

80 420-6

FILED
JUL 23 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. _____
Court of Appeals No. 57679-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

VILLAS AT HARBOUR POINTE OWNERS ASSOCIATION,

Petitioner.

FILED
COURT OF APPEALS DIVISION #1
STATE OF WASHINGTON
2007 JUL 12 PM 2:15

AMENDED PETITION FOR REVIEW

Daniel Zimmeroff, WSBA# 25552
Dina Wong, WSBA #30542
Attorneys for Petitioner
Villas at Harbour Pointe
Owners Association

BARKER • MARTIN, P.S.
719 Second Avenue
Suite 1200
Seattle, WA 98104
Telephone: 206-381-9806

TABLE OF CONTENTS

A. IDENTITY OF THE PETITIONER1

B. COURT OF APPEALS DECISION1

C. ISSUES PRESENTED FOR REVIEW1

D. STATEMENT OF THE CASE2

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....4

1. Summary of Argument4

2. Allowing an Insurer to Relitigate the Legal Liability of its Insured in a Separate Lawsuit is an Issue of Substantial Public Interest That This Court Should Review [RAP 13.4(b)(1), (2) and (4)]6

a. The Court of Appeals’ Remand For Determination of “Legal Obligation to Pay” was Based on its Misunderstanding of the Association’s Argument.....6

b. T&G Became Legally Obligated to Pay Damages as a Result of the Stipulated Judgment Amount.....7

c. MOE’s Attempt to Relitigate T&G’s Dissolution is an Improper Collateral Attack on the Stipulated Judgment.....8

d. The Court of Appeals’ Decision Violates Public Interest.....10

e. Even if the Construction Defect Judgment Were Somehow Assailable, MOE is Estopped from Relitigating Issues Determined in the Construction Defect Action.....12

3. To Prevent Needless Litigation and Inconsistent Results, the Amount of a Stipulated Judgment Determined to be Reasonable Should Constitute the Presumptive Measure of Damages in a Declaratory Judgment Action, Regardless of Bad Faith [RAP 13.4(b)(4)].13

4. In a Declaratory Judgment Action, an Insurer Should be Estopped from Relitigating Certain Coverage Issues Already Litigated in an Underlying Lawsuit [RAP 13.4(b)(1), (2) and (4)].16

F. CONCLUSION.....20

APPENDICES

- Appendix A:** Unpublished Opinion – Court of Appeals, Division One, Cause No. 57679-8-1, Linked with No. 56144-8-1, dated April 2, 2007.
- Appendix B:** Published In Part – Court of Appeals, Division One, Cause No. 56144-8-1, Linked with No. 57679-8-1, dated April 2, 2007.
- Appendix C:** Motion to Publish – Court of Appeals, Division One, Cause No. 57679-8-1, dated April 23, 2007.
- Appendix D:** Non-Party’s Joinder in Motions to Publish – Court of Appeals, Division One, Cause No. 57679-8-1, dated May 3, 2007.
- Appendix E:** RAP 12.3(e) Motion to Publish – Court of Appeals, Division One, Cause No. 57679-8-1, Linked with No. 56144-8-1, dated April 13, 2007.
- Appendix F:** Order Granting Motion to Publish – Court of Appeals, Division One, Cause No. 57679-8-1, Linked with No. 56144-8-1, dated June 12, 2007.

TABLE OF AUTHORITIES

CASE LAW- WASHINGTON

American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.,
134 Wn.2d 413, 428, 951 P.2d 250 (1998).....8

Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.,
126 Wn. App. 285, 108 P.3d 818 (2005);
review granted,
155 Wn.2d 1024, 126 P.3d 820 (2005), aff'd on
other grounds,
158 Wn. 2d 603, 146 P.3d 914 (2006).....9

Besel v. Viking Ins. Co. of Wisconsin,
146 Wn.2d 730, 49 P.3d 887 (2002).....13, 16

Chaussee v. Maryland Casualty Co.,
60 Wn. App. 504, 803 P.2d 1339 (1991).....13, 15

Crown Controls, Inc. v. Smiley,
110 Wn.2d 695, 756 P.2d 717 (1988).....15

Equilon Enterprises LLC v. Great Am. Alliance Ins., Co.,
132 Wn. App. 430, 440-41, 132 P.3d 758 (2006)12

Felter v. McClure,
135 Wash. 410, 413, 237 P. 1010 (1925)10

Finney v. Farmers Ins. Co.,
21 Wn. App. 601, 617, 586 P.2d 519 (1978).....12, 16

Fisher v. Allstate Ins. Co.,
136 Wn.2d 240, 961 P.2d 350 (1998).....16, 19

Glover v. Tacoma General Hospital,
98 Wn.2d 708, 658 P.2d 1230 (1983), overruled on
other grounds by Crown Controls, Inc. v. Smiley,
110 Wn.2d 695, 756 P.2d 717 (1988)..... 15-16

<u>Haller v. Wallis,</u> 89 Wn.2d 539, 545, 573 P.2d 1302 (1978).....	10-11
<u>Handley v. Mortland,</u> 54 Wn.2d 489, 496, 342 P.2d 612 (1959).....	10-11
<u>Lenzi v. Redland Ins. Co.,</u> 140 Wn.2d 267, 273-75, 996 P.2d 603 (2000)	16
<u>Mulcahy v. Farmers Ins. Co. of Washington,</u> 152 Wn.2d 92, 105 n.9, 95 P.3d 313 (2004).....	12
<u>Nationwide Mutual Ins. Co. v. Hayles, Inc.,</u> 136 Wn. App. 531, 150 P.3d 589 (2007).....	18-19
<u>Overton v. Consol. Ins. Co.,</u> 145 Wn.2d 417, 428, 38 P.3d 322 (2002).....	7-8
<u>Valley/50th Ave., LLC v. Stewart,</u> 159 Wn.2d 736, 153 P.3d 186 (2007).....	18
<u>Waite v. Aetna Cas. & Sur. Co.,</u> 77 Wn.2d 850, 467 P.2d 847 (1970).....	16
<u>Washington Asphalt Co. v. Harold Kaeser Co.,</u> 51 Wn.2d 89, 91, 316 P.2d 126, 69 A.L.R.2d 752 (1957):	11

CASE LAW-OTHER JURISDICTIONS

<u>Midwestern Indem. Co. v. Laikin,</u> 119 F.Supp.2d 831, 838-41 (S.D.Ind. 2000)	15-16
<u>Miller v. Shugart,</u> 316 N.W.2d 279 (Minn. 1982)	15
<u>Patrons Oxford Ins. Co. v. Preston,</u> 905 A.2d 819 (Maine 2006)	15

<u>United Services Automobile Assoc. v. Morris</u> , 741 P.2d 246 (Ariz. 1987)	15
---	----

COURT RULES

RAP 13.4(b)(1).....	5, 6, 13, 16, 19, 20
RAP 13.4(b)(2).....	5, 6, 13, 16, 18, 19, 20
RAP 13.4(b)(4).....	5, 6, 13, 16, 19, 20

OTHER AUTHORITIES

42 C.J.S. <u>Indemnity</u> §§ 25, 32 at 114-16, 122-24 (2006).....	14-15
49 C.J.S. <u>Judgments</u> § 6.....	8
<u>Restatement (Second) of Judgments</u> § 58(1)(a) (1982).....	14-15
Justin A. Harris, <u>Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants not to Execute in Insurance Litigation</u> (47 Drake L. Rev. 853).....	9
Chris Wood, <u>Assignment of Rights and Covenants not to Execute in Insurance Litigation</u> (75 Tex. L. Rev. 1373).....	11

A. IDENTITY OF THE PETITIONER

Petitioners are the 96 homeowners that comprise the Villas at Harbour Pointe Owners Association (“Association”) and T&G Construction, Inc. (“T&G”).

B. COURT OF APPEALS DECISION

The Association, in its own right and as successor in interest to certain rights of T&G, seeks review of the Court of Appeals’ decision vacating the judgment against respondent Mutual of Enumclaw (“MOE”) and reversing the trial court’s orders on summary judgment in Mutual of Enumclaw Insurance Company v. T&G Construction, Inc. and Villas at Harbour Pointe Owners Association, No. 57679-8-I (linked with No. 56144-8-I), filed on April 2, 2007. A copy of the Court of Appeals’ decision is attached as Appendix A; a copy of the linked decision is attached as Appendix B.¹ No motion for reconsideration was filed.

C. ISSUES PRESENTED FOR REVIEW

1. Whether an insurer in a declaratory judgment action should be estopped from collaterally attacking a judgment entered against its insured in a separate underlying lawsuit.

2. Whether the amount of a stipulated judgment should constitute the presumptive measure of an insured’s damages if the stipulated judgment is determined reasonable and the insured

¹ The Association is not seeking this Court’s review of the linked appeal (the construction defect action).

independently proves coverage and a duty to indemnify in a subsequent insurance declaratory judgment action.

3. Whether an insurer who litigated type and extent of property damage in an underlying liability action should be allowed to relitigate the same issues in a subsequent declaratory judgment action regarding coverage.

D. STATEMENT OF THE CASE

Villas at Harbour Pointe is a 23-building, 96-unit condominium complex in Mukilteo, Washington. T&G was the siding subcontractor for the Villas project.² At all relevant times, MOE insured T&G under a commercial general liability policy.

1. The Construction Defect Lawsuit

In 2002, the Association sued the condominium developer for claims under the Washington Condominium Act. The general contractor and multiple subcontractors were joined in the suit. In 2004, the Association settled with the developer and general contractor and received an assignment of claims against T&G. (RP 20:10-16).³ Less than one month before trial was scheduled to commence, MOE filed a declaratory judgment action denying coverage and indemnity obligations. (RP 22:1-8).

The Association pursued settlement negotiations with T&G; however, MOE refused to participate. (RP 20:10-21:1). As a result, T&G

² Under its subcontract, T&G agreed to install the “complete siding system,” which included weather resistive barrier, flashings, caulking and siding.

³ RP from the linked case was designated as part of the record in this declaratory judgment appeal.

reached a settlement with the Association whereby T&G assigned to the Association its coverage and bad faith claims against MOE and stipulated to a judgment in the amount of \$3.3 million with a covenant not to execute on the judgment. (RP 21:2-22:19).

The Association and T&G moved for a hearing to determine the reasonableness of the settlement. MOE intervened, was granted discovery and a continuance of the hearing, conducted depositions and participated in a two-day reasonableness hearing with seven live witnesses. The court entered Findings of Fact and Conclusions of Law Regarding Reasonableness Hearing that reduced the amount determined reasonable from \$3.3 million to \$3 million. (CP 639). MOE appealed the reasonableness hearing and entry of judgment against its insured, T&G.

