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STATE OF WASHINGTON  
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NO. 38411-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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RSUI,  
Intervenor and Appellant,

v.

VISION ONE, LLC, and VISION TACOMA, INC.,  
Plaintiffs and Respondents,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
Defendant and Appellant,

and

D&D CONSTRUCTION, INC.;  
Defendant, Third-Party Plaintiff, and Respondent,

v.

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

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BRIEF OF VISION RESPONDENTS AND RESPONDENT D&D, INC.,  
IN RESPONSE TO APPELLANT RSUI'S OPENING BRIEF

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## I. INTRODUCTION/SUMMARY

RSUI was not denied information or given too little opportunity to follow up on “circumstantial evidence” that Vision and Berg colluded by settling for \$3.3 million. Berg provided reports to RSUI and gave it access to its counsel’s files until a February 2008 mediation failed. Once it was clear that RSUI was denying coverage, Berg was not obliged to keep it informed and RSUI stopped seeking information. RSUI did not make “repeated requests” for “information” after the mediation; it only challenged Berg to cite legal authority against its coverage position.

The trial court had tenable reasons for finding the settlement reasonable. Pretrial rulings allowed Vision to prove \$4.5 million in damages. Berg had exposure to \$5 million more in bodily injury claims. Vision compromised substantially by agreeing to a settlement for \$3.3 million, of which only \$1 million was in sure cash, and promising to indemnify Berg against all bodily injury liability.

There was nothing unusual about the Vision-Berg settlement’s timing or structure to suggest “collusion.” Settlements on the eve of trial are commonplace. In denied-coverage settlements, a defendant typically pays little or no money, agrees to a covenant judgment against its insurer, and assigns its rights against the insurer to the plaintiff.

The trial court had tenable reasons for rejecting RSUI's request to continue the reasonableness hearing and postpone trial for 11 days so RSUI could go fishing for evidence of collusion. Berg was entitled to settle within the range of its exposure to damages on terms that required it to pay no money of its own. Because the court had tenable reasons for proceeding with the reasonableness hearing after continuing it for three days, it did not abuse its discretion. This Court should affirm.

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED BY  
RSUI'S APPEAL AND OPENING BRIEF

1. Is there evidence that RSUI made any requests after February 2008 for information about the case or settlement negotiations?
2. Does it matter whether RSUI's refusal to participate in the parties' February 2008 mediation is confidential and, if it does, *is* RSUI's refusal to participate confidential?
3. Is there any basis in the record upon which to conclude that the trial court failed to base its reasonableness finding on consideration of the *Chaussee/Besel* factors?
4. Did the trial court have tenable reasons for finding the Vision-Berg settlement reasonable?
5. Was there probable cause to believe the Vision-Berg settlement was collusive?

### III. COUNTERSTATEMENT OF THE CASE

#### A. Nature of the Case.

Vision One, LLC, and Vision Tacoma, Inc. (“Vision”), undertook development of a 93-unit luxury condominium, The Reverie at Marcato, as the first phase of a planned mixed-use development with 600 condominiums plus retail and office space, in Tacoma.<sup>1</sup> Vision broke ground in May 2005, and expected to begin delivering completed condominiums by September 1, 2006.<sup>2</sup> Vision presold 60 condominium units under agreements that were nonrescindable if it tendered occupancy by December 1, 2006.<sup>3</sup>

Vision contracted concrete work to D&D, Inc.<sup>4</sup> Under contract with Berg Equipment & Scaffolding Co., Inc., D&D leased shoring equipment to support the concrete while it was poured and until it had cured to form an above-grade, partly-sloped slab.<sup>5</sup> As D&D was pouring the slab on October 1, 2005, it collapsed.<sup>6</sup> Construction was set back for three months. CP 1779-80 (¶¶ 16-17). The overall project experienced a

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<sup>1</sup> CP 543 (¶ 1.1), 5552; RP 302.

<sup>2</sup> CP 3779, 3882, 4958-63; RP 376-77.

