

No. 38411-6-II
COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
11 FEB 25 PM 3:15
STATE OF WASHINGTON
BY SW
DEPUTY

VISION ONE, LLC, Plaintiff and Respondent,

v.

RSUI, Intervenor and Appellant,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC., Third-Party
Defendant and Respondent

And

MCNAUL EBEL NAWROT & HELGREN, PLLC,
MICHAEL D. HELGREN, and DAVID LINEHAN, Appellants.

Brief of Respondent Berg Equipment & Scaffolding, Inc.

(Relating to Appeals of Orders Denying CR 60(b) Relief
and Imposing CR 11 Sanctions on RSUI and Its Counsel)

Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
Mullin Law Group PLLC
101 Yesler Way, Suite 400
Seattle, WA 98104
(206) 957-7007
Attorneys for Respondent Berg
Equipment and Scaffolding Co., Inc.

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u>	1
II. <u>STATEMENT OF THE ISSUES</u>	2
III. <u>COUNTERSTATEMENT OF THE CASE</u>	2
A. RSUI Had the Opportunity to Be As Involved As It Wanted to Be	2
B. RSUI Knew That Its Refusal to Meaningfully Participate in the February 2008 Mediation Could Result in the Negotiation of an Assignment	4
C. There Were Substantial Developments Between the February 2008 Mediation and the September 2008 Settlement	6
D. The Settling Parties Reached a Settlement and Sought Court Approval of Its Reasonableness	7
E. The Trial Court Found that the Record Was Replete with Evidence that the Settlement Negotiations Were Contentious and Conducted at Arms’ Length, and Completely Lacking in Evidence of Bad Faith, Fraud or Collusion on the Part of the Settling Parties	9
F. RSUI Filed Coverage Action Against Berg and Appealed Reasonableness Ruling	11
G. RSUI Deposed Attorneys Who Negotiated the Settlement	15
H. RSUI Prolonged Discovery Dispute with Berg’s Counsel and Stayed Federal Court Action on the Heels of Damaging Rulings	17
I. RSUI Filed CR 60(b) Motion	19
J. RSUI Filed Amended CR 60(b) Motion as “Professional Courtesy” to Vision’s Counsel	21
K. Vision and Berg Sought CR 11 Relief	22
L. Trial Court Denied RSUI’s CR 60(b) Motion and Granted Vision and Berg’s CR 11 Motion	23

M.	Trial Court Entered Findings of Fact and Conclusions of Law and Awarded Attorney Fees to Vision and Berg.....	26
IV.	<u>ARGUMENT</u>	28
A.	The Trial Court Did Not Abuse Its Discretion in Denying RSUI’s CR 60(b) Motion.....	28
1.	Standard of Review	28
2.	The Trial Court Appropriately Denied RSUI Relief under CR 60(b)(4)	28
a.	RSUI Ignores Evidence Demonstrating the Parties Had Yet to Negotiate a Dollar Amount for Extra-Contractual Rights	29
b.	Vision and Berg Did Not Withhold Material Evidence.....	33
c.	There Was Nothing Untoward About Berg’s Sharing Proposal.....	36
d.	Vision and Berg Did Not Make Misrepresentations or Mislead the Trial Court	37
e.	The Trial Court Applied the Appropriate Legal Standard	39
3.	The Trial Court Appropriately Considered and Rejected RSUI’s Arguments under CR (60)(b)(11)	41
B.	The Trial Court Appropriately Granted Vision and Berg’s Request for CR 11 Relief.....	42
1.	Standard of Review	42
2.	Standard under CR 11	43
3.	The Trial Court Properly Determined Use of Phrases Such as “Improper Means,” “Collusion” and “Kickback Scheme,” and the Testimony of Mr. Linehan Purportedly Based on Personal Knowledge Were Not Well Grounded in Fact or Based on a Reasonable Inquiry	43

4.	Trial Court Was Permitted to Consider Evidence of Improper Purpose.....	46
5.	RSUI’s Amended CR 60(b) Motion Did Not Amount to a Withdrawal of the Initial Motion	47
C.	The Trial Court Appropriately Awarded Berg Reasonable Attorney Fees	49
D.	Berg Is Entitled to Appellate Attorney Fees	50
V.	<u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	42
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	46
<i>Eller v. East Sprague Motors & R.V. 's, Inc.</i> , 244 P.3d 447 (2010)	46, 50
<i>Glover v. Tacoma Gen. Hosp.</i> , 98 Wn.2d 708, 658 P.2d 1230 (1983).....	10
<i>Heights at Issaquah Ridge Owners Ass 'n v. Derus Wakefield I, LLC</i> , 145 Wn.App. 698, 187 P.3d 306, review denied, 165 Wn.2d 1029 (2009).....	9
<i>Herr v. Herr</i> , 35 Wn.2d 164, 211 P.2d 710 (1949)	47
<i>Howard v. Royal Specialty Underwriting, Inc.</i> , 121 Wn.App. 372, 89 P.3d 265 (2004).....	36, 44
<i>In re General Plastics Corp.</i> , 184 B.R. 1008 (S.D.Fla. 1995).....	48-49
<i>Madden v. Foley</i> , 83 Wn.App. 385, 922 P.2d 1364 (1996).....	42
<i>Manteufel v. Safeco Ins. Co. of America</i> , 117 Wn.App. 168, 68 P.3d 1093 (2003).....	50
<i>Miller v. Badgley</i> , 51 Wn.App. 285, 753 P.2d 530 (1988).....	49
<i>Mitchell v. Washington State Institute of Public Policy</i> , 153 Wn.App. 803, 225 P.3d 280 (2009).....	28-29, 40
<i>State v. Keller</i> , 32 Wn.App. 135, 647 P.2d 35 (1982).....	41

Water's Edge Homeowners Ass'n v. Waters Edge Assocs.,
152 Wn.App. 572, 216 P.3d 1110 (2009),
Review denied, 168 Wn.2d 1019 (2010).....31

Yearout v. Yearout,
41 Wn.App. 897, 707 P.2d 1367 (1985).....41

Statutes

RCW 5.60.060.....35

Court Rules

CR 11*passim*

CR 2635

CR 60*passim*

RAP 1850

I. INTRODUCTION

This appeal arises out of RSUI Indemnity Company's ("RSUI") attempt to set aside a September 15, 2008, reasonableness order based on unsupported accusations that the settling parties, Vision One, LLC and Vision Tacoma, Inc. (collectively "Vision") and Berg Equipment & Scaffolding Co. ("Berg"), together with their respective attorneys and multiple insurance companies, conspired to artificially inflate the underlying settlement agreement and set RSUI up for a bad faith action. RSUI's arguments are based on four innocuous emails exchanged by the settling parties' counsel during settlement negotiations, which RSUI contends evidence an "unseemly kickback scheme," collusion, the concealment of material evidence and professional misconduct.

The trial court ultimately denied RSUI's motion to set aside the reasonableness order and imposed CR 11 sanctions against RSUI, the law firm of McNaul, Ebel Nawrot & Helgren, PLLC, and attorneys Michael D. Helgren and David Linehan for filing offensive CR 60(b) motion papers that were neither well grounded in fact nor advanced after a reasonable inquiry under the circumstances. It is therefore ironic, to say the least, that RSUI concludes its opening brief with the assertion that Vision and Berg successfully diverted the trial court's attention "by savagely attacking RSUI and the McNaul Ebel attorneys" and making "unfair accusations" against them. The record demonstrates that the trial court was well within

its discretion in denying RSUI's CR 60(b) Motion and imposing CR 11 sanctions. Accordingly, the trial court's rulings should be affirmed.

II. STATEMENT OF THE ISSUES

1. Should the trial court's order denying RSUI's CR 60(b) Motion be affirmed in the absence of clear and convincing evidence of fraud, misrepresentation or misconduct on the part of the settling parties and their attorneys?

2. Should the trial court's order imposing CR 11 sanctions on RSUI be affirmed where RSUI's allegations of fraud, misrepresentation or other misconduct were baseless and advanced without reasonable inquiry under the circumstances?

3. Should the trial court's award of \$18,500 in attorney fees to Berg be affirmed where RSUI has yet to concede wrongdoing and where no lesser amount would suffice to accomplish the CR 11 purposes of fairness, compensation, and deterrence of future misconduct?

III. COUNTERSTATEMENT OF THE CASE

A. RSUI Had the Opportunity to Be As Involved As It Wanted to Be.

This litigation arose out of a shoring collapse at a construction project owned by Vision. CP 5-12, 35-38, 69-79, 607-14, 618-26. Berg was the shoring supplier, Admiral Insurance Company ("Admiral") was Berg's primary carrier, RSUI was Berg's excess carrier, and Philadelphia

Indemnity Insurance Company was Vision's carrier. Vision's action was ultimately consolidated with two additional actions relating to the collapse, including a bodily injury action filed by Matthew Thompson. CP 39-45.

Berg kept RSUI apprised of the litigation from the outset of this case. 9/12/2008 RP 11: 17-19. Berg's defense counsel was in continuous contact with RSUI's claims representative, Don Frye, and had been providing him with all status reports for over a year. 9/12/2008 RP 11: 19-20; CP 337. RSUI was even involved in key decisions such as the consolidation of the cases arising out of the collapse. 9/12/2008 RP 11: 20-22; CP 337.