2. The Declaratory Judgment Action Regarding Coverage

In the subsequent declaratory judgment and bad faith action upon which this petition is based, MOE asserted that its insuring agreement did not provide coverage and that three policy exclusions applied to bar coverage for T&G's loss. (CP 1-4). In response, the Association and T&G alleged coverage existed, the policy exclusions did not apply and T&G's actions in refusing to settle constituted bad faith. (CP 714-26).

In four separate summary judgment motions, the Association and T&G proved: coverage under MOE's policy existed for T&G's loss (CP 763-65); none of the exclusions in the Policy asserted by MOE applied to bar coverage (CP 1173-75); and MOE had a duty to indemnify T&G the \$3 million judgment amount found reasonable in the underlying

construction defect action. (CP 1347-49). Judgment against MOE was entered for \$3 million, plus interest, costs and attorneys' fees.

MOE appealed both the construction defect and declaratory judgment cases and the Court of Appeals linked the two appeals. On April 2, 2007, Division One filed rulings in both cases. In the construction defect case, the Court of Appeals affirmed the trial court's finding that the T&G-Association settlement was reasonable and also affirmed the judgment entered against T&G. In the declaratory judgment action, the Court of Appeals vacated the judgment entered against MOE and held that the trial court had erroneously relied upon findings and conclusions from the reasonableness hearing in the construction defect lawsuit to bar MOE from challenging coverage and indemnity obligations. The court remanded the declaratory judgment action to relitigate T&G's liability to the Association, as well as MOE's obligation to indemnify T&G for its loss. The Association only seeks review of the Court of Appeals' decision in the declaratory judgment action.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Summary of Argument

The published Court of Appeals' decision in this case merits review under RAP 13.4(b) because the court's holdings conflict with other reported Washington cases and affect issues of substantial public interest.⁴

⁴ Motions to publish this decision were filed by MOE and two independent third parties. See Appendices C, D and E. On June 12, 2007, the Court of Appeals granted the motions to publish; thus, confirming the substantial public interest of its decision. See Appendix F.

First, by reversing the trial court's rulings on coverage, the Court of Appeals found MOE could relitigate in a separate lawsuit an affirmative defense on behalf of its insured, T&G. This Court should accept review under RAP 13.4(b)(4) because the ruling drastically changes the civil litigation landscape in Washington and has grave affects on insurance policy holders by taking away their option to settle when they are facing liability and their insurer has reserved its right to deny coverage. This Court should accept review under RAP 13.4(b)(1) and (2) because the ruling conflicts with prior case authority in that an insurer in a declaratory judgment action should not be able to relitigate the legal liability of its insured.

Second, the Court of Appeals held that absent bad faith, a stipulated judgment is not the presumptive measure of damages in a declaratory judgment action. As a matter of strong public interest under RAP 13.4(b)(4), and in order to strike a fair balance between insurers and insureds, this Court should follow the majority rule that a stipulated judgment constitutes the measure of damages in all declaratory judgment actions, regardless of bad faith, as long as coverage is shown.

Third, by reversing the trial court, the Court of Appeals ruled that an insurer in a declaratory judgment action can relitigate discrete coverage issues when the same facts that determined the insured's liability in the underlying case helped determine coverage in the declaratory judgment action. This Court should accept review under RAP 13.4(b)(4) because under the court's decision, such stipulated judgments will have absolutely

no preclusive effect in declaratory judgment actions and shall be meaningless. Unless the claimant has an ironclad bad faith claim against the releasing party's insurer, the Court of Appeals' decision will have a chilling effect on future settlements in Washington.

Lastly, this Court should accept review under RAP 13.4(b)(4) because an ever increasing number of complex civil litigation cases, especially cases involving construction claims, are being resolved through settlements that incorporate stipulated judgments and assignment of claims. Washington case law construing reasonableness hearings is sparse.

2. **Allowing an Insurer to Relitigate the Legal Liability of its Insured in a Separate Lawsuit is an Issue of Substantial Public Interest That This Court Should Review [RAP 13.4(b)(1), (2) and (4)].**
 - a. **The Court of Appeals' Remand For Determination of "Legal Obligation to Pay" was Based on its Misunderstanding of the Association's Argument.**

As part of the coverage determination in the declaratory judgment action, the trial court was charged with determining whether T&G, as the insured, was "legally obligated to pay" the Association because of the particular language in the MOE policy, which provided:

1. Insuring Agreement
 - a. We will pay those sums that *the insured becomes legally obligated to pay* as damages because of . . . "property damage" to which this insurance applies. . . .

(emphasis added) (CP 644). Despite the obvious derivation of the language “legally obligated to pay,” the court intertwined T&G’s “legal obligation to pay” a claimant with MOE’s obligation to indemnify its insured. In fact, the two obligations are entirely separate: the first is T&G’s obligation to the Association as determined by the construction defect action; and the second is MOE’s obligation to indemnify T&G in the declaratory judgment action.

Based on this apparent misunderstanding, the Court of Appeals held that the stipulated judgment entered against T&G in the construction defect case did not automatically establish MOE’s indemnity liability to T&G and remanded to determine T&G’s legal obligation to pay. Appendix A at 10. But the Association did not, and does not, argue that the judgment entered in the construction defect lawsuit barred MOE from contesting coverage in this declaratory judgment action. In so ruling, the Court of Appeals missed the Association’s actual argument discussed in subsection “b” below: that the judgment entered against T&G irrevocably constituted the *insured’s* “legal obligation to pay” claimant under the policy.

b. T&G Became Legally Obligated to Pay Damages as a Result of the Stipulated Judgment Amount.

MOE did not define the term “legally obligated to pay” in its policy. Undefined terms in an insurance policy are given a plain, ordinary, and popular meaning as defined in standard English language dictionaries. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 428, 38 P.3d

322 (2002). A judgment, defined as “an obligation for the payment of money,”⁵ clearly fits within the plain, ordinary meaning of “legally obligated to pay.” Accordingly, the judgment against T&G constitutes its “legal obligation to pay” the Association. Even if the court were to hold that the language “legally obligated to pay” is ambiguous, the term should be construed in favor of the insured. American Nat’l. Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc., 134 Wn.2d 413, 428, 951 P.2d 250 (1998). Whether construed under its plain meaning or in favor of the insured, a judgment is, by definition, a legal obligation to pay. The judgment entered against T&G has been affirmed by the Court of Appeals.⁶ If a judgment entered against an insured that has been affirmed by the Court of Appeals does not constitute a legal obligation to pay, what does?

c. MOE’s Attempt to Relitigate T&G’s Dissolution is an Improper Collateral Attack on the Stipulated Judgment.

In the underlying construction defect action, the trial court rejected T&G’s argument that it was a dissolved corporation immune from liability. Notably, in the linked opinion involving the construction defect action, *the Court of Appeals affirmed the denial of MOE’s dissolution argument*. In the declaratory judgment action, MOE attempted to relitigate this issue in the hope of establishing that the insured was not

⁵ 49 C.J.S. Judgments § 6.

⁶ See Appendix B.

“legally obligated to pay” the Association.^{7 8} Enigmatically, in the instant action, the Court of Appeals reversed the trial court’s decision denying MOE the opportunity to relitigate the dissolution issue. The Court of Appeals held:

[B]ecause there was no final determination on the merits in the underlying condominium construction defect lawsuit, neither collateral estoppel no[r] res judicata bars MOE from asserting that the two-year time limitation under former RCW 23B.14.340 bars [the general contractor’s] claims against T&G.

Appendix A at 11. The Court of Appeals’ decision ignores established case authority as discussed in subsection “e” below and reflects a myopic interpretation of the Association’s claim. The Association need not rely upon principals of res judicata or collateral estoppel to bar MOE from relitigating the issue of T&G’s dissolution. The issue was litigated in the construction defect case, judgment was entered against T&G and affirmed by the Court of Appeals. As such, the judgment is binding as to T&G and not subject to collateral attack in a subsequent lawsuit.

⁷ MOE’s argument relied exclusively upon Ballard Square Condo. Owners Ass’n v. Dynasty Constr. Co., 126 Wn. App. 285, 108 P.3d 818 (2005); rev. granted, 155 Wn.2d 1024, 126 P.3d 820 (2005), aff’d on other grounds, 158 Wn.2d 603, 146 P.3d 914 (2006), which was published five months *after* T&G and the Association executed their settlement agreement. Thus, the law at the time of settlement, which governs the reasonableness of the settlement, did not include Ballard Square.

⁸ “[Insurance p]roviders have argued that a covenant not to execute against an insured means that the insured is not ‘legally obligated to pay,’ a necessary condition under the terms of the insurance contract to implicate the provider’s duty to indemnify the insured. The majority rule is that a covenant not to execute is a contract and not a release – tort liability on behalf of the insured still exists and the provider is still obligated to indemnify its insured.” Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants not to Execute in Insurance Litigation* (47 Drake L. Rev. 853, 857-58) (footnotes omitted).

Setting aside the issue of whether MOE even has standing to relitigate an affirmative defense already litigated by its insured,⁹ allowing MOE to relitigate potential defenses to that action would constitute a collateral attack upon the judgment. The Court of Appeals' decision to remand for a determination of one issue underlying the judgment would allow an insurer, or any third-party indemnitor, to collaterally attack any judgment with which it disagrees. Certainly, this is not the law in Washington, or parties would seldom settle cases for fear third parties could vacate their judgments in subsequent actions.

d. The Court of Appeals' Decision Violates Public Interest.

This case involves an issue of substantial public interest because the Court of Appeals' decision disfavors settlements and promotes needless, redundant relitigation of issues. If the Court of Appeals' decision stands, settlements involving product liability, medical malpractice, motor vehicle accidents, construction defects—or any claim that is settled through a stipulated judgment, covenant not to execute and assignment of claims—is in jeopardy.

“The law favors amicable settlement of disputes, and is inclined to clothe them in finality.” Haller v. Wallis, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978) (quoting Handley v. Mortland, 54 Wn.2d 489, 496, 342 P.2d

⁹ MOE lacks standing to step into the shoes of its insured to an affirmative defense its insured failed to prevail upon in a separate lawsuit. Accord Felter v. McClure, 135 Wash. 410, 413, 237 P. 1010 (1925) (“The right to object belongs to the party appearing, and not to a third party seeking later to attack the proceedings.”).

