

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

---

RSUI,  
Intervenor and Appellant,

McNaul Ebel Nawrot & Helgren, PLLC;  
Michael D. Helgren; and David Linehan,  
Appellants,

v.

VISION ONE, LLC, and VISION TACOMA, INC.  
and D&D CONSTRUCTION, INC.  
Respondents,

v.

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

---

BRIEF OF VISION RESPONDENTS  
(RELATING TO APPEALS OF ORDERS DENYING CR 60(b) RELIEF  
AND IMPOSING CR 11 SANCTIONS ON RSUI AND ITS COUNSEL)

---

Jerry B. Edmonds, WSBA #05601  
Teena M. Killian, WSBA # 15805  
Daniel W. Ferm, WSBA #11466  
WILLIAMS, KASTNER & GIBBS PLLC  
Attorneys for Respondents Vision One, LLC  
and Vision Tacoma, Inc. and D&D, Inc.

Two Union Square  
601 Union Street, Suite 4100  
Seattle, WA 98111-3926  
(206) 628-6600

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
11 FEB 15 PM 2:58  
BERG  
EDMONDS  
KILLIAN  
FERM  
WILLIAMS  
KASTNER  
GIBBS  
PLLC

ORIGINAL

TABLE OF CONTENTS

I. SUMMARY .....1

II. COUNTERSTATEMENT OF THE CASE .....2

    A. Introduction.....2

    B. RSUI Denied Coverage to Berg for Claims and Liabilities Stemming from the Failure of Berg’s Shoring System and the Collapse of Part of Vision’s Construction Project.....3

    C. Vision-Berg Settlement; 2008 Reasonableness Hearing.....5

    D. The Trial Court Found the Vision-Berg Settlement Reasonable on September 15, 2008. ....8

    E. RSUI Chose to Litigate with Vision in Federal Court. ....10

    F. 2010 Developments in RSUI’s 2008 Appeal to This Court. ....12

    G. April 7, 2010 Motion Accusing Vision, Berg, Aliment, and Mullin of Defrauding the Trial Court in September 2008. ....12

    H. Amended CR 60(b)(4) Motion Claiming Vision and Berg Had Misled the Trial Court in September 2008 by Failing to Disclose that Berg Had Proposed to Include a “Kickback Scheme” in the Settlement. ....15

    I. Responses and Counter-motions for CR 11 Sanctions.....17

    J. Argument On, and Denial of, RSUI’s CR 60(b)(4) Motion.....20

    K. Award of Attorney Fees for Violating CR 11.....23

- III. ARGUMENT .....24
  - A. Introduction.....24
  - B. RSUI Was Properly Denied Relief Under CR 60(b)(4). .....25
    - 1. Any notion that Vision’s and Berg’s settlement was collusive is wildly implausible to begin with. ....25
      - a. It was to be expected that any settlement Berg made would include a stipulated judgment for an amount in excess of the limit of RSUI’s policy coverage.....25
      - b. As even RSUI conceded, the settlement terms are objectively reasonable. ....28
      - c. The settlement was negotiated at arms’ length by adverse litigants.....29
    - 2. RSUI’s contention that Berg negotiated the price of settlement up is – and always has been – patently unsupportable. ....30
    - 3. There is no merit to RSUI’s first fallback argument that Vision and Berg were obligated to disclose to the trial court in 2008 that their settlement did not include a “kickback”. ....34
      - a. The sharing proposal was not a “red flag”. ....34
      - b. Trial courts should not have to consider objections to settlements that an insurer bases on unagreed-to negotiation proposals.....35
    - 4. There is no merit to RSUI’s second fallback argument that it was misconduct for Berg and Vision not to make sure in September 2008 that RSUI got the e-mails that do not show collusion.....38

5.	This case is unlike Water’s Edge.....	39
6.	RSUI should not be heard to argue that Mullin and/or Aliment testified evasively in the federal court lawsuit or that Mullin firm documents may still prove “collusion”.....	40
C.	The Trial Court Cannot be Affirmed Under CR 60(b)(4) But Reversed Under CR 60(b)(11).....	42
D.	The Imposition of CR 11 Sanctions Was Warranted.....	42
1.	Appellants accused Vision and Aliment of fraud.....	42
2.	Appellants had the opportunity to retract.....	44
3.	The April 15 motion did not retract the fraud charges made in the April 7 motion.....	45
4.	The \$44,250 award to Vision was not excessive.....	46
E.	Vision Should Be Awarded Its Attorney Fees on Appeal.....	47
IV.	CONCLUSION .....	48

TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>STATE CASES</b>	
<i>Besel v. Viking Ins. Co.</i> , 146 Wn.2d 730, 49 P.3d 887 (2002).....	27
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	43, 44
<i>Chaussee v. Maryland Cas. Co.</i> , 60 Wn. App. 504, 803 P.2d 1339, 812 P.2d 487, <i>rev. denied</i> , 117 Wn.2d 1018 (1991).....	9, 27, 35
<i>Eller v. East Sprague Motors &amp; R.V. 's, Inc.</i> , 159 Wn. App. 180, 244 P.3d 447 (2010).....	47
<i>Estate of K.O. Jordan v. Hartford Acc. &amp; Indem. Co.</i> , 120 Wn.2d 490, 844 P.2d 403 (1993).....	47
<i>Glover v. Tacoma Gen. Hosp.</i> , 98 Wn.2d 708, 658 P.2d 1230 (1983).....	9, 27
<i>Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC</i> , 145 Wn. App. 698, 187 P.3d 306 (2008), <i>rev. denied</i> , 165 Wn.2d 1029 (2009).....	9, 29
<i>Herr v. Herr</i> , 35 Wn.2d 164, 211 P.2d 710 (1949).....	45
<i>Kagele v. Aetna Life &amp; Cas. Co.</i> , 40 Wn. App. 194, 698 P.2d 20, <i>rev. denied</i> , 103 Wn.2d 1042 (1985).....	25
<i>Manteufel v. Safeco Ins. Co.</i> , 117 Wn. App. 168, 68 P.3d 1093, <i>rev. denied</i> , 150 Wn.2d 1021 (2003).....	47
<i>Martin v. Johnson</i> , 141 Wn. App. 611, 170 P.3d 1198 (2007).....	25, 26

<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	27
<i>Miller v. Shugart</i> , 316 N.W.2d 729 (Minn. 1982).....	25
<i>Mutual of Enumclaw Ins. Co. v. T &amp; G Const., Inc.</i> , 165 Wn.2d 255, 199 P.3d 376 (2008).....	26-27, 31
<i>Safeco Ins. Co. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992).....	25, 26
<i>Suburban Janitorial Servs. v. Clarke Am.</i> , 72 Wn. App. 302, 863 P.2d 1377 (1993), <i>rev. denied</i> , 124 Wn.2d 1006 (1994).....	42
<i>Vision One, LLC. v. Philadelphia Indem. Ins. Co.</i> , 158 Wn.2d 91, 241 P.3d 429 (2010).....	4
<i>Wash. State Physicians Exchg. &amp; Ass'n. v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	43, 46
<i>Water's Edge Homeowners Ass'n v. Water's Edge Assocs.</i> , 152 Wn. App. 572, 216 P.3d 1110 (2009).....	39
<i>Werlinger v. Warner</i> , 126 Wn. App. 342, 109 P.3d 22, <i>rev. denied</i> , 155 Wn.2d 1025 (2005).....	27
<i>Yearout v. Yearout</i> , 41 Wn. App. 897, 707 P.2d 1367 (1985).....	42

**FEDERAL CASES**

<i>Goodyear Tire &amp; Rubber Co. v. Chiles Power Supply, Inc.</i> , 332 F.2d 976 (6 <sup>th</sup> Cir. 2003).....	37
<i>Spence-Parker v. Maryland Ins. Group</i> , 937 F. Supp.2d 951 (E.D. Va. 1996).....	36

**STATE STATUTES**

RCW 4.22.070(1).....4

**RULES**

CR 11 ..... *passim*

CR 60(b)..... *passim*

CR 60(b)(3).....11

CR 60(b)(4).....11 and *passim*

CR 60(b)(11).....11, 42

RAP 9.11.....10, 11

RAP 18.1(b).....47

**OTHER AUTHORITIES**

Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 165, 192  
(1983).....43

Schwarzer, *Sanctions Under the New Federal Rule 11-A, A Closer  
Look*, 104 F.R.D. 181, 184 (1985) .....46

*Wash. Prac., Rules of Practice, § 514 (3d ed. Supp. 1991)* .....44

## I. SUMMARY

The trial court was right to order RSUI and its counsel to pay Vision \$44,250 in CR 11 sanctions for concocting a CR 60(b)(4) fraud/misconduct motion out of four August 2008 settlement negotiation e-mails. Lawyers properly mindful of their responsibilities under CR 11, and knowing what RSUI's counsel knew, when the motion was filed in April 2010, about the history of the Vision-Berg litigation and terms of settlement would never have accused Vision, Berg, and their lawyers of fraud, or of misrepresentation, or of non-disclosure of material facts, or of collusion, or of withholding evidence of such misconduct. RSUI and its counsel had no basis for signing and filing any motion(s) that characterized statements Vision's and Berg's lawyers made to the trial court in 2008 as "false," that characterized settlement proposals as "unseemly," that used the words "kickback" and "scheme," that accused Vision's and Berg's lawyers of having "pull[ed] the wool over the [trial] court's eyes," and that accused them of misconduct in failing to disclose to the trial court that a "red flag" proposal had been made during settlement negotiations.