In January of 2008, after significant discovery and motion practice, the parties agreed to mediation before Dale Kingman. CP 332. RSUI was apprised of this mediation. CP 332. In January, Berg's defense counsel was contacted by attorney Michael Helgren of McNaul Ebel Nawrot & Helgren who advised Berg that he was representing RSUI in this matter. CP 332. Mr. Helgren wrote to Berg's counsel on January 16, 2008, asking for all defense counsel's status reports, all correspondence between the parties, and all interrogatory responses. CP 332, 335. Berg's defense counsel responded to Mr. Helgren by letter dated January 20, 2008, expressing surprise at Mr. Helgren's request because Berg had been supplying RSUI with information for over a year. 9/12/2008 RP 12: 1-5;

CP 333, 337. Nevertheless, Berg's counsel offered to make its complete file available for RSUI's review. 9/12/2008 RP 12: 5; CP 333, 337.

On February 5, 2008, one of RSUI's attorney's, David East, came to the office of Berg's defense counsel to conduct a document review. CP 427. Mr. East spent approximately two hours in a conference room reviewing those documents and tagging the same for copying. CP 427. Mr. East then made arrangements to have the tagged documents, as well as all of the pleadings, motion papers, and written discovery, copied by an outside copy service. CP 427. Mr. East was advised that any future requests to review documents should be coordinated through Berg's personal counsel, Peter Petrich. CP 427. From February 5, 2008, until the time of the reasonableness proceedings, Berg's defense counsel did not receive any further requests from RSUI, either through RSUI's counsel or through Mr. Petrich, to review any additional documents maintained at the office of Berg's defense counsel. CP 428.

B. RSUI Knew That Its Refusal to Meaningfully Participate in the February 2008 Mediation Could Result in the Negotiation of an Assignment.

RSUI was fully apprised of the February 2008 mediation and received Berg's mediation materials, including Berg's confidential statement to the mediator, Mr. Kingman. CP 333, 340. The mediation went forward over a two day period on February 6 and 7, 2008. CP 333. Mr. Helgren was present during the entire mediation. CP 333. Berg's

personal counsel, Peter Petrich, conferred with Mr. Helgren during the mediation, and informed him that the absolute refusal of RSUI to participate in the mediation would probably result in Berg considering an assignment of its claim against RSUI in any settlement negotiations. 9/12/2008 RP 13: 1-8. At no time did RSUI communicate to Vision or Berg that it had any settlement authority or would offer assistance in settling Vision's claims. 2CP¹ 269, 288; 7/1/2010 RP 50. The mediation was unsuccessful. 9/12/2008 RP 12: 10-21; CP 333.

On February 19, 2008, Berg received a demand from Vision, which included an assignment against RSUI. CP 333, 342-43. Berg forwarded the same to RSUI's representative, Don Frye. CP 333, 342-43. After February of 2008, RSUI never made any request of Berg's counsel for information regarding the issues or facts of the case, and RSUI did not provide any assistance or input as the case moved toward trial. 9/12/2008 RP 13: 17-22; CP 333. It was Berg's understanding that RSUI was denying coverage. CP 333. Mr. Helgren did contact Berg's personal counsel requesting more information regarding why Berg thought there was coverage under the RSUI policy, but because RSUI had already denied coverage, Berg's personal counsel did not think it was appropriate to respond. 9/12/2008 RP 13: 9-16. Berg's personal counsel took the

¹ Berg will be using "2CP ___" to cite to the clerk's papers that were indexed in 2010 and numbered from 1-1433 prior to an order consolidating the instant appeal with RSUI's appeal from the September 15, 2008, Reasonableness Order.

position that it was RSUI's job to investigate and evaluate coverage under the RSUI policy, not Berg's job to convince RSUI that coverage existed. 9/12/2008 RP 13: 13-14, 15: 24 - 16: 2.

C. There Were Substantial Developments between the February 2008 Mediation and the September 2008 Settlement.

Between the February 2008 mediation and the September 2008 settlement, Vision and Berg were engaged in a vigorous and contentious battle over Berg's liability, with both sides having brought numerous motions for summary judgment and motions to exclude evidence. CP 189, 1520-35, 3038-50, 3960-67, 4659-73, 4732-39, 4905-17, 4989-92, 5469-74, 5664-68, 5669-75, 6126-56, 6190-6251, 6481-85. In addition, both sides deposed multiple fact and expert witnesses. CP 189. The substantial motion practice significantly increased the parties' trial preparedness but did little to reduce the number of complex issues for trial. 2CP 627.

There were also numerous bodily injury claims, including the \$4 million claim by Matthew Thomson. 9/12/2008 RP 44: 2-6. Just one week prior to the parties' settlement agreement, another personal injury lawsuit was filed against Berg, wherein the plaintiff demanded \$800,000. 9/12/2008 RP 44: 1-2. There were also between eight and nine additional bodily injury claimants that had yet to file suit and the statute of limitations had yet to expire. 9/12/2008 RP 45: 11-17. Consequently, Berg was facing approximately \$10 million of exposure with only \$1

million of policy limits available. CP 329. Even if Berg were only found 25% - 33% at fault, the company's excess exposure would be approximately \$3.5 million, an amount that would bankrupt the company unless there was a successful bad faith claim. CP 329-330.

As trial approached and settlement negotiations heated up, a key issue became the scope of the indemnity for the bodily injury claims. 2CP 627. From Berg's standpoint, it was imperative that Berg have no exposure on the bodily injury claims. 2CP 627. Berg insisted the indemnity from the bodily injury claims include all consequential damages and injuries flowing therefrom, and that Vision's insurers confirm their agreement to back Berg for all of the bodily injury claims in writing. 2CP 267. This was a hard sell for Vision's insurers, who had a wasting policy and were taking a significant increased risk given the unknowns surrounding the bodily injury claims. 2CP 267. Another hurdle to finalizing the settlement was Vision's demand that Mr. Mullin and his firm not represent Philadelphia at trial. 2CP 627. This demand was unacceptable to Berg because any restriction on the right to practice, by either Mr. Mullin or his firm, would be a violation of RPC 5.6. 2CP 627.

D. The Settling Parties Reached a Settlement and Sought Court Approval of Its Reasonableness.

After seven months of hard-fought, arms' length negotiations with the assistance of mediator, Dale Kingman, Vision and Berg reached a

settlement agreement on September 5, 2008. CP 208. Berg's primary insurer, Admiral, agreed to pay Vision its policy limits of \$1 million, and the parties agreed to a \$2.3 million covenant judgment enforceable only against RSUI. CP 213. Thereafter, Vision gave RSUI notice of the proposed settlement and moved for court approval of the settlement's reasonableness. CP 187-205. In turn, RSUI filed a Motion to Intervene In and to Continue Reasonableness Hearing. CP 385-91.

At the September 12, 2008, reasonableness hearing, RSUI's counsel, David East, claimed to "know nothing of this case." 9/12/2008 RP 9: 2-4. RSUI argued that it had been "kept in the dark" and "excluded from settlement negotiations since February 2008." CP 6893, 6895. The Court allowed RSUI to intervene for the sole purpose of contesting the settlement. 9/12/2008 RP 11: 2-4; CP 485. The Court gave RSUI the weekend to "do whatever it need[ed] to do, homework-wise," to determine whether the terms of the settlement were reasonable. 9/12/2008 RP 11: 5-6, 53: 12-13. The Court made it clear that it felt it was "RSUI's burden to show that there's some kind of fraud or collusion" and that it was "a pretty high burden." 9/12/2008 RP 54: 1-2, 56: 14-15. The Court continued the hearing until the afternoon of Monday, September 15, 2008.

At 4:08 p.m. on Friday, September 12, 2008, the legal assistant to Mr. East and Mr. Helgren sent an email to Berg's counsel requesting that they forward to RSUI's counsel via email all information pertaining to the

liability of Berg, the claims against Berg that have been resolved in the proposed settlement, and how the figure of \$3.3 million was determined, by 9:30 a.m. on Monday, September 15, 2008. CP 456. Berg's defense counsel and Berg's personal counsel both responded to Mr. East. CP 458-59, 461. Despite the overly burdensome nature of RSUI's request, Berg's counsel did offer to make their records available for review over the weekend. CP 458, 461. RSUI did not review those records prior to the September 15, 2008, hearing. 9/15/2008 RP 33: 6-17.

E. The Trial Court Found that the Record Was Replete with Evidence that the Settlement Negotiations Were Contentious and Conducted at Arms' Length, and Completely Lacking in Evidence of Bad Faith, Fraud or Collusion on the Part of the Settling Parties.

On September 15, 2008, the Court approved the reasonableness of the parties' settlement agreement, and denied RSUI's request for a continuance. CP 483-87. During its oral ruling, the trial court stated as follows:

I think that the record is replete with what's gone on for the many months that this case has been going on, and certainly, I've been aware of it for the last—since February, I guess, of how contentious it is, I believe that this Court does have the authority to approve the settlement agreement.