612 (1959) (court refused to set aside judgment approving settlement after claimant alleged the judgment was based on inadequate settlement amount and mistaken appraisal of injuries)). As this Court held in Washington Asphalt Co. v. Harold Kaeser Co., 51 Wn.2d 89, 91, 316 P.2d 126 (1957):

A judgment by consent or stipulation of the parties is construed as a contract between them embodying the terms of the judgment. It excuses all prior errors and operates to end all controversy between the parties, within the scope of the judgment. In the absence of fraud, mistake, or want of jurisdiction, a judgment by consent will not be reviewed on appeal.

The strong public policy that encourages stipulated judgments extends to the exact situation here, where the judgment was based on an assignment of claims with a stipulation not to execute on the judgment.¹⁰

Under the plain language of the policy, T&G became “legally obligated to pay” the Association when the judgment was entered. Allowing an insurer in an insurance declaratory judgment action to relitigate whether its insured was legally liable to a claimant is tantamount to vacating a judgment entered in a prior lawsuit. Such action would challenge the very nature and viability of settlements in Washington and would violate public policy encouraging such settlements.

¹⁰ “The assignment-covenant not to execute may also play a valuable role in encouraging settlements. With the ability to assign its rights against the carrier in return for capping its own liability, the insured has greater leverage in reaching a settlement with the plaintiff. This resolution is more efficient than litigation between the plaintiff and insured that serves only to preserve the insured’s cause of action against the carrier. By allowing litigation between the plaintiff and the carrier to immediately proceed, the arrangement avoids wasting the limited resources of litigants and courts and may result in a quicker resolution of the issues in a case.” Chris Wood, *Assignment of Rights and Covenants not to Execute in Insurance Litigation* (75 Tex. L. Rev. 1373, 1384) (footnote omitted).

e. **Even if the Construction Defect Judgment Were Somehow Assailable, MOE is Estopped from Relitigating Issues Determined in the Construction Defect Action.**

Even if MOE could demonstrate some legal basis for collaterally attacking the judgment against T&G in the construction defect action, MOE should be estopped from doing so here under a series of Washington insurance cases: “[I]n the interests of fairness and to avoid redundant litigation, insurers, who have received notice of litigation by their insureds against tortfeasors and an opportunity to intervene, are bound by settlements between their insureds and tortfeasors.” Mulcahy v. Farmers Ins. Co. of Washington, 152 Wn.2d 92, 105 n.9, 95 P.3d 313 (2004); see also Equilon Enterprises LLC v. Great Am. Alliance Ins., Co., 132 Wn. App. 430, 440-41, 132 P.3d 758 (2006) (insurer had a duty to indemnify insured for amount of settlement because same facts that created insurer’s duty to indemnify also caused insured to settle with plaintiff); Finney v. Farmers Ins. Co., 21 Wn. App. 601, 617, 586 P.2d 519 (1978), aff’d, 92 Wn.2d 748, 600 P.2d 1272 (1979) (when an insurer has notice of an action and an opportunity to participate, it is bound by the judgment against its insured on liability questions).

Contrary to Mulcahy, Finney and the Court of Appeals’ own holding in Equilon, the Court of Appeals erroneously held that MOE can relitigate an affirmative defense which its insured raised, litigated and lost in the construction defect action. MOE intervened in the construction defect lawsuit, the case was settled, the settlement was deemed reasonable by the trial court, the settlement was reduced to judgment and the

judgment was affirmed by the Court of Appeals. The Court of Appeals' decision remanding this issue is inconsistent with Washington law and contravenes the strong public policy encouraging finality of settlements. Thus, this Court should accept review under RAP 13.4(b)(1), (2) and (4).

3. **To Prevent Needless Litigation and Inconsistent Results, the Amount of a Stipulated Judgment Determined to be Reasonable Should Constitute the Presumptive Measure of Damages in a Declaratory Judgment Action, Regardless of Bad Faith [RAP 13.4(b)(4)].**

The law in Washington and the majority rule in the United States is that the presumptive measure of the insured's damages in a bad faith action is the settlement amount agreed to by the insured, so long as the amount is reasonable and not the product of fraud or collusion. Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 735-39, 49 P.3d 887 (2002). In Besel, this Court articulated the rationale behind the rule:

This approach promotes reasonable settlements and discourages fraud and collusion. Furthermore, using the amount of a covenant judgment to measure tort damages in this context makes sense in light of our long standing requirement that such settlement be reasonable. If a reasonable and good faith settlement amount of a covenant judgment does not measure an insured's harm, our requirement that such settlements be reasonable is meaningless. Finally, the *Chaussee* criteria protect insurers from excessive judgments especially where, as here, the insurer has notice of the reasonableness hearing and has an opportunity to argue against the settlement's reasonableness.

Id. at 738-39.

The public policy that promotes reasonable settlements and discourages redundant litigation applies to subsequent declaratory judgment actions, regardless of whether bad faith is alleged. Consequently, the Association asks this Court to expand its holding in Besel by ruling that when an insured and claimant enter into a stipulated judgment and covenant not to execute, the judgment is the presumptive measure of damages in the subsequent declaratory judgment action, but only if coverage is proven and the judgment amount does not exceed policy limits. Expansion of the presumptive measure of damages doctrine to include declaratory judgment actions is well grounded because in this context there is no relevant distinction between a bad faith action and a declaratory judgment action. Moreover, the number of cases where an insurer may not have acted in bad faith greatly surpasses instances of bad faith. Because each of the factors and rationale that support the presumptive rule for bad faith cases also relate to declaratory judgment actions, the rule should apply in instances with and without bad faith, so long as the claimant can prove coverage exists and no exclusions apply.

In order to protect the insurer, neither the fact nor amount of liability to the claimant is binding on the insurer unless the insured and claimant can survive a reasonableness hearing and show that the settlement was reasonable and not the product of fraud or collusion. This concept accords with general principles of indemnification law.¹¹ Further,

¹¹ 42 C.J.S. Indemnity §§ 25, 32 at 114-16, 122-24 (2006); see also Restatement (Second) of Judgments § 58(1)(a) (1982) (a judgment has the effect of estopping an

the protections provided to an insurer by conducting a reasonableness hearing and validating the settlement under the nine Glover factors¹² can be fulfilled in the underlying action for both bad faith and declaratory judgment actions. Finally, if a reasonable and good faith settlement amount of a stipulated judgment does not measure an insured's harm, the requirement that such settlements be reasonable is meaningless when applied to both bad faith and declaratory judgment actions.

The Association urges this Court to expand its holding in Besel and adopt the law in other states. In similar circumstances, the Supreme Courts of Arizona, Maine and Minnesota have held that the presumptive measure of the insured's damages *in a declaratory judgment* action is the settlement amount, so long as the amount is reasonable and not the product of fraud or collusion. See Patrons Oxford Ins. Co. v. Preston, 905 A.2d 819 (Maine 2006); United Services Automobile Assoc. v. Morris, 741 P.2d 246 (Ariz. 1987); Miller v. Shugart, 316 N.W.2d 279 (Minn. 1982); see also Midwestern Indem. Co. v. Laikin, 119 F.Supp.2d 831, 838-41 (S.D.Ind. 2000) ("Courts in many states have followed the reasoning of both Miller and Morris. They have held that when an insured and tort claimant enter into an agreed judgment and a covenant not to

indemnitor who has a duty and an opportunity to defend the indemnitee "from disputing the existence and extent of the indemnitee's liability to the injured person").

¹² Nine factors a trial court should consider when determining the reasonableness of a settlement. See Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988) (also referred to as the "Chaussee criteria." See Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 803 P.2d 1339 (1991)).

execute the judgment against the insured, the judgment can be enforced against the insurer if coverage is shown.”).

Because the same public policy consideration applies to both bad faith and coverage disputes absent bad faith, and since the number of declaratory judgment actions exceeds instances of bad faith, this Court should expand its holding in Besel and rule the amount of a stipulated judgment that meets Glover’s reasonableness test should constitute the presumptive measure of damages in a declaratory judgment action. This Court should therefore grant review under RAP 13.4(b)(4).

4. **In a Declaratory Judgment Action, an Insurer Should be Estopped from Relitigating Certain Coverage Issues Already Litigated in an Underlying Lawsuit [RAP 13.4(b)(1), (2) and (4)].**

In Washington, when an insurer has notice of an action and an opportunity to participate, it is bound by any judgment against its insured on liability questions, and barred by any material finding of fact that is essential to the liability judgment and also is decisive of coverage under an insurance policy. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 996 P.2d 603 (2000); Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998); Finney v. Farmers Ins. Co., 21 Wn. App. 601, 586 P.2d 519 (1978), aff’d, 92 Wn.2d 748, 600 P.2d 1272 (1979); Waite v. Aetna Cas. & Sur. Co., 77 Wn.2d 850, 467 P.2d 847 (1970). The foregoing cases adopt a type of collateral estoppel particular to the insurer-insured relationship. Under this estoppel theory, when an insurer intervenes and participates in an underlying lawsuit where factual issues affecting

coverage are determined, the insurer may not relitigate those issues in a subsequent declaratory judgment action.

It is undisputed that MOE fully prepared for and actively participated in the two-day reasonableness hearing where findings were made that also affected coverage. In the construction defect action, MOE obtained a continuance of the hearing, conducted discovery of its insured's expert witnesses, used the witnesses as its own during the hearing and argued liability and damage issues. A large percentage of testimony presented during the reasonableness hearing involved expert witnesses who focused almost exclusively on the results of comprehensive intrusive investigations identifying the type, scope and cost of covered "property damage" at Villas. (RP 75-77, 80-85, 117-76, 195-260, 200-46, 260-61, 269-91, 297-382).¹³ The parties submitted substantial evidence as to the precise type of damage at Villas resulting from T&G's defectively installed siding, including water intrusion, dry rot, decay, deterioration and elevated moisture levels within the exterior and interior walls of the units. The court also reviewed and considered comprehensive and extensive written evidence, including 32 separate documentary submissions and exhibits totaling over 2,800 pages. (CP 625-39; Exhibits 1-14). Several of these exhibits focused exclusively on property damage (a coverage issue) (CP 55-60; 195-260; 467-597; 643-45). Since MOE participated in

¹³ There were over 105 photos entered into evidence that showed physical damage to property that resulted from T&G's defective siding installation. See Reasonableness Hearing Exhibits 3, 6, 7 (designated as part of the record in this declaratory judgment appeal).

litigating these factual and legal issues affecting coverage, the insurer should not be given a second opportunity to argue these same issues in the declaratory judgment action.