<sup>3</sup> CP 4959, 5552; RP 384-85; 9/25/08RP 438-41.

<sup>4</sup> CP 535 (¶ 1.3), CP 1069 (¶ 6.5).

<sup>5</sup> CP 1061 (¶ 8), 1756, 1760-61, 1773-76, 2989-90, 3040.

<sup>6</sup> CP 535 (¶ 3.1), 1620-21, 1778 (¶ 12), 3961-62.

cascade of further delays,<sup>7</sup> and was not completed until May 2007.<sup>8</sup> Vision could not meet the ready-for-occupancy deadline in its presale contracts, and had to re-market 23 of the 60 units in a market much cooler than the one that had existed in the fall of 2005 and with “stigma” associated with the building due to notoriety of the slab collapse.<sup>9</sup>

B. Litigation over collapse-related liabilities.

Vision’s All Risk Builder’s insurer, Philadelphia Indemnity, denied coverage, CP 620, 3666-68, so Vision had to sue Berg, CP 7340, and complex litigation ensued over how financial and legal responsibility for slab collapse losses would be borne and apportioned. Vision sued D&D and Philadelphia in March 2006. CP 1-4. Philadelphia and D&D sued Berg; Berg counterclaimed against D&D.<sup>10</sup> Matthew Thompson, a subcontractor’s employee, sued for alleged disabling physical and psychological injuries, for which he would ultimately seek \$4 million.<sup>11</sup>

In June 2006, Vision settled with D&D, which had no insurance, releasing its claims against D&D in return for \$25,000 and an assignment

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<sup>7</sup> CP 3780, 3814, 3832-33, 3838-40, 3857-60, 3788-89. 3780, 3814, 3832-33, 3838-40, 3857-60, 3788-89, 9/24/08RP 346-52, 355-56, 360-65, 375-76; 9/25/08RP 419-20.

<sup>8</sup> 9/30/08RP 846-47.

<sup>9</sup> CP 3841-42, 5552-55; 9/25/08RP 440-451. Vision was able to mitigate its losses by persuading 37 of its 60 presale buyers to grant it extensions of the ready-for-occupancy deadline. CP 4959-60, 5552-54.

<sup>10</sup> CP 607-14, 618-26, 1060-62. Philadelphia’s claim against Berg was later summarily dismissed. CP 1006-08.

<sup>11</sup> CP 2724-29, 3568, 10601 (¶ 6).

of D&D's claims against Berg.<sup>12</sup> Berg had only \$1 million in liability coverage through Admiral Insurance Co., because RSUI, Berg's insurer against \$1 million in liabilities in excess of \$1 million, denied coverage to Berg for slab-collapse liabilities, citing an exclusion in its excess policy.<sup>13</sup> (The issue of whether RSUI denied coverage correctly and in good faith is being litigated elsewhere, and was never before the trial court in this case.)

Mr. Thompson's lawsuit was consolidated in May 2007 with the Vision-Philadelphia-Berg lawsuit by agreement,<sup>14</sup> but issues of causation and damages as to his claim were severed for later trial. Vision, Berg, and D&D stipulated that Thompson was not at fault and that any allocation of fault made at trial of the claims among them would bind them for purposes of liability to Thompson. CP 1011. An amended case schedule was established, fixing a discovery cutoff date of January 31, 2008; a February 21, 2008 deadline for hearing dispositive motions; and a March 20, 2008 trial date. CP 1016-17.

Following Vision's settlement with D&D and severance of Thompson's claim for trial, the case became one in which (1) Vision was suing Philadelphia for losses that Vision claims are covered under its

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<sup>12</sup> CP 4192 (¶ 1.6), 852-53, 4192-94.

<sup>13</sup> CP 329 (¶ 5); 9/15/08RP 37; *RSUI Br. at 6*.

<sup>14</sup> CP 999-1003, 1004-05, 1009-1015.