* * *

So I looked again at the *Issaquah Heights* case. **I don't think there's any evidence of bad faith or collusion or fraud. There just absolutely isn't any evidence of that. I think this has all been very hard fought and difficult.**

Then there are the additional factors under *Glover*, and I'll just talk about some of those because I think they've also been met, whether that's required or not.

The first is the releasing person's damages, and I think the evidence is clear that there are some negotiations in regards to the actual damages in releasing—in the releasing person's damages, the merits of the releasing person's liability, and the released person's relative fault. And those things are such a huge question of fact, and have been—we've argued about those facts at every legal issue that I had to decide. It's clearly, hotly contested.

The risk and the expenses of continued litigation, I think, is very high. This is very expert-intense litigation, and we had originally mapped out six weeks for it, and that, obviously, is very expensive and difficult.

The released person's ability to pay. I think Berg's declaration makes it clear that Berg has done what they could, and would certainly have no ability to pay, at least with liquid assets. **Again, the *Glover* factors include bad faith, collusion, or fraud. Again, no evidence of that.**

Then the extent of the releasing person's investigation and preparation of the case, and this is extreme, in terms of preparation and investigation. I don't know how to say it any differently, but **I think the record speaks for itself that there has been an awful lot of investigation and preparation, and the interest of the parties that are arguing against this, RSUI, and I think that they've been able to be involved as much as they wanted to. I don't think that it's Berg's responsibility to continually ask them to provide coverage. I think once an insurance company says, we're denying coverage, you don't have to keep working with them, necessarily.**

* * *

I just think in fairness, and in equity, I think that the settlement was clearly worked on over many, many hours, and hotly contested there, as well.

But I will approve the settlement. I think it's appropriate to release Berg from all obligations, and move forward between Vision and Philadelphia in terms of trial.

9/15/2008 RP 52:19 – 55:10.

F. RSUI Filed Coverage Action Against Berg and Appealed Reasonableness Ruling.

In September of 2008, on the heels of the trial court's reasonableness ruling, RSUI filed suit against Berg in federal court for a declaratory judgment that its excess policy does not provide any coverage for the underlying shoring collapse. 2CP 747. In turn, Vision, Berg's assignee under the Settlement Agreement, filed a bad faith action against RSUI. 2CP 747. On October 15, 2008, RSUI appealed from the trial court's reasonableness determination. 2CP 747.

During the course of the federal action, Vision, as assignee for Berg, produced documents concerning the parties' underlying settlement communications to RSUI. 2CP 380. Included in Vision's production were the four emails that RSUI takes issue with in this appeal. 2CP 380. On August 25, 2008, Mr. Aliment sent an email to Mr. Mullin proposing the following relevant settlement terms:

- Admiral pays \$1,000,000 to Vision One and Vision Tacoma ("Vision").
- Vision and its carriers will provide a complete indemnity to Berg against the bodily injury claims.

* * *

- There will otherwise be a complete release between Berg, D& D and Vision.
- A stipulated judgment against Berg in the amount of \$2,000,000 although we are willing to discuss some other way to access this policy that does not involve a judgment. The settlement agreement would include an assignment of coverage **and extracontractual rights against RSUI**. The remaining \$1,000,000 to be paid only by RSUI, with a covenant not to execute on any assets of Berg other than the RSUI policy.

2CP 673 (emphasis added).

On August 27, 2008, Mr. Mullin sent an email to Mr. Aliment and to the mediator, Dale Kingman, setting forth a counter offer. 2CP 679.

The counteroffer proposed in relevant part:

7. Berg will assign its rights against RSUI with the condition that there is a stipulated judgment (not filed) in the amount of \$3.3 million which can only be executed and collected against RSUI, and further that Berg receive 33% of any recovery from RSUI for its bad faith refusal to provide coverage.

2CP 679. The mediator responded to Mr. Mullin's email without taking issue with the proposed sharing agreement. 2CP 679. In fact, the mediator expressed his appreciation for Mr. Mullin's direct contact. 2CP 679.

Mr. Aliment responded to Mr. Mullin's counter-offer by email dated August 28, 2008. 2CP 681-82. Mr. Aliment expressly stated as follows:

For hopefully your ease of tracking the respective positions, the text in **black²** reflects terms different than that proposed by you in your August 27 email to Dale Kingman and me.

* * *

7. Berg will assign **all its rights including its coverage and extra contractual rights** against RSUI with the condition that there is a stipulated judgment (not filed) **unless necessary** in the amount of **\$5.5** million which can only be executed and collected against RSUI.

2CP 681. Mr. Aliment's counter-offer expressly indicates that rather than a sharing agreement, Vision demanded "**all [Berg's] rights including its coverage and extra contractual rights** against RSUI." 2CP 681.

On August 28, 2008, Mr. Mullin responded to Mr. Aliment as follows:

I was a little surprised by this counter. Before I forward this to my clients, I wanted to be sure this is the direction you want me to tell them it is headed. As you know, the assignment is an important issue to Berg in a number of ways. As a small business, the idea of a \$5.5 million assignment is daunting and could break the deal. Berg was agreeing to the risk associated with the assignment with the understanding that they may receive 33% of any recovery against RSUI. This helped to balance their concerns. Your counter may be perceived as a step backwards, rather than forward. Please give this consideration and let me know if this is truly the counter you want me to suggest to the clients.

2CP 685.

² The bolded text indicates the text that was "black" in Mr. Aliment's August 28, 2008, email.

On August 29, 2008, Mr. Aliment sent Mr. Mullin the following email and again rejected the sharing proposal:

I have had the opportunity to discuss this with the carriers. They are willing to modify paragraph 7 as follows:

7. Berg will assign all its rights including its coverage and extra contractual rights against RSUI with the condition that there is a stipulated judgment (not filed) unless necessary in the amount of \$3.3 million which can only be executed and collected against RSUI.

There are no other changes.

2CP 684 (emphasis added).

It is undisputed that RSUI had the above-referenced email communications as of August 7, 2009, less than one year after the trial court's September 15, 2008, reasonableness order. 2CP 380. In fact, in August of 2009, RSUI attempted to add these email communications to the record on appeal concerning the reasonableness of the settlement by arguing that they constituted evidence of potential collusion that was not disclosed to the trial court. 2CP 747. Commissioner Skerlec denied RSUI's motion, finding that RSUI failed to satisfy the pre-requisites of establishing that the additional evidence was necessary to resolve the appeal or that the additional evidence would have changed the decision being reviewed. 2CP 753-54.

G. RSUI Deposed Attorneys Who Negotiated the Settlement.

Nearly two weeks after receiving the August 2008 emails, RSUI deposed Mr. Aliment and Mr. Mullin in the federal court action. 2CP 698, 711. RSUI therefore had the opportunity to fully explore any issues concerning those emails with the attorneys who negotiated the settlement. RSUI used the August 2008 emails as exhibits in the deposition of Mr. Aliment. 2CP 717-18. When asked whether he and Berg's attorneys had ever discussed splitting proceeds in a stipulated judgment action against RSUI, Mr. Aliment acknowledged that Berg wanted to pursue the claim "in some shared fashion." 2CP 715. Mr. Aliment also testified that "ultimately my clients decided, no, that wasn't going to happen. I think the parties had been in combat too long and too hard to suddenly proceeded together, so it didn't happen." 2CP 715. When RSUI specifically questioned Mr. Aliment about the email from Mr. Mullin stating that a \$5.5 million assignment could break the deal, and that Berg was agreeing to an assignment with the understanding that it may receive 33% of any recovery against RSUI, Mr. Aliment replied unequivocally:

[W]e weren't going to get into bed on that claim with our adversary, and we said, no, it wasn't going to happen, and so the 5.5 million ultimately was negotiated down.

2CP 718.

RSUI also used the August 2008 emails as exhibits in the deposition of Mr. Mullin. 2CP 702. However, RSUI did not quiz Mr. Mullin on Vision's rejection of the sharing proposal, much less on any purported "collusion," "kickback scheme" or "side deal." 2CP 633. In fact, the only time RSUI even touched on the sharing proposal was when it asked Mr. Mullin when he and Vision's counsel first discussed the possibility of Berg receiving some portion of a recovery against RSUI as part of the settlement. 2CP 702. Mr. Mullin responded "probably somewhere...around these communications in August." 2CP 702. RSUI's counsel made no objection that this answer was somehow unresponsive, and asked Mr. Mullin no further questions about the sharing proposal. 2CP 702.

Mr. Mullin also testified that at the time of Mr. Aliment's August 25, 2008, email, Vision and Berg had yet to agree on a specific dollar amount for the extracontractual rights against RSUI. 2CP 704.

Like I said before, RSUI, from the mediation forward, was always on the table as an assignment of rights. As we got into August, the method by which the assignment is done and its value and everything were part of the negotiation process and developing, and the concept of the extracontractual rights were in addition to Berg's claim for coverage under the policy. It had clearly ripened...in our mind that there were...exponential extracontractual rights that would have value in trying to resolve this case in Berg's favor.

2CP 704.