The Court of Appeals reversed the trial court's orders on summary judgment because it found that the "trial court *appears* to have erroneously relied on the reasonableness determination to decide whether policy exclusions applied." (Emphasis added). See Appendix A at 11. Whether the trial court in the declaratory judgment action relied upon the findings of fact and conclusions of law entered in the construction defect action, under a *de novo* review, this Court can choose to consider those findings and conclusions. Summary judgment rulings are reviewed *de novo*. Valley/50th Ave., LLC v. Stewart, 159 Wn.2d 736, 153 P.3d 186 (2007). If this Court chooses not to rely on the reasonableness hearing findings, then it can rely on the substantial evidence, separate from the findings, that was submitted to the trial court in the declaratory judgment action in support of the summary judgment rulings.¹⁴

At least one other Washington appellate court has allowed findings from an underlying court's decision to help determine coverage in a subsequent declaratory judgment action, which makes this case ripe for review by this Court under RAP 13.4(b)(2). In Nationwide Mutual Ins. Co. v. Hayles, Inc., 136 Wn. App. 531, 150 P.3d 589 (2007), an insurer brought a declaratory judgment action against its insured, who had settled

¹⁴ See CP 763-65; 1173-75; 1347-49.

a claim for damage to an onion crop due to improper irrigation. The insurer intervened in the underlying lawsuit and requested a reasonableness hearing on the settlement between the insured and claimant. In affirming the trial court's summary judgment on coverage in the declaratory judgment action, Division Three relied upon a factual finding in the reasonableness hearing regarding the insured's intentional act of turning on the irrigation. *Id.* at 538-39. Because the factual finding related to both the insured's liability to claimant and the insurer's coverage obligation, Division Three held it was proper for the trial court in the declaratory judgment action to rely upon the testimony and findings on a reasonableness hearing in the underlying liability lawsuit. Due to the apparent conflict among Divisions One and Three, this Court should accept review under RAP 13.4(b)(2).

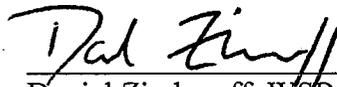
In summary, MOE should not be given a "second bite" at coverage when it aggressively and comprehensively litigated certain coverage issues in the underlying action. As a matter of public policy, this type of estoppel applies because the insured should not be forced to endure multiple actions in order to obtain its insurance benefits. Forcing the insured to relitigate liability and damages issues is not only unfair to the insured, it fosters inconsistent judgments and additional delay and expense for the insured. *Fisher*, 136 Wn.2d at 249. Thus, in order to protect insureds' rights, promote judicial economy, and resolve a conflict between Divisions One and Three on this issue, this Court should accept review under RAP 13.4(b)(1), (2) and (4).

F. CONCLUSION

Because this case presents issues “of substantial public interest that should be determined by the Supreme Court,” and since the opinion conflicts with decisions of the Supreme Court and other Court of Appeals’ decisions, the Association respectfully requests this Court grant review under RAP 13.4(b)(1), (2) and (4), reverse the Court of Appeals’ April 2, 2007 decision and reinstate the trial court judgment.

Respectfully submitted this 12th day of July, 2007.

BARKER • MARTIN, P.S.



Daniel Zimberoff, WSBA #25552

Dina Wong, WSBA #30542

Attorneys for Petitioners Villas at
Harbour Point Owners Association
and T&G Construction, Inc.

Appendix A

No. 57679-8-1/2
Linked w/No. 56144-8-1

the orders granting summary judgment, vacate the judgment entered against MOE, and remand.

FACTS

Condominium Construction Defect Lawsuit

In June 2002, a homeowners association, the Villas at Harbour Pointe Owners Association (the Association), sued the condominium developer and the general contractor, Construction Associations, Inc. (CAI), for \$7.3 million in construction and design defects damages. CAI sued a number of subcontractors including T&G Construction, Inc. (T&G), the subcontractor responsible for installing the exterior siding. CAI alleged T&G was liable for breach of contract, breach of warranty, and indemnification. MOE defended T&G under a reservation of rights to deny coverage.¹

During the course of discovery, MOE learned that T&G was administratively dissolved on October 23, 2000. T&G filed a motion for summary judgment dismissal arguing that the statutory two-year time limit to file claims against a dissolved corporation barred CAI's lawsuit against it. The trial court ruled the two-year time limitation did not bar CAI's post-dissolution claims against T&G, and there were material issues of fact concerning whether CAI's pre-dissolution claims were barred.

The Association, the developer, CAI, and T&G each retained independent experts to investigate the water damage and determine the scope of repair. The experts agreed that T&G's defective siding work resulted in water damage, but disagreed as to the method and cost of repair.

¹ The general commercial policy and the excess liability policy was in effect from October 26, 1997 to October 26, 2000.

No. 57679-8-1/3
Linked w/No. 56144-8-1

After failing to reach an agreement on the method and cost of repair, the Association filed a motion for summary judgment arguing that the alleged design and construction defects violated the Uniform Building Code (UBC) and the Washington Condominium Act (WCA). The court ruled that a number of the alleged defects violated the UBC and the WCA. As to T&G's work, the court ruled the improperly installed weather barrier and flashing violated the UBC and the WCA.

Following a court-ordered mediation in September 2004, the Association reached a settlement with all parties except T&G. As part of the settlement, CAI assigned its claims against T&G to the Association. On October 15, 2004, without MOE's consent, T&G and the Association entered into a settlement agreement. T&G agreed to entry of a \$3.3 million stipulated judgment and to assign its coverage and bad faith claims against MOE to the Association. In exchange, the Association agreed to not execute on the judgment and to dismiss the claims against T&G.

After entering into the settlement agreement, the Association notified MOE and asked the court to schedule a reasonableness hearing. The court scheduled a hearing and granted MOE's motion to intervene to challenge the reasonableness of the settlement agreement between the Association and T&G.² At the conclusion of the hearing, the court determined the settlement agreement was reasonable and entered a stipulated judgment for \$3 million against T&G.

Declaratory Judgment Action

² As addressed in the linked case, Villas at Harbour Pointe Owners Association v. Mutual of Enumclaw, No. 56144-8-1, MOE also challenged the authority of the court to conduct a reasonableness hearing in a condominium construction defect case.

No. 57679-8-1/4
Linked w/No. 56144-8-1

Following entry of the \$3 million stipulated judgment, MOE filed an amended complaint in its declaratory judgment action against the Association and T&G.³ In the amended complaint, MOE asked the court to rule that under the policy, it had no obligation to indemnify T&G. The Association, as T&G's assignee, filed a counterclaim, contending MOE was estopped from denying coverage or asserting any policy exclusions contesting the amount of the stipulated judgment. The Association also alleged bad faith, breach of contract, violation of the Consumer Protection Act, unjust enrichment and negligence.

In a series of summary judgment decisions, the trial court relied on the findings and conclusions from the reasonableness determination of the settlement agreement in the underlying construction litigation in ruling that MOE was estopped from contesting coverage based on the two-year time limitation for claims against dissolved corporations; that exclusions "l. Damage to Your Work", "m. Damage to Impaired Property", and "n. Recall of Products, Work or Impaired Property" did not apply; and that MOE was obligated to pay the stipulated \$3 million judgment amount. The court then entered a \$3 million judgment against MOE plus interest, costs, and attorney fees. MOE appeals.

ANALYSIS

MOE contends that the trial court in the declaratory judgment action erred in ruling that it could not contest coverage or its obligation to indemnify based on the

³ "Amended Complaint for Declaration re: Insurance Coverage for T&G Construction, Inc."

No. 57679-8-1/5
Linked w/No. 56144-8-1

findings and conclusions that supported the court's reasonableness determination of the settlement in the underlying construction action.

On review of summary judgment, this court engages in the same inquiry as the trial court. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Mains Farms Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). The court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. Mason v. Kenyon Zero Storage, 71 Wn. App. 5, 8-9, 856 P.2d 410 (1993). Only when reasonable minds could reach but one conclusion on the evidence, should the court grant summary judgment. Smith v. Safeco, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). We also review questions of law de novo. State, Dep't of Ecology v. Campbell & Guinn, 146 Wn.2d 1, 9, 43 P.3d 4 (2000).

The duty to indemnify is a separate and distinct obligation from the duty to defend. Alaska Nat'l Ins. Co. v. Bryan, 125 Wn. App. 24, 104 P.3d 1 (2004), rev. denied, 155 Wn.2d 1077, 120 P.3d 577 (2005). Where, as here, there is a question about coverage, the insurer can defend under a reservation of rights. The insurer then has the right to file a declaratory judgment action to determine coverage and its obligation to indemnify. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 760, 58 P.3d 276 (2002). But if an insurer in bad faith breaches the duty to defend, the insurer is estopped from asserting the claim is outside the scope of coverage. Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 563, 951 P.2d 1124 (1998). However absent

No. 57679-8-1/6
Linked w/No. 56144-8-1

bad faith, the insurer in the declaratory judgment action is entitled to a determination on whether there is coverage under the insurance policy and if so, whether the insurer is responsible for the entire stipulated judgment amount. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 132 Wn. App. 803, 134 P.3d 240 (2006). The insurer is only liable for the judgment "entered provided the act creating liability is a covered event and provided the amount of the judgment is within the limits of the policy." Kirk v. Mt. Airy Ins. Co., 134 Wn.2d at 561.

In both the underlying construction lawsuit and in the declaratory judgment action, MOE argued that the claims against T&G were barred by the two-year time limitation under former RCW 23B.14.340 of the Business Corporation Act (BCA).

The determination of whether coverage exists is a two-step process: first, the insured must show the policy covers his loss and second, to avoid coverage, the insurer must show specific policy language excludes the insured's loss. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). The insured has the burden to establish coverage. Diamaco, Inc. v. Aetna Cas. & Sur Co., 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

The coverage section of the commercial general liability policy states that the policy only applies to damages the insured is "legally obligated" to pay.

Coverage A. Bodily Injury and Property Damage Liability

1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.

T&G was administratively dissolved on October 23, 2000. CAI sued T&G for breach of contract, breach of warranty, and indemnification in the condominium construction defect case in April 2003. On summary judgment, T&G argued that CAI's claims were barred under former RCW 23B.14.340. Former RCW 23B.14.340 provided that "any right or claim existing" against a corporation before its dissolution is barred if the claim is not brought within two years of the corporation's dissolution.⁴ As to CAI's pre-dissolution claims against T&G, the court ruled that there were material issues of fact as to whether CAI was a known claimant entitled to notice. But as to the post-dissolution claims, the court ruled as a matter of law that the time limitation did not bar the claims against T&G.