This Court should affirm the order imposing CR 11 sanctions as well as the order denying RSUI's CR 60(b)(4) motion.

## II. COUNTERSTATEMENT OF THE CASE

### A. Introduction.

In its initial appeal, RSUI argued that it was suspicious that Berg entered into a \$3.3 million settlement with Vision on the eve of trial in September 2008, because Berg had rejected a settlement demand seven months earlier that was for a lower amount, and that the trial court should have given RSUI eleven more days to ferret out evidence of collusion before making the reasonableness determination that is binding on RSUI. Vision and Berg explained that the trial court had correctly rejected RSUI's arguments because, among other reasons, that trial court understood that the settlement terms that Berg did not accept in February and those Berg agreed to in September 2008 were materially different and that the parties had negotiated their settlement at arms' length.

This appeal offers new theories of collusion that are no longer based on comparing the February and September 2008 settlement proposals. Appellants' latest collusion theories are based on four August 2008 e-mail messages exchanged during the settlement negotiations. 2CP 220-21, 231, 233-35.<sup>1</sup> Based on

---

<sup>1</sup> Vision will be using "2CP \_\_\_" to cite to a set of clerk's papers that were indexed in 2010 with page numbers from 1-1433.

those e-mails, counsel for RSUI filed motions under CR 60(b)(4) in April 2010 that accused Vision, Berg, and those lawyers first of having lied to the trial court, and then with having withheld material information to mislead the trial court, to secure the 2008 reasonableness finding. The fraud and subsequent fallback “misconduct” arguments that RSUI and its counsel have made are all based on a theory that the e-mails show Berg negotiating for worse terms than Vision offered it on August 25, 2008 than those it accepted on August 29, circumstantially proving that it colluded with Vision to “inflate” the settlement by which RSUI would be bound. In effect, RSUI is arguing that its suspicion of collusion was borne out by the August 2008 e-mails.

Because this case now turns on whether the August 2008 e-mails prove fraud or at least collusion, and whether RSUI and its counsel complied with CR 11 in charging that they do, a review of the context in which the e-mails were exchanged is in order.

B. RSUI Denied Coverage to Berg for Claims and Liabilities Stemming from the Failure of Berg’s Shoring System and the Collapse of Part of Vision’s Construction Project.

Berg supplied a shoring system to D&D, Inc., a concrete contractor on Vision’s construction project. In October 2005, as concrete was being poured to create an above-grade walkway slab,

the shoring system failed and the concrete collapsed.<sup>2</sup> The project was not only damaged but delayed.<sup>3</sup> Several workers would eventually assert bodily injury claims against Berg and Vision.<sup>4</sup> Vision sued its builder's risk insurer, Philadelphia Indemnity, for coverage of property damage and delay losses, and sued Berg under tort and contract theories for damages due to slab-collapse losses. CP 928, 3666-68, 7340. Trial was scheduled to begin September 8, 2008, CP 5797.

It is undisputed that Berg had \$1 million in primary liability insurance coverage with Admiral and a \$1 million excess liability policy with RSUI. RSUI has repeatedly admitted that it denied coverage to Berg in 2007 based on policy exclusions.<sup>5</sup>

---

<sup>2</sup> See *Vision One, LLC. v. Philadelphia Indem. Ins. Co.*, 158 Wn.2d 91, 95-96, 241 P.3d 429 (2010); 2CP 409 (walkway function of slab).

<sup>3</sup> CP 3857-60; 9/30/08RP 846-47.

<sup>4</sup> CP 2724-29, 3568, 6720, 10601 (¶ 6); 9/23/08RP 20; 10/16/08RP 1415-16. Because the workers were fault-free, both Berg and Vision faced joint and several liability on bodily injury claims if they were found at fault to any degree. RCW 4.22.070(1).

<sup>5</sup> 9/15/08RP 196 (“We do not dispute Mr. Petrich’s assertion that coverage was denied back in April of 27 [sic 2007]”); 2CP 5 (RSUI “denied coverage in April 2007 based on available information”); CP 329 (¶ 5); *RSUI 2009 Br. at 6*. In September 2008, RSUI filed a declaratory judgment action in federal court in Seattle seeking a ruling that Berg had not been covered, and in 2009 it moved (unsuccessfully) for summary judgment on the issue of coverage. 2CP 402. Appellants assert that during 2008, after a February mediation failed, Peter Petrich, Berg’s private coverage counsel, did not respond to RSUI’s requests for “information.” *App. Br. at 10* (citing two letters, 2CP 191 and 2CP 193). Neither letter requested any “information”; both merely challenged Petrich to provide legal authority against RSUI’s denial of coverage.

In March 2008, the trial court denied Berg's motion to dismiss Vision's product liability claim against Berg and breach of contract claims that Vision was asserting against Berg in its own right and as assignee of the concrete contractor, D&D. CP 852-53, 928, 4192-94, 4998-5000. The effect of that ruling was to allow Vision to prove and seek \$5.5 million in damages from Berg at trial. *See* 2CP 613 (¶ 9).

C. Vision-Berg Settlement; 2008 Reasonableness Hearing.

On August 5, 2008, as trial neared, Vision offered to settle with Berg on terms that Berg had rejected in February 2008. 2CP 187, 208-12. In an August 25 e-mail to Berg's litigation counsel, Daniel Mullin, Vision counsel Randy Aliment, referencing discussions following August 5 (the substance of which is not of record), made a new proposal. 2CP 220-21.

Aliment's August 25 settlement proposal renewed demands by Vision for the \$1 million limits of Berg's primary liability coverage with Admiral and for Berg's \$1 million coverage claim against RSUI. It also offered a major concession that Vision had not previously offered and made a major demand that Vision's previous written proposals had not included.

The new offer was to give Berg a complete indemnity against bodily injury claims, and thus to pledge Vision's own assets, as well as its available liability insurance, to back up the indemnity. 2CP 220 (third line from bottom of page). The new demand was for assignment, by Berg to Vision, not only of Berg's *coverage* claim against RSUI for the \$1 million provided by the RSUI policy, but also of Berg's *extracontractual* claims against RSUI, *i.e.*, for amounts in excess of the policy limit.<sup>6</sup> 2CP 221 (third line from top of page); *compare* 2CP 187, 210-11.

During the several days after August 25, Mullin and Aliment exchanged both rhetoric and counterproposals, 2CP 231, 233-35, and participated in conference calls with lawyers and representatives of Vision's liability insurers regarding settlement terms, *see* 2CP 234. On August 27 Mullin, in an e-mail to Aliment and the parties' mediator, Dale Kingman, made a counterproposal for a settlement for a total (with Admiral's \$1 million) of \$4.3 million on terms that included not only the complete indemnity of Berg against bodily injury liability, but an incomplete assignment

---

<sup>6</sup> Vision contends in the federal court litigation that the settlement with Berg establishes \$2.3 million as the minimum damages for which RSUI is liable for wrongful denial of coverage as of September 2008, and claims additional damages as a result of RSUI's failures, after September 2008, to honor obligations under its insurance contract.

to Vision of Berg's extracontractual claims against RSUI, with Berg retaining a 1/3 interest for itself. 2CP 231 (item 7).

Vision and its insurers, unwilling to accept a partial assignment of extracontractual claims, countered with a proposed \$6.5 million settlement (with Admiral's \$1 million) that included complete indemnification but also complete assignment to Vision of Berg's rights against RSUI.<sup>7</sup> The parties' negotiations culminated in a settlement, reduced to writing on September 4, 2CP 26-41, for an agreed total value of \$3.3 million, in a package that included, among various other provisions, mutual releases of liability, Admiral's payment of its \$1 million policy limits, and assignment to Vision of Berg's \$1 million coverage-limit claim against RSUI and all of Berg's extracontractual rights against RSUI in exchange for, among other consideration, the complete indemnification of Berg against bodily injury claims. 2CP 26-27 (¶¶ 3-4, 6). The Settlement Agreement provided for entry of a stipulated judgment, enforceable only against RSUI, for \$2.3 million (the \$3.3 million minus Admiral's \$1 million payment). 2CP 28 (¶ 4).

---

<sup>7</sup> 2CP 233, 235, 382 (¶ 8), 561 (¶ 6).

On September 9, when all of Vision's liability insurers, as well as Vision, Berg, and the lawyers for each, had all signed or approved the Settlement Agreement,<sup>8</sup> Vision and Berg informed the trial court and asked it to schedule a reasonableness hearing.<sup>9</sup> The court set a hearing for Friday, September 12. 9/09/08RP 87-91. RSUI was notified of the hearing, intervened, and requested a 14-day continuance.<sup>10</sup> The court continued the hearing to September 15.<sup>11</sup>

D. The Trial Court Found the Vision-Berg Settlement Reasonable on September 15, 2008.

At the reasonableness hearing, RSUI's counsel told the trial court that "until we get the documents, anything related to what's gone on with the settlement negotiations – we won't know if we need to do additional discovery," and that "[w]e may need to do depositions with the parties involved because the information is directly germane to whether or not they can satisfy the standards of the reasonableness." 9/15/08RP 198. When asked "[h]ow come you didn't go look at the files this morning?", RSUI's counsel

---

<sup>8</sup> Philadelphia was not among them, because it was Vision's first-party builder's risk insurer, not one of Vision's third-party liability insurers, and was not party to the settlement.