H. **RSUI Prolonged Discovery Dispute with Berg’s Counsel and Stayed Federal Court Action on the Heels of Damaging Rulings.**

Despite the fact that Vision had already produced voluminous documents in the federal court action, RSUI also issued a subpoena duces tecum to Mullin Law Group, Berg’s counsel in both the state court action and these appellate proceedings. 2CP 750, 756-58, 769. RSUI sought “any and all documents that refer or relate in any way” to the state court litigation between Vision and Berg. 2CP 758. Mullin Law Group issued a timely objection to the subpoena. 2CP 760-70. Thereafter, RSUI revised the scope of its discovery request to (1) all documents relating to the settlement in the underlying case and (2) all documents relating to any communications with Berg’s insurers concerning the underlying litigation. 2CP 772-73. RSUI took the position that the privileged status of any communications after February 2008 between Mullin Law Group and Berg’s insurer, Admiral, had been waived. 2CP 772-73. In response, Mullin Law Group made clear that its client, Berg, the holder of the privilege, disagreed with RSUI’s assertion that the privilege had been waived. 2CP 775. Nonetheless, and in an effort to comply with the subpoena to the extent reasonably possible, Mullin Law Group produced non-privileged documents in its possession. 2CP 775.

RSUI continued to maintain that Mullin Law Group’s communications with Berg’s insurer after February of 2008 were not

privileged, and requested that Mullin Law Group provide a privilege log. 2CP 778-79. In response, Mullin Law Group pointed out that Vision had already produced all settlement communications that were not privileged. 2CP 781-82. A subsequent discovery conference was unsuccessful, and RSUI filed a motion to compel on August 20, 2009—nearly two weeks after RSUI admittedly had the four emails in its possession, and after it had already used the same in its depositions of Mr. Aliment and Mr. Mullin. 2CP 702, 717-18, 749-50.

In response to RSUI's Motion to Compel, Mullin Law Group filed a Cross-Motion for Protective Order. 2CP 789-800. The federal court issued an order on the cross-motions on December 28, 2009, agreeing with Mullin Law Group that it should not have to produce duplicative settlement communications already produced by Vision, and denying RSUI's motion for contempt. 2CP 802-07. The federal court also concluded that the documents sought by RSUI were relevant to the bad faith and CPA claims Vision asserted against RSUI. 2CP 802-07. The federal court therefore ordered Mullin Law Group to produce a privilege log and any non-privileged documents not already produced. 2CP 802-07.

Mullin Law Group complied with the Court's Order, and provided RSUI with a detailed privilege log demonstrating that none of the withheld documents involved settlement communications with Vision or its counsel. 2CP 750-51, 809-13. Instead, the documents involved

communications between Berg's counsel, Berg and/or Berg's insurer, Admiral, that contained the mental impressions, conclusions, opinions and legal theories of Berg's counsel. 2CP 809-13. Nonetheless, RSUI continued to take issue with Mullin Law Group's assertion of privilege. 2CP 751. In an effort to put an end to further wasteful motion practice, Mullin Law Group stipulated to an *in camera* inspection of the privileged records at issue. 2CP 751, 817-27.

Meanwhile, RSUI's federal declaratory judgment action took a serious blow. On December 18, 2009, Judge Lasnik held that Berg was indeed covered under the RSUI policy. 2CP 379, 402-09. Judge Lasnik also held that Vision, as assignee for Berg, could proceed to trial on its bad faith and CPA claims against RSUI. 2CP 379, 402-09, 411-19. Judge Lasnik noted that "RSUI is facing approximately \$7 million in damages, plus attorney fees." 2CP 379, 397. On January 20, 2010, just weeks after receiving these damaging rulings, RSUI moved to stay the federal court action pending the outcome of the reasonableness appeal. 2CP 751, 829-41. The federal court granted RSUI's motion on February 12, 2010, before it could rule on whether it would conduct the *in camera* inspection of Mullin Law Group's documents. 2CP 843-46.

I. RSUI Filed CR 60(b) Motion.

On April 7, 2010, approximately nineteen (19) months after the trial court approved the reasonableness of the Settlement Agreement, eight

(8) months after receiving copies of the parties' settlement communications, on the heels of receiving damaging summary judgment orders in the federal court action and less than two months after successfully obtaining a stay of the federal court proceedings, RSUI filed its CR 60(b) Motion for Relief from the September 15, 2008, Reasonableness Order. 2CP 1-16. RSUI contended that the trial court's reasonableness ruling should be vacated because the August 2008 emails proved that Vision and Berg entered "a collusive agreement to inflate the amount [of the settlement] in order to accommodate a proposed kickback scheme hatched by Berg." 2CP 3. In addition, RSUI stated that no document produced to RSUI indicates that Vision ever rejected Berg's 33 percent kickback proposal, and the disappearance of the proposal from the email communications implied "that Vision and Berg realized the kickback scheme was unseemly and that any further discussions should not be in writing." 2CP 8. RSUI also accused Vision and Berg's counsel of "misleading" the Court, making "false statements" to the Court, engaging in professional "misconduct" and "pull[ing] the wool over [the trial court's] eyes." 2CP 1-16. RSUI argued that "[t]here is no question...Vision and Berg engaged in misconduct, if not fraud." 2CP 12.

In support of its CR 60(b) Motion, RSUI submitted the Declaration of David A. Linehan, one of its attorneys. 2CP 17-328. Mr. Linehan declared, purportedly based on personal knowledge, that the August 2008

emails showed that Mr. Mullin and Mr. Aliment colluded in their settlement negotiations. 2CP 18, 23. Mr. Linehan further declared that after Berg proposed “the kickback scheme,” “the subject was apparently deemed too ‘hot’ to mention further in writing because it suddenly disappears from all further correspondence without comment.” 2CP 18, 24.

J. RSUI Filed Amended CR 60(b) Motion as “Professional Courtesy” to Vision’s Counsel.

Vision and Berg’s counsel were shocked and offended by these accusations against their professional integrity. 2CP 379, 613-15, 648-49, 651, 850-51. After the motion was filed and before responses were due, RSUI’s counsel, Mr. Helgren, called Mr. Aliment to propose that RSUI and Vision attempt to settle the stayed federal court action. 2CP 379-80. Mr. Aliment expressed his disappointment that Mr. Helgren’s office filed the CR 60(b) Motion, and suspected that the motion had been filed to create settlement leverage. 2CP 380. Thereafter, in what RSUI’s counsel contends was “a professional courtesy to Vision’s attorney,” RSUI filed an Amended CR 60(b) Motion. 2CP 329-46. The Amended Motion did little to soften the overall tone of the accusations.³ RSUI continued to accuse Vision and Berg’s counsel of “misleading” the Court, making “false

³ A “compare write” document prepared by Vision’s counsel and showing what changed from RSUI’s original CR 60(b) Motion to its Amended CR 60(b) Motion is in the record at 2CP 512-30.

statements” to the Court, engaging in professional “misconduct” and “pull[ing] the wool over [the trial court’s] eyes.” 2CP 329-46. While RSUI now acknowledged that “discovery to date has not established that the proposed kickback scheme was accepted by Vision,” RSUI nonetheless maintained that the proposal itself should have been disclosed and “raised a ‘red flag.’” 2CP 331. RSUI continued to rely on the original Declaration of Mr. Linehan submitted with its original motion. 2CP 17-328. At no time did RSUI strike or withdraw its original motion, its amended motion or the Declaration of Mr. Linehan. CP 13372.

K. Vision and Berg Sought CR 11 Relief.

On April 26, 2010, and before the parties’ responses to RSUI’s Amended 60(b) Motion were due, Vision and its counsel filed a Request for CR 11 Relief together with supporting declarations. 2CP 347-51, 352-77, 378-544, 545-58, 559-602, 603-06. On April 28, 2010, Berg’s counsel, Mr. Mullin, electronically sent a letter to RSUI’s counsel, Mr. Helgren and Mr. Linehan, stating as follows:

This letter serves to inform you of Berg’s intention to join in Vision One’s Motion for Relief under CR 11 and CR 12(f). Like Vision One and its counsel, we are outraged and offended by the unsupported accusations contained in your moving papers. There is no basis in law or fact to support your defamatory assertion that Mr. Aliment and [Mr. Mullin] colluded, much less that we committed a fraud on the Court. Please consider this letter as your opportunity to mitigate sanctions by withdrawing the offending papers voluntarily. If you refuse to do so, we will seek all relief available to us.

2CP 745.

On April 29, 2010, Berg and its counsel joined in Vision's CR 11 Motion. 2CP 742-45. Berg's Joinder states that "[i]n the event RSUI and its attorneys do not voluntarily withdraw the offending papers, this joinder will be further supported by Berg's Memorandum in Opposition to RSUI's CR 60(b) Motion...and additional declarations...which will be filed and served in accordance with Pierce County Local Rule 7(a)(5)." 2CP 743. On May 3, 2010, the trial court declined to hear RSUI's CR 60(b) Motion based on RAP 7.2(e). 2CP 619. This Court subsequently directed the trial court to hear RSUI's CR 60(b) Motion and Vision and Berg's CR 11 Motion which were ultimately re-noted for hearing on July 1, 2010—nearly three months after RSUI's CR 60(b) Motion was initially filed. 2CP 1010-17. Despite having several months to do so, RSUI and its attorneys never withdrew the offending papers, forcing Berg to defend against the same. 2CP 620-46, 647-745, 746-848, 849-56, 967-73.

