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DIVISION II

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STATE OF WASHINGTON

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

BY  DEPUTY

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., an Oregon
corporation; KEY PROPERTY SERVICE, 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.

APPELLANT'S REPLY BRIEF

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I. *De Novo* Review is Appropriate.

Farmers' proposition that abuse of discretion is the appropriate standard of review based on a single citation to a Division One opinion in which there were no factual disputes¹ is oversimplified. In cases where there *were* factual disputes, the courts have held that findings of fact within that decision must be supported by substantial evidence.² In *Mavroudis v. Pittsburgh-Corning Corp.*,³ the court attempted to reconcile the different standards being applied to reasonableness hearings, noting that while cases generally rely on *Glover* for the proposition that reasonableness hearings are reviewed for substantial evidence, "*Glover* only says that reasonableness involves factual determinations, and that factual determinations will not be disturbed if supported by substantial evidence." *Id.* at n. 34. The court concluded:

A determination of reasonableness involves two steps: first, determining the historical facts giving rise to the settlement, and, second, deciding whether those historical facts make the settlement reasonable consideration the relevant factors outlined in *Glover*. The second inquiry may be a mixed question of law and fact and should perhaps be reviewed de novo.

Id. The Association urges this Court to adopt this approach especially where, as here, the reasonableness hearing was conducted exclusively

¹ *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) (because case was decided on one undisputed factor – the defendant's bankruptcy – the court made no findings of fact and therefore, did not employ a substantial evidence standard).

² *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995).

³ 86 Wn. App. 22, 935 P.2d 684 (1997).

through the review of documents, for which a *de novo* review is appropriate. *See, e.g., In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004) (“Since the [findings] were made from the same cold record of affidavits and depositions which has been filed here, and the court below did not have the opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony, we should reassess its factual findings as well as its legal conclusions *de novo*.”)⁴

II. The Trial Court’s Finding that the Reasonable Settlement was \$400,000 of the Stipulated \$8.75 million is Reversible Error.

A. The Trial Court’s “Inferences of Collusion” are Not Based on Substantial Evidence.

It is Farmers’ burden to show fraud or collusion. The trial court found no fraud,⁵ but its reduction of the stipulated judgment to \$400,000 was based on a finding of *inferences* of collusion.⁶ But a legitimate inference of collusion must be based on actual facts. As this Court has previously stated, “[w]e cannot infer bad faith, collusion or fraud merely based on innuendo and speculation alone.” *Martin v. Johnson*, 141 Wn.

⁴ *See also Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969) (“[W]here the record both at trial and on appeal consists entirely of written and graphic material-documents, . . . and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record *de novo*.”); *Carlson v. Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968) (*de novo* review appropriate where trial court ruled on documentary evidence alone).

⁵ By arguing that it need not prove fraud, Farmers essentially concedes that it has failed to prove the elements of fraud sufficient for the court to have considered actual fraud.

⁶ While the court claimed to have reached its conclusion that only \$400,000 of the settlement was reasonable *absent the consideration of collusion*, the statement is belied by its six-page focus upon collusion in its order. CP 1774, 1758-64.

App. 611, 623, 170 P.3d 1198 (2007) (citing, e.g., *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969)). Washington courts have provided no other guidance on what collusion means in the context of a covenant judgment. However, other courts have noted, “[a]ny negotiated settlement involves cooperation to a degree.”⁷ Farmers’ citation to out-of-state court decisions regarding collusive *trials* before courts that were unaware of the lack of adversarial nature of the trials is not helpful because those cases lacked the procedural safeguard of a reasonableness hearing.⁸ It is helpful, however, to recall that the insurer must show that there was collusion *between the parties* to the settlement.⁹ Moreover, because the court is charged with determining the amount that *is* reasonable, any such collusion must logically relate to the evidence

⁷ *Continental Casualty Co. v. Westerfield*, 961 F. Supp. 1502, 1505. (D.N.M. 1997).

⁸ In an attempt to define collusion as broadly as possible, Farmers cites out-of-state cases relating to collusive *trials* where no reasonableness hearings existed to protect against collusion. See *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L. Ed. 1413 (1943) (*lawsuit* dismissed where it was discovered there was no real “case or controversy” because the parties had orchestrated the suit for a determination on the constitutionality of a federal act; actual plaintiff knew virtually nothing about the case and was assured by the defense that he would incur no expense); *Westerfield*, 961 F. Supp. 1502 at 1504-08 (trial was collusive when the parties had settled, but no reasonableness hearing process existed, so the parties presented an essentially fake trial which the defendant agreed not to defend. In finding the *trial* to be collusive, the court cited the fact that defendants retained 10% of the recovery against the insurer as part of the settlement so that they stood to benefit financially from a higher recovery and the fact that the factual findings, drafted by the plaintiff, were inconsistent and manipulated to demonstrate coverage where there was none. In other words, both parties benefitted financially from the arrangement, the purpose of which was to create coverage where there was none.) The standard for collusive *trials* simply does not apply where the parties have the reasonableness hearing as a safeguard against collusive settlements, as is the case in Washington.

⁹ *Westerfield*, 961 F. Supp. at 1506 (collusion occurs when *plaintiff and insured* enter into a “questionable collaboration . . .”)

presented or show that the collusion produced an improperly inflated settlement number.

Just as the trial court's distaste for the covenant judgment process tainted its ruling (because the court ultimately believed that the process itself "undermine[d] the respect owed to an honorable profession"¹⁰), the court's assumption as to the unassailable quality of Bruce White's defense and its disdain for coverage counsel's actions led it to find collusion where there was none. Instead, Farmers has attempted to wring collusion from a series of neutral or ambiguous events.¹¹

In fact, when viewed from the perspective of the insured, the same basic facts paint quite a different picture – one which was completely ignored by both Farmers and the trial court. Ultimately, if the same facts are equally susceptible to interpretation as either collusive or proper, then Farmers has failed to demonstrate collusion at all and the trial court erred in finding the settlement unreasonable. That is the case here.

1. The Finding that Farmers-Appointed Counsel was Successfully Defending the Lawsuit is Not Supported by Substantial Evidence.