Builder's All Risk policy, for "bad faith," and for attorney fees; (2) Vision was suing Berg for all actual, incidental and consequential damages resulting from the collapse (a) in its own right, under tort (product liability) theories, and (b) as the assignee of D&D's contract/warranty claims; and Berg was suing D&D, which had no insurance, for various breach of contract damages.

By the discovery cutoff at the end of January 2008, the parties had engaged in extensive discovery, taking more than 40 depositions, generating 5,386 pages of deposition transcript plus thousands of pages of exhibits, and filling 16 boxes with produced documents, including ones from nearly 30 nonparties. CP 10607.

As of February 1, 2008, Berg's stated understanding was that Vision was claiming \$5.7 million in delay damages.<sup>15</sup>

On February 7, 2008, the case was re-assigned from Judge Linda CJ Lee to Judge Kitty-Ann van Doorninck, CP 13356, who presided for the duration of the litigation in the trial court.

C. RSUI's position and role.

During 2007, Berg sent information and reports about the litigation to RSUI.<sup>16</sup> RSUI sent its attorney Michael Helgren to attend the parties'

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<sup>15</sup> CP 3347, 3363 (¶ 3), 3366.

<sup>16</sup> CP 6863-64.

February 2008 mediation, in which it refused to participate.<sup>17</sup> Even if RSUI's refusal to participate in the mediation is confidential (as it now claims<sup>18</sup>), there is no evidence that RSUI ever indicated a willingness to contribute to a settlement. Berg's coverage counsel, Peter Petrich, represented (and RSUI did not deny) that he told Mr. Helgren after the mediation that Berg would likely assign its rights against RSUI if it settled with Vision.<sup>19</sup>

In mid-February 2008 Berg received, and advised RSUI of, CP 333 (¶ 10) and CP 343, a proposed settlement in which:

- Judgment for \$2.5 million would be entered and satisfied in part by payment to Vision of \$1 million by Admiral and \$500,000 by Berg;
- The amount not paid by Berg and Admiral (\$1 million) would be enforceable by Vision against RSUI only; and
- Vision's liability insurers – but not Vision itself – would be responsible for all bodily injury claims against Berg.

CP 451. RSUI did not offer to contribute to any such settlement, and Vision's proposal was not accepted. CP 6864.

In April and June 2008 RSUI counsel Helgren sent Berg's counsel Petrich letters challenging him to cite legal authority against RSUI's

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<sup>17</sup> CP 6864 (¶¶ 7-8), 6739 (¶ 5), 6864 (¶ 9).

<sup>18</sup> Vision explains at pages 23-24 why RSUI's refusal to participate isn't confidential.

<sup>19</sup> 9/12/08RP 107.

position that its policy does not cover Berg's slab-collapse liabilities.<sup>20</sup> There is no evidence that RSUI asked for information about the litigation or inquired about settlement after February 2008.

D. Where Vision and Berg stood as trial approached.

Judge Lee had denied a motion by Berg for summary judgment for partial summary judgment on contract-terms issues,<sup>21</sup> and, after Judge van Doorninck was assigned to the case on February 7, 2008, she entered three orders,<sup>22</sup> on extensively-briefed motions and cross-motions for partial summary judgment relating to other Vision-Berg issues.<sup>23</sup> On May 13, 2008, trial was continued from March 20 to September 8, 2008, and, except for provisions permitting several more witness depositions, the discovery cutoff of January 31, 2008 was not extended, nor was the February 21 deadline for hearing dispositive motions.<sup>24</sup>

After February 2008, the parties could no longer file dispositive motions as such, but nonetheless mounted pretrial attacks on each other's

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<sup>20</sup> CP 12373, 12375.

<sup>21</sup> CP 12644; *see* CP 1520-35.

<sup>22</sup> CP 4993-97, 4998-5001, 12644 (item 1).

<sup>23</sup> *See* CP 3038-50, 3732-46, 4212-23; CP 12263-753, 3607-10, 3611-23; CP 3960-67, 3778-97, 3728-31, 4460-88, 4231-38.