L. **Trial Court Denied RSUI's CR 60(b) Motion and Granted Vision and Berg's CR 11 Motion.**

The trial court heard oral argument on RSUI's Amended CR 60(b) Motion and Vision and Berg's CR 11 Motion on July 1, 2010. 7/1/2010 1-68. Interestingly, this was the same day this Court heard oral argument on RSUI's reasonableness appeal. 7/1/2010 RP 30: 16-17. During the hearing before the trial court, RSUI backed off from the accusation in its

written submissions about a secret “side deal.” 7/1/2010 RP 10: 1-8. Instead, RSUI focused on its theory that the 2008 emails proved that Berg negotiated the settlement amount upward, and therefore the settling parties should have disclosed those emails to the trial court during the September 2008 reasonableness hearing. 7/1/2010 RP 8:9-11:8. According to RSUI, Berg could have simply said yes to Vision in response to Mr. Aliment’s August 25, 2008, email and settled the case, including extracontractual rights, for \$2 million. 7/1/2010 RP 25:12-14. In response, Jerry Edmonds, one of Vision’s attorneys, argued as follows:

Opposing counsel is simply ignoring, for whatever reason, very specific language that says the settlement agreement, not the settlement, the settlement agreement would include an assignment of coverage and extra contractual rights. Whatever someone else may think, extra contractual rights refers to claims in excess of policy limits. The 2 million was only policy limits. And so if the other side, if Berg had said, quote, yes, just yes, period, then it would have been open to the parties to determine in their best negotiation or estimate what were those extra contractual rights worth. And, in fact, that’s exactly what happened over the coming days.

7/1/2010 RP 26:21-27:7.

Mr. Mullin echoed Mr. Edmonds arguments, and added as follows:

To stand here and say that on August 27th we could have simply accepted that offer is absurd. We were in heavy negotiations. We were in prep for trial. We were trying to protect Berg. That hadn’t yet occurred. We were in this courtroom preparing for trial as the jury was coming in, because we were still negotiating protection for Berg against the personal injury claims...Vision One had a 5 million dollar claim against us and you know that we were

going to fight that tooth and nail. What did we have on the personal injury? If I didn't get a defense verdict in this case against Vision One, I'm going in to the personal injury, and it's admitted liability. We're looking at damages. I got a client who has a million-dollar policy and it's going to be bankrupt...[I]t's absurd to say I could have taken that without making sure that all of the T's are crossed and I's are dotted for our client, Berg.

7/1/2010 RP 35:9-36:1.

The trial court questioned RSUI's counsel about the timing of the motion, and found it "interesting" that RSUI did not file its motion until April of 2010 when it had the August 2008 emails as early as August of 2009—less than one year before the reasonableness order was entered and within the time period for filing CR 60(b)(3) motion based on newly discovered evidence. 7/1/2010 RP 13:16-18:4. The trial court stated:

I'm just trying to figure out why we're going with this motion that has some very serious allegations that, rightfully so, some of the responding parties are pretty personally offended. So I'm just curious. It just seems a little bit, when you're talking about being above board and what all should be disclosed to the Court, I'm just interested in why that timing, why this is filed April 7th and April 13th when you're trying to negotiate the federal lawsuit.

7/1/2010 RP 15:20-16:3. RSUI denied that that the CR 60(b) pleadings were designed to instigate settlement discussions. 7/1/2010 RP 18:5-8. RSUI also argued that one of the factors that affected the timing of their motion was that RSUI was waiting for a ruling from this Court concerning its motion to add evidence to the record on appeal. 7/1/2010 RP 18:18-

19:14. Berg's counsel pointed out, however, that Commissioner Skerlec's ruling was issued on August 26, 2009, nearly eight months before RSUI filed its CR 60(b) Motion. 7/1/2010 RP 34:51-20; 2CP 753-54.

In deciding to deny RSUI's Amended CR 60(b) Motion and grant Vision and Berg's CR 11 Motion, the trial court stated as follows:

It's obvious that I find this really troubling...I really haven't seen language used like this against other lawyers. I haven't. So it's upsetting to me, too, just because I do have respect for the attorneys that are involved. I think these are really harsh words. I do think it's sanctionable. I don't know exactly what the remedy is. I think they are asking for attorney fees. We're probably going to have to have another hearing on that, in terms of what is really the remedy. I do find the language, the allegations to be improper without reasonable inquiry and based on an objective standard that it's inappropriate to have these kinds of pleadings.

7/1/10 RP 58:23-59:12.

M. Trial Court Entered Findings of Fact and Conclusions of Law and Awarded Attorney Fees to Vision and Berg.

At the trial court's request, Vision and Berg subsequently submitted briefing and declarations in support of their respective motions for attorney fees and costs. 2CP 1021-39, 1040-74, 1075-76, 1077-79, 1080-81, 1082-93, 1094-1128, 1129-32, 1133-39, 1309-25, 1326-37, 1338-48, 1349-1415. Vision requested fees and costs of \$130,085.00, and Berg requested fees and costs of \$52,000. 2CP 1317, 1348. On August 31, 2010, the trial court entered its Findings of Fact and Conclusions of Law Regarding CR 11 Sanctions Against RSUI. CP 13371-72. The trial

court held that “RSUI’s CR 60(b) Motion for Relief from Reasonableness Order alleging fraud, misrepresentation or other misconduct was baseless and advanced without an inquiry that is reasonable under the circumstances of this case based on an objective standard.” CP 13372. The trial court also found that “[t]he allegations were serious and would constitute serious professional misconduct and likely result in discipline. The accused attorneys were compelled to vigorously defend against the allegations.” CP 13372. In addition, the trial court recognized that “RSUI had the opportunity not to file the offending pleadings or to withdraw them after the conversation with Randy Aliment or at any time prior to the July 1, 2010 argument, but again, chose not to.” CP 13372.

Recognizing that the primary purpose of CR 11 is to deter baseless filings and to curb abuses of the judicial system, the trial court awarded attorney fees in the amount of \$44,250 to Vision (150 hours at \$295/hour) and \$18,500 to Berg (100 hours at \$185/hour). CP 13372. The trial court subsequently entered judgment for those amounts plus post-judgment interest against RSUI, the law firm of McNaul Ebel Nawrot & Helgren PLLC, and attorneys Michael D. Helgren and David A. Linehan. CP 13371-72, 13437-38, 13349-441. This appeal followed and has been consolidated with RSUI’s earlier appeal from the September 15, 2008, reasonableness order. 2CP 1927-1308; CP 13379-92, CP 13442-50.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion in Denying RSUI's CR 60(b) Motion.

1. Standard of Review

A trial court's decision on a motion to vacate under CR 60(b) is reviewed for abuse of discretion. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn.App. 803, 821, 225 P.3d 280 (2009). An abuse of discretion is present *only* if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *Id.* A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* at 821-22. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take and arrives at a decision outside the range of acceptable choices. *Id.* at 822. None of these scenarios is present in the instant case.

2. The Trial Court Appropriately Denied RSUI Relief under CR 60(b)(4).

Civil Rule 60(b)(4) allows a trial court to relieve a party from a final judgment or order based on “[f]raud..., misrepresentation, or other misconduct of an adverse party.” CR 60(b)(4). However, the moving party must prove the misconduct by clear and convincing evidence.

Mitchell, 153 Wn.App. 825. Here, the trial court’s ruling denying RSUI’s CR 60(b) Motion rests on facts supported in the record, was reached by applying the appropriate legal standard, adopted a reasonable view and was within the range of acceptable choices. Accordingly, the order denying RSUI’s Motion for CR 60(b) relief should be affirmed.

a. **RSUI Ignores Evidence Demonstrating the Parties Had Yet to Negotiate a Dollar Amount for Extracontractual Rights.**

RSUI desperately clings to its argument that the August 2008 emails somehow prove that Berg negotiated Mr. Aliment’s August 25, 2008, settlement offer upward. RSUI even goes so far as to represent that “Vision and Berg do not deny that Berg declined an opportunity to settle for \$2 million, instead counter-offering a larger judgment against itself coupled with a 33% kickback....” *See* RSUI’s Brief at p. 44. Nothing could be further from the truth. Vision and Berg have consistently and vehemently denied, in deposition testimony, sworn declarations, and in open court, that Mr. Aliment’s August 25, 2008, email constituted an offer to settle the underlying case for \$2 million.

Inexplicably, RSUI continues to ignore express language contained in Mr. Aliment’s August 25, 2008, email to Mr. Mullin stating that “[t]he settlement agreement would include an assignment of coverage *and extracontractual rights against RSUI.*” 2CP 673 (emphasis added). By their very definition, extracontractual rights refer to claims *in excess* of

policy limits. 7/1/2010 RP 26:25-27:2. It would strain reason to conclude that the \$2 million figure referenced in Mr. Aliment's email included a dollar amount for the extracontractual rights against RSUI when the combined limits of coverage available under the Admiral and RSUI policies was \$2 million. The trial court agreed:

I'm still having a hard time seeing how there was collusion in any way, shape or form. It makes sense to me in terms of how it all got resolved.

7/1/2010 RP 23:23-25.