<sup>9</sup> 9/080/08RP 4-5; 9/09/08RP 83-84.

<sup>10</sup> CP 6682-87; 9/12/08RP 104-05.

<sup>11</sup> 9/12/08RP 148-49; CP 5119.

described e-mails he had exchanged on September 12 and 13 with Berg's appointed litigation counsel Daniel Mullin and private coverage counsel Peter Petrich, and said:

We're looking for any information either to verify that this is a reasonable settlement, or determine if it is not. The fact is, we don't know either way. We had received case reports and the like, prior to mediation. Since then we have been excluded from information relating to the case, including any of the insured's evaluations of what had gone on. So, again, we're from the standpoint of all we see is one million dollars to 2.3 million dollars, and we have nothing to connect the dots between the two.

9/15/08RP 198-99.

The court applied the factors that the case law required it to consider,<sup>12</sup> noted that RSUI had been "involved as much as they wanted to," 9/08RP 212, found the settlement reasonable, *id.* 52-55; CP 483-87, and proceeded with trial of Vision's lawsuit against Philadelphia. RSUI appealed, CP 500-18, and argued in its prior briefs that Berg had settled in September 2008 for more than Vision had demanded in February, suggesting collusion between

---

<sup>12</sup> The court cited *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), and *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.3d 306 (2008), *rev. denied*, 165 Wn.2d 1029 (2009). 9/15/08RP 52-53; CP 484(¶ 1). The same factors are sometimes referred to the "Chaussee factors," after *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487, *rev. denied*, 117 Wn.2d 1018 (1991).

Vision and Berg that it should have been given time to ferret out through discovery.

E. RSUI Chose to Litigate with Vision in Federal Court.

A week after being notified of the Vision-Berg settlement, RSUI filed suit in federal court in Seattle, seeking a declaratory ruling that its policy excludes coverage for any of Berg's walkway-collapse-related liabilities. 2CP 402. By August 7, 2009, RSUI had received, in the federal case discovery, copies of the e-mails Aliment and Mullin had exchanged in August 2008. 2CP 380 (¶ 6). RSUI had deposed Aliment, Mullin, and Petrich by August 19.<sup>13</sup> RSUI's counsel made the e-mails exhibits at Aliment's deposition, 2CP 717-18; Aliment was asked about Mullin's claim-sharing proposal and explained why it had not become part of the settlement, 2CP 715-16, 718.<sup>14</sup>

Appellants assert that “[b]ased on the newly discovered emails,” RSUI moved in this Court for an order to take additional evidence under RAP 9.11. *App. Br. 19-20*. Among the grounds on which Vision opposed that motion was that RSUI had failed to show that “it is equitable to excuse [RSUI's] failure to present the

---

<sup>13</sup> 2CP 698-704, 706-09, 711-19.

<sup>14</sup> RSUI does not claim to have objected to or moved to strike any of Aliment's or Mullin's answers as nonresponsive, and it did neither.

evidence to the trial court,” citing RAP 9.11(a)(3). 2CP 72. This Court denied RSUI’s RAP 9.11 motion. When RSUI filed the motion, time remained to ask the trial court to vacate the reasonableness finding under CR 60(b)(3) (newly discovered evidence) without charging fraud or misconduct under CR 60(b)(4). Once the one-year anniversary of the September 15, 2008 reasonableness determination passed, RSUI could not move for relief under CR 60(b)(1), (2), or (3). RSUI was not precluded from seeking relief under CR 60(b)(4)-(11).<sup>15</sup>

On December 18, 2009, Judge Lasnik, ruling in the federal case on cross-motions for partial summary judgment, held that RSUI’s liability policy did not exclude coverage for, and thus covered, Berg’s above-grade-walkway-collapse-related liabilities. 2CP 5-9.<sup>16</sup> Issues that remain for trial in federal court are whether RSUI made a good faith *investigation* of Berg’s coverage claim, *see* 2CP 418-19<sup>17</sup>, and damages RSUI must pay for failure to

---

<sup>15</sup> CR 60(b) specifies that a motion “shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the... order... was entered...”

<sup>16</sup> Judge Lasnik ruled that RSUI’s coverage position was not supported by the policy language, not consistent with what the policy’s drafter clearly contemplated, and did not match the parties’ probable intent. CP (2) 406.

<sup>17</sup> Judge Lasnik ruled that RSUI’s coverage position had been based on one reasonable policy interpretation and that taking it was not, by itself, bad faith, 2CP 415, but that it is for a jury to decide whether RSUI’s pre-denial coverage

honor, before and/or after September 2008, its obligations under its insurance contract. Judge Lasnik has noted that RSUI faces damages liability of \$7 million. 2CP 397.

With trial set to begin March 1, 2010 and cross-motions pending on the scope of damages, RSUI moved to stay proceedings in the federal case until its appeal in Washington courts is decided. 2CP 325. Vision objected, but Judge Lasnik granted RSUI's stay motion on February 12, 2010. 2CP 325-28.

F. 2010 Developments in RSUI's 2008 Appeal to This Court.

The parties filed briefs in late 2009 and this Court heard oral argument on July 1, 2010. On July 28, 2010, RSUI and its counsel appealed from trial court orders under CR 60(b) and CR 11.<sup>18</sup> Those appeals were consolidated with RSUI's 2008 appeal.

G. April 7, 2010 Motion Accusing Vision, Berg, Aliment, and Mullin of Defrauding the Trial Court in September 2008.

On April 7, 2010 – almost 19 months after the September 2008 reasonableness determination was entered – RSUI filed a motion, over the names of McNaul Ebel law firm attorneys David

---

*investigation* was reasonable (noting RSUI's "problematic reliance on assumptions," 2CP 416), and/or whether RSUI's post-denial conduct shows bad faith. 2CP 417. He noted that, after RSUI denied coverage to Berg, it did not investigate after learning new facts that could have triggered coverage. *Id.*

<sup>18</sup> 2CP 1927-1308, CP 13379-92, CP 13442-50.

Linehan and Michael Helgren and signed by Linehan, asking the trial court to order Vision and Berg to show cause why it should not vacate the 2008 determination. 2CP 1-16. RSUI relied on CR 60(b)(4) and (11), which are not subject to the one-year limit on relief-from-judgment motions. 2CP 3, 11-13; 2CP 331.

RSUI's April 7 motion asserted that Vision and Berg had made materially false statements to the trial court when they asked it to find the Settlement Agreement reasonable in 2008 because, according to RSUI, the August 2008 e-mails between Aliment and Mullin prove there is a side-deal "scheme" in which Berg will get a "kickback" from any recovery from RSUI, such that the Settlement Agreement was falsely presented as the parties' entire agreement. 2CP 3, 7-14. RSUI argued that a "kickback" makes a settlement "collusive" and not reasonable. 2CP 12-14.

RSUI's April 7 motion featured the following assertions:

- Vision and Berg used "improper means" to obtain the reasonableness finding. 2CP 2.
- there was a "collusive agreement" to "accommodate a proposed kickback scheme hatched by Berg." 2CP 3.
- "the misrepresentations and misconduct" of Berg and Vision prevented the Court from fulfilling its obligation to vigilantly assess their proposed settlement. 2CP 4.

- “the implication [from the e-mails] is that Vision and Berg realized the kickback scheme was unseemly” and for that reason stopped mentioning it as one of the terms of settlement they had agreed to. 2CP 8.
- “Vision’s attorney” – referring to Aliment – “affirmatively represented to the Court” that there had been no collusion between Berg and Vision in the case or settlement negotiations, that such statements “were false,” and “misled this Court and RSUI and thereby affected this Court’s reasonableness determination.” 2CP 8-9.
- Berg and Vision “pull[ed] the wool over this [trial] Court’s eyes.” 2CP 9.
- “the settling parties [made] false statements [to the Court],” 2CP 10, and “repeatedly misled the Court. . . by asserting an absence of collusion,” 2CP 12, and that Vision’s own 2009 appeal brief shows that it knew collusion is a kind of fraud and that “a settlement is fraudulent or collusive if it includes provisions for ‘kickbacks.’”<sup>19</sup> 2CP 12-13.

In support of the April 7 motion, RSUI submitted a declaration signed under oath by Linehan, 2CP 17-328, in which, after professing personal knowledge and willingness to so testify, 2CP 18 (¶ 1),<sup>20</sup> Linehan asserted that e-mails attached to his declaration show “collusion in their negotiation of the settlement,” 2CP 23 (¶ 39); characterized a settlement proposal in Mullin’s August 27 e-mail (2CP 231) as including “a kickback scheme,” and went on

---

<sup>19</sup> See footnote 30 below.

<sup>20</sup> Linehan stated that he has “personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently to those facts under oath.”

to use the word “kickback” six more times, in one instance asserting that:

[T]he kickback. . . was apparently deemed too “hot” to mention further in writing because it suddenly disappears from all future correspondence without comment.” 2CP 23-24 (¶ 40).