This lawsuit was filed on July 1, 2005. Although Defendants¹² immediately tendered the claim to Farmers, Farmers did not retain counsel

¹⁰ CP 1759.

¹¹ The trial court compounded this error by essentially giving Farmers a pass on its burden of proof. "Agreements of the type alleged are seldom susceptible of direct testimony. Their existence is postulated from circumstantial evidence and reasonable inferences." CP 1763.

¹² Defendants are Water's Edge Associates ("WEA") and Key Property Services ("KPS"), also referred to herein as "Insureds."

for Defendants until four months later.¹³ Farmers defended under a reservation of rights, which triggered an “enhanced obligation of fairness toward its insured” because of the potential conflicts that situation creates.¹⁴ Yet Farmers refused to mediate until January 16, 2007, just one month prior to trial. CP 1635-36. The mediation was unsuccessful.

The Association has previously catalogued the poor state of the defense at the time of settlement, just three weeks from trial.¹⁵ Newly-appointed defense attorney, Steve Todd, characterized the effort to shore up the defense in preparation for trial as a “Herculean task.” CP 1623. Additional facts demonstrate counsel’s complete misunderstanding of the Association’s claims. First, White did not oppose the Association’s Summary Judgment Motion which would have established unambiguous *liability* against his client, Water’s Edge Associates (“WEA”), for failure to maintain and repair the condominiums because White did not “view those new claims as increasing the damage exposure, as they dealt with *technical violations* of the Condominium Act.” CP 734 (emphasis added). Second, White miscalculated the total damages to be \$940,000 based upon his expert’s \$70,000-\$80,000 per building estimate; yet there are 23 buildings at Water’s Edge, which would total \$1,725,000. CP 1495, 1538. Ultimately, Defendants viewed this lack of preparation as Farmers’

¹³ CP 3, 1906. In March 2006, after the Association amended its Complaint to add Key Property Services, Inc. (“KPS”) as a named defendant, KPS tendered defense of the claim to Farmers. Farmers failed to respond to the tender for over *eight months*, and did not retain separate counsel until a month prior to trial. CP 729, 736-37.

¹⁴ *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 383, 715 P.2d 1133 (1986).

¹⁵ See Brief of Appellant at pp. 21-23.

“apparent unwillingness to pay for a proper expert witness or otherwise allow Mr. White to fully prepare KPS’s defense.” CP 1633.

2. The Association’s Proper Contact with Personal Counsel to Recommend Coverage Counsel is Not Evidence of Collusion.

On August 31, 2006, more than a year after commencing the lawsuit and the day after a key deposition,¹⁶ the Association’s counsel, Daniel Zimmeroff, emailed Defendants’ personal counsel, Robert Hughes, questioning the insurers’ attention to the case since White had not participated in the deposition, had not disclosed any witnesses and had not engaged in any independent investigation of the condominium. CP 1650. Zimmeroff contacted Hughes because he believed that coverage counsel was necessary and, due to concerns about the defense, could not discuss the issue with White directly. CP 1635-36. As argued in the Association’s Opening Brief, Zimmeroff’s contact with Hughes, *as personal co-counsel* for Defendants, was entirely proper and certainly did not violate the Rules of Professional Conduct.¹⁷ Farmers does not dispute

¹⁶ KPS on-site manager, Gil Mulder, was responsible for the day-to-day maintenance of Water’s Edge. CP 1121. He testified that he repeatedly expressed his concerns over the damage at the complex during the conversion process and lack of proper repair, ultimately opining that he believed the entire condominium needed to be re-sided and re-roofed. CP 267-70, 352-56. *See* Brief of Appellant at pp. 6-7.

¹⁷ *See* Brief of Appellant at pp. 32-37. Coverage issues should be handled by independent coverage counsel and not insurance-retained defense counsel to avoid appearing as if the insurance-appointed counsel is demonstrating a greater concern for the insurer’s interest (in denying coverage) than the insured’s risk (escaping liability). *See Tank*, 105 Wn.2d at 388 (requiring the insurer defending under a reservation of rights to: 1) thoroughly investigate the claim; 2) retain competent defense counsel; 3) inform the insured of the reservation of rights defense, developments relevant to policy coverage, and progress of the suit; and 4) refrain from actions that demonstrate a greater concern for the insurer’s interest than the insured’s risk).

this, but continues to promote the falsehood that the Association's counsel contacted Defendants directly.¹⁸ Notably, White himself encouraged Defendants to retain insurance coverage counsel in the memo he drafted for his clients after Farmers issued its 28-page reservation of rights letter.¹⁹

Thus, the trial court's reliance upon the belief that the Association's contact with Hughes to recommend coverage counsel was improper is completely without factual support and cannot contribute to a finding of collusion.

3. Farmers' Reservation of Rights Letter was the Catalyst for Engaging Coverage Counsel.

Despite acknowledging that the parties settled "a long and drawn out litigation, near the eve of trial,"²⁰ the court's comment that "[t]he manner in which the case shifted, abruptly, from litigation to collaboration is highly suspect, and troublesome"²¹ is completely unsupported and, therefore, cannot contribute to a finding of collusion. The reason for this shift was not some collusive effort by the Association and coverage counsel; it was wholly of Farmers' making.

Farmers created the chasm between the Defendants and White and the need to settle when it sent a *second* reservation of rights letter dated November 14, 2006, just one month prior to mediation and three months

¹⁸ See Intervenors' Brief at p. 22.

¹⁹ CP 1258 ("I urge you to retain independent counsel to advi[s]e you regarding coverage issues.")

²⁰ CP 1758.

²¹ *Id.*

prior to trial. CP 700-27. The 28-page letter stated that Farmers did not owe any duty to indemnify any of the Defendants, warned that it might terminate defense of the claim outright, and stated *that it might sue Defendants in order to obtain reimbursement of defense costs incurred to date.* CP 700-27. The letter created an actual adversarial relationship between Farmers and the Defendants, which was the catalyst for the shift from litigation to settlement.

