below, and provided evidence to support the trial court's findings. CP 1568 -1584. Page constraints prevent repeating this detailed analysis here, but the Intervening Insurers encourage the Court to examine that briefing and supporting evidence hereby incorporated.

Plaintiff complains that the trial court gave too much weight to certain *Glover/Chaussee* factors and too little to others, and that the trial court appeared to "conflate" various factors, considering the relative merits of the parties' liability theories and defenses rather than laying them out one by one in its ruling. Opening Brief at 24. Such actions are precisely and expressly within the trial court's discretion.¹⁹ *Werlinger v. Warner*, 126 Wn. App. At 351, *citing Besel*, 146 Wn.2d at 739 n.2. ("The trial court combined several of the *Chaussee* criteria. We believe this is appropriate, as no single criterion controls and trial courts must exercise their discretion in applying the criteria. All nine criteria will not

¹⁹ Moreover, it is clear from the trial court's ruling on reasonableness, and from the parties' briefing, that the trial court was presented with, and considered, evidence under each of the factors and gave weight to the factors the court decided were determinative. CP 1758 to CP 1773.

necessarily be relevant in every case.").

Plaintiff next argues that the trial court did not appropriately consider the “relative fault of the parties” in reference to the breach of contract claim against Key Property Services, Inc. Opening Brief at 29. Division I has recently ruled that many of the tort-based *Glover/Chaussee* factors may not even be relevant to a construction defect claim that arises in contract, and held that “in construction defect cases which involve contractual obligations to indemnify . . . protecting the insurer from excessive judgments that are the product of collusion or fraud between the claimant and insured, is the main concern.” *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 704-05, 187 P.3d 306 (2008). Moreover, Plaintiff has not explained how its contract claim against Key Properties would result in *joint and several liability* against Key Property Services—an inherent tort concept. The trial court correctly determined that this *Glover* factor was designed to assess the relative fault of a party being dismissed by settlement compared to a defendant who was not being dismissed—a concern that does not apply here.

Furthermore, the trial court was presented with substantial evidence from which it could conclude that the claim against Key Property Services was nearly valueless. There was no written contract between Plaintiff and Key Property Services, there was no evidence that any term in a hypothetical implied contract was breached or that violation of some implied term in an imaginary contract resulted in any compensable

damage. CP 1245. The most compelling evidence of how the Defendants themselves assessed the relative fault of Key Property Services, Inc. is that when defendants allocated their respective shares of the \$215,000 settlement payment, Key Property was obligated to pay only \$5,000 (approximately two percent). CP 1498.

Plaintiff's reliance on *ACLU v. Blaine Sch. Dist*, 95 Wn. App. 106, 975 P.2d 536 (1999) is misplaced. The court in *Blaine* was required to determine a reasonable attorney fee award using a lodestar analysis which the court failed to apply. *Id.* at 119-20. The reasonableness of a settlement is governed by RCW 4.22.060(2), which requires the court to consider the *Glover/Chaussee* factors as the trial court did here. *Villas at Harbour Point v. Mut. of Enumclaw*, 137 Wn. App. 751, 758, 154 P.3d 950 (2007). Washington courts have particularly stated that whether and how a court relies on expert opinion to reach this conclusion is left to the discretion of the trial court. *Schmidt v. Cornerstone Invest.*, 115 Wn.2d 148, 159, 795 P.2d 1143 (1990), *citing Glover*, at 718 n.3.

E. The Trial Court Properly Exercised Its Discretion in Weighing Evidence

Plaintiff complains on appeal that the trial court placed greater weight on some evidence than other evidence, relied more heavily on some witness testimony while apparently discounting other testimony—but this is all inherent in the detailed factual inquiry with which the trial court is charged, and to which this Court has said it will give deference.

Plaintiff appears to object most strongly to what Plaintiff describes

as the trial court's "deference" to the case assessments, opinions and evaluations of defense attorney Bruce White who reported that the full verdict value of Plaintiff's case was \$200,000-\$500,000. CP 1248; 1261. Yet case evaluation and settlement valuation inherently involves informed legal analysis and opinion. Plaintiff offered the opinion testimony of attorney Rick Beal in support of its argument that \$8.75 million was reasonable. CP 679-98. But Mr. Beal has never tried a case of this type and had an obvious and inherent bias—his supportive testimony was an express condition of the settlement the trial court found to be collusive. CP 1316. In contrast, Bruce White was the most experienced trial attorney involved in this case. He was involved in defending this case substantially longer than any of the other attorneys in this matter and therefore was in the best position to evaluate the strengths and weaknesses of the parties' respective cases. The settlement evaluations by Mr. White that the court relied upon were made in real time, when Mr. White was advising his clients, before he knew anything about a planned bad faith action or that he was being set up for legal malpractice.²⁰ CP 1258-61. Therefore, it certainly was within the trial court's province to state, when weighing the evidence of various attorneys' case evaluations, that "guidance must be had in the most reliable opinions of counsel available."