<sup>24</sup> CP 5796-98.

cases through motions in limine and motions to strike evidence,<sup>25</sup> with Philadelphia joining in some Berg motions,<sup>26</sup> and through briefing concerning jury instructions.<sup>27</sup> During the months before trial, there were conferences with the court on numerous legal issues raised by the parties' claims and defenses and how to explain them in jury instructions.<sup>28</sup> In connection with several motions, Judge van Doorninck considered briefing and testimony explaining and challenging Vision's damages theories and calculations.<sup>29</sup>

There were myriad issues of fact as to liability, causation, and damages that Vision and Berg were preparing to try. For example, Berg raised a number of UCC-based contract formation, disclaimer, and remedy-limitation defenses to the contract/warranty claims that Vision asserted against Berg as D&D's assignee.<sup>30</sup> Berg nonetheless faced the prospect that the jury would find it negligent and/or liable for leasing D&D shoring equipment that was faulty because it was not fit for its

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<sup>25</sup> CP 3960-67, 4247-58, 4624-58, 4659-73, 4905-17, 4732-39, 4933-37, 4938-57, 4989-92, 5080-5109, 5159-73, 5355-67, 5384-89, 5390-93, 5334-54, 5421-24, 5425-30, 5469-74, 5458-68, 5664-68, 5528-49, 5690-5701, 5707-12, 5713-19, 5720-25.

<sup>26</sup> CP 3690-67, 4535-4621, 5002-79, 5690-5701.

<sup>27</sup> *E.g.*, CP 6190-6251, 6271-6287.

<sup>28</sup> *E.g.*, CP 5798-5800, 6190-6251; CP 13288-96, 13299, 13302, 13309; 5/15/08RP 5-6, 58; 5/22/08RP 78-144; 5/29/08RP 149-202; 6/20/08RP 207-19.

<sup>29</sup> *See, e.g.*, CP 3354-61, 3728-29, 3791-96, 3960-67, 3968-4069, 4070-4144, 4236-37, 4247-55, 4259-4360, 4669-71, 5528-38, 5550-55, 6126-38, 6288-98.

<sup>30</sup> *See* CP 1059 (¶ 12), CP 1526-33.

intended purpose. There was evidence that the collapse had occurred because the shoring system, when erected, was unstable due to Berg having supplied D&D with mismatched and/or incomplete shoring equipment components (stabilizer caps and tightly-fitted screwjack base plates.<sup>31</sup> Berg disputed those contentions.<sup>32</sup>

Berg's contract defenses against the claims D&D had assigned to Vision did not apply to Vision's tort claims,<sup>33</sup> and the court denied Berg's motion for summary dismissal of the contract claims based on those defenses.<sup>34</sup> Vision's claims against Berg based on product liability law also withstood summary judgment challenge in March 2008. CP 4998-5000. Although Berg succeeded, in another partial summary judgment

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<sup>31</sup> See CP [2144344.2 at 12]. CP 1756 (¶ C), CP 1777 (¶ 10), CP 1778 (¶ 13), CP 1780 (¶ 19), CP 1878-1885. The Product Liability Act, RCW ch. 7.72, defines "product seller" as including "a party who is in the business of *leasing*" a product. RCW 7.72.010(1) (*italics added*). Thus, Berg distributed products subject to the PLA by leasing shoring equipment to D&D. The court ruled on March 13, 2008 that Vision could maintain claims against Berg under the PLA. CP 4999. As a lessor of shoring equipment, Berg was a "product seller" under RCW 7.72.010(2). Under RCW 7.72.040(1)(a), a product seller is liable for negligence.

<sup>32</sup> See, e.g., CP 4241-43.

<sup>33</sup> The "economic loss rule" did not limit Vision to a recovery based on contract because Vision did not have a contract with Berg (it was asserting breach-of-contract claims as D&D's assignee).