Both the Defendants' and White's testimony supports this reality. Immediately after the letter was issued, White recalls a lengthy conference call with his clients that was "somewhat hostile and accusatory." CP 1299 (55: 19-20). White stated:

I think it had become clear to me that they, and probably Paul Nelson on behalf of Key Properties, had received a reservation of rights letter not long before that because he expressed a concern that Farmers, you know, was reporting that there would be no coverage at all.

CP 1244 (56:16-57:8). White continued, "He was concerned that, I suppose, that I was representing Farmers's interests and not looking out after his interests. And he made some statements to the effect that, you know, witness[es] can't go to trial. We have to get this case settled." CP 1244 (55:4-6).

After the second letter was received, the Defendants'/Insureds' concern that Farmers was not acting in their best interests was heightened. Paul Nelson, owner and president of KPS and general partner of WEA, stated that Defendants retained coverage counsel "in direct response to the

reservation of rights letter it had received.” CP 1632. He explained: “This letter plainly showed that Farmers was refusing coverage, and KPS hired Mr. Beal to protect its interests against Farmers.” CP 1632. Nelson and KPS requested an emergency meeting with Beal “in response to the reservation of rights letter, and KPS’s perception that Farmers was not adequately defending the case.” CP 1633. At that time, Nelson “felt Farmers was hanging us out to dry and that we needed some serious help.” CP 1633. This is precisely the situation in which Washington courts have said that an insured may take its case into its own hands and settle around the insurance company to protect itself.²²

Despite these facts, Farmers and the court *speculated* that the only explanation for the shift was the Association’s having lost its warranty claims on summary judgment because, they believed, the dismissal “guttled” the Association’s case. CP 1766. First, the timeline does not support this. Zimberoff’s contact with Hughes occurred on August 31, 2006, the day after the deposition of onsite property manager Gil Mulder and prior to the court’s order granting partial summary judgment to Defendants. CP 1649. Thus, the loss of the warranty claims was not the catalyst. As set forth in the Association’s Opening Brief, Zimberoff contacted Hughes regarding Farmers’ lack of attention to the multi-million dollar case. CP 1636-38, 1649-50, 1744-46.

²² See Section II.C., *infra*.

Second, the loss of the Association's warranty claims did not "gut" the Association's case because the Association's evidence at trial for the remaining claims would be almost identical to its evidence had the warranty claims remained. The facts in this case make it unlike the usual construction defect case because the Water's Edge was a conversion condominium where both Defendants did work on the buildings over four years, during which time Defendants "maintained" and "repaired" the complex, replacing portions of siding, roofs and exterior stairways.²³ These repairs either exacerbated or covered up damage to the buildings.²⁴ Thus, the case did not depend solely upon the existence of original construction defects, as it might in most new condominium cases.

While the Association had lost its right to pursue claims against WEA for the original defects, it still had claims against both WEA and KPS for failure to maintain and repair the buildings. WEA had a fiduciary obligation to maintain and repair the common elements during its period of control.²⁵ Defendant KPS, as the property manager, had a similar duty, fully acknowledged by its president and owner.²⁶ In fact, KPS believed that if the jury found a failure to repair, KPS "would be held liable under our property management agreement with the homeowners for all

²³ See Brief of Appellant at pp. 6-9.

²⁴ *Id.*; CP 312-15, 333-35.

²⁵ RCW 64.34.308(1); *see also* CP 478-91 (Association's Motion for Partial Summary Judgment).

²⁶ "KPS was the sole entity coordinating and providing these services to the homeowners at the Condominium. At trial KPS could not have put the blame for a lack of maintenance and/or associated repairs on anyone other than KPS. For all intents and purposes we were the buck stopping entity for all maintenance/repair issues." CP 1631.

damages deemed the result of poor maintenance, repair, etc.” CP 1631. Thus, liability for both was relatively certain even without the warranty claims. Moreover, the measure of damages for Association’s remaining claims against Defendants for breach of fiduciary duty and breach of contract to maintain the common elements would be the cost to repair – which is the same measure of damages and relied upon the same evidence that would have been offered in support of breach of the warranty claims. CP 638-42, 993-1008.

As the actual evidence presented to the trial court demonstrates, it was the issuance of the second reservation of rights letter that created the “sudden” shift from litigation to cooperation observed by the trial court, not the loss of the Association’s warranty claims. Therefore, this factor cannot support collusion.

4. Coverage Counsel’s Actions Do Not Demonstrate Collusion.

Despite the logical tenet that the collusion must be between the *settling parties*, the trial court cited independent actions of *coverage counsel*, such as their failure to notify White of their representation or their workup of the bad faith claim, in support of finding an *inference* of collusion. These independent events do not represent collusion. However, Farmers argued, and the court apparently agreed, that coverage counsel Beal and Harper sabotaged the defense to “artificially inflate the Association’s damages.”²⁷ Again, these findings are not based

²⁷ See Intervenors’ Brief at pp. 9-10.

in fact. Defendants met with coverage counsel for the first time on November 22, 2008, *after* the November 14 reservation of rights letter was issued. CP 1633. The settlement was reached on January 25, 2007. CP 749-53. Thus, Farmers claims that coverage counsel scuttled Defendants' entire case *and* "manufactured a bad faith claim" in less than 60 days.

A review of the record demonstrates how Farmers has distorted the facts to fit its theory. For example, Farmers states: "Attorney Beal is known for 'creating' bad faith claims in order to 'sell' such claims during settlement negotiations in exchange for a covenant judgment. . . ." ²⁸ Yet Beal's actual testimony refers only to his negotiation of covenant judgments and his pledge to back up the covenant judgment settlement agreement with the level of cooperation necessary for the parties to proceed through the judicial process. CP 1439. There is absolutely no evidence in the record that Beal has a reputation for creating bad faith claims where they do not naturally exist. This innuendo was manufactured by Farmers to take advantage of the trial court's distaste for the covenant judgment process.

Finally, the claim that coverage counsel's motives were to target Farmers is illogical. If the Association's remaining claims were "frivolous," ²⁹ and the case was being "skillfully litigated," ³⁰ Beal and Harper, *who also represent the insureds*, would have had absolutely no

²⁸ *Id.* at p. 23.