Indeed, any suggestion that Berg could have simply accepted Mr. Aliment's August 25, 2008, proposal was "absurd". 7/1/2010 RP 35:9-10.

As articulated by Mr. Mullin,

[the parties] were in heavy negotiations. We were in prep for trial. We were trying to protect Berg. That hadn't yet occurred. We were in this courtroom preparing for trial as the jury was coming in, because we were still negotiating protection for Berg against the personal injury claims... Vision One had a 5 million dollar claim against us and you know that we were going to fight that tooth and nail. What did we have on the personal injury? If I didn't get a defense verdict in this case against Vision One, I'm going in to the personal injury, and it's admitted liability. We're looking at damages. I got a client who has a million-dollar policy and it's going to be bankrupt... [I]t's absurd to say I could have taken that without making sure that all of the T's are crossed and I's are dotted for our client, Berg.

7/1/2010 RP 35:10-36:1. Mr. Petrich echoed the sentiments of Mr. Mullin. "That was just the tip of the iceberg. There [were] other parts to the settlement that had to be negotiated." 7/1/2010 RP 56:12-13. As

succinctly stated by Vision's attorney, Jerry Edmonds, "[Berg] could have accepted extra contractual rights and [Vision] wouldn't have negotiated a value of the dollars on that? That makes no sense at all." 7/1/2010 RP 58:16-18.

The absence of any "upward" negotiation on the part of Berg is further demonstrated by the deposition testimony in the federal court action. Mr. Mullin testified that at the time of Mr. Aliment's August 25, 2008, email, Vision and Berg had yet to agree on a specific dollar amount for the extracontractual rights against RSUI. 2CP 704. "As we got into August, the method by which the assignment is done and its value and everything were part of the negotiation process and developing, and the concept of the extracontractual rights were in addition to Berg's claim for coverage under the policy." 2CP 704.

Thus, unlike in *Water's Edge Homeowners Ass'n v. Waters Edge Assocs.*, 152 Wn.App. 572, 216 P.3d 1110 (2009), *rev. denied*, 168 Wn.2d 1019 (2010), there was never an abrupt shift from litigation to collaboration in Vision and Berg's settlement negotiations. The first time a monetary value was ever mentioned in settlement negotiations that included an amount for extracontractual claims was when Mr. Mullin made the offer of \$3.3 million with Berg sharing 33% of any recovery against RSUI. Vision countered at \$5.5 million with no sharing agreement, an offer Berg flatly refused. If Berg was interested in inflating

the value of the settlement, it could have easily done so by agreeing to the \$5.5 million which was well within the range of damages (\$10 million or more). 2CP 650. The fact that Berg balked at the \$5.5 million judgment is further evidence that the parties were engaged in arms' length good faith negotiations. 2CP 650.

Vision subsequently agreed to come down to \$3.3 with no sharing arrangement, demonstrating that Berg successfully negotiated the settlement amount *downward*, not upward. Moreover, the back and forth did not stop there. The indemnification and hold harmless provided by Vision to Berg was a critical component to settlement. 2CP 650. Resolution of these personal injury claims took a significant amount of time and negotiations. 2CP 650. In fact, as the jury was coming in and trial was scheduled to begin, Berg was still negotiating the language to ensure it was fully protected against the personal injury claims. 7/1/2010 RP 35:12-15. Thus, RSUI's unflinching position that Vision and Berg colluded to artificially inflate Vision's recovery is simply not borne out by the record evidence. The trial court was therefore well within its discretion in finding that RSUI failed to come forward with clear and convincing evidence of any fraud, misrepresentation or misconduct on the part of Vision, Berg or their attorneys. Accordingly, the order denying RSUI's CR60(b) Motion should be affirmed.

b. **Vision and Berg Did Not Withhold Material Evidence.**

The crux of RSUI's argument with respect to the CR 60(b) ruling is that Vision and Berg committed misconduct by withholding material evidence and misrepresenting that all material evidence had been provided to RSUI. However, because the record evidence establishes that there was nothing nefarious about the August 2008 emails, RSUI can hardly be heard to argue that the emails were "material" to the reasonableness determination, much less that Vision, Berg and/or their counsel committed misconduct by not disclosing them. The record evidence demonstrates that a sharing arrangement was proposed but rejected, that in August of 2008, Vision and Berg were still in the process of negotiating the value of extracontractual damages, and that Berg negotiated the total settlement amount downward, not upward. Thus, there was nothing unique about these four email communications that would make them material to determining the reasonableness of the September 2008 settlement. Indeed, RSUI's own counsel acknowledged that settling parties need not produce every settlement communication they have had in order to get the reasonableness of the settlement approved. 7/1/2010 RP 21: 1-4.

Moreover, any suggestion that Berg interfered with RSUI's ability to obtain information is disingenuous. From the outset of the underlying action, RSUI had the opportunity to be as involved as it wanted to be.

9/15/2008 RP 54: 17-18. Berg was under no obligation to keep RSUI in the loop after it denied coverage. 9/15/2008 RP 54: 18-22. When RSUI's counsel appeared at the September 12, 2008, reasonableness hearing claiming to "know nothing of this case," and the trial court gave RSUI the weekend to "do whatever it need[ed] to do, homework-wise," Berg did not fail to make reasonable accommodations—RSUI failed to make reasonable efforts. 9/12/2008 RP 9: 2-4, 53: 21-13. Despite the fact that it was RSUI's burden to show some kind of fraud or collusion, RSUI tried to put the onus on Berg's counsel by sending an email late Friday afternoon requesting that Berg "forward all information pertaining to the liability of insured, Berg, the claims against Berg that have been resolved in the proposed settlement [and] how the figure of \$3.3 million was determined." CP 456. Putting aside the unduly burdensome nature of RSUI's request, Berg's counsel did offer to make their records available for review over the weekend. CP 458, 461. RSUI failed to take advantage of this offer. 9/15/2008 RP 33: 6-17.

RSUI also mischaracterizes the discovery dispute in the federal court action, contending that RSUI was somehow "stymied by Berg's resistance" to discovery until Judge Lasnik ordered partial production and a privilege log. RSUI's Brief at p. 37. As a preliminary matter, RSUI's discovery dispute was not with Berg—it was with Mullin Law Group, Berg's defense counsel in the underlying matter and a non-party to the

federal court litigation. That notwithstanding, RSUI's arguments ignore Judge Lasnik's ruling that Mullin Law Group had valid objections to RSUI's discovery requests which resulted in the entry of a protective order. 2CP 750, 802-07. Furthermore, RSUI glosses over the fact that its own motion to stay the federal court proceedings, made *after* RSUI received adverse rulings exposing it to significant bad faith damages, prevented Judge Lasnik from considering RSUI and Mullin Law Group's agreed motion for *in camera* inspection. 2CP 751, 829-41, 843-46. Most importantly, RSUI fails to acknowledge the incontrovertible fact that at the time it filed its motion to compel against Berg's counsel, it already had the August 2008 emails in its possession. 2CP 380, 750.

To the extent RSUI insinuates that communications withheld by Berg's counsel on the basis of privilege may contain evidence supportive of their accusations of misconduct, such insinuations are not well taken. RSUI's Brief at pp. 20, 26, 38, 47. As indicated in the privilege log prepared by Mullin Law Group, the withheld communications are between Berg's counsel, Berg and/or Berg's insurer, Admiral, and involve mental impressions, conclusions, opinions and legal theories of Berg's counsel. 2CP 809-13. As such, they are classic examples of communications protected by the attorney-client privilege and work product doctrine. RCW 5.60.060(2)(a); CR 26(b)(4). Thus, RSUI's representation that it is somehow being "penalized for carefully pursuing discovery while parties

who had been in possession of the evidence all along dragged their feet and delayed RSUI's eventual [CR 60(b)] motion" is a mischaracterization of the record. RSUI's Brief at p. 38. Accordingly, the trial court's order denying RSUI's CR 60(b) Motion should be affirmed.

c. **There Was Nothing Untoward About Berg's Sharing Proposal.**

In its Amended CR 60(b) Motion, RSUI took the position that the mere existence of the sharing proposal itself should have raised a "red flag" and alerted the trial court that something sinister was afoot. 2CP 331. Putting aside the fact that the sharing proposal was ultimately rejected, RSUI has never been able to point to any Washington authority suggesting anything untoward about Berg's sharing proposal. In fact, a few years before the underlying settlement was approved, Division One held that a trial court did not abuse its discretion in finding a \$17.4 million settlement reasonable where the settlement included an assignment of the defendant's rights against two non-participating insurers, and where the participating insurer stood to receive 40% of any recovery while the plaintiff stood to receive 60% of any recovery. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn.App. 372, 376-77, 383, 89 P.3d 265 (2004). The *Howard* decision demonstrates that Berg's sharing proposal is hardly the "smoking gun" RSUI makes it out to be.

d. **Vision and Berg Did Not Make Misrepresentations or Mislead the Trial Court.**

RSUI also accuses Vision and Berg's counsel of making misrepresentations and misleading the trial court. With respect to the deposition testimony in the federal court action, RSUI claims that "Vision and Berg misstated the deposition evidence when they claimed incorrectly that Vision attorney Aliment expressly stated that Vision rejected the proposed 33% kickback and that RSUI's attorneys never asked Mullin about the kickback proposal." RSUI's Brief at pp. 24-25. RSUI also contends that the deposition testimony of Mr. Aliment and Mr. Mullin was "vague and equivocal." RSUI Brief at p. 47. These accusations are belied by the record evidence.