²⁰ Plaintiff argues that Mr. White had a motive to undervalue the case because he was not prepared to go to trial and thus would have a motive to lessen his legal malpractice exposure. But this argument is ludicrous. If Mr. White really thought he was unprepared to go to trial and might be sued as a result—clearly he would have an incentive to overvalue the case so that his clients and/or their insurers would settle the matter. But again, the evaluation of witnesses' motivations and resultant credibility are matters best left to the discretion of the trial court.

CP 1765; Opening Brief at 19.

Plaintiff's argument that \$8.75 million was the reasonable case value relied exclusively on three bases that it was well within the trial court's discretion to reject: (1) the case was not worth \$8.75 million simply because Plaintiff's opening settlement demand was even higher²¹ and (2) the trial court was not obligated to base its reasonableness determination on the Charter Construction repair estimate because this estimate was neither factually reliable nor legally relevant. There was strong evidence presented to the trial court that the Charter Construction estimate was artificially inflated for litigation purposes. CP 1487-89; CP 1241-42; 1246.

In addition, after the dismissal of the construction defect warranty claims, repair costs were no longer an available remedy under the economic loss rule. *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998) ("Under the economic loss rule, defects in materials evidenced by deterioration are characterized as economic losses, for which claims sounding in tort are barred."). Bruce White had pled the economic loss rule as an affirmative defense, and replacement counsel intended to file a motion *in limine* to exclude evidence of the cost of repairs from trial—both defense counsel agreed that repair cost estimates

²¹ One party's opening negotiation position, particularly when no evidence or argument was given in support of the number chosen, should never determine the true value of a case. But in this case, the opening demand was particularly suspect because the attorney who asserted the outrageous demand thereafter suggested at lunch with Mr. Beal that they should throw a few intermittent numbers back and forth to make it look as if they were truly negotiating—something Mr. Beal refused to do. CP 1317.

should not be admitted at trial, and Mr. Todd had confirmed that this trial judge had so ruled in another case. CP 1258-74.²² It was within the trial court's discretion to discount the Charter Construction repair cost estimate when determining the reasonable value of settlement. The trial court certainly had discretion to reject Mr. Beal's opinion that \$8.75 million was the reasonable settlement value, when he had no experience trying such a case and had bartered his supportive testimony as part of the settlement deal.

There was substantial evidence apart from Mr. White's case evaluations corroborating the trial court's conclusion that the objective settlement value of this case was \$400,000, not \$8.75 million. Defendants abruptly walked out of mediation without even making a counter offer when Plaintiff demanded \$1.75 million. CP 1313-1314. When Defendants' own money was at stake, they negotiated for weeks before finally agreeing to pay only \$215,000. CP 1314. Replacement defense counsel Steve Todd, even after the case had been collusively sabotaged (*e.g.*, after White was instructed to withdraw his winning summary judgment motion and drop his expert), never recommended settlement in excess of \$1 million, agreed that repair costs were not a legally available

²² Defendants had similar winning legal arguments for why the cost of repairing construction defects was not compensable under the few legal theories remaining in Plaintiff's case when it settled. As the court in *Kelsey Lane* stated: "We hold that the POS [Public Offering Statement] provisions of the WCA [Washington Condominium Act] do not require the disclosure of construction defects." *Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc.*, 125 Wn. App. 227, 241-42, 103 P.3d 1256 (2005) (involving a condominium project where, as here, the statute of limitations barred WCA warranty claims).

remedy and reported that Plaintiff had not produced any evidence of damages flowing from the few claims that remained in the case after summary judgment. CP 1263-74. Therefore, Mr. Todd's settlement evaluation was based solely on the *risk* that the trial judge would make an incorrect evidence ruling and that the jury would be swayed by an inflated Charter Construction estimate. CP 1263-74.