²⁹ *Id.* at p. 3.

³⁰ CP 1763.

reason to cause Defendants to pay \$215,000 of their own money towards the settlement. The only motive Beal and Harper had was the proper motive – to best serve their clients by negating liability entirely rather than risking greater liability at trial. Thus, these facts do not support a finding of collusion.

5. The Court’s Finding that a Malpractice Claim was Assigned with a “Kickback” to Defendants Cannot Support Collusion Because it is Not Supported by the Record.

The trial court explicitly held that his finding of collusion was based, in part, upon “[t]he fact that Defendants retained the right to recover their \$215,000 contribution toward the settlement, against the insurers and Mr. White’s firm, if *Plaintiffs* prevailed in the malpractice case *and/or* bad faith case. . . .” CP 1761, 1764 (emphasis added). On appeal, Farmers continues to argue that the malpractice claim demonstrates collusion because the parties would “share in the profits.”³¹ These related arguments demonstrate a complete misunderstanding of the settlement agreement pursuant to which *Defendants* reserved their rights to pursue malpractice claims to attempt to recoup the \$215,000 paid under the settlement.³² The language referred to by Farmers was merely a protection for the Association to ensure that Defendants did not recoup those costs while the Association recovered nothing. Thus, the reliance on these facts to demonstrate that both Defendants and the Association

³¹ See Intervenor’s Brief at p. 9, 28-29.

³² See Brief of Appellant at pp. 18-19; CP 741-69.

profited at the expense of Farmers is completely misplaced. The actual facts do not demonstrate collusion.

6. The Withdrawal of the Summary Judgment Motion Does Not Demonstrate Collusion.

Farmers and the trial court repeatedly cited the withdrawal of White's summary judgment motion on which he believed he would prevail³³ to support an inference of collusion. By filling the factual gaps with unsupported innuendo, Farmers charges that the Insured's coverage counsel forced White to withdraw the motion because it did not want the Insureds to prevail.³⁴ This is completely incorrect and unsupported by the record. In fact, White testified that it was *his own clients* who requested the motion be stricken *temporarily* so the court would not rule on the motion prior to the scheduled January mediation. CP 1248. White testified that the client "expressed some concerns that . . . [w]e might have better leverage at mediation if the arguments of the motion for summary judgment was after the mediation date." CP 1248. When asked if he disagreed with that decision, White hedged, saying: "Well, I understood, like I said, there was pros and cons." CP 1249 (86:7-18).

Nothing in the record supports the accusation that coverage counsel ordered White to strike the motion indefinitely. The issue was

³³ Farmers cites CP 1301-02 for this proposition, but those pages correspond to eight pages of Beal's deposition testimony in which the only reference to the motion is Beal's awareness that the motion was pending at some point. There is no support for the proposition that White expected to prevail. Exhibit 7 to White's deposition is his update to the client projecting the likelihood of success of dismissal of each of the remaining claims. CP 1245.

³⁴ See Intervenor's Brief at p. 25.

one of timing and strategy. In fact, the record reflects that while the parties disagreed about the probability of the motion's success, they agreed that there were strategic reasons for having it heard before or after the mediation. Beal testified that he gave input on the timing of the summary judgment to personal counsel Hughes, stating there were "pros and cons," but that it was his "2 cents worth" that the client "would be better off negotiating into the face of the motions." CP 1302. However, he also testified that he was not aware who made the final decision to strike the motion prior to mediation. CP 1301 (76:18-77:6).

As is typical of the liberties taken with the record in this case, the only suggestion that White withdrew the motion against his better judgment arises in the form of the *questions* asked of Beal during his deposition, when Farmers' counsel inquired whether Beal knew that "it was important that those summary judgment motions be heard and decided prior to the mediation." CP 1302. In fact, White seemed relatively ambivalent about the decision. He admitted that he agreed to strike the motion at the client's request because "there are pros and cons to hearing it before and hearing it after. I could understand the other side of the coin, so because they had made that request, I honored it." CP 1248-49 (85:17-86:2). While Farmers has distorted the facts to imply improper motive, the facts demonstrate that the withdrawal of the summary judgment motion prior to mediation was only temporary and not forced upon White by coverage counsel. Thus, it does not demonstrate collusion.

Based on a review of the actual record, none of the events that Farmers claims represent inferences of collusion are supported by substantial evidence. Interpreting these events as collusive requires a presumption of collusion followed by a distortion of the timeline in order to fit the events into Farmers' conspiratorial story. Ultimately, if the facts are susceptible of both a collusive and a neutral motive, Farmers has failed to meet its burden. Thus, the finding of collusion should be reversed.

B. A *De Novo* Review Demonstrates that Substantial Evidence at the Time of Settlement Supports the Reasonableness of the \$8.75 Settlement.

The parties agree that a reasonableness hearing is an important safeguard of the covenant judgment process. However, the process only works if the trial court actually analyzes the evidence rather than relying entirely upon non-evidentiary opinions of counsel. The court's job at a reasonableness hearing is to weigh *evidence* in the light of the nine *Glover* factors.³⁵ One of the main purposes of the hearing is for the court to consider whether the settlement was reasonable in light of the evidence that would have been presented to determine the relative strength of the parties' liability or defense theories. In this way, the reasonableness hearing is like a hypothetical bench trial in which the court determines what claims and defenses would have been presented at trial, decides what

³⁵ The factors include: 1) the releasing person's damages; 2) the merits of the releasing person's liability theory; 3) the merits of the released person's defense theory; 4) the released person's relative faults; 5) the risks and expenses of continued litigation; 6) the released person's ability to pay; 7) any evidence of bad faith, collusion, or fraud; 8) the extent of the releasing person's investigation and preparation of the case; and 9) the interests of the parties not being released. *Glover*, 98 Wn.2d at 717-18.

evidence might or might not have been admissible in support of those claims and defenses,³⁶ concludes what the likely outcome of the trial would have been, and then compares that hypothetical outcome to the settlement amount to determine whether, factoring in the risks to both parties, it was reasonable.