After the Association and T&G entered into a settlement agreement with a stipulated judgment and covenant not to execute, the Association requested a

⁴ Former RCW 23B.14.340 (1995) provides:

The dissolution of a corporation either: (1) By the issuance of a certificate of dissolution by the secretary of state, (2) by a decree of court, or (3) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

RCW 23B.14.340 as amended in 2006, provides:

The dissolution of a corporation either (1) by the filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name. Laws of 2006, ch. 52, §17.

No. 57679-8-1/8

Linked w/No. 56144-8-1

reasonableness hearing. The court granted MOE's request to intervene to challenge the reasonableness of the settlement. After a two-day hearing, the court concluded the settlement agreement was reasonable.

During the reasonableness hearing, the Association and T&G submitted additional evidence on whether CAI was a known claimant. The court, in its findings and conclusions on the reasonableness of the settlement, concluded it likely that the jury would have found CAI was a known claimant. While acknowledging the risk of reversal on the summary judgment rulings regarding the corporate dissolution time bar and the statute of limitations, the court concluded CAI would have prevailed at trial.

If the matter proceeded to trial, C.A. faced the risk that later the Court of Appeals would reverse summary judgment determined in its favor regarding corporate dissolution, the existence of written contracts, statute of limitations and indemnity. C.A. also would have had to prevail in proving certain facts to defeat some of T&G's legal issues at trial, such as the corporate dissolution defense and to prove the existence of written contracts.

However, the evidence supplied at the reasonableness hearing and in summary judgment hearings suggested C.A. should have been able to prevail in proving these facts. Although there was certainly some risk C.A. would not ultimately prevail on these issues, the risk was relatively small. I am aware the ramifications of losing on these legal issues would be great. C.A. could lose all or most of its claims. Therefore, this court has carefully weighed that risk in determining the value of C.A.'s claims.

In the declaratory judgment action, the court relied on the findings and conclusions from the reasonableness determination in ruling that MOE was estopped from arguing T&G's dissolution barred coverage. MOE contends the court erred in relying on the reasonableness determination to establish MOE's obligation under the policy to indemnify T&G for the stipulated judgment amount. We agree.

No. 57679-8-1/9
Linked w/No. 56144-8-1

When an insured, without the consent of the insurer, enters into a settlement agreement with a stipulated judgment the insurer is only presumptively liable to the extent the amount is reasonable. Besel v. Viking Ins. Co. of Wisc., 146 Wn.2d 730, 738, 49 P.3d 887 (2002). In determining whether a settlement is reasonable, the trial court considers the factors first adopted in Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 711, 658 P.2d 1230 (1983) overruled on other grounds by Crowns Controls, Inc. v. Smiley, 100 Wn.2d 695, 756 P.2d 717 (1988), and later in Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 803 P.2d 1339 (1991). The Glover/Chaussee factors include:

[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. Glover, 98 Wn.2d at 717.

Below and on appeal, the Association mischaracterizes a reasonableness hearing as a "mini-trial" to determine liability and an adjudication on the merits.⁵ But the purpose of a reasonableness hearing is to determine whether a settlement agreement is reasonable under the Glover/Chaussee factors. A reasonableness hearing is not an adjudication on the merits. And, although the relative fault of a party is one of the several discretionary factors the court must consider, the purpose of the reasonableness hearing is not to establish the defendant's actual liability.

⁵ In Glover, the Court expressly rejected a proposal to treat the reasonableness hearing as a "mini-trial." Glover, 98 Wn.2d at 717.

No. 57679-8-I/10
Linked w/No. 56144-8-I

The Association relies on Besel, to argue that the stipulated judgment entered after the reasonableness hearing establishes MOE's legal liability under the policy. But the court in Besel only held that the amount of a covenant judgment is the presumptive measure of harm if the insured established bad faith and the covenant judgment is reasonable under the Glover/Chaussee factors. Besel, 146 Wn.2d at 738. In other words, under Besel, coverage by estoppel is only imposed if the insurer acted in bad faith. Kirk, 134 Wn.2d at 563. Here, although the Association, as T&G's assignee, alleged bad faith, the court did not rule that MOE acted in bad faith. Absent bad faith, MOE is not estopped from disputing coverage or its obligation to indemnify T&G on the stipulated judgment.

The underinsured and uninsured motorist (UIM) cases relied on by the Association are also inapposite. Finney v. Farmers Ins. Co. of Wash., 21 Wn. App. 601, 617-618, 586 P.2d 519 (1978); Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 246, 961 P.2d 350 (1998); and Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 275, 996 P.2d 603 (2000) hold that when an insurer refuses to participate in the arbitration between its insured and the tortfeasor, it is bound by the judgment entered against the insured for underinsured or uninsured benefits.⁶ But here, unlike in the UIM context, when an insurer defends under a reservation of rights, the insurer is not bound by the prior findings, conclusions, or the judgment in the declaratory judgment action on coverage. See Wear v. Farmers Ins. Co. of Wash., 49 Wn. App. 655, 745 P.2d 526 (1987).

⁶ The Association also relies on East v. Fields, 42 Wn.2d 924, 926, 259 P.2d 639 (1953), a refusal to defend case. But in East, the Court held that when an insurer refuses to defend, it is not estopped from challenging the question of indemnification and coverage.

No. 57679-8-1/11
Linked w/No. 56144-8-1

Because there was no finding of bad faith, on remand MOE is entitled to a determination in the declaratory judgment action as to whether there is coverage under the policy.⁷ And because there was no final determination on the merits in the underlying condominium construction lawsuit, neither collateral estoppel nor res judicata bars MOE from asserting that the two-year time limitation under former RCW 23B.14.340 bars CAI's claims against T&G.⁸ In addition, the trial court appears to have erroneously relied on the reasonableness determination to decide whether policy exclusions applied. On remand MOE is also entitled to a determination of its obligation to indemnify and whether the exclusions apply.

Citing this court's recent decision in Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co., 126 Wn. App. 285, 108 P.3d 818, rev. granted, 155 Wn.2d 1024, 126 P.3d 820 (2005), aff'd on other grounds, 158 Wn.2d 603, 146 P.3d 914 (2006), MOE asks this court to rule as a matter of law that CAI's claims against T&G are barred by under former RCW 23B.14.340. Because Ballard Square does not address pre-dissolution claims and material issues of fact remain, we decline to do so. On remand, the court will need to address the implications of the Washington Supreme Court's recent decision in Ballard Square and the 2006 amendments.

⁷ See also Mutual of Enumclaw v. Paulson Constr., Inc., 132 Wn. App. at 817-18, (when an insurer's actions do not amount to bad faith, there is no need to decide whether the stipulated judgment amount was reasonable).

⁸ Collateral estoppel only applies when (1) the issue decided in the prior adjudication is identical, (2) the prior adjudication ended in a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and (4) application of the doctrine will not work an injustice. Res judicata applies to matters that were actually litigated or might have been litigated in a prior action. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 280, 996 P.2d 603 (2000).

No. 57679-8-I/12
Linked w/No. 56144-8-I

MOE also contends it has no obligation to indemnify T&G because T&G violated the policy condition requiring an insured to obtain consent prior to entering into a settlement.⁹ But “an insured’s noncompliance with a cooperation clause releases the insurer from its responsibilities ‘only if the insurer was actually prejudiced by the insured’s actions or conduct.’” Pub. Util. No. 1 of Klickitat County v. Int’l Ins. Co., 124 Wn.2d 789, 803, 881 P.2d 1020 (1994) (citing Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 377, 535 P.2d 816 (1975)). Whether MOE was actually prejudiced is a factual question that the trier of fact must resolve on remand. Pub. Util. No. 1, 124 Wn.2d at 804 (even if the insured violated a policy condition, the insurer’s duty to pay has not been extinguished because insurer failed to show they were actually prejudiced by the settlement without their consent). Id. at 803.

CONCLUSION

We conclude that MOE is entitled to adjudication on coverage and the extent of its obligation to indemnify T&G. We reverse the trial court’s orders granting summary judgment,¹⁰ vacate entry of the judgment against MOE, and remand for trial.

⁹ Section IV – Commercial General Liability Conditions

...
2. Duties In the Event Of Occurrence, Offense, Claim or Suit.
...

d. No insureds will, except at that their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us.

No person or organization has a right under this Coverage Part.

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

¹⁰ Order granting motion to reconsider or clarify order denying defendant’s motion for summary judgment re: coverage; order granting defendant’s motion for partial summary judgment that exclusions (m) and (n) do not apply; and order granting defendant’s second motion for partial summary judgment that exclusion (l) does not apply.

No. 57679-8-1/13
Linked w/No. 56144-8-1

11

WE CONCUR:

Schindler, ACF

Appelwick, CJ

Cox, J.

¹¹ Because we reverse the trial court's grant of summary judgment in favor of the Association and T&G, the trial court's award of attorney fees and costs is also reversed.

Appendix B

No. 56144-8-1/2
Linked w/No. 57679-8-1

to not execute on the judgment and dismiss the claims against the siding subcontractor. At the request of the homeowners association, the court conducted a hearing to determine whether the settlement was reasonable. After ruling that the settlement was reasonable, the court entered the stipulated judgment against the siding subcontractor. On appeal, the siding subcontractor's insurer contends the trial court did not have the authority to conduct a reasonableness hearing. In the alternative, the insurer challenges the court's reasonableness determination. Because the court had the authority to conduct a reasonableness hearing and did not abuse its discretion in determining that the settlement agreement was reasonable, we affirm.

FACTS

The Villas at Harbour Pointe is a 96 unit condominium development located in Mukilteo. Possession View, L.L.C. (PVLLC) was the developer of the project and Construction Associates, Inc. (CAI) was the general contractor. Construction on the condominium project began in March 1998. The first phase was completed by mid-1999, and the second phase by early 2000.

T&G Construction, Inc. (T&G) was the siding subcontractor for the project. T&G's contract required it to indemnify CAI and obtain a general liability and commercial excess liability policy naming CAI as an additional insured. As agreed, T&G obtained a policy from Mutual of Enumclaw (MOE).¹

Soon after construction was complete, homeowners began reporting water intrusion around the windows and the sliding glass doors. CAI concluded the water

¹ The policy was in effect from October 26, 1997 to October 26, 2000.

leaks were caused by defective siding installation, and notified T&G. In early 2001, T&G returned to perform repairs. But after T&G's repairs, homeowners continued to report problems with water intrusion. The Association hired an independent construction expert to investigate the water intrusion. The expert's report identified a number of construction and design defects, including improper installation of water resistive barriers and window flashing.