Finally, Plaintiff argues that the trial court was too concerned about the impact of the stipulated judgment settlement on the Intervening Insurers; falsely stating, with no reference to the record, that the insurers had full access to information and full opportunity to participate in the settlement negotiations. Opening Brief at 29-30. Plaintiff's implication that because they were paying for the defense, Intervening Insurers had full access to all relevant defense information is entirely false. Defense counsel's only clients are the Defendants, regardless of who is paying his bill, and in this instance, attorney Rick Beal, reportedly on behalf of the Defendants, discouraged defense counsel from reporting relevant information to the insurers. CP 1366-67. Indeed, replacement defense counsel Mark Scheer agreed to *never report to the insurer* to appease Mr. Beal's goals and he never did report. CP 1378-80; CP 1382; CP 1384-86.

Nor were the Intervening Insurers or their attorney invited to the secret meeting the night before the mediation, or the lunch at which the stipulated judgment was negotiated. The purported "invitation" the insurers received was a take-it-or-leave-it offer to be involved in settlement discussions if the insurers would forfeit all coverage defenses,

fully defend and indemnify without reservation of coverage rights all named and unnamed individual partners in the defendant organizations, and agree to pay the unquantified attorneys' fees of Defendants' general counsel Hughes and attorneys Beal and Harper in addition to retained defense counsel. CP 1211-12. These insurers never even issued an insurance policy to developer Water's Edge Associates and Water's Edge Associates never paid them a dime in premiums. The insurers had valid reasons and every right to reserve their coverage positions.

Assignment of Error B: The Trial Court's Summary Judgment Ruling Is Moot And Should Not Be Reviewed; But If Reviewed It Should Be Affirmed Because The Statute of Limitations Had Expired

A. The Summary Judgment Orders Are Moot

Plaintiff and Defendants have fully and finally settled all of their claims, and the Defendants have been fully released from any liability, rendering all issues related to the 2006 partial summary judgment rulings moot. CP 741-69. This Court should not engage in *de novo* review of these interim partial summary judgment orders because nothing this Court does can rejuvenate these claims that have been fully resolved and settled—a ruling by this Court would be purely advisory. Moreover, due to the unique terms of the settlement, which the trial court found created a collusive unity of interest between Plaintiff and Defendants, the Defendants who were the prevailing parties on the 2006 motions no longer have any interest in opposing an appeal and have declined to even file an appellate brief with this Court.

“Only an aggrieved party may seek review by the appellate court.”

RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987). Here, there is no aggrieved party because the parties have settled their claims against one another that were subject to the summary judgment order, there is no justiciable controversy between the parties as to those orders, the issues are moot, and the parties have waived jurisdiction on the designated claims.²³

B. Summary Judgment Based on the Statute of Limitations Was Appropriate

In the event this Court decides to reach the merits of this assignment of error, the trial court’s order on summary judgment was appropriate because there is no genuine issue of material fact that the statute of limitations had expired prior to Plaintiff filing suit.

(1) Standard of review

A grant of summary judgment is reviewed *de novo*. *Beaupre v. Pierce County*, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). Summary judgment should be denied only “if the

²³ The Intervenors fully briefed these issues in their Motion to Dismiss dated 05/09/08, Reply in Support of Motion to Dismiss dated 5/30/08, Motion to Modify the Commissioner’s Ruling dated 06/27/08 and Reply in Support of Motion to Modify the Commissioner’s Ruling dated 07/18/08. Due to page limitations, those arguments will not be repeated but are incorporated herein.

evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added), *cited with approval in Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d. 216, 770 P.2d 182 (1989).

(2) The warranty claims were barred

The trial court dismissed Plaintiff’s claims for breach of implied and express warranties under the Washington Condominium Act (“WCA”), RCW 64.34.443-45 because there were no genuine issues of material fact that the statute of limitations had run on those claims.

Because condominiums are statutory creations, the rights and duties of condominium unit owners are not the same as those of real property owners at common law; instead, they are determined strictly by statute. *Shorewood West Condominiums Ass’n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000). Claims under the WCA are subject to a four-year statute of limitations as set out in RCW 64.34.452, which provides:

(1) A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2)(b) of this section shall not expire prior to one year after termination of the period of declarant control, if any, under RCW 64.34.308(4)

* * * *

(2) Subject to subsection (3) of this section, a cause of action or [for] breach of warranty of quality, regardless of the purchaser’s lack of knowledge of the breach, accrues:

* * * *

(b) As to each common element, at the latest of (i) the date the first unit in the condominium was conveyed to a bona fide purchaser, (ii) the date the common element was completed, or (iii) the date the common element was added to the condominium.