RSUI’s April 7 motion was noted for hearing on April 15, 2010. 2CP 1. That made any response by Vision and Berg due by noon on April 13.<sup>21</sup> At about mid-day on April 13, Helgren phoned Aliment. The two lawyers’ versions of their conversation are related in declarations. 2CP 378-544; 2CP 947-53. Helgren acknowledges that Aliment objected to being accused of accepting a kickback scheme. 2CP 952 (¶ 12).

H. Amended CR 60(b)(4) Motion Claiming Vision and Berg Had Misled the Trial Court in September 2008 by Failing to Disclose that Berg Had *Proposed* to Include a “Kickback Scheme” in the Settlement.

Two days later, RSUI noted and filed an amended CR 60(b)(4) motion, 2CP 329-46, citing as support the Linehan declaration filed on April 7. 2CP 330, 333-38. RSUI’s amended CR 60(b)(4) motion stopped short of asserting that Vision and Berg had kept a “kickback scheme” secret from the court and RSUI.

---

<sup>21</sup> April 15 was a day on which the trial court would not be hearing motions, so the court’s judicial assistant notified counsel on the morning of April 13 (just before Vision’s response to the April 7 motion was due) that the motion would have to be renoted. Vision did not file a response to the motion that morning.

Instead, the amended motion acknowledged that the evidence does not *prove* that a “kickback” was agreed to, but insinuated that one must have been:

[There was] a proposed agreement to inflate the [settlement] amount in order to accommodate a proposed kickback. . . though *discovery to date has not established* that the proposed *kickback scheme* was accepted by Vision. 2CP 331 (emphases added).

[The e-mails imply] that *Vision and Berg realized the kickback scheme was unseemly and that any further discussions should not be in writing*. 2CP 336 (emphasis added).

Apparently, Berg and Vision’s \$3.3 million settlement and the \$2.3 million covenant judgment does not reflect Vision’s damages, but instead is a figure based on Berg and Vision’s *undisclosed agenda [that Vision and Berg] used just long enough for them to pull the wool over this Court’s eyes*. . . 2CP 337 (emphasis added).<sup>22</sup>

RSUI’s amended motion argued that the mere “proposal” (RSUI’s emphasis), by Berg, during negotiations in 2008, of what RSUI and Linehan characterized as a “kickback scheme” was a “*red flag*” (emphasis added) about which Vision and Berg had been obliged to tell the trial court, and that their failure to do so constituted misconduct for purposes of CR 60(b)(4). 2CP 331.

---

<sup>22</sup> At pages 23-24 of appellants’ brief, RSUI and its counsel display a “track-changes” type juxtaposition of what they characterize as “representative” changes the amended motion made to assertions in RSUI’s April 7 motion. More complete juxtapositions are in the record at 2CP 512-32.

RSUI and its counsel did not retract, repudiate, or apologize for any assertion in the April 7 motion or Linehan declaration. It was not until January 2011 that appellants acknowledged, in writing and without hedging, that the settlement does not include a “kickback”: “[Berg] then settled for \$3.3 million against itself without any kickback.” *App. Br. 1*.

I. Responses and Counter-motions for CR 11 Sanctions.

On April 26, 2010, Vision filed its memorandum, 2CP 352-77, and four declarations,<sup>23</sup> in response to RSUI’s CR 60(b)(4) motions, and cross-moved for CR 11 sanctions, 2CP 355. One declaration was by William Pelandini, 2CP 559-602, who had been involved in the Vision-Berg settlement negotiations as counsel for Vision liability insurers Gemini and ICSOP (an AIG subsidiary). 2CP 559 (¶ 3). Berg joined in Vision’s response and sanctions motion, CP 13436, and filed its own responses to RSUI’s motion.<sup>24</sup>

Vision’s and Berg’s lawyers denied that there is, or ever was, any side-deal, and expressed dismay at being accused of fraud and misconduct.<sup>25</sup> Vision (2CP 603-05) and Aliment (2CP 378-

---

<sup>23</sup> 2CP 545-58, 559-602, 603-06, 378-544.

<sup>24</sup> 2CP 607-610, 611-18, 620-46, 647-745, 746-848, 849-56.

<sup>25</sup> 2CP 366, 378-80, 614-17, 648.

84) pointed out why RSUI's CR 60(b)(4) motion is based on a patently unreasonable reading of the August 2008 e-mails (which are at 2CP 365-78) and so did Mullin (2CP 649-50), Petrich (2CP 611-15), and a third Berg attorney who was involved in the negotiations, Dennis Perkins (2CP 849-51). Pelandini declared:

The settlement negotiations were complicated and contentious. Berg and Vision were quite adversarial and each was represented by, in my view, very capable and experienced attorneys, Daniel Mullin for Berg and Randy Aliment for Vision. My clients, Gemini and ICSOP, and I were also heavily involved since my clients were being asked to indemnify Vision/Berg for the potentially multi-million dollar personal injury claims. D & D, the concrete subcontractor, and its counsel were also involved. The settlement agreement required 10 different signatures.

2CP 600 (¶ 4).

Vision and Berg both pointed out how farfetched it is to suppose that, after litigating contentiously against each other for months, they and their lawyers would have made, much less succeeded in keeping secret, a "kickback" deal to "inflate" a settlement that several other lawyers were involved in negotiating. 2CP 369-72, 635, 641-42, 649 (¶ 4). They pointed out that RSUI's "kickback scheme" theory depends on an untenable reading of the e-mails themselves, 2CP 375-77, and that RSUI had ignored the

fact that Aliment's August 25 e-mail had been Vision's first written proposal demanding an assignment not only of Berg's \$1 million *coverage* claim against RSUI, but also of all *extracontractual* claims Berg had against RSUI.<sup>26</sup>

Aliment testified in his declaration that the partial assignment proposal that Berg made in Mullin's August 27 e-mail to him (with a copy to mediator Kingman) (2CP 231) had been considered but rejected.<sup>27</sup> Pelandini testified in his declaration:

I did not view the issue of Berg's participation in the pursuit of RSUI as a particularly unusual proposal. Parties often propose such relief in one form or another, and as long as it is for a reasonable exchange of consideration, and is disclosed to the

---

<sup>26</sup> 2CP 366, 368, 375-77, 381-83, 625-29, 649-52. Thus, because coverage claims alone (against Admiral and against RSUI) accounted for \$2 million, and Aliment was also demanding the assignment of extracontractual claims *in addition to* the \$2 million in coverage claims, his August 25 e-mail, as Mullin obviously understood, did not offer to accept a \$2 million settlement that *included extracontractual claims*.

<sup>27</sup> "[It] was not something I considered inherently wrong, since Berg had exposure to substantial damages and, had the sharing proposal been agreed to, we would have made it a part of the settlement agreement . . . . However, as I stated in my deposition, which was taken by another McNaul Ebel Nawrot & Helgren attorney on August 19, 2009:

And it [the sharing proposal] was in play for a while, but 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 proceed together, so it didn't happen.

2CP 382 (¶ 8). Appellants assert, *App. Br.* 24-25, that this testimony related not to the proposed sharing of extracontractual claims but rather to Mullin's participation as counsel. Not so; Aliment stated not that the *lawyers* could not shift from adversarial to cooperative mode; he stated that "the *parties* had been in combat too long and too hard to suddenly proceed together [italics added]."

court at any reasonableness hearing, I do not consider such a term problematic or inherently wrong. . . [H]ere, it was specifically rejected by my clients and Mr. Aliment, as set forth in Mr. Aliment's August 28, 2008 email . . . .

2CP 561 (¶ 5).<sup>28</sup>

J. Argument On, and Denial of, RSUI's CR 60(b)(4) Motion.

On July 1, 2010, the trial court heard oral argument on RSUI's CR 60(b)(4) motion and the cross-motions for CR 11 sanctions against RSUI and its counsel Linehan and Helgren. Linehan professed to "credit [Vision's and Berg's] representations that that ["kickback"] deal never actually occurred," 7/1/10RP 10, but his colleague also insinuated that they do so only because they lack smoking-gun evidence.<sup>29</sup> By the time of the hearing, however, RSUI was arguing mainly that the August 2008 e-mails show collusion in that Berg agreed to a \$3.3 million settlement that Aliment had offered on August 25 to give Berg for \$2 million:

[MR. LINEHAN:] At a minimum, the Court should have been told that Berg could have bought the full and same piece [sic, peace] for 2 million dollars, for a 2 million dollar judgment on August

---

<sup>28</sup> Pelandini added that "[h]aving participated in the settlement negotiations in the Vision One case, and being a signatory, along with my clients, to the settlement agreement, I would have been aware of any "side deal" or 'kickback.' I am aware of no such thing." 2CP 562 (¶ 6).

<sup>29</sup> See 7/1/10RP at 41, where RSUI counsel Vial asserts that Mullin's August 27 e-mail proposed "a kickback" and "they *say* they rejected it [italics supplied]."

25<sup>th</sup>, rather than the 3.3 million dollar settlement they agreed to four days later.