In this case, the trial court ignored the evidence and theories that would have been presented and instead relied exclusively upon *the opinions of Farmers-appointed counsel* as to the likely success of claims and defenses and the reasonable settlement value, globally rejecting all other opinions on the basis of bias.³⁷ Regardless of the applicable standard of review, the court's wholesale rejection of any evidence or opinions other than White's was an abuse of discretion. A *de novo* review reveals that the entire \$8.75 million settlement is reasonable.

³⁶ See *Martin*, 141 Wn. App. at 621-22 (discussing whether evidence would have been admissible at trial in light of the defendant's dead man's statute defense); *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 514-15, 803 P.2d 1339 (1991) (holding it was improper to consider facts contained within a settlement package prepared by counsel because the documents had not been admitted as evidence for the truth of the matters asserted therein).

³⁷ CP 1765 ("Guidance must be had in the most reliable opinions of counsel available. Mr. White again comes to the forefront. . . . The representations of the settling parties presented in this motion, on the other hand, are for the purposes of convincing me that the settlement was reasonable. . . . The motives behind the representations are substantial in this case.")

1. Evidence of Defects, Damage, and the Cost to Repair those Defects Would Likely Have Been Admitted as Evidence of the Measure of the Damages for Remaining Claims.

As described above,³⁸ this case is not the usual condominium construction defect case. The Water's Edge Condominiums were converted over four years during which the Defendants failed to repair certain elements of the condominium and covered up damage with the repairs they did do. Had the trial court actually considered the remaining claims and the likely measure of damages for those claims, it would have realized that it was far more likely than not that the Association's nearly \$10 million cost estimate to repair the damages would be admitted into evidence at trial.

Defendants would have been unable to rebut the Association's scope of repair and cost estimate because they had not prepared a scope of repair or cost estimate of their own. CP 736. Nor did they have any *admissible evidence* that would have rebutted the Association's estimate. Both Farmers and the court referred to "compelling impeachment evidence"³⁹ relating to Charter Construction's estimates, yet the only "evidence" White had was his consultant's *unfounded speculation* that Charter's litigation estimates were generally "somewhere in the range of double" what it costs to actually repair the defects.⁴⁰ This testimony should be completely disregarded because it was not raised by any party at

³⁸ See Section II.A.3, *supra*.

³⁹ See Intervenors' Brief at p. 4.

⁴⁰ CP 1241 (40:8-41:1).

the time of settlement; rather, it was disclosed in response to Farmers' interrogatories posed *after* settlement. Thus, it could not have become a factor considered by the parties to the settlement.⁴¹

Moreover, the testimony of Defendants' experts would not have been helpful to Defendants. While such wildly speculative testimony is completely inadmissible, if admitted, it means that Mark Lawless believed the cost of repair was half that of Charter's estimate – *or nearly \$5,000,000*. Thus, KPS had even more reason to be concerned about using Lawless as a defense expert. Originally, KPS president Paul Nelson was adamant that Lawless not testify because he had expressed several times that the complex was poorly built and in substantial need of repair. CP 1632. KPS was also concerned that Lawless had never generated a cost estimate relevant to the remaining claims:

At the time I authorized settlement, I was very concerned that the jury would wonder why the homeowners had a firm estimate of what it would cost in 2007 and my company had no firm estimate.

CP 1632. Thus, Lawless's testimony, even if admitted, would not have been helpful to Defendants.

Therefore, this factor favors a finding of reasonableness because the entire \$10 million estimate likely would have been admitted without rebuttal. Accounting for the subtraction of attorneys' fees and costs, the \$8.75 million was a massive reduction from the amount demanded by the

⁴¹ See *T&G Construction*, 2008 WL 4670256 at 6.

Association, yet was still within the range of likely outcomes at trial, which is a major factor to consider. *See Martin*, 141 Wn. App. at 620-21 (roughly \$61,000 was reasonable given that party could likely prove damages of at least \$81,000 at trial); *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 706, 187 P.3d 306 (2008) (fact that settlement represented 17.5 percent decrease and substantial compromise from the amount the HOA intended to present to a jury was crucial factor).⁴²

2. The Defense Theories Would Not Have Been Successful.

Having no challenge to the Association's scope of repair and only a highly tenuous and speculative challenge to the cost estimate, Defendants would have had to rely on their legal defenses to defeat the Association at trial. These defenses were appropriately given little weight by the settling parties. As demonstrated above, the temporary withdrawal of the summary judgment motion does not demonstrate collusion because even White admits that there were "pros and cons" to having it heard before mediation. However, the trial court should have analyzed whether any part of the motion would have been successful instead of relying solely upon biased opinions as to the success of the motion.⁴³

⁴² In light of *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, --- P.3d ---, WL 4670256, * 3 (2008), it is probable that *Issaquah Heights* has been overruled to the extent that the opinion claims that the *Glover* factors are only relevant to the extent they inform the issues of bad faith and collusion.

⁴³ CP 1258-61.

First, reliance upon White's memo led the court to ignore the fact that the summary judgment did not address the Association's primary claims for breach of fiduciary duty; breach of duty to repair common elements; and violation of the consumer protection act. Regardless of the outcome of White's summary judgment motion, the Association could have entered into evidence its \$10 million cost estimate under any one of the legal theories. Moreover, statutory attorneys' fees were allowable for each of the claims. The trial court completely missed this basic fact.

In addition, with respect to the claims White sought to dismiss, evidence in the record demonstrates his estimations of success were greatly misplaced based on his misunderstanding of the claims themselves. For example, White claims that he could obtain dismissal of the misrepresentation and breach of duty to disclose claims because there is no duty to disclaim "alleged construction defects" in the public offering statement.⁴⁴ But the Association was not claiming that Defendants failed to disclose the original construction defects, the Association had evidence that Defendants actually knew about, yet failed to disclose, the latent property damage under the exterior siding, stairways, and roofs of the condominium's 23 buildings.⁴⁵ This same evidence supports the claims for breach of fiduciary duty as well. Thus, White's opinion of his likelihood of gaining a dismissal of the Association's warranty claims was

⁴⁴ CP 1258.