Id. The construction defects alleged by the Plaintiff all relate to the common elements of the condominium; therefore subsection 2(b) of RCW 64.34.452 controls when the Association's cause of action accrued.

RCW 64.34.020(6) defines the term "common elements" to mean "all portions of a condominium other than the units." In Plaintiff's list of known construction defects included with its Amended Complaint (CP 14), Plaintiff identified alleged defects in the building envelope, hardboard panel siding, weather resistive barrier, flashing, wood components, decks, structural, and geotechnical drainage. Indisputably, these are all "common elements" under the statute.

The buildings were originally constructed as apartments in 1987 to 1988 and consisted of 138 units. CP 17. In 2000, all 138 apartments were converted to condominiums. *Id.* No construction was done on the building exteriors at the time the apartments were converted to condominiums. CP 17-18. However, maintenance and repairs to the building took place prior to and after conversion. *Id.* The repairs included work on the stairways, some replacement of individual siding boards and the repair of some roofs. *Id.* There is no authority for Plaintiff's position that ordinary maintenance and repair tolls the statute of limitations.

Because construction of the buildings was complete prior to conversion of the apartments into condominiums and all the common elements had been added or completed prior to the conversion, the statute of limitations began to run as to the common elements on the date the first unit was conveyed to a bona fide purchaser. In this case, the first unit was sold on August 24, 2000. CP 17-20. Accordingly, that is when the four-year statute of limitations accrued. Any action for breach of express or implied warranties under the Condominium Act was required to be filed by August 24, 2004. The Complaint in this case was not filed until July 1, 2005, more than 10 months after expiration of the statute of limitations. Summary judgment on this issue should be affirmed.

Assignment of Error C: The Court Correctly Dismissed The Case Rather Than Entering a Collusive Stipulated Judgment

A. Appellant Fails to Support this Assignment of Alleged Error With Any Legal Authority

In accordance with RAP 10.3(a)(6), an appellant must support an assignment of alleged error with argument including legal authority. Plaintiff/Appellant fails to cite any legal authority in support of its position that the trial court erred in dismissing the case with prejudice after the parties had settled all their claims. An appellate court will not attempt to construct an argument on behalf of an appellant, *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993), and will not consider an issue absent argument and citation to legal authority. *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

Without adequate, cogent argument and briefing, a court should not consider an issue on appeal. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989). A mere citation to a court rule or a rule of evidence is insufficient. Besides citing CR 54 and 58, appellant has provided this court no legal authority or reasoned analysis in support of its position that the trial court committed error when dismissing the case below. Without authority to support it, an assignment of error is waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *Post v. City of Tacoma*, 140 Wn. App. 155, 165 P.3d 37 (2007). Accordingly, this court should decline to review Assignment of Error C.

B. The Trial Court Dismissal Was Not Error

After the trial court found that the settlement amount was unreasonable and the product of collusion, the settling parties asked the trial court to enter judgment for the entire \$8.75 million settlement amount. CP 1775. The settling parties' proposed judgment specifically stated that the trial court had "reviewed the files and records herein and having received evidence and exhibits supporting this Judgment" and "good cause having been shown" hereby enters judgment in the amount of \$8.75 million (underlining added). CP 1792. Entering the proposed judgment with these findings would have been a lie, while entering *any* \$8.75 million judgment following the trial court's January 29, 2008 decision would have made a mockery of our judicial system. The trial court correctly concluded that a dismissal under CR 41 was supported by

the parties' Settlement Agreement.

C. Standard of Review

A trial court order dismissing an action under CR 41 is reviewed for abuse of discretion. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 130-31, 896 P.2d 66 (1995). Here, the trial court did not abuse its discretion when it refused to enter a judgment the court had already found to be unreasonably inflated and the product of collusion.

D. Argument

1. The trial court did not abuse its discretion by refusing to enter the settling parties' collusive proposed judgment

At the time the parties moved for entry of the \$8.75 million stipulated judgment, the trial court had already determined that the amount of the moving parties' proposed judgment had no basis in fact or the law of the case and was the product of a collusive effort to artificially inflate the value of the bad faith claim Defendants assigned to the Plaintiff.