7/1/10RP 13; *see also* pages 8-10, 21-22, 24, 29, 38 and 54.<sup>30</sup> The trial court asked counsel for RSUI how their inquiry into the settlement process could have been reasonable, given that the dollar amount of the settlement seemed reasonable compared to the amounts of money that had been at stake in the case and the fact that counsel for the parties, whom she respected, had assured her there had been no collusion and that they had negotiated at arms' length. 7/1/10RP 20. RSUI's counsel Linehan responded by conceding that the terms of the settlement were objectively reasonable, but contended they should have been *more* reasonable:

[MR. LINEHAN:] [The settlement] came out at 3.3 [million dollars]. So as Your Honor quite rightly noted, based on the information you had, yeah, that looks like the number roughly in the middle of what the parties' positions were. And that would obviously look reasonable if you didn't know these important details about what had actually happened to make it go from a 2 million dollar settlement to a 3.3 million dollar settlement.

---

<sup>30</sup> In addition, RSUI and its counsel evidently considered it fair to characterize pages 33-35 in Vision's November 5, 2009 brief as conceding that a "kickback" agreement *per se* establishes "collusion" for purposes of a reasonableness determination under the *Chaussee* factors. *See* 2CP 13, 2CP 22 (¶ 35), and 2CP 291-93. The point actually made in Vision's earlier appellate brief was that some court decisions can be cited for the proposition that an undisclosed "kickback" arrangement may indicate that a settlement was collusive.

7/1/10RP 22.<sup>31</sup> Told by Linehan that “If they [Berg] had said yes [to the August 25 proposal], as a matter of contract law that would have been a settlement right there, 2 million dollars,” the court pointed out that the proposed settlement “would include an assignment of extra contractual rights.” 7/1/08RP 25.<sup>32</sup>

Vision’s counsel then addressed RSUI’s theory that the August 2008 e-mails show that Berg had inflated the settlement by turning down a better offer made by Vision on August 25:

MR. EDMONDS: . . . Opposing counsel is simply ignoring . . . very specific language that says the settlement agreement, not the settlement, the settlement agreement would include an assignment of coverage *and* extra contractual rights. [E]xtra 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 . . . [T]he only way you can read this as troubling or confusing or silent or tantalizingly silent . . . is simply to ignore the very clear language about extra contractual rights. [Italics supplied.]

---

<sup>31</sup> Linehan’s colleague made the same argument: “[I]f 2 million would have gotten the same product, it is imminently [sic] more reasonable and it’s exactly what you should have been able to consider. 7/1/10RP 54.

<sup>32</sup> Linehan responded by saying the stipulated *judgment* would have been for \$2 million, and Vision would have “had a right to go sue RSUI for whatever damages [it] would be able to claim.” 7/1/10RP 25-26. The court noted that “[t]his is the issue that they are contending is the open negotiation,” to which Linehan said he was “missing the open subject to negotiation aspect.” *Id.* 26.

\* \* \*

[E]xtra contractual rights against a liability insurer arise in contract and in tort when the liability insurer denies coverage and forces its insureds into a settlement position. And that settlement is driven exactly by, at least initially, the damages against them. So the argument that . . . somehow the extra contractual rights aren't connected to the value of the underlying claims, is just wrong.

7/1/10RP 26-27.<sup>33</sup> The trial court denied RSUI's CR 60(b) motion.

7/1/10RP 30; 2CP 1014-17.

K. Award of Attorney Fees for Violating CR 11.

The trial court granted the cross-motions for CR 11 sanctions, indicating that it would award attorney fees. 7/1/10RP 59; 2CP 1010-13. Vision documented fees and expenses totaling \$130,085.<sup>34</sup> The court entered findings and conclusions, CP 13371-72, and judgment for Vision and against RSUI, the McNaul Ebel law firm, Helgren, and Linehan, for \$44,250. CP 13437-38.

---

<sup>33</sup> Mullin was more blunt ("To stand here and say that on August 27th we could have simply accepted that offer is absurd," 7/1/10RP 35). Petrich seconded Vision's counsel and Mullin. *Id.* 56.

<sup>34</sup> 2CP 1029, 1040-74, 1326-37.

### III. ARGUMENT

#### A. Introduction.

The trial court imposed CR 11 sanctions on appellants and denied RSUI's CR 60(b)(4) motions for the same reason: the charge that the August 2008 e-mails show fraud, misconduct, and collusion were reckless, not well-grounded in fact. The orders being challenged on appeal should be affirmed for that reason, too.

RSUI has at least as much evidence as it could have obtained in the 11 extra days that it argued, in its first appeal, the trial court should have given it before conducting a reasonableness hearing, because in the federal court litigation RSUI obtained all of the negotiation e-mails between, and deposed, Aliment and Mullin. The trial court, presented with that evidence, has refused to vacate its 2008 findings that the settlement was reasonable and that there is no evidence of collusion between Berg and Vision. Unless the denial of RSUI's CR 60(b) motion(s) was an abuse of discretion, no basis exists for vacating the 2008 reasonableness determination. Because the fraud, misconduct, and collusion charges made in RSUI's CR 60(b) motion were not well-grounded in fact, CR 11 sanctions were warranted, and the sanction imposed was not excessive.

B. RSUI Was Properly Denied Relief Under CR 60(b)(4).

1. Any notion that Vision's and Berg's settlement was collusive is wildly implausible to begin with.
  - a. It was to be expected that any settlement Berg made would include a stipulated judgment for an amount in excess of the limit of RSUI's policy coverage.

Washington case law recognizes that an insured in Berg's position as of August 2008, *i.e.*, facing liability for which its liability insurer has denied coverage, has no duty to protect that insurer and is free to settle on terms that require it to contribute no money of its own. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 397, 823 P.2d 499 (1992) ("If . . . insureds are offered a settlement that effectively relieves them of any personal liability, at a time when their insurance coverage is in doubt, surely it cannot be said that it is not in their best interest to accept the offer. Nor, do we think, can the insurer who is disputing coverage compel the insureds to forego a settlement which is in their best interests"<sup>35</sup>); *Martin v. Johnson*, 141 Wn. App. 611, 618, 170 P.3d 1198 (2007) (holding, in a case where a defendant insured gave only an assignment of its claims against its insurer and agreed to entry of an \$81,928

---

<sup>35</sup> Quoting *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 198, 698 P.2d 20, *rev. denied*, 103 Wn.2d 1042 (1985) (quoting *Miller v. Shugart*, 316 N.W.2d 729, 733-34 (Minn. 1982)).

judgment that could not be enforced against the defendant itself, “it is in an insured’s best interest to accept a settlement offer that effectively relieves him or her of personal liability”).

It is therefore commonplace for an insured in denied-coverage situations to demand that the insurer attempt to settle the claim against them within policy limits (which Berg did, 2CP 854) and to notify the insurer that it may assign its coverage and other claims against the insurer to the plaintiff in settlement (which Berg also did, 9/08RP 107) and to contribute little or no cash of its own to a settlement and assign to the plaintiff all contract and tort claims it has against the insurer that denied coverage, including coverage and bad faith claims. *E.g., Safeco*, 118 Wn.2d at 399 (a covenant not to execute coupled with an assignment and settlement agreement is 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”); *Martin*, 141 Wn. App. at 618 (it is “in an insured’s best interest” to accept a settlement that relieves him of personal liability). Such a settlement, if found reasonable, establishes the minimum amount for which the insurer will be liable on the assigned claims as of the time of assignment. *Mutual of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn.2d

255, 267 and 274, 199 P.3d 376 (2008). A court considers nine factors in determining whether such a settlement is reasonable:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

*Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487, *rev. denied*, 117 Wn.2d 1018 (1991)<sup>36</sup>; *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002). A trial court's determination as to the reasonableness of a settlement made by a defendant whose insurer has denied coverage is reviewed for abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22, *rev. denied*, 155 Wn.2d 1025 (2005). A trial court's discretion is abused only if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

---

<sup>36</sup>Quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, *rev. denied*, 756 P.2d 717 (1988).

- b. As even RSUI conceded, the settlement terms are objectively reasonable.

RSUI's counsel conceded below that the terms of the Vision-Berg settlement are objectively reasonable, 7/1/10RP 22, but the terms are reasonable even without that concession. For \$3.3 million that included none of its own money, Berg avoided a potential liability to Vision of \$5.5 million, CP 329, and received Vision's and Vision's liability insurers' promise to indemnify Berg against liability to several fault-free bodily injury claimants to whom Berg faced joint and several liability for a total of \$5 million or more even if the jury apportioned a minority of the "fault" for the slab collapse to it, 2CP 613-14, and on which 25-50% of the fault was likely to be apportioned to Berg according to an assessment Mullin provided to Admiral and RSUI in January 2008, 2CP 179. Vision was going to present evidence of \$5.5 million in damages due to the failure of Berg's shoring system, 2CP 613 (¶ 9), but received only Admiral's \$1 million in cash and the right to enforce Berg's contract and tort claims against RSUI – but with the risk that it will not prevail on those claims and will end up with no more than Admiral's \$1 million. By any objective standard, the settlement reflected an obvious compromise nearer the lower than

the higher end of the range of best to worst litigation outcomes Berg could have realized had it gone to trial. Berg hardly gave Vision an “inflated” settlement; to settle, Vision had to step into the shoes RSUI had refused to fill as Berg’s insurer against liability both to bodily injury claimants and Vision did so *without a limit on its exposure* to bodily injury claims.

- c. The settlement was negotiated at arms’ length by adverse litigants.