When RSUI's counsel asked Mr. Aliment whether he and Berg's attorneys had ever discussed splitting proceeds in a stipulated judgment action against RSUI, Mr. Aliment acknowledged that Berg wanted to pursue the claim "in some shared fashion." 2CP 715. Mr. Aliment also testified that "ultimately my clients decided, no, that wasn't going to happen. I think the parties had been in combat too long and too hard to suddenly proceeded together, so it didn't happen." 2CP 715. When RSUI specifically questioned Mr. Aliment about the email from Mr. Mullin stating that a \$5.5 million assignment could break the deal, and that Berg

was agreeing to an assignment with the understanding that it may receive 33% of any recovery against RSUI, Mr. Aliment replied unequivocally:

[W]e weren't going to get into bed on that claim with our adversary, and we said, no, it wasn't going to happen, and so the 5.5 million ultimately was negotiated down.

2CP 718.

Similarly, and contrary to RSUI's contention, Vision and Berg accurately represented to the trial court that Mr. Mullin was not interrogated about the proposal for a kickback during his deposition in the federal court action. RSUI never asked Mr. Mullin if Vision rejected the sharing proposal, much less if there was any "collusion," "kickback scheme" or "side deal" in connection with the underlying settlement. 2CP 633. In fact, the only time RSUI even touched on the sharing proposal was when it asked Mr. Mullin when he and Vision's counsel first discussed the possibility of Berg receiving some portion of a recovery against RSUI as part of the settlement. 2CP 702. RSUI contends he "replied vaguely" when in fact, Mr. Mullin responded "probably somewhere...around these communications in August." 2CP 702. RSUI's counsel made no objection that this answer was somehow unresponsive, and asked Mr. Mullin no further questions about the sharing proposal. 2CP 702.

RSUI also claims that Berg's counsel made misrepresentations in open court by stating during the reasonableness proceedings that there was

nothing they could provide to RSUI that in any way gives a hint of collusion or fraud or is somehow different than the evidence they already had that the settlement was arrived at through arms' length negotiations. RSUI's Brief at pp. 14-15. Despite RSUI's conspiracy theories, the fact remains that there is nothing special about these four innocuous emails that made them material to the trial court's reasonableness determination. Consequently, the statements of Berg's counsel can hardly be characterized as misleading, much less as outright misrepresentations.

e. **The Trial Court Applied the Appropriate Legal Standard.**

In an effort to establish an abuse of discretion, RSUI maintains that the trial court's analysis "conflated the standard for CR 60 with that of CR 11." RSUI's Brief at p. 38. RSUI takes specific issue with the trial court's following statement:

I don't think there was anything improper that was done in September of 2008, and I don't think any of the new information changes my mind about that.

7/1/2010 RP 30:11-15. RSUI contends the trial court "appeared to demand that RSUI demonstrate that the additional evidence actually would have changed the outcome of the reasonableness hearing." RSUI Brief at p. 37. RSUI's argument ignores that in order to vacate the reasonableness ruling, the trial court had to find clear and convincing evidence of "[f]raud..., misrepresentation, or other misconduct..." CR

60(b)(4); *Mitchell*, 53 Wn.App. 825. This would necessarily require that the trial court analyze whether Vision and Berg *improperly* failed to disclose the August 2008 emails, which could only be the case if the trial court found the emails to be evidence of fraud and collusion material to the issue of the reasonableness of the underlying settlement.

RSUI's assertion that the trial court abused its discretion because it inquired into the suspicious timing of RSUI's CR 60(b) Motion is likewise unpersuasive. The trial court heard counsels' arguments on both the CR 60(b) motion and the CR 11 motion during the same hearing. Given that the CR 11 motion was filed in response to the offensive CR 60(b) motion papers, many issues were inextricably intertwined. That notwithstanding, the trial court made clear that the purpose of its questions concerning the timing of RSUI's CR 60(b) Motion was related to its analysis under CR 11, not CR 60(b):

You see I'm mixing some of the issues because *under CR 11*...one of the factors I need to look at is what the motive is.

7/1/2010 RP 18: 9-11 (emphasis added). The absence of any "conflation" of the appropriate standards is also reflected in the trial court's Findings of Fact and Conclusions of Law Regarding CR 11 Sanctions, where the trial court's observations concerning the timing issues appropriately appear. CP 13371-72. Nothing in the record indicates that the trial court applied

the incorrect legal standard to RSUI's CR 60(b) Motion. The trial court's ruling denying the same should therefore be affirmed.

3. **The Trial Court Appropriately Considered and Rejected RSUI's Arguments under CR (60)(b)(11).**

RSUI erroneously contends that the trial court abused its discretion in failing to analyze RSUI's CR 60(b)(11) request for relief and addressing only CR 60(b)(4). RSUI Brief at p. 39. Once again, RSUI's contention is not borne out by the record. RSUI's motion papers contained an alternative request for relief under CR 60(b)(11), which allows a trial court to relieve a party from a final judgment or order for "[a]ny other reason justifying relief from the operation of the judgment." Under Washington law, "[t]he use of CR 60(b)(11) 'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.'" *Yearout v. Yearout*, 41 Wn.App. 897, 707 P.2d 1367 (1985) (quoting *State v. Keller*, 32 Wn.App. 135, 140, 647 P.2d 35 (1982)). Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. *Id.* Washington courts have stressed the need for the presence of "unusual circumstances" before CR 60(b)(11) will be applied. *Id.*

In the proceedings below, RSUI failed to point to any irregularity extraneous to the action of the trial court or to questions concerning the

regularity of the trial court's proceedings. 2CP 341-42. Moreover, RSUI's baseless accusations hardly rose to the level of "unusual circumstances" warranting relief under CR 60(b)(11). Furthermore, any assertion that that the trial court failed to consider RSUI's request for relief under CR 60(b)(11) is incorrect. RSUI's request was fully briefed by all parties, and the trial court's Order Denying RSUI's CR 60(b) Motion acknowledged its review of all submitted materials. 2CP 1014-17. Lastly, if RSUI's allegations were baseless under CR 60(b)(4), they were equally baseless under CR 60(b)(11). Accordingly, the trial court's order denying RSUI's CR 60(b) Motion should be affirmed.

B. The Trial Court Appropriately Granted Vision and Berg's Request for CR 11 Relief.

1. Standard of Review

Like a decision under CR 60(b), a trial court's imposition of sanctions is reviewed for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). In deciding whether the trial court abused its discretion, an appellate court must keep in mind that the purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Id.* at 198. The policies underlying CR 11 are best served where the rule is interpreted broadly so a court can fashion a penalty that deters litigation abuses most efficiently and effectively. *Madden v. Foley*, 83 Wn.App. 385, 392, 922 P.2d 1364 (1996).

2. Standard under CR 11

In accordance with CR 11, attorneys are required to date and sign every pleading, motion and memorandum filed with the Court, certifying

that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law...; and (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation...If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

CR 11(a).

3. The Trial Court Properly Determined Use of Phrases Such As "Improper Means," "Collusion" and "Kickback Scheme," and the Testimony of Mr. Linehan Purportedly Based on Personal Knowledge Were Not Well Grounded in Fact or Based on a Reasonable Inquiry.

RSUI relentlessly maintains that its use of phrases such as "improper means," "collusion" and "kickback scheme" to describe the underlying settlement negotiations was, and still is, well grounded in fact. RSUI Brief at pp. 44-46. As set forth above, the record evidence does not support RSUI's contention that Vision and Berg artificially inflated the settlement amount or abruptly shifted from a position of contentious litigation to purported collaboration. On the contrary, the record evidence

demonstrates that Vision and Berg were engaged in hard fought negotiations all the way up to the time of jury selection. 7/12/2010 RP 35: 12-15.

In addition, the term “kickback” brings to mind corrupt city officials and payments obtained through coercion, while the word “scheme” connotes a secret or underhanded plan. As recognized by the *Howard* court, there was nothing corrupt or underhanded about Berg’s sharing proposal. Indeed, when Berg’s counsel sent the email containing the sharing proposal, he copied the mediator, Dale Kingman. 2CP 279. The mediator responded without taking issue with the proposed sharing agreement and expressed his appreciation for Mr. Mullin’s direct contact. 2CP 679.

Moreover, and as indicated in the express language of the August 2008 emails as well as in the deposition testimony of Mr. Mullin (both of which RSUI had in its possession approximately eight months prior to filing its CR 60(b) Motion), the sharing proposal was made at a time when the settling parties had yet to negotiate a value for extracontractual damages. 2CP 673, 704. There is simply no evidence to suggest that the August 2008 emails show anything but a snapshot in time of ongoing arms’ length settlement negotiations. Nonetheless, RSUI submitted motion papers describing the sharing proposal as “unseemly.” 2CP 336. Mr. Linehan even went so far as to declare, based on purported personal

knowledge, that August 2008 emails between Mr. Aliment and Mr. Mullin “show[ed] collusion in their negotiation of the settlement,” and that the proposed “kickback scheme” “was apparently deemed too ‘hot’ to mention further in writing because it suddenly disappears from all further correspondence without comment.” 2CP 8, 18, 24.