⁴⁵ See Brief of Appellant at pp. 6-9.

clearly overestimated.⁴⁶ Defendants' additional legal defenses were similarly weak.

a. A *Kelsey Lane* Defense Would have Failed as a Matter of Law.

Had the court independently analyzed White's argument based on *Kelsey Lane*,⁴⁷ it would have found that the motion would have failed because that case requires dismissal of a *fraudulent concealment* claim where the only allegation is that the developer *should have known* about the existence of construction defects.⁴⁸ In contrast, the Association was not alleging constructive knowledge of construction defects, it was alleging Defendants had *actual* knowledge of hidden *property damage* that they failed to disclose in violation of the Condo Act's public offering statement provisions and in breach of their fiduciary duties to the Association's members. Thus, *Kelsey Lane* simply does not apply.

b. A Diminution in Value Defense Would Likely Have Failed.

The appropriate measure of damages for Condo Act claims is the cost to repair damage and defects. *Park Avenue Condominium Owners*

⁴⁶ Even if White's estimate was accurate, by his own admission, the Association would have survived summary judgment on each respective claim as follows: misrepresentation in the public offering statement: 25%; breach of duty to disclose material facts: 35%; declarants' torts: 25%; breach of contract: 20%; and breach of fiduciary duty: 40%. In short, even under their own attorney's subjective standard, Defendants were facing an appreciable risk that all of the Association's non-warranty claims would survive summary judgment. CP 1258-61.

⁴⁷ *Kelsey Lane Homeowners Association v. Kelsey Lane Co., Inc.*, 125 Wn. App. 227, 103 P.3d 1256 (2005).

⁴⁸ See CP 265-89 (Opposition to Defendants' Motion for Partial Summary Judgment and declarations).

Association. v. Buchan Developments, LLC, 117 Wn. App. 369, 384-85, 71 P.3d 692 (2003). If, however, those costs are clearly disproportionate to the probable loss in value of units within the condominium, the appropriate measure of damages would be loss of value.⁴⁹ *Id.* (citing *Eastlake Construction Company, Inc. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984)). The party arguing for diminution of value has the burden of proving: a) whether there was a loss of value; and b) that the costs to repair the defects are clearly disproportionate to that loss. *Id.* This is also the proper measure of damages for breach of a construction contract where defects are involved.⁵⁰

In this case, it is unfathomable that Defendants would have been able to present an argument for diminution of value to the jury because at the time of settlement – three weeks prior to trial – they had failed to retain any expert who could testify that there was little or no loss of value of the units at Water’s Edge. From KPS’s perspective at the time of settlement, while White said he had spoken to “eight or nine appraisers or agents” on the subject, KPS knew that none had been named as witnesses and had never seen a report from any of these supposed witnesses. CP 1631. Moreover, even if White could somehow have retained and disclosed such witnesses prior to trial, the president of KPS believed that

⁴⁹ A full discussion of the measure of damages can be found in the Joint Motion on Reasonableness of Settlement. CP 1615-17.

⁵⁰ See *Panorama Village Homeowners Ass’n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 427, 10 P.3d 417 (2000).

his own testimony would have killed the defense. Based upon his experience as an association manager, Nelson would have had to testify that “it was highly unlikely any sale . . . would close” based on buyers’ and lenders’ reluctance to buy or lend on condos with defects. Thus, “at the time of settlement [KPS] had no confidence in the ultimate success of our diminution in value defense.” CP 1631-32. Given these facts, it was highly improbable that the jury would ever hear the diminution in value argument, much less rely upon it to the exclusion of the \$10 million cost of repair entered by the Association.

c. An Economic Loss Defense Was Not Contemplated at the Time of the Settlement and Would Likely Have Failed.

The first problem with consideration of the economic loss defense is that it had never been properly raised by Farmers-appointed counsel prior to settlement. While it was raised by newly appointed attorney Todd – not White – in the context of a motion to continue, the record reflects it was unlikely that he would be able to present this defense given the relatively short period of time prior to trial. Thus, consideration of economic loss *at all* violates the rule of determining reasonableness of the settlement *at the time of the settlement*.⁵¹ The trial court not only *assumed* that the doctrine would apply, it incorrectly attributed that motion to

⁵¹ The reasonableness of the settlement agreement must be judged on the facts known to the settling parties at the time of settlement.” *See Brewer*, 127 Wn. 2d at 542 (“This court should not permit hindsight to govern an analysis of whether or not a settlement is reasonable.”)

White: “This court had no opportunity to hear and rule upon the summary judgment motion *envisioned by Mr. White*, involving the economic loss doctrine, as it appears that Mr. White’s efforts to further reduce his clients’ exposure were undermined by coverage counsel.” CP 1763. This is not accurate.

The economic loss rule would not apply to bar the Association’s estimate from being entered into evidence because the damages reflected in the record are not mere economic losses; they are the result of *physical damage* to the property created while Defendants attempted to repair or cover up other damage.⁵² *See Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 213, 969 P.2d 486 (1998) (citing *Stuart v. Coldwell Banker Commercial Group*, 109 Wn.2d 406, 420, 745 P.2d 1284 (1987) (“[D]efects causing physical injury or harm to other objects are not characterized as economic losses, and actions for such damage are not barred by the [economic loss] rule.”) Moreover, White admitted that there was no Washington case law applying the economic loss doctrine to statutory claims like the Condo Act claims alleged. CP 1628 (184:15-22).

It was within the court’s purview to review and analyze each of the defenses raised at the time of settlement. Instead, the court abdicated its responsibility and relied upon White’s inflated estimations as to his likelihood of success on the summary judgment motion. Ultimately, the likelihood of prevailing on the defenses was very small. Thus, this factor

⁵² *See* CP 1613-15 (Reply in Support of Joint Motion on Reasonableness of Settlement).

supports a finding of reasonableness of the settlement because of the risks involved.⁵³

C. The Insureds had Little Choice but to Enter into a Covenant Judgment to Protect Them from Liability.

Once Farmers issued its second reservation of rights letter, the Defendants reasonably believed there was a probability that they would have to pay the full judgment amount entered after trial. At the time of the settlement, Defendants were facing the possibility of paying anywhere from \$250,000 to \$2,000,000 (White's estimates⁵⁴) to over \$17,000,000 based on the Association's claims.⁵⁵ When this potential exposure was coupled with the Defendants' concerns over how White was handling the case, the likelihood of actually having to pay a multi-million dollar verdict was all too real.