Appellants do not dispute that the litigation between Vision and Berg was “contentious,” “hard fought,” and “hotly contested,” as the trial judge observed and found in 2008 based on her extensive exposure to the parties, their counsel, and the pretrial motions each filed and opposed over a period of several months in 2008. 9/08RP 210-11. A trial court that is in a position to confirm that settling parties litigated fiercely does not abuse its discretion in finding that a settlement is not collusive. *Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 706-07, 187 P.3d 306 (2008), *rev. denied*, 165 Wn.2d 1029 (2009). The only respect in which RSUI challenges the finding of arms’ length negotiations is in asserting that Berg inexplicably negotiated the price for the terms that were in the final settlement

agreement *up* from \$2 million to \$3.3 million between August 25, 2008 and August 29. That did not happen.

2. RSUI's contention that Berg negotiated the price of settlement *up* is – and always has been – patently unsupportable.

The fact that, by April 2010, RSUI could seek relief under CR 60(b) only through a charge of fraud or misconduct may explain, but does not excuse, RSUI's and its counsel's decision to level such charges based on e-mails that show no fraud, no misrepresentation, and no collusion. RSUI and its counsel allowed their need for a CR 60(b)(4) argument to distort the settlement negotiation record.

The terms of Aliment's August 25 e-mail were *not* the same as those in the Settlement Agreement, as RSUI insists they were. It is *not* reasonable to read Aliment's August 25 e-mail as treating the assignment of Berg's \$1 million (policy-limits) coverage claim *and* (above-policy-limits) extracontractual claims against RSUI as worth only \$1 million to Vision, as RSUI insists it did. Mullin plainly did not so interpret the August 25 proposal, nor would any reasonable recipient of the proposal have done so.<sup>37</sup>

---

<sup>37</sup> Mullin testified in his federal case deposition that the prospect of assigning extracontractual as well as contractual rights against RSUI had "always [been]

As every lawyer involved with this case and familiar with the way denied-coverage cases are typically settled knew in 2008, if Admiral contributed its \$1 million coverage limits and Berg contributed nothing and Berg assigned to RSUI only its \$1 million policy-limits *coverage* claim against RSUI, the settlement would be for \$2 million, and there would be a \$1 million stipulated judgment enforceable only against Berg's RSUI policy.<sup>38</sup> RSUI's e-mail collusion theory misreads Aliment's reference to \$2 million in the August 25 e-mail as a proposal to buy both Berg's \$1

---

on the table," 2CP 704 (Dep. p. 100), but it had not been included in either party's proposals until August 25. As Mullin testified,

As we got into August, the method by which the assignment is done and its value . . . 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. [I]n our mind . . . there were exponential extracontractual rights that would have value in trying to resolve this case in Berg's favor.

*Id.*

<sup>38</sup> If Admiral contributed its \$1 million and Berg nothing, and Berg assigned to RSUI its coverage and at least some *extracontractual* claim(s) against RSUI, the settlement would have to take one of three possible forms: (1) the stated monetary value of the extracontractual claims assigned to Vision would have had to be \$0, in which case there would have been no reason to bargain over such claims in the first place; (2) there would have been an agreed-upon stated value for extracontractual claims, which would have been \$2 million less than the gross settlement amount, because the gross amount would include Admiral's \$1 million payment and the \$1 million coverage claim against RSUI; or (3) there would be no stated value for extracontractual claims – which, according to the position Linehan took for RSUI at the July 1, 2010 hearing, would have allowed Vision “to sue RSUI for whatever damages [it] would be able to claim,” 7/1/10 RP 25-26 – but a reasonableness determination would not have afforded Vision the benefit of the “presumptive measure of damages” principle, *see T & G Const., Inc.*, 165 Wn.2d at 267, except to the extent of RSUI's policy limit. RSUI neither does nor can cite any authority that required Vision and Berg to choose the third course.

million coverage claim against RSUI *and* Berg’s extracontractual claims against RSUI for \$1 million. It is patently implausible that Vision would have offered to accept \$1 million from Admiral and an assignment of Berg’s “coverage *and* extra-contractual rights against RSUI” in a settlement for a total of \$2 million.<sup>39</sup> Yet RSUI’s misconduct theories asked the trial court to find that Aliment did. And, although no lawyer representing a litigant in Berg’s position would have understood Aliment’s August 25 e-mail as offering, for \$2 million, all the terms of settlement that were ultimately agreed upon, RSUI asked the trial court to find that Mullin not only did understand it that way but that he and Berg refused to accept the offer in order to inflate RSUI’s liability.

Instead of showing a nefarious conspiracy against RSUI, what the e-mails “reveal” is an unremarkable exchange of offers and counteroffers in a denied-coverage settlement context, complicated to some extent – but also made exceptionally transparent – by the fact that Aliment had to consult with and get approval from his client’s liability insurers. The main elements of negotiation and of ultimate settlement – the insured paying no money of its

---

<sup>39</sup> That would have meant the extracontractual claims were of no value and not worth asking for, either.

own and assigning claims against its insurer to the plaintiff; a stipulated judgment enforceable only against the insurer; mutual releases; indemnification of the insured against liability to third parties – were features *to be expected* in a denied-coverage settlement. If RSUI and its counsel had conducted anything close to a careful analysis of the sequence of proposals exchanged beginning August 25 compared to prior proposals, they would have recognized that. Careful lawyers representing RSUI in April 2010 would have appreciated that, as of August 25, 2008, if the Vision-Berg settlement ended up including release of Vision's \$5.5 million in damages claims against Berg (for which RSUI had denied coverage to Berg), indemnification of Berg against the bodily injury claims that exposed Berg to another \$5 million in liability (for which RSUI also had denied coverage), and assignment by Berg of any rights against RSUI for more than the \$1 million in coverage under the RSUI policy, any stipulated judgment had to be the sum of the \$1 million coverage-limits claim against RSUI *plus* the negotiated estimated value of the indemnity and assignment of extra-contractual rights against RSUI. When Mullin countered on August 27 with a proposed participation by Berg in the pursuit of RSUI under which Berg would retain a 1/3

interest in extracontractual claims, and Vision and Pelandini's clients insisted instead on full assignment of extracontractual as well as coverage claims, the parties were narrowing, not widening, the gap between their settlement positions.<sup>40</sup> Thus, Berg bargained the non-coverage claim part of the settlement package (which was \$2 million) *down* to \$1.3 million, not *up* to \$1.3 million.<sup>41</sup>

3. There is no merit to RSUI's first fallback argument that Vision and Berg were obligated to disclose to the trial court in 2008 that their settlement did not include a "kickback".

a. The sharing proposal was not a "red flag".

RSUI's amended CR 60(b)(4) motion argued, 2CP 331, that the claim-sharing proposal that Berg made on August 28 was a "red flag." The "red flag" argument was a lame attempt by RSUI and its counsel to backtrack from fraud-on-the-court charges, because RSUI cited no authority for the proposition that a partial assignment of claims is illegal, immoral, or improper. Had the parties agreed to include a provision for claim-sharing in the

---

<sup>40</sup> As Mullin noted in a declaration, if Berg had wanted to inflate the settlement out of spite toward RSUI, it could have accepted Aliment's August 28 demand for Admiral's \$1 million and a \$5.5 million stipulated judgment. 2CP 650 (¶ 7).

<sup>41</sup> The \$1.3 million figure implicitly assigned to the extracontractual (above policy limits) claim against RSUI in the Settlement Agreement was hardly an "inflated" estimate of their value because, as it turns out, the extracontractual claims are ones on which Vision stands, according to the federal district court, to recover several million dollars more than \$1.3 million. 2CP 397.

settlement they presented to the trial court for approval, there would have been nothing wrong with that.<sup>42</sup>

- b. Trial courts should not have to consider objections to settlements that an insurer bases on unagreed-to negotiation proposals.

The notion that mere *proposals* made, but rejected, during the course of settlements can be “red flags” that a trial judge must have been told about in order for a reasonableness determination to be valid is troubling. A trial court has enough to weigh when it applies the nine *Chaussee/Glover* factors to what actually *was* agreed to, and insurers by denying coverage should lose any say about how their insureds settle if the trial court, considering the *Chaussee* factors, finds the settlement – the settlement actually *made* – objectively reasonable. RSUI’s arguments also fallaciously presume that one can reliably extract from e-mails exchanged during settlement agreements negotiated under time pressure (and partly over the telephone) not only exactly what was communicated but what each party’s true negotiating objectives and priorities were. Negotiation proposals, however, are made for myriad reasons, not always because they express something the proposer really wants or expects to receive. It is unreasonable to

---

<sup>42</sup> See *Pelandini* (2CP 561 (¶ 5)) and *Aliment* (2CP 382 (¶ 8)) declarations.

expect a defendant insured who has been denied coverage to carefully word every proposal exchanged during negotiations with its insurer's eventual scrutiny for imprecision and ambiguity in mind.