On June 11, 2002, the Association sued the condominium developer, PVLLC, for \$7.3 million in damages, alleging breach of contract and construction and design defects in violation of the Washington Condominium Act (WCA)² and the Consumer Protection Act (CPA).³ PVLLC sued the general contractor, CAI. CAI sued the subcontractors for breach of contract, breach of warranty, and indemnification.⁴ MOE defended T&G, subject to a reservation of its right to deny coverage.

The parties retained a number of experts to investigate the alleged damage. The experts agreed T&G's defective siding work resulted in water intrusion damage. The experts' estimated cost to repair the damage ranged from approximately \$336,000 to \$4.6 million.

During discovery, MOE learned that T&G was administratively dissolved on October 23, 2000. T&G then filed a motion for summary judgment, arguing that the statutory two-year time limitation to file a claim against a dissolved corporation barred

² 64.34 RCW.

³ 19.86 RCW.

⁴ T&G filed a fifth-party claim against its subcontractors.

No. 56144-8-1/4
Linked w/No. 57679-8-1

CAI's claims against it.⁵ In October 2004, the trial court denied T&G's motion for summary judgment. The trial court ruled that as a matter of law the two-year time limitation did not apply to CAI's post-dissolution claims and there were material issues of fact concerning the pre-dissolution claims.⁶

The Association filed a motion for summary judgment, claiming that the alleged construction and design work violated the Uniform Building Code (UBC) and the WCA. The court ruled that a number of the alleged defects violated the UBC and the WCA. As to T&G's work, the court ruled that the improperly installed weather barriers and flashing violated the UBC and the WCA.

At mediation, the Association settled with all parties except T&G for approximately \$5.7 million.⁷ Without MOE's consent, T&G then entered into a settlement agreement with the Association in November 2004. In exchange for a stipulated judgment of \$3.3 million and assignment of its coverage and bad faith claims, the Association agreed to not execute on the judgment and dismiss the lawsuit against T&G.⁸

The Association and T&G notified MOE that a reasonableness hearing on the settlement agreement was scheduled for December 2. MOE filed a motion to intervene

⁵ In the alternative, T&G argued CAI's contract claims were barred by the three-year statute of limitations.

⁶ The court also ruled that as a matter of law the six-year statute of limitations applied.

⁷ The Association also did not settle with the framing contractor, Burley Bear Homes, Inc.

⁸ On September 22, 2004, MOE filed a declaratory judgment action on coverage and its obligation to indemnify T&G under the policy.

No. 56144-8-I/5
Linked w/No. 57679-8-I

for the "purpose of challenging the reasonableness of the settlement between Plaintiff and T&G Construction, Inc." The court granted MOE's request to intervene and continued the hearing to allow MOE to conduct additional discovery.

The day before the hearing, MOE objected to the court's authority to conduct a reasonableness hearing in a breach of contract condominium construction defect case. Over MOE's objection, the court proceeded with the hearing. A number of witnesses testified on behalf of the Association and T&G and MOE. The court also reviewed extensive documentary evidence including the experts' scope and estimated cost of repair, and a number of photographs depicting the damage.

In a memorandum decision issued on March 8, 2005, the court ruled that it had the authority to conduct a reasonableness hearing and the \$3.3 million settlement between the Association and T&G was reasonable. On March 17, the court entered the \$3.3 million stipulated judgment against T&G.

On April 12, MOE filed a motion asking the court to withdraw or correct its memorandum decision. Based on a recent decision of this court, MOE argued that the claims against T&G were barred by the two-year time limitation to file a claim against a dissolved corporation.⁹ The court denied MOE's motion and entered findings and conclusions on its determination that the settlement agreement was reasonable.¹⁰

⁹ Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 126 Wn. App. 285, 108 P.3d 818 (2005); rev. granted, 155 Wn.2d 1024, 126 P.3d 820, (2005), aff'd on other grounds, 158 Wn.2d 603; 146 P.3d 914 (2006).

¹⁰ Although the court denied MOE's motion to withdraw or correct the memorandum decision, the court concluded \$3 million, instead of \$3.3 million, was reasonable "based on risks Construction Associates/Association would have incurred at trial." The parties do not challenge the court's \$3 million determination.

ANALYSIS

Authority to Conduct Reasonableness Hearing

MOE contends that under RCW 4.22.060, the trial court had no authority to conduct a reasonableness hearing in a breach of contract condominium construction defect case.

We review questions of law de novo. Dep't of Ecology v. Campbell & Gwinn L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002); Stuckey v. Dep't of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996). The applicability of whether a statute applies is also a question of law. Lobdell v. Sugar 'N Spice Inc., 33 Wn. App. 881, 887, 658 P.2d 1267 (1983).

As part of the 1981 Tort Reform Act, Laws of 1981, ch. 27 (codified in chapters 7.72 and 4.22 RCW), RCW 4.22.060 creates a right of contribution between joint tortfeasors and procedures to enforce that right. Glover v. Tacoma General 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, 756 P.2d 717 (1988). Under RCW 4.22.060(1), the court's determination that a settlement amount is reasonable establishes the offset for a nonsettling joint tortfeasor. RCW 4.22.060(2) requires the court to determine whether the settlement amount is reasonable and, if not, set forth the amount that is

¹¹ RCW 4.22.060(2) provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

No. 56144-8-1/7
Linked w/No. 57679-8-1

reasonable.¹¹

In Glover, the Washington Supreme Court adopted a number of factors the court should consider in determining the reasonableness of a settlement under RCW 4.22.060. But according to the court, no one factor controls and the trial court retains the discretion to make an objective determination of the reasonableness of the settlement based on the facts and circumstances of each case. Glover, 98 Wn.2d at 718.

When an insurer refuses to settle a claim, the insured, without the consent of the insurer, can negotiate a settlement with the claimant. Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc., 128 Wn. App. 317, 322, 116 P.3d 404 (2005). The insurer is liable for the settlement amount to the extent it is reasonable. Red Oaks, 128 Wn. App. at 322. An insured's assignment of its bad faith claims also allows the claimant to seek more than the policy limits. In Besel v. Viking Ins. Co., 146 Wn.2d 730, 49 P.3d 887 (2002).

In Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 803 P.2d 1339 (1991), this court adopted the Glover factors to evaluate the reasonableness of a settlement between an insured and the claimant for a stipulated judgment and an assignment of coverage and bad faith rights in exchange for a covenant not to

¹¹ RCW 4.22.060(2) provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

No. 56144-8-1/8
Linked w/No. 57679-8-1

execute and dismissal. Because of similar concerns regarding the impact of a settlement on other parties and the risk of fraud or collusion, we concluded the Glover factors should apply to a covenant judgment settlement agreement between an insured and the claimant. Chaussee, 60 Wn. App. at 512.

In Besel, the Washington Supreme Court approved of the procedure adopted in Chaussee and of conducting a reasonableness determination in the underlying action prior to a coverage or a bad faith action. The court also held that the settlement amount the court determines is reasonable establishes the presumptive measure of harm in a later bad faith action against the insurer. Besel, 146 Wn.2d at 738. According to the Court, a reasonableness determination under the Chaussee criteria protects “insurers from excessive judgments especially where . . . the insurer has notice of the reasonableness hearing and has an opportunity to argue against the settlement’s reasonableness.” Besel, 146 Wn.2d at 739.

In Red Oaks, a recent breach of contract condominium defect case, this court reiterated the importance of the trial court’s reasonableness determination when the insured enters into a stipulated judgment and assigns its coverage and bad faith claims in exchange for a covenant not to execute on the judgment. Red Oaks, 128 Wn. App. at 321-322. In Red Oaks, after the trial court denied the insurer’s motion to continue the reasonableness hearing, the insurer decided not to participate in the hearing. On appeal, we held that the trial court’s denial of the motion to continue did not violate due process and the insurer was not subject to greater bad faith liability by participating in the reasonableness hearing. Red Oaks, 128 Wn.2d at

324.

As in Chaussee, Besel and Red Oaks, the Association's settlement agreement with T&G included a stipulated judgment in favor of the Association with a covenant not to execute and an assignment of T&G's coverage and bad faith claims against MOE. Based on Chaussee, Besel and Red Oaks, we conclude the trial court has the authority in a contract condominium defect case to conduct a reasonableness hearing on a covenant judgment settlement agreement between an insured and the claimant.

MOE also argues the trial court did not have jurisdiction to conduct a reasonableness hearing because the Association and T&G entered into the settlement agreement prior to the hearing. Specifically, MOE argues the court did not have jurisdiction because there was no case in controversy and T&G did not comply with the requirements of RCW 4.22.060(1).

For a court to exercise judicial power, there must be a justiciable case or controversy. U.S. Const. art. III, § 2; To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (before the jurisdiction of a court may be invoked, the virtually universal rule is that there must be a justiciable controversy).¹² Because the stipulated judgment establishes the presumptive measure of harm in a later bad faith action against the insurer if the court determines the settlement is reasonable, there was a justiciable controversy. Besel, 146 Wn.2d at 738. And in Howard v. Spec. Underwriting, 121 Wn. App. 372, 89 P.3d 265 (2004), rev. denied, 153 Wn.2d 1009

¹² The Association contends MOE waived the right to argue jurisdiction based on its participation in the reasonableness hearing. But the right to challenge jurisdiction cannot be waived and may be raised at any time. Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit Cy., 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

(2005), this court rejected the argument that the reasonableness hearing must be held in the subsequent bad faith action. Howard, 121 Wn. App. at 379.¹³

Relying on the requirements of RCW 4.22.060(1), MOE also argues that the court did not have jurisdiction because MOE did not receive notice before T&G and the Association entered into the settlement agreement. RCW 4.22.060(1) provides that:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court.

Under the plain terms of the statute, the claimant must provide five days notice of the intent to settle to all other parties. But here, there is no dispute that MOE was not a party and, therefore, was not entitled to notice under RCW 4.22.060(1). Nevertheless, even assuming MOE was entitled to notice as a party, MOE cannot establish a due process violation or prejudice. There is no dispute that MOE received notice of the settlement agreement before the reasonableness hearing or that MOE intervened and participated in the hearing. Red Oaks, 128 Wn. App. at 324. We conclude the trial court had jurisdiction to conduct a reasonableness hearing on the settlement agreement between the insured and the claimant in this condominium construction defect case.

The remainder of this opinion has no precedential value. Therefore, it will not be published but has been filed for public record. See, RCW 2.06.040; CAR 14.