A court has no obligation to enter a stipulated judgment. It is within the trial court's sound discretion to weigh all the admissible evidence and enter judgment based on those facts it deems important. *Affordable Cabs, Inc. v. Employment Sec., Dep't*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004) (holding that it is the trier of fact's exclusive province to weigh evidence). Additionally, except in cases of default judgments (where judgment may not be *greater* than that requested in the

pleadings), every final judgment, including summary judgments, shall grant the relief to which the prevailing party is entitled. *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 663 P.2d 141 (1983); CR 54(c).

The trial court invited argument over whether it should enter judgment for the \$400,000 that the court found to be the “reasonable” value of Plaintiff’s claim at the time of settlement, but no party could provide legal support for that option. \$400,000 was the reasonable settlement value of Plaintiff’s claim in January of 2007, but the trial court did not have a basis or legal authority to impose a judgment against Defendants in that amount if the parties did not stipulate to such a judgment. The parties’ settlement agreement was not contingent on the trial court finding the \$8.75 million covenant judgment reasonable or entering judgment in that amount. Therefore, as is true after any final settlement, the case was over and appropriately dismissed.

If the settling parties wanted a stipulated judgment to be entered as part of the case dismissal, then they were advised that Washington law provided them with a means of accomplishing that end. The option is not to ask the trial court to enter the unreasonable judgment—an effort that has no legal support. Rather, in *Meadow Valley Owners Ass'n v. Meadow Valley, L.L.C.*, 137 Wn. App. 810, 813, 156 P.3d 240 (2007), the court stressed, “[a] court’s reasonableness determination under RCW 4.22.060(2) cannot affect the validity of a settlement agreement or the amount paid, [but] RCW 4.22.060(3) does not prevent the parties from agreeing to the amount the court determines reasonable” in order to have a

stipulated judgment entered. *Id.* Neither the trial court nor the Intervenor may force the parties to *stipulate* to a different judgment amount. But if the settling parties wanted a judgment entered in this case—as opposed to a simple order of dismissal that would be entered in any case that had been settled—then the parties needed to stipulate to a reasonable judgment, which they refused to do.

In *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005), the trial court found the parties’ stipulated judgment of \$5 million to be unreasonable and explicitly stated that it would not enter judgment in excess of \$25,000. *Id.* at 347-348. The appellate court upheld the trial court’s finding that the stipulated judgment amount was unreasonable and its refusal to enter a judgment in excess of \$25,000.

As Judge Posner of the Seventh Circuit Court of Appeals has succinctly stated:

[The issue] is whether a court asked to approve a consent judgment is required to accept and enforce any terms that the parties adopt. The court is not so constrained. If the Board and Brooke had agreed that Brooke would be ordered to break the knees of its director of labor-management relations, or make the director wear a dunce cap, a court would not be required to enforce a judgment embodying that order. That would be a clear case of a consent judgment’s affecting the rights of a third party. Far from being required to rubber stamp such a judgment, a court would be obliged to reject it.

NLRB v. Brooke Industries, Inc., 867 F.2d 434, 435 (7th Cir. 1989). Judge Posner further reasoned, “When the parties’ bargain calls for judicial

action . . . the benefits of settlement to the parties are not the only desiderata. The . . . judge does not automatically approve but must ensure that the agreement is an appropriate commitment of judicial time and complies with legal norms.” *Id.* at 436.

Here, the trial court had already conducted its reasonable inquiry and its findings did not support a judgment of \$8.75 million. Accordingly, the moving parties’ request for entry of an \$8.75 million stipulated judgment was a sham and the trial court was obliged to reject it.

2. The Moving Parties’ Settlement Agreement Does Not Require Entry of the Judgment

The Settlement Agreement between the settling parties did not require that the trial court enter the \$8.75 million proposed stipulated judgment; rather it only required that the defendants stipulate to entry of judgment in that amount; which they did. CP 741–48. Accordingly, the trial court’s exercise of its discretion in refusing to enter a collusive judgment, did not affect the validity of the settling parties’ Settlement Agreement. This is consistent with Washington law holding that finding the settlement amount unreasonable does not impact the validity of the settlement or the amount that must be paid pursuant to a settlement agreement. RCW 4.22.060(3). The trial court’s January 29, 2008 memorandum decision only found the amount of the stipulated judgment to be unreasonable; it in no way disturbed the moving parties’ Settlement Agreement. *See* CP 1757 – 1775.