Although Vision has gladly addressed RSUI's contention that the several August 2008 e-mails at issue for this particular appeal show that RSUI's insured turned down a better offer than the one it ultimately accepted, and hopes this Court will affirm the trial court's ruling rejecting that contention, Vision hopes the Court will go farther if it issues a published decision. Vision hopes the Court will relieve trial courts of any obligation to consider insurers' demands to parse settlement negotiation communications unless the insurer can make a *prima facie* showing of apparent collusion based on admissible evidence other than the communications themselves, such as evidence showing that the insured and the plaintiff had not litigated as true adversaries,<sup>43</sup> or made a secret side-deal, or engaged in other specific behavior clearly inconsistent with arms' length negotiation. If a settlement

---

<sup>43</sup> See, e.g., *Spence-Parker v. Maryland Ins. Group*, 937 F. Supp.2d 951, 962 (E.D. Va. 1996) (insurer had established constructive fraud where insured and other party failed to advise court that settlement of which they sought approval had not been the product of arms-length negotiation in an adversarial setting).

strikes a knowledgeable trial judge as a reasonable compromise, an insurer that effectively forced the insured to enter into the settlement by denying coverage, and that should have *expected* the settlement to be for at least as much as, or more than, the contractual limit on the coverage it denied, should be limited to arguing that the settlement is not *objectively* reasonable. The insurer should not be allowed to base a “collusion” argument solely on the spin its lawyers try to put on settlement offers, counteroffers, and posturing statements.<sup>44</sup>

As RSUI’s counsel argued back on September 15, 2008 – although he was referring to Philadelphia, *Vision’s* insurer, rather than to RSUI – courts should not allow an insurer that has denied coverage to “second-guess[ ]” the insured’s negotiations and argue that “we don’t think you made such a good deal,” and “didn’t negotiate very well with Berg,” because “it essentially makes. . . it sort of impractical to enter into a settlement.” 9/15/08RP 123.

---

<sup>44</sup> Vision suggests the Court also expressly disavow any implicit endorsement of the notion that pre-settlement communications can be reliable evidence of either party’s true, goals, strategy, motives, and values. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.2d 976, 981 (6<sup>th</sup> Cir. 2003) (cautioning against taking settlement communications at face value because negotiations typically involve puffing and posturing). The fact that Mullin stated in one of his e-mails that a Vision proposal “may be perceived as a step backwards, rather than forward” see *App. Br. 18*, is evidence of nothing except posturing.

4. There is no merit to RSUI's second fallback argument that it was misconduct for Berg and Vision not to make sure in September 2008 that RSUI got the e-mails that do not show collusion.

RSUI argues that this Court should overrule the trial court and vacate the reasonableness determination for misconduct because Berg “withheld” and “concealed” the negotiation e-mails from it in 2008, and because Vision’s counsel Aliment stood silently by while Berg’s counsel represented to the trial court that nothing in their files indicated collusion. *App. Br. 39*. RSUI’s counsel stated at the hearing on July 1, 2010 that:

First off, it’s not our position that any time the parties want a settlement approved that they have to come in and dump every settlement communication they have ever had to try and wade through and figure out what actually happened.

\* \* \*

But in this case, we’re not talking about the entire history of the settlement negotiations. We’re talking about the final few e-mails that . . . made the settlement go up rather than down, which is the normal direction of settlement negotiations.

7/01/10RP 21. According to RSUI, then, an insured that has settled does not *ordinarily* have to give the insurer that denied coverage all its settlement communications before seeking a reasonableness determination, but Berg in *this* case was obligated to give RSUI the August 2008 e-mails because there are only four

of them and because the e-mails show that the settlement went “up rather than down.” But, under the logic of RSUI’s argument, Berg had no reason to give RSUI the August e-mails, and Aliment had no duty to speak up at the hearing, because they knew the settlement had *not* gone “up rather than down.”

Settling parties can hardly be expected to turn over evidence of collusion in which they did not engage. Because the e-mails do not show collusion, it was not misconduct for Berg not to give them to RSUI. Nor did Vision’s counsel commit misconduct by “failing” to tell the court or RSUI that Berg had not turned over e-mails that do not show collusion. RSUI’s second fallback argument thus converges with its other e-mail-based arguments, which all fail because the e-mails do not show collusion.

5. This case is unlike *Water’s Edge*.

This case is factually unlike *Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009), to which appellants seek to liken it. *App. Br. 45*. In *Water’s Edge*, the court affirmed a finding that a settlement was unreasonable due to an array of indicia of collusion not present here. No lawyers in *this* case connived to have an adversary’s counsel replaced; Vision’s case had been solidified, not gutted, by

summary judgment rulings<sup>45</sup>; Berg's counsel were not obligated to testify in support of the settlement (although they chose to do so); the agreement did not obligate Berg to pursue a claim for its and Vision's mutual benefit and it *was* conditioned on court approval.

6. RSUI should not be heard to argue that Mullin and/or Aliment testified evasively in the federal court lawsuit or that Mullin firm documents may still prove "collusion".

Appellants assert that Aliment and Mullin testified "vaguely" and "equivocally" in their federal lawsuit depositions in August 2008. *App. Br. at 24-25, 47 (citing 2CP 702 and 927-28)*. Cheap shots seem to be irresistible to RSUI and its advocates in this case. Had RSUI considered the testimony nonresponsive to questions its counsel asked, RSUI could and should have objected on the record to and moved to strike it as nonresponsive and applied to the federal court for relief, not waited until 2010 or 2011 to disparage Aliment's and Mullin's responsiveness in briefing in state court. RSUI does not claim to have raised any issue of responsiveness in the federal court case, and it did not. Aliment testified, in response to the few questions he was asked based on e-mails, that Mullin's August 27, 2008 claim-sharing proposal had

---

<sup>45</sup> CP 12643-49 and 2CP 613; *see* CP 4417-18, 4998-5000, 12663-12753.

been unacceptable to Vision and its insurers, 2CP 715-16, 718, and RSUI has not disputed Mullin's representation to the trial court, 7/1/10RP 34, that RSUI's counsel did not ask him any questions in his August 2009 deposition about the August 27 claim-sharing proposal. The deposition testimony belies RSUI's theory that the 2008 e-mails show collusion. It provides no support for appellants' contention that the CR 60(b) motions were well enough grounded in fact to immunize them against CR 11 sanctions.

RSUI notes that Judge Lasnik had been about to review certain Mullin law firm documents *in camera* to evaluate claims of privilege when proceedings were stayed in February 2010 pending the final result of (what then was RSUI's original) appeal to this Court. *App. Br.* 37-38. The stay order was issued on RSUI's motion, *see* 2CP 325, so any delay in resolving that discovery dispute is due to RSUI's litigation tactic.

RSUI has not claimed that Vision produced fewer than all of its 2008 settlement negotiation communications with Berg (and Vision denies withholding any). Whatever documents Mullin's law firm is claiming privilege with respect to are not communications with Vision. RSUI should not be heard to argue that Mullin law firm documents still may yield evidence of collusion.

C. The Trial Court Cannot be Affirmed Under CR 60(b)(4) But Reversed Under CR 60(b)(11).

RSUI argues that it is entitled to relief under CR 60(b)(11) even if not under CR 60(b)(4). *App. Br.* 38-39. CR 60(b)(11) applies to situations involving irregularities extraneous to the action of the court or to questions concerning the regularity of the court's proceedings. *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). RSUI's CR 60(b)(11) argument is redundant with its CR 60(b)(4) arguments because it depends on the theory that the e-mails show collusion, and is meritless for the same reasons RSUI's other arguments are.<sup>46</sup>

D. The Imposition of CR 11 Sanctions Was Warranted.

The CR 60(b) motions were denied as much because they were not well-grounded in fact as because Aliment and Mullin and others gave explanations of the e-mails the trial court found satisfactory. CR 11 sanctions were warranted as well.

1. Appellants accused Vision and Aliment of *fraud*.

Appellants claim that two accusations made in April 2010 and that are paraphrased in the heading on page 40 of their brief,

---

<sup>46</sup> It also amounts to a "newly discovered evidence" argument. CR 60(b)(11) may not be used to evade the one-year limit that applies to certain types of CR 60(b) motions, *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 312, 863 P.2d 1377 (1993), *rev. denied*, 124 Wn.2d 1006 (1994), including CR 60(b)(3) (newly discovered evidence) motions.

were well grounded in fact, and that to hold otherwise would “chill” RSUI’s counsel’s “enthusiasm.” *App. Br. 41*.<sup>47</sup> Not only were both accusations *ungrounded* in fact, but appellants left equally baseless and more slanderous accusations unretracted.

Whether a lawyer should be sanctioned for making baseless charges of lying to and misleading a court to obtain a ruling does not depend on how enthusiastically the lawyer made the charges. Subjective belief and good faith do not shield a lawyer from sanctions, because whether a lawyer has made a reasonable inquiry is judged by an objective standard. *Wash. State Physicians Exchg. & Ass’n. v. Fisons Corp.*, 122 Wn.2d 299, 343, 858 P.2d 1054 (1993). CR 11 “requires attorneys to ‘**stop, think, and investigate** more carefully **before** serving and filing papers [emphasis added].’” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (quoting *Fed. R. Civ. P. 11 advisory committee note*, 97 F.R.D. 165, 192 (1983)). RSUI’s counsel did not stop, think, or investigate carefully even *after* filing the April 7 motion. Anyone who accuses a party and lawyer of lying to a court should

---

<sup>47</sup> The two statements are: “Vision and Berg engaged in misrepresentation and misconduct by failing to disclose Berg’s 33% kickback proposal,” and “the settlement amount of \$3.3 million was arrived at by collusion where Berg rejected Vision’s demand to settle for \$2 million [and] countered with an offer to pay Vision \$3.3 million with a kickback . . .”

be held to high standards of forethought and investigation. By filing an amended CR 60(b)(4) motion, appellants tacitly admitted that the April 7 motion's fraud charges were not well-grounded.