¹³ The cases MOE relies on to argue that the court did not have jurisdiction are either inapposite or distinguishable. In Nat'l Sch. Studios, Inc. v. Superior Sch. Photo Serv., Inc., 40 Wn.2d 263, 242 P.2d 756 (1952), the court declined to accept review because the time limitation in a covenant not to compete had expired. In Rosling v. Seattle Bldg. & Constr. Trades Council, 62 Wn.2d 905, 907, 385 P.2d 29 (1963), the court declined to review a case concerning picketing at a construction site because construction was complete, making the question "purely academic." In Tosco Corp. v. Hodel, 804 F.2d 590 (10th Cir. 1986), while the appeal was pending, the parties settled. When third parties moved to intervene, the court ruled that it lacked jurisdiction because there was no case or controversy.

Reasonableness Determination

In the alternative, MOE challenges the trial court's reasonableness findings on some of the Glover/Chaussee factors. Under Glover and Chaussee, the court must consider the following factors in making a reasonableness determination: (1) the releasing party's damages; (2) the merits of the releasing party's liability; (3) the merits of the released party's defense theory; (4) the released party's relative faults; (5) the risks and expense of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released. Glover, 98 Wn.2d at 717. While the court must consider these factors, no one factor controls and the trial court has the discretion to decide each case individually. Chaussee, 60 Wn. App. at 512 (citing Glover, 98 Wn. App. at 717).

We review the trial court's determination of reasonableness for abuse of discretion. Werlinger v. Warner, 126 Wn. App. 342, 109 P.3d 22 (2005). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A reasonableness determination necessarily involves factual findings which will not be disturbed on appeal if supported by substantial evidence. Howard, 121 Wn. App. at 380.

MOE challenges the trial court's findings on the merits of T&G's defense theory, the Association's damages, T&G's ability to pay, and the risks and expenses of continued litigation.

First, MOE contends the trial court erred in finding that T&G would not prevail on its corporate dissolution defense under former RCW 23B.14.340. Former RCW 23B.14.340 provided in part that “[t]he dissolution of a corporation . . . [b]y the issuance of a certificate of dissolution by the secretary of state . . . shall not take away . . . any remedy available against such corporation . . . for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.”

T&G in its motion for summary judgment argued that the two-year time limit under former RCW 23B.14.340 barred CAI’s claims against it. The court ruled that as a matter of law CAI’s post-dissolution claims were not barred. But as to CAI’s pre-dissolution claims against T&G, the trial court ruled there were material issues of fact about whether T&G failed to give notice to CAI as a known claimant.¹⁴

At the reasonableness hearing, the Association and T&G presented additional evidence about whether CAI was a known creditor. In the court’s findings of fact on the reasonableness of the settlement, the court stated that “[i]t is also likely Construction Associates’ claim that it was a known creditor would have been found true by a jury in light of the sworn statements by C.A.[I]’s former employees, other evidence and complaints made.”

After the court issued its memorandum decision finding the settlement reasonable and after the court entered the stipulated judgment for \$3.3 million, MOE filed a motion to correct or withdraw the memorandum decision. In the motion to

¹⁴ Former RCW 23B.14.060 provides that a dissolved corporation must notify “its known claimants in writing of the dissolution”

correct or withdraw, MOE cited and relied on this court's recent decision in Ballard Square. In Ballard Square, we held that former RCW 23B.14.340 did not apply to post-dissolution claims based on pre-dissolution contract rights, but that the post-dissolution claims were barred by the common law.¹⁵ Ballard Square, 126 Wn. App. at 296. The trial court denied MOE's motion to correct or withdraw and entered findings of fact and conclusions of law consistent with its memorandum decision.

According to established caselaw, the court determines the reasonableness of a settlement "at the time the parties enter into it." Brewer v. Fibreboard Corp., 127 Wn.2d 512, 541, 901 P.2d 297 (1995); Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 38, 935 P.2d 684 (1997). See also Schmidt v. Cornerstone Invest. Inc., 115 Wn.2d 148, 795 P.2d 1143 (1990). Even though the Ballard Square decision affected the analysis of T&G's corporate dissolution defense, because the reasonableness determination is based on the facts and law at the time of settlement, we conclude the trial court's findings on the merits of T&G corporate dissolution defense were not erroneous.¹⁶

Substantial evidence also supports the trial court's finding that a jury could conclude CAI was a known creditor. A former CAI employee, Deb Harrington, testified that in early 2000, she notified T&G's president about the siding installation problems at

¹⁵ On review, the Washington Supreme Court affirmed but on different grounds. The court concluded post-dissolution claims against a dissolved corporation were authorized under former RCW 23B.14.340, but the 2006 amendment to the statute retroactively barred the claims. Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d at 619.

¹⁶ MOE also relies on CAI's brief in opposition to T&G's motion for summary judgment to argue only post-dissolution claims was asserted against T&G. MOE's argument is unpersuasive. In opposing T&G's motion for summary judgment based on administrative dissolution, CAI argued not only that its claims against T&G were post-dissolution but also that CAI was entitled to notice as a known claimant on the pre-dissolution claims.

No. 56144-8-1/14
Linked w/No. 57679-8-1

the condominium. Records from CAI to T&G in December 2000 and in October 2001, also show T&G was on notice that there were water problems in several units, missing flashing, and leaks above the windows. In addition, CAI's project manager and superintendent, Rob Hensel, testified that in 2000 and 2001, he telephoned T&G's president several times about the water intrusion problems and T&G's defective work.

MOE also argues the trial court abused its discretion in failing to consider the Association's \$1.9 million settlement offer after T&G and the Association entered into the \$3.3 million settlement agreement. But according to testimony, the \$1.9 million offer was only based on the declaratory judgment and bad faith action against MOE.

The trial court's assessment of damages is also supported by substantial evidence. The experts all agreed T&G's substandard work resulted in water damage to the condominium. The estimated cost of repair ranged from \$300,000 to approximately \$4.6 million. The court concluded that a jury would likely find that the cost of repair was between \$2 and \$4.6 million based on the record and that the \$3.3 million settlement amount was reasonable.

Next, relying on Chaussee, MOE claims the trial court erred in failing to consider T&G's ability to pay. In Chaussee, the court held that the judicial approval of a guardian's settlement on behalf of a minor was insufficient to establish reasonableness because the plaintiff failed to present any evidence to show the risk and expense of litigation or the defendant's ability to pay. Chaussee, 60 Wn. App. at 513.

But unlike in Chaussee, the trial court did not fail to consider T&G's ability to pay. Substantial evidence supports the trial court's finding that as a dissolved entity, T&G

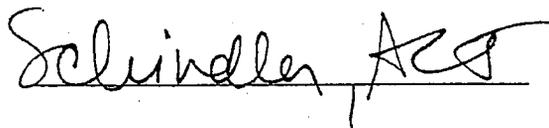
No. 56144-8-1/15
Linked w/No. 57679-8-1

could only pay to the extent it was insured. T&G stated in the settlement agreement that the company did not have the ability to pay. As part of the reasonableness hearing, the Association also presented a declaration from T&G's owner confirming T&G did not have the ability to pay.

Last, MOE argues substantial evidence does not support the trial court's finding that the expenses related to continuing the litigation were significant. Specifically, MOE asserts there was no evidence concerning reasonable attorney fees. Contrary to MOE's assertion, the Association submitted information concerning litigation costs and the amount of attorney fees. In addition, the trial court estimated the trial would last three to five weeks and described necessary pretrial preparation, including the fact that T&G had to "hire its own experts to conduct additional discovery to duplicate much of this work at great expense." Substantial evidence supports the trial court's findings that the cost of continuing litigation was between \$500,000 and \$1 million.

CONCLUSION

The trial court had the authority and the jurisdiction to conduct a reasonableness hearing on the settlement agreement between the insured and the claimant for a stipulated judgment and covenant not to execute. We conclude the trial court did not abuse its discretion in determining the settlement between the Association and T&G was reasonable and substantial evidence supports the trial court's findings. We affirm.



No. 56144-8-1/16
Linked w/No. 57679-8-1

WE CONCUR:

Appelwick, G.

Cox, J.

Appendix C

No. 57679-8-I

THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON
SEATTLE

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant,

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR
POINTE OWNERS ASSOCIATION,

Respondents.

MOTION TO PUBLISH

Brent W. Beecher, WSBA #31095
James M. Beecher, WSBA #468
Attorneys for Appellant Mutual of Enumclaw

HACKETT, BEECHER & HART
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101
206-624-2200

RECEIVED

APR 23 2007

BARKER . MARTIN, P.

I. RELIEF SOUGHT BY APPELLANT

Mutual of Enumclaw joins non-party William Hickman in asking that the opinion filed April 2, 2007 be designated for publication pursuant to RAP 12.3(e).

II. GROUND FOR RELIEF

The unpublished opinion in this case is of considerable precedential value and should be published because it clarifies existing caselaw. While there is much caselaw in Washington holding that an insurer is liable for an insured's (reasonable) covenant judgment if the insurer acted in bad faith, there is almost no law in this State regarding the consequences of a reasonableness determination where there was *no* bad faith. In fact, there is not a single reported case in Washington where an insurer has actively participated in a reasonableness hearing, and the insured's assignee alleges that the insurer is bound as a matter of *res judicata*.

It comes as no surprise that our Courts have made efforts to dissuade bad faith claims handling by insurers. One of the tools in the judicial arsenal to further this goal is binding an insurer to the terms of the insured's covenant judgment settlement, and estopping the insurer from asserting policy-based coverage defense. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002). As the Court in *Besel* noted, estoppel is

strong medicine, but well behaved insurance companies should have nothing to fear: "Insurers can avoid this result in the future by acting in good faith." *Id.* at 739-740.

Below, the Association argued Washington caselaw, and convinced the trial court judge that Mutual of Enumclaw was estopped from asserting coverage defenses *regardless* of bad faith. The promise of *Besel* that this result could be avoided was effectively eviscerated. This result leads to two unpalatable policy implications: first, the insured's threat of a covenant judgment could be easily manipulated into an inappropriate threat to force insurers to pay for claims outside of policy coverage. Second, there would be no incentive for an insurer to act in good faith, since the result would be the same either way. In its unpublished opinion in this case, the Court dispelled these concerns. But the Association's argument continues to resonate in trial courts of our State, and continues to needlessly increase both risk and legal expense that could be eliminated by publication of this opinion.

The Court's opinion in this case resolved not only the issue of whether an insurer is estopped by a (reasonable) covenant judgment, but also resolved the relationship between the insurer's participation in the reasonableness hearing and coverage under the policy. Both of these issues present themselves repeatedly in insurance coverage litigation.

With increased risk comes increased costs to all parties involved in insurance relationships. The Court's decision in this case decreases that risk, and therefore is of general public interest, and appropriate for publication.

RESPECTFULLY SUBMITTED THIS 23rd day of April, 2007.