⁵³ See *Martin*, 141 Wn. App. at 621 ("In a case that turns on a complicated issue of statutory construction and jury questions, a decision to settle for an amount within the range of evidence is reasonable.")

⁵⁴ At later stages of the case, just eight weeks from trial, even White began having second thoughts about the minimal value of the Association's claims and strength of the defenses. CP 1537-38. He also stated to Farmers that there was less than a 25% chance of a complete defense verdict. CP 1538.

⁵⁵ Even newly retained WEA attorney Todd stated in an evaluation letter to Farmers and his client, "If plaintiff succeeds in being able to present its cost of repair damages to a jury, this case will have very significant exposure." CP 1264. He went on to state: "While it is clear that a number of technical legal defenses exist which may protect the partnership in whole or in part, we view this case as having significant exposure and significant settlement value. First, it is a given that condominium homeowners are viewed with sympathy and developers are viewed negatively. . . . Second, the evidence of significant water intrusion and resultant rot will further inflame a jury. . . . Thus, the question of how damages are to be measured becomes paramount. If the plaintiff is allowed to introduce a \$10 million estimated cost of repair, we fully expect a verdict to be in the millions of dollars. . . . In our experience, a jury will discount the plaintiff's estimated cost of repair as artificially high and the defense costs of repair as artificially low, and 'split the baby.'" CP 1273. "A runaway jury, however, could award the entire \$10 million claim." CP 1274.

To avoid this risk, Defendants entered into an agreement whereby they would stipulate to judgment with a covenant not to execute and assign their claims against Farmers to the Association. Washington courts have endorsed this process, by recognizing that it is the insured's right to independently negotiate a settlement if the insurer refuses in bad faith to settle a claim. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002); *Meadow Valley Owners Assn'n v. Meadow Valley, L.L.C.*, 137 Wn. App. 810, 817, 156 P.3d 240 (2007); *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings*, 128 Wn. App. 317, 322, 116 P.3d 404 (2005); *Chaussee*, 60 Wn. App. at 509. The Supreme Court has also upheld the insurer's right to settle around the insurance company when the insurer is defending under a reservation of rights. *Besel*, 146 Wn.2d at 736 (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992)). Lastly, this Court has emphasized that an insured need not wait for a formal finding of bad faith in order to negotiate a settlement on its own. *Martin*, 141 Wn. App. at 618 (citing *Butler*, 118 Wn.2d at 397, for the proposition that "at a time when insurance coverage is in doubt, it is in an insured's best interest to accept a settlement offer that effectively relieves him or her of personal liability.") An insurance company cannot compel its insured to forego settlement that is in the insured's best interests. *Id.* at 618.

While Farmers goes to great lengths to repeat the court’s warnings as to the potential for abuse of the covenant judgment process,⁵⁶ the mandatory consideration of the *Glover/Chaussee* factors to determine reasonableness hearing *is* the proper and effective method to ensure that the settlements are reasonable and without fraud or collusion. *Besel*, 146 Wn.2d at 738. “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 739; *Issaquah Ridge*, 145 Wn. App. at 704. Thus, the process not a “necessary evil” but “simply ‘an agreement to seek recovery only from a specific asset—the proceeds of the insurance policy and the rights owed by the insurer to the insured.’” *Besel*, 146 Wn.2d at 737 (quoting *Butler*, 118 Wn. 2d at 399). Farmers attempts to employ this cautionary language almost as if there is a presumption that collusion exists. This was not the intent of the Court’s warnings; it was the basis for the requiring a reasonableness hearing in the first place.

In extending the effect of a reasonable covenant judgment, the Washington Supreme Court reaffirmed its faith in the covenant judgment and reasonableness hearing process in an opinion issued after Appellant’s

⁵⁶ Farmers’ entire section B sets forth the importance of reasonableness hearings and why they are necessary in these circumstances. Although the Association vehemently denies any collusive or fraudulent conduct, it agrees that the court may look skeptically on the settlement. Because the parties had nothing to hide, they voluntarily subjected the settlement to judicial scrutiny and voluntarily provided all communication between Zimberoff and Beal/Harper. *See* CP 1600.

Opening Brief was filed. In *T&G Construction*,⁵⁷ the Court held that a covenant judgment determined reasonable by the court not only becomes the presumptive measure of damages where bad faith is found, but it is the presumptive measure of damages in *any subsequent coverage action*, calling this a “reasonable extension” of its original purpose. *Id.* at 5.

Importantly, the *T&G Construction* Court reiterated that while conducting a reasonableness hearing, the trial court must consider each of the nine *Glover/Chaussee* factors. *Id.* at 3. The Court emphasized the importance of the requirement that the court analyze the merits of the case and the defense theories.

The merits of the homeowners’ liability case and the merits of T & G’s defense theories were, of course, central to any settlement because whether to settle, and under what terms, turned in large part on the risk of an adverse judgment. Those same issues must be carefully considered in any judicial proceeding to determine the reasonableness of the settlement. Like any issue touching on the liability of a releasing party, T & G’s statute of limitation defense had to have been considered by the parties during settlement discussions and was carefully evaluated by the judge both at summary judgment and at the reasonableness hearing.

Id. at 4. The Supreme Court’s affirmation of the covenant judgment and reasonableness hearing process confirms that the trial court here erred

⁵⁷ *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, --- P.3d ---, WL 4670256 (2008).

because its overall decision was based on a disdain for the process itself. Thus, this Court should reverse.