RSUI’s contention that imposing CR 11 sanctions under these circumstances would have a chilling effect on “an attorney’s enthusiasm or creativity in pursuing factual or legal theories” is troubling. Making unsupported accusations of professional misconduct against fellow members of the Washington State Bar is hardly analogous to zealous advocacy. Even more troubling is the fact RSUI had the August 2008 emails in its possession for approximately eight months before filing its CR 60(b) motion, and had the opportunity to explore the emails with the negotiating attorneys during their depositions in the federal court action. Nonetheless, RSUI’s counsel made no inquiry, much less a reasonable inquiry, into any suspicions of “collusion” or “kickback schemes” or “side deals,” and only filed its offensive motion papers on the heels of damaging rulings in the federal court action. Consequently, the trial court was well within its discretion in finding that neither RSUI’s inflammatory accusations nor Mr. Linehan’s declaration testimony was well grounded in fact or based on an actual inquiry that was reasonable under the

circumstances. The order granting Vision and Berg CR 11 relief should therefore be affirmed.

4. **Trial Court Was Permitted to Consider Evidence Concerning Improper Purpose.**

RSUI contends that the trial court erred to the extent it gave any weight to its finding of fact that the timing of the CR 60(b) motion was “suspicious.” CP 13372. The trial court noted that RSUI’s CR 60(b) Motion “may likely have been filed for improper purposes,” but could not “make a clear conclusion of law without a more thorough investigation.” CP 13372. However, a finding of improper purpose was not a prerequisite to the trial court’s imposition of CR 11 sanctions. *Eller v. East Sprague Motors & R.V.’s, Inc.*, 244 P.3d 447, 452 (2010). “CR 11 permits a trial court to impose sanctions against a litigant for filing claims not well grounded in fact or law *or* for filings made for an improper purpose.” *Id.* (emphasis in the original).

CR 11 addresses *two types of problems* relating to pleadings, motions and legal memoranda: filings which are not “well grounded in facts and...warranted by...law” and filings interposed for “any improper purpose.”

Id. (emphasis in the original) (quoting *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992)). RSUI cannot be heard to argue that the trial court abused its discretion in weighing the suspicious timing of the CR 60(b) Motion when its Findings of Fact and Conclusions of Law unequivocally state that it imposed CR 11 sanctions based on its

independent finding that RSUI's CR 60(b) filings were not well grounded in fact. CP 13371-72.

5. RSUI's Amended CR 60(b) Motion Did Not Amount to a Withdrawal of Its Initial Motion.

RSUI erroneously relies on *Herr v. Herr*, 35 Wn.2d 164, 211 P.2d 710 (1949), for the proposition that the filing of its Amended CR 60(b) Motion effectively withdrew its original CR 60(b) Motion from the record. The *Herr* decision is inapposite. In *Herr*, the court addressed the effect of an amended *pleading* on the prior *pleading*, not the effect of an amended *motion* on a prior *motion*. *Id.* at 165. Moreover, the *Herr* court held that an amended pleading effectively withdrew the initial pleading only where it did not refer to or adopt the prior pleading. *Id.* at 166. Here, RSUI's Amended CR 60(b) Motion essentially regurgitated the original motion and did little to soften its overall tone. 2CP 512-30. In what RSUI's counsel contends was "a professional courtesy to Vision's attorney," RSUI continued to accuse Vision and Berg's counsel of "misleading" the Court, making "false statements" to the Court, engaging in professional "misconduct" and "pull[ing] the wool over [the trial court's] eyes." 2CP 329-46. While the Amended CR 60(b) Motion graciously acknowledged that "discovery to date has not established that the proposed kickback scheme was accepted by Vision," RSUI nonetheless maintained that the

proposal itself should have been disclosed and “raised a ‘red flag.’” 2CP 331.

Even if RSUI’s Amended CR 60(b) motion did effectively withdraw the original CR 60(b) motion, which Berg denies, RSUI is not entitled to any downward adjustment of the sanctions. RSUI never amended the baseless accusations contained in Mr. Linehan’s Declaration, nor did it withdraw its Amended CR 60(b) Motion despite having more than two months to do so. CP 13372. Instead, RSUI repeated its baseless accusations in future filings and continues to do so at the appellate level. 2CP 857-905, 974-93. Moreover, and as the trial court keenly observed, “[t]he allegations were serious and would constitute serious professional misconduct and likely result in discipline.” CP 13372. RSUI’s Amended CR 60(b) Motion did nothing to alleviate the need of Vision, Berg and their counsel to vigorously defend against the allegations. CP 13372. To date, RSUI has never acknowledged the error of its ways, let alone shown any remorse for filing its offensive motion papers. Under such circumstances, a reduction in RSUI’s sanctions would not accomplish the goals of CR 11. *See, e.g., In re General Plastics Corp.*, 184 B.R. 1008, 1023 (S.D.Fla. 1995) (finding that where a party never conceded error in filing improper pleadings, let alone sanctionable conduct, and caused the party seeking sanctions to incur over \$67,000.00 in additional fees, a sanction of \$15,000 would not accomplish goals of deterrence, fairness

and compensation). Accordingly, the trial court's CR 11 ruling should be affirmed.

C. **The Trial Court Appropriately Awarded Berg Reasonable Attorney Fees.**

Contrary to RSUI's assertion, the trial court's award of \$18,500 to Berg for 100 hours of work at \$185 per hour was not excessive, much less grossly excessive. "In fashioning an appropriate sanction, the trial judge must of necessity determine priorities in light of the *deterrent, punitive, compensatory and educational aspects of sanctions as required by the particular circumstances.*" *Miller v. Badgley*, 51 Wn.App. 285, 753 P.2d 530 (1988) (emphasis added). RSUI would have this Court believe that some lesser amount would suffice to accomplish the purpose of deterring future misconduct. However, RSUI has yet to even concede wrongdoing in filing its CR 60(b) Motion. Indeed, RSUI continues to pursue its baseless allegations at the appellate level. For fairness and compensation, as well as deterrence, the sanction must be proportional to the burden in additional fees the insupportable filings cast upon the defending party. *In re General Plastics Corp.*, 184 B.R. 1023. Accordingly, this Court should affirm the trial court's award of \$18,500 to Berg in furtherance of the goals of CR 11.

D. Berg Is Entitled to Appellate Attorney Fees.

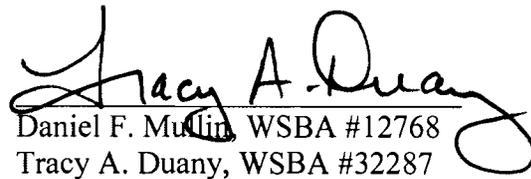
In accordance with RAP 18.1, Berg requests an award of its appellate attorney fees. Where a party successfully defends the propriety of a CR 11 order on appeal, appellate attorney fees are recoverable. *Eller*, 244 P.3d at 452; *Manteufel v. Safeco Ins. Co. of America*, 117 Wn.App. 168, 178, 68 P.3d 1093 (2003). Berg is also entitled to appellate attorney fees in accordance with RAP 18.9. The instant appeal is frivolous and caused Berg to incur additional legal fees and costs in defending against RSUI's baseless accusations. *Id.*

V. CONCLUSION

For the foregoing reasons, the trial court's September 15, 2008, Reasonableness Order, the trial court's Order Denying RSUI's CR 60(b) Motion, the trial court's Order on Vision and Berg's Motion for CR 11 Sanctions, the trial court's Findings of Fact and Conclusions of Law Regarding CR 11 Sanctions Against RSUI, and the trial court's Judgments against RSUI with respect to the same should all be affirmed.

Respectfully submitted this 25th day of February, 2011

MULLIN LAW GROUP PLLC


Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
Attorneys for Respondent Berg
Equipment & Scaffolding Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2011, I caused a true and correct copy of Brief of Respondent Berg Equipment & Scaffolding, Inc. to be delivered to the following counsel of record:

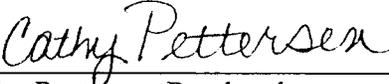
Michael D. Helgren (via email and messenger)
David A. Linehan
Barbara H. Schuknecht
MCNAUL EBEL NAWROT & HELGREN
600 University Street, Suite 2700
Seattle, WA 98101
Counsel for Appellants

Kenneth W. Masters (via email and U.S. mail)
Shelby R. Frost Lemmel
MASTERS LAW GROUP, PLLC
241 Madison Ave. N.
Bainbridge Island, WA 98110
Counsel for Appellants

Jerry B. Edmonds (via email and messenger)
Randy J. Aliment
Daniel W. Ferm
Teena M. Killian
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Counsel for Respondents Vision One and Vision Tacoma

D. Michael Shipley (via messenger)
Attorney at Law
14009 42nd Ave E
Tacoma, WA 98446-1618
Counsel for Respondent D&D Construction, Inc.

11 FEB 25 PM 3:15
STATE OF WASHINGTON
BY _____
DENNY



Cathy Pettersen, Paralegal