Brent W. Beecher, WSBA #31095
Attorneys for Appellant

RECEIVED

APR 23 2007

CERTIFICATE OF SERVICE

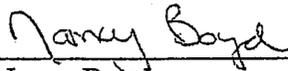
BARKER . MARTIN . P.

I, Nancy Boyd, declare that on the date noted below I caused to be delivered via ABC Legal Messengers, Inc., a copy of *Appellant's Motion to Publish* to:

Daniel Zimberoff/Dina Wong
BARKER MARTIN
719 Second Avenue, #1200
Seattle, WA 98104

I Certify Under Penalty of Perjury Under the Laws of the State of Washington that the Foregoing is True and Correct.

SIGNED IN Seattle, WA this 23rd day of April, 2007.



Nancy Boyd

Appendix D

NO. 57679-8-I
COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant, v.

T&G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE
OWNERS ASSOCIATION,

Respondent.

NON-PARTY'S JOINDER IN MOTIONS TO PUBLISH

Misty A. Edmundson, WSBA #29606

SOHA & LANG P.S.
701 Fifth Avenue, Suite 2400
Seattle, WA 98104
(206) 624-1800

I. IDENTITY OF JOINING PARTY

Applicant, Misty A. Edmundson, is a non-party to the underlying action.

II. STATEMENT OF RELIEF SOUGHT

Applicant joins in the Motion of Non-party William C. Hickman and the Joinder of Appellant Mutual of Enumclaw for publication of the opinion of this court filed on April 2, 2007, relative to the above-captioned case.

III. FACTS RELEVANT TO JOINDER

On April 2, 2007, this Court filed its opinion in the above-captioned cause. A true copy of the Court's Opinion is attached hereto. The court determined that the opinion would not be published. For the reasons set forth below, the applicant believes this case should be printed in the Washington Appellate Reports.

IV. GROUND FOR RELIEF AND ARGUMENT

The unpublished opinion in this case is of considerable precedential value and should be published because it clarifies existing caselaw. RAP 12.3(e) provides:

Motion To Publish. A motion requesting the Court of Appeals to publish an opinion that had been ordered filed for public record should be filed within 20 days after the opinion has been filed. If the motion is made by a person not a party, the motion must include a statement of (1) applicant's interest and the person or group applicant represents and (2) applicant's reasons for believing publication is necessary.

Because applicant is a non-party, each consideration will be taken in turn.

A. Applicant's Interest

The applicant is a non-party in this case. The applicant is an attorney who practices in Washington. During the course of applicant's practice, the issues addressed by the court arises with some frequency. Indeed, at this moment, the applicant is aware of two cases in the office to which this case may be relevant.

B. Applicant's Reasoning for believing Publication is necessary

RCW 2.06.040 grants this court discretion to determine whether its decisions have precedential value to be published as an opinion of the Court. RAP 12.3(e) allows a party to move for publication in the event that the Court determines publication will not occur. Opinions of the court of appeals should be published:

- (1) Where the decision determines an unsettled or new question of law or constitutional principle.
- (2) Where the decision modifies, clarifies or reverses an established principle of law.
- (3) Where the decision is of general public interest or importance.
- (4) Where the decision is not unanimous.

State v. Fitzpatrick, 5 Wn. App. 661, 669, 491 P.2d 262 (1971).

The present case meets the first and second criteria because it determined unsettled law and it clarifies existing case law and is of significant

precedential value. There is almost no law in this State regarding the consequences of a reasonableness determination where there was *no* bad faith. In fact, there is not a single reported case in Washington where an insurer has actively participated in a reasonableness hearing, and the insured's assignee alleges that the insurer is bound as a matter of *res judicata*.

The Court's opinion in this case resolved not only the issue of whether an insurer is estopped by a (reasonable) covenant judgment, but also resolved the relationship between the insurer's participation in the reasonableness hearing and coverage under the policy. Both of these issues present themselves repeatedly in insurance coverage litigation. The Court's opinion effectively clarified current case law with respect to these issues.

Because the opinion clarifies prior case law as well as settles issues which were previously unsettled, and these issues will arise again, applicant respectfully requests the court to publish the present opinion.

DATED THIS 3rd day of May, 2007.

SOHA & LANG, P.S.


Misty Edmundson, WSBA #29606

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 3, 2007, I arranged for service of Non-Party's Joinder in Motions to Publish and this Declaration of Service to the court and counsel for the parties to this action as follows:

Jim Beecher
Brent Beecher
Hackett, Beecher, & Hart
1601 5th Avenue, Suite 2200
Seattle, WA 98101-1651
*Counsel for Mutual of Enumclaw
Ins. Co.*

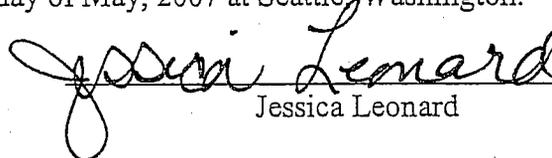
Dan Zimberoff
Barker Martin
719 2nd Avenue, Suite 1200
Seattle, WA 98104-1749
*Counsel for Villas at Harbour
Point*

VIA ABC LEGAL MESSENGERS VIA ABC LEGAL MESSENGERS

William C. Hickman
Reed McClure
Two Union Square
601 Union Street Suite 1500
Seattle, WA 98101-1363

VIA ABC LEGAL MESSENGERS

DATED this 3rd day of May, 2007 at Seattle, Washington.



Jessica Leonard

Appendix E

RECEIVED

APR 16 2007

BARKER, MARTIN, ESQ.

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

MUTUAL OF ENUMCLAW
INSURANCE COMPANY,

Intervenor/Appellant,

vs.

T&G CONSTRUCTION, INC., AND
VILLAS AT HARBOUR POINTE
OWNERS ASSOCIATION,

Respondents.

No. 57679-8-I

Linked with No. 56144-8-I

RAP 12.3(e) MOTION TO
PUBLISH

**I. IDENTITY OF MOVING PARTY AND
STATEMENT OF INTEREST**

The moving party, William R. Hickman, is a Washington attorney whose practice has been concentrated in insurance coverage, tort litigation, and appellate matters since 1970. The moving party has edited the *Washington Insurance Law Letter* since 1976. The moving party reads each insurance-related, tort-related opinion filed by the Court of Appeals or the Supreme Court.

II. RELIEF REQUESTED

Pursuant to RAP 12.3(e), the undersigned asks this court to publish its opinion filed on April 2, 2007.

III. FACTS RELEVANT TO MOTION

On April 2, 2007, this court filed its unpublished opinion. In this case, the court concluded that the insurance company was entitled to a determination on whether there is coverage under its policy and if so, the extent of the insurance company's obligation to indemnify its policyholder. The court reversed the trial court which had ruled that the insurance company was obligated to pay a stipulated \$3,000,000 judgment.

This court's opinion is essential to the clarification and development of the common law in this area.

IV. GROUNDS FOR RELIEF AND ARGUMENT

RCW 2.06.040 provides, in pertinent part:

All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court.

The criteria for determining whether a case has precedential value are set forth in *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev. denied*, 80 Wn.2d 1003 (1972):

OPINIONS OF THE COURT OF APPEALS SHOULD BE PUBLISHED:

- (1) Where the decision determines an unsettled or new question of law or constitutional principle.

(2) Where the decision modifies, clarifies or reverses an established principle of law.

(3) Where the decision is of general public interest or importance.

(4) Where the case is in conflict with a prior opinion of the Court of Appeals.

(5) Where the decision is not unanimous.

This case qualifies under grounds (2) and (3).

In the opinion, this court made three major rulings:

1. The insurance company can litigate coverage without waiting for resolution of the bad faith claim;

2. The insurance company can relitigate the policyholder's liability on the coverage issue i.e. whether the insured was "legally obligated to pay";

3. The insurance company can still attempt to enforce the policy condition prohibiting settlement without the insurer's consent if there has been no bad faith.

In addition to the three major rulings mentioned above, we must not overlook the fact that in reaching the ultimate conclusion that Mutual of Enumclaw was entitled to determination of whether there was coverage for a stipulated \$3,000,000 judgment, this court had to reverse the trial court judge. That means the trial court judge got the law wrong. That in turn clearly indicates that the law in this area needs to be clarified.

Publication of this opinion will go a long way toward eliminating the confusion.

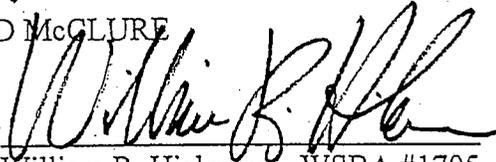
The court's opinion must be available to trial courts and coverage counsel.¹

V. CONCLUSION

The court's opinion has significant precedential value, makes a contribution to the common law of Division One, and is of general public interest and importance. It should be published.

DATED this 12 day of April, 2007.

REED McCLURE

By 

William R. Hickman WSBA #1705
Attorneys for Moving Party
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

¹ It is coincidental (or perhaps more accurately ironic) that on the same date the same panel published an opinion in another case involving Mutual of Enumclaw: Villas At Harbour Pointe v. Mutual of Enumclaw Insurance Company ___ W.A. ___, ___ P3d ___ (2007). In that reasonableness hearing case the court applied prior case law and added little to the common law. In striking contrast this opinion clarifies and adds to the common law. It should be published.

Appendix F

RECEIVED

JUN 13 2007

BARKER . MARTIN . E.

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

MUTUAL OF ENUMCLAW)
INSURANCE COMPANY,)
)
Intervenor/Appellant,)
)
v.)
)
T&G CONSTRUCTION, INC., and)
VILLAS AT HARBOUR POINTE)
OWNERS ASSOCIATION,)
)
Respondents.)

No. 57679-8-1
Linked with No. 56144-8-1

ORDER GRANTING MOTION
TO PUBLISH

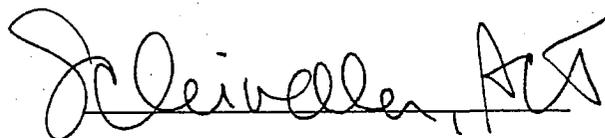
William Hickman, Misty Edmundson, non-parties in the above matter and Mutual of Enumclaw, intervenor/appellant filed a motion for publication of the opinion filed on April 2, 2007. Respondent, Villas as Harbour Pointe Owners Association, responded to the motion. The panel has determined that the motion should be granted;

Now, therefore, it is hereby

ORDERED that the motion for publication is granted.

DATED this 12th day of June, 2007.

For the Court:



Presiding Judge

2007 JUN 12 AM 10:03
COURT OF APPEALS
STATE OF WASHINGTON