III. The Trial Court Erred in Granting Summary Judgment Because the Association Raised Material Issues of Fact.

Because the Court has already ruled that the summary judgment issues are properly before this Court, the Association will not further address the appealability issue, again raised by Farmers in its Brief.⁵⁸ The statute of limitations for warranty claims under the Condo Act runs four years from the latter 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. RCW 64.34.452(2)(b). The Association produced evidence that Defendants did not complete common elements of siding, roofing and exterior stairways until 2003. CP 150-62, 175-84. The Association also demonstrated that Defendants added or authorized additions to the common elements involving exterior windows, decks and patios through 2003. CP 17-18, 24-108. Thus, there was at least a material dispute of fact that should have prevented summary judgment on the issue of statute of limitations.

Farmers' new argument that the common elements of the condominium were completed when the buildings were originally constructed in 1987 and 1988 defies common sense. Water's Edge was operated as an apartment complex for many years. However, *the*

⁵⁸ See Appellants' Answer to Respondent's Motion for Partial Dismissal of Appeal.

condominium did not exist until the declaration of condominium was filed with the Lewis County Auditor's office on May 22, 2000. See RCW 64.34.200(1). The Declaration defines the common elements of the condominium. Thus, the "common elements" did not exist prior to the creation of the condominium and therefore could not have been "completed" prior to the creation of the condominium. The Association produced evidence that common elements had been added or completed in 2003. Therefore, it was error to have granted summary judgment in the face of a material dispute of fact.

IV. The Trial Court Erred When it Dismissed the Lawsuit Prior to Entry of Judgment.

Farmers does not dispute that the parties to the lawsuit agreed, without condition, to "stipulate to a judgment in the sum of \$8,750,000 ("Judgment Sum") in the form attached hereto as Appendix A."⁵⁹ Instead, Farmers plays semantics by arguing that the settlement agreement does not require *entry* of judgment. Farmers then repeatedly and inaccurately asserts that the court had the right not to enter judgment because the trial court found the amount to be "the product of collusion," even though the court's order stated that its determination of reasonableness did not take into account any collusion.⁶⁰

In short, Farmers argues that the court's finding on the reasonableness hearing allows it to refuse to enter judgment because the

⁵⁹ CP 742.

⁶⁰ *But see* n. 6, *supra*.

court found that that amount was unreasonable. *But that is not the purpose or intended effect of a reasonableness hearing.* The only effect of the court's ruling is to prove the presumptive measure of damages in a subsequent coverage action if there is coverage for the claims under Farmers' policies.⁶¹ In other words, *the judgment would have no preclusive effect upon Farmers* beyond the \$400,000 that the court determined *was* reasonable. In that respect, Farmers had no standing to argue that the court should not enter the judgment.

Nor does it make sense that Defendants sought to enter a "bogus judgment" to negatively impact its own credit ratings so it could "manufacture an element of 'harm' in the pending bad faith action against Respondents."⁶² Defendants need not manufacture harm because the *reasonable* settlement, not the judgment entered, is the presumptive amount of damages suffered as a result of Farmers' bad faith. Thus, even under the trial court's ruling, the Insureds have been harmed in the amount of \$400,000 in addition to the \$215,000 they actually paid. It is well settled that the fact that no personal liability was incurred beyond that paid because of a covenant not to execute does not mean that the insured was not damaged. *See Chaussee*, 60 Wn. App. at 511; *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 228, 741 P.2d 1054 (1987); *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 199, 698 P.2d 90 (1985). Thus, Farmers' argument that the court may refuse to enter

⁶¹ See Section II.C, *supra*.

⁶² Intervenors' Brief at p. 48.

judgment in this case is illogical. On the other hand, refusing to enter the judgment because the parties refused to reform their settlement agreement is exactly what the Supreme Court of Washington has warned against: “A court’s reasonableness determination under RCW 4.22.060(2) cannot affect the validity of a settlement agreement or the amount paid . . .” *Meadow Valley*, 137 Wn. App. at 813. Having already filed its notice of discretionary review, the parties refused this suggestion that they reform the settlement agreement to stipulate to a \$400,000 judgment, noting that doing so might allow Farmers to argue that the parties waived its arguments that the court erred in making its reasonableness conclusion.⁶³ Thus, the court dismissed the action without entering judgment and without authority to do so. Dismissal of the action prior to entry of judgment was clear error.

V. CONCLUSION

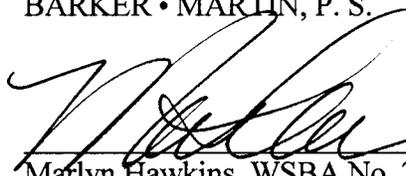
Both Farmers and the trial court viewed the facts of this case through a lens distorted by their distaste for the covenant judgment process, thus finding collusion where there was none. Instead of analyzing the facts before it, the court grasped at the innuendos created by Farmers’ descriptions of the events. A *de novo* review reveals that the record contains a plethora of admissible evidence in support of the parties’ \$8.75 million settlement. Under such circumstances, the Washington Supreme Court and this Court have endorsed the covenant judgment

⁶³ See CP 1868-71 (Reply to Farmers’ Response to Joint Motion for Entry of Judgment).

process to protect the insured. Thus, the Court should find that dismissal of the warranty claims was in error, reverse the trial court's findings of collusion and refusal to enter judgment, and rule the \$8.75 million settlement was reasonable.

Respectfully submitted this 1st day of December, 2008.

BARKER • MARTIN, P. S.

A handwritten signature in black ink, appearing to read 'Marlyn Hawkins', written over a horizontal line.

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STATE OF WASHINGTON

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

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., an Oregon
corporation; KEY PROPERTY SERVICE, 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.

CERTIFICATE OF SERVICE

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I, Ian McDonald, hereby certify and declare:

1. I am over the age of 18 years and am not a party to the within cause:

2. I am employed by the law firm of Barker Martin, P.S. My business and mailing address are 719 2nd Avenue, Suite 1200, Seattle, WA 98104-1749;

3. On the 1st day of December 2008, I caused to be served **Appellant's Reply Brief** upon the following parties in the manner described below:

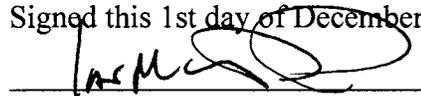
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I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

Signed this 1st day of December, 2008 in Seattle, Washington



Ian McDonald