CR 11 exists "to reduce 'delaying tactics, procedural harassment, and mounting legal costs.'" *Bryant*, 119 Wn.2d at 219 (quoting 3A L. Orland, *Wash. Prac., Rules Practice*, § 5141 (3d ed. Supp. 1991)). RSUI's motions slowed litigation in two court systems, harassed Vision, Berg, and their lawyers, and drove up the cost of litigating against RSUI.

2. Appellants had the opportunity to retract.

Appellants argue that Vision and Aliment did not expressly threaten to seek CR 11 sanctions and give them an opportunity to mitigate the sanction to be imposed before moving for sanctions. *App. Br.* 42-43. Aliment's complaints on April 13 obviously gave appellants ample opportunity to file something retracting their accusations, because they filed a new motion two days later. The problem is that what appellants filed on April 15 amounted to evasive, not corrective or mitigative, action. Their amended motion did not retract, repudiate, or withdraw the grave but baseless accusations against Aliment, Mullin, and their clients, but instead insinuated that appellants cannot *prove* the making of a

“kickback” side-deal that they suspect was made, 2CP 331, 336-37, and appellants asserted that the motion had been amended solely as a professional courtesy, 2CP 876. RSUI and its counsel *to this day* have filed nothing expressly retracting or apologizing for their April 7 fraud accusations. As the trial court found appellants’ “lack of notice” claim is unpersuasive. CP 13772 (§ 5).

3. The April 15 motion did not retract the fraud charges made in the April 7 motion.

Appellants argue, based on *Herr v. Herr*, 35 Wn.2d 164, 166, 211 P.2d 710 (1949), that the accusations made against Vision, Berg, Aliment, and Mullin in the April 7 CR 60(b)(4) motion can be considered as a basis for imposing sanctions under CR 11 only for the period April 7-14 because filing the amended motion on April 15 operated to withdraw the April 7 motion. *App. Br.* 43. RSUI’s reliance on *Herr* is misplaced. *Herr* involved pleadings; motions and declarations are not pleadings.<sup>48</sup> It was not a case in which the original pleading had made explicit allegations of grave misconduct. Nor did it hold or suggest that someone who

---

<sup>48</sup> Moreover, *Herr* applies when an amended pleading “does not reserve any part of” the prior one. *Herr*, 35 Wn.2d at 167. RSUI’s amended motion repeated many of the accusations made in the April 7 motion but shifted from explicit allegations of fraud on the court to insinuations of lying coupled with a new argument, unsupported by citation to authority, that nondisclosure of a “red flag” *proposal* is sufficient to constitute “misconduct” under CR 60(b)(4).

makes baseless charges of fraud in a motion can protect himself from sanctions by filing an “amended” motion and doing nothing more. A lawyer should not be heard to argue that leaving baseless accusations of grave misconduct in a court file is a wrong that is cured by also filing a less explicit version of the accusations.

[V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer’s duty to place his client’s interests ahead of all others presupposes that the lawyer will live with the rules that govern the system . . . .

*Fisons*, 122 Wn.2d at 354-55.<sup>49</sup> The system’s rules should not allow RSUI and its counsel to argue that a second wrong rights a first and even greater one.

4. The \$44,250 award to Vision was not excessive.

The trial court could have imposed a punitive monetary sanction. *See, e.g., Fisons*, 122 Wn.2d at 356 (sanctions serve not only to compensate but also to punish and deter). Imposing sanctions on lawyers is a difficult and disagreeable task, but “it is a necessary one if our system is to remain accessible and responsible.” *Id.* at 355. In view of the fact that the trial court imposed a

---

<sup>49</sup> Quoting Schwarzer, *Sanctions Under the New Federal Rule 11-A, A Closer Look*, 104 F.R.D. 181, 184 (1985).

sanction that falls short of making appellants' victims whole even financially, the sanction is not excessive.

E. Vision Should Be Awarded Its Attorney Fees on Appeal.

Vision requests an award of its all of its attorney fees and expenses on appeal. RAP 18.1(b). Vision is entitled to fees for defending the CR 11 sanctions on appeal. *Eller v. East Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 244 P.3d 447 (2010); *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 68 P.3d 1093, *rev. denied*, 150 Wn.2d 1021 (2003).

An insured's assignee is entitled to an award of its attorney fees on appeal if it prevails in a coverage action. *Estate of K.O. Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 508, 844 P.2d 403 (1993). RSUI's sole objective in this appeal is to undo the reasonableness determination that establishes RSUI's minimum damages liability now that the federal court has ruled in Vision's favor on the issue of coverage. The fact that some coverage-related issues are being litigated in federal court and others in state court should not leave Vision unable to recover all of its coverage-related litigation fees if it ultimately prevails on coverage-related issues in both courts. This Court should award Vision its fees not

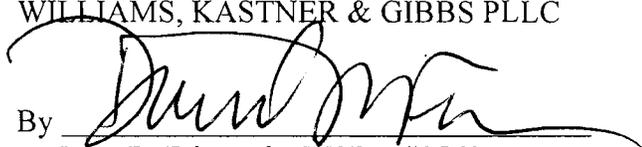
only for defending the CR 11 order on appeal but also for defending the order denying RSUI's CR 60(b)(4) motion.<sup>50</sup>

IV. CONCLUSION

For the reasons explained above, the trial court's orders determining the settlement between Vision and Berg Equipment to be reasonable and denying RSUI's CR 60(b) motion, the trial court's findings and conclusions that appellants violated CR 11, and the trial court's order requiring appellants to pay Vision \$44,250 as a CR 11 sanction, should all be affirmed.

RESPECTFULLY SUBMITTED this 15th day of February, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By 

Jerry B. Edmonds, WSBA #05601

Teena M. Killian, WSBA # 15805

Daniel W. Ferm, WSBA #11466

Attorneys for Respondents Vision One, LLC,  
Vision Tacoma, Inc. and D&D, Inc.

---

<sup>50</sup> If this Court concludes that it cannot award Vision fees for the CR 60(b) part of this appeal because the action below was not a coverage action, Vision requests that the Court state in its decision that it is not expressing any opinion that the federal court may not or should not award Vision its fees for this appeal when final judgment is entered in Vision's favor in that court.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th day of February, 2011, I caused a true and correct copy of the foregoing document, "Brief of Vision Respondents (Relating to Appeals of Orders Denying CR 60(b) Relief and Imposing CR 11 Sanctions on RSUI and Its Counsel)," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Philadelphia Indemnity Ins. Co.:  
**NOT SERVED (NO LONGER A PARTY TO THIS APPEAL).**

Counsel for Appellants:  
Michael D. Helgren, WSBA #12186  
David A. Linehan, WSBA #34281  
Barbara H. Schuknecht, WSBA #14106  
MCNAUL EBEL NAWROT & HELGREN  
PLLC  
600 University St Ste 2700  
Seattle WA 98101-3143  
E-mail: [mhelgren@mcnaul.com](mailto:mhelgren@mcnaul.com)  
[dlinehan@mcnaul.com](mailto:dlinehan@mcnaul.com)  
[bschuknecht@mcnaul.com](mailto:bschuknecht@mcnaul.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Kenneth W. Masters, WSBA #22278  
Shelby R. Frost Lemmel, WSBA #33099  
MASTERS LAW GROUP, PLLC  
241 Madison Ave. N.  
Bainbridge Island, WA 98110  
E-mail: [ken@appeal-law.com](mailto:ken@appeal-law.com)  
[shelby@appeal-law.com](mailto:shelby@appeal-law.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

COURT OF APPEALS  
DIVISION II  
FILED 15 FEB 15 11 31 AM '11  
BY DENNY

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:

Daniel F. Mullin, WSBA #12768  
Tracy A. Duany, WSBA #32287  
MULLIN LAW GROUP PLLC  
101 Yesler Way, Suite 400  
Seattle WA 98104  
E-mail: [dmullin@mullinlawgroup.com](mailto:dmullin@mullinlawgroup.com)  
[tduany@mullinlawgroup.com](mailto:tduany@mullinlawgroup.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:

Dennis J. Perkins, WSBA #05774  
ATTORNEY AT LAW  
1570 Skyline Tower  
10900 NE 4th St  
Bellevue WA 98004-5873  
E-mail: [dperklaw@seanet.com](mailto:dperklaw@seanet.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

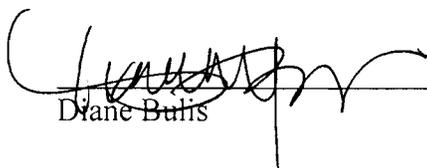
Counsel for Respondent D&D Construction, Inc.:

D. Michael Shipley, WSBA # 18257  
Attorney at Law  
14009 42nd Ave E  
Tacoma WA 98446-1618  
E-mail: [shipleylaw@aol.com](mailto:shipleylaw@aol.com)

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 15th day of February, 2011, at Seattle, Washington.

  
Dyane Bulis