Since the Settlement Agreement did not require entry of the

proposed \$8.75 million stipulated judgment, one might logically ask: Why in the world would the parties—particularly the Defendants—ask the trial court to enter an \$8.75 million judgment against the Defendants? The only possible reason for a joint motion for entry of the unreasonable stipulated judgment would be to manufacture an element of “harm” in the pending bad faith action against the Respondents.

Generally, the amount of a confessed judgment establishes the presumptive measure of damages in a bad faith claim against the insurers. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002). However, here the trial court had already found that the amount of the proposed confessed judgment was unreasonable, so it will not be the presumptive measure of damages in the bad faith action. *Besel v. Viking Ins. Co.*, 146 Wn.2d at 737-38. Therefore, the settling parties collectively and collusively looked for another way to artificially create an \$8.75 million damage element for their bad faith action against the Intervenor by seeking to enter a bogus judgment so that the settling parties could argue that they suffered consequential damages (e.g., impact to credit rating) as a result of a large judgment being entered against the Defendants.

The Washington Supreme Court has found that the entry of a covenant judgment against an insured, *by itself*, may constitute “harm” in a bad faith action. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 399-400, 823 P.2d 499 (1992). The court in *Butler* reasoned that a covenant judgment which a defendant has no obligation to pay “still ‘constitutes a real harm because of the potential effect on the insured’s credit rating [and] damage

to reputation and loss of business opportunities.” *Id.* But in this case, there was no sound reason for this alleged harm despite the parties’ invitation to the trial court to enter a bogus judgment against the Defendants. Entry of the stipulated judgment was not required by the Settlement Agreement, and there was no justification for the amount of the proposed judgment. It would be unconscionable for a court to enter a sham judgment just so the moving parties could try to artificially create damages for their bad faith action. Accordingly, the trial court did not abuse its discretion when it refused to enter the fictitious judgment and, when the settling parties refused to stipulate to a reasonable judgment amount, to enter an order of dismissal pursuant to settlement.

V. CONCLUSION

For the foregoing reasons, the Intervening Insurers respectfully ask this Court to affirm the trial court on all issues. The Intervenors further ask this Court to affirmatively encourage trial courts going forward to permit insurers who are the sole target of a covenant judgment, and the only entity with any interest in revealing collusion in these cozy covenant judgment settlements that are becoming more and more prevalent in this State--the time and discovery necessary to unveil collusive dealings between “opposing” counsel that threatens the integrity of our legal system in this State.

Respectfully submitted this ^{10th}10 day of October, 2008.

SOHA & LANG P.S.



Tyna Ek, WSBA #14332
Misty Edmundson, WSBA #29606
Attorneys for Respondents Farmers
Insurance Exchange, Truck Insurance
Exchange and Mid-Century Insurance
Company

NO. 3741-5-3

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DIVISION II
STATE OF WASHINGTON

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WATER'S EDGE HOMEOWNERS
ASSOCIATION, a Washington nonprofit
corporation;

Plaintiff/Appellant,

v.

WATER'S EDGE ASSOCIATES, a
Washington general partnership; PAUL
A. NELSON and "JANE DOE"
NELSON, and their marital community;
LARRY PRUITT and "JANE DOE"
PRUITT, and their marital community;
BURKE M. RICE and "JANE DOE"
RICE, and their marital community;
SALMON CREEK DEVELOPERS,
INC., and Oregon corporation; KEY
PROPERTY SERVICES, INC., a
Washington corporation,

Defendants/Respondents,

And

FARMERS INSURANCE EXCHANGE,
a foreign corporation; MID-CENTURY
INSURANCE COMPANY, a foreign
corporation; and TRUCK INSURANCE
EXCHANGE, a foreign corporation,

Intervenors/Respondents.

DECLARATION OF SERVICE

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STATE OF WASHINGTON
BY [Signature] DEPUTY

Executed this 17th day of October, 2008 at Seattle, Washington.

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

A handwritten signature in black ink that reads "Helen M. Thomas". The signature is written in a cursive style and is positioned above a horizontal line.

Helen M. Thomas

Legal Secretary to Tyna Ek

SOHA & LANG, P.S.

701 Fifth Avenue, Suite 2400

Seattle, WA 98104

(206) 624-1800

Attorneys for Intervenors/Respondents

Farmers Insurance Exchange, Mid-

Century Insurance Company and Truck

Insurance Exchange