<sup>34</sup> CP 12643-49; see CP 1520-35, 1726-53, 6190-98. The D&D-Berg disputes began with a classic "UCC battle of the forms," in which a seller or lessor of goods and the buyer or lessee dispute which party's forms – the seller/lessor's, which disclaims warranties and limits remedies, or the buyer/lessee's, which typically rejects such provisions, take precedence as the operative contract terms based on how the transaction occurred, supplemented by such commercial law concepts such as "usage of trade," "course of dealing," "failure of essential purpose," and policies favoring or disfavoring warranty disclaimers. See, CP 1772-1781, 3088-3345, 6421-24, 6427-31, 6474-77.

motion, in persuading the court to disallow and strike Vision's claim for \$500,016 in lost-sales delay damages due to the market downturn,<sup>35</sup> Berg failed to eliminate or further reduce Vision's multi-million dollar delay-damages claims. The court also denied Berg's partial summary judgment motion seeking a ruling that Vision was at fault for the collapse as a matter of law under a theory that Vision had been a "general contractor" with a "non-delegable" duty to Thompson and other workers to maintain a safe workplace.<sup>36</sup>

By September 4, 2008, Vision was preparing to prove clean-up expense damages of about \$500,000 and consequential (construction and project delay) damages of about \$4 million, and both Vision and Berg faced claims for personal injury by Thompson and at least five other people.<sup>37</sup> The trial court had yet to rule on whether, as Philadelphia argued,<sup>38</sup> a substantial portion of Vision's claimed consequential (delay) losses did not qualify as losses covered by its All Risk Builders policy even if Vision had incurred them. That argument – which the court later decided in Philadelphia's favor, CP 7105 (and which is now the subject of

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<sup>35</sup> CP 3358-59, 4994.

<sup>36</sup> CP 12663-753, 4417-18.

<sup>37</sup> CP 6720; Ex. 379; 9/23/08RP 20; 10/16/08RP 1415-16.

<sup>38</sup> CP 5858-60, 6498-99.

a Vision cross-appeal), raised the prospect of Berg, but not Philadelphia, being at risk for most of Vision's consequential losses.

E. Eve-of-trial settlement between Vision and Berg.

With trial scheduled to begin on Monday September 8, and based on advice of their respective corporate and coverage counsel,<sup>39</sup> Vision and Berg reached a settlement on Thursday September 4, 2008. CP 211-221. Philadelphia was not a party to the settlement, nor was RSUI. Under the settlement, which was conditioned on court approval and a reasonableness determination,<sup>40</sup> Berg's primary insurer, Admiral, agreed to pay Vision its \$1 million policy limits, CP 213 (¶ 3); and Berg agreed to assign its rights against RSUI and stipulate to entry of a covenant judgment for \$2.3 million enforceable only against RSUI, with Vision acknowledging that "[t]he risk of collecting (or not) from RSUI is a risk understood and assumed by Vision." CP 213 (¶ 4). As would have happened under Vision's February settlement demand, Vision took responsibility for all bodily injury liabilities. But, under the September 4 settlement, unlike the earlier proposal,<sup>41</sup> Vision pledged its own assets, and not just its liability insurance, to indemnify and hold Berg harmless against such claims. CP 214 (¶ 6). The settlement agreement reflects the parties' awareness of six

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<sup>39</sup> CP 206-209, CP 6858-6861.

<sup>40</sup> CP 215-16 (¶¶ 7, 9).

<sup>41</sup> See CP 451 (item 5).

bodily injury plaintiffs and of subrogation-type claims by the Department of Labor and Industries. *Id.* Berg's corporate/coverage counsel, Mr. Petrich, advised Berg that its potential exposure on the bodily injury claims was \$5 million.<sup>42</sup> Through mutual releases, Berg was to give up claims against D&D. CP 212 (¶ 1). RSUI has not raised on appeal any issues concerning release of claims against D&D.

On Monday, September 8, 2008, the parties informed the court that Vision and Berg had settled conditioned on one insurer's approval and on court approval; prospective trial jurors were given questionnaires to complete and by September 12 some voir dire concerning hardships had been conducted and the rest of the prospective jurors had been sent home to wait.<sup>43</sup> On September 9, the Vision's counsel advised the court that the settlement would be signed within the day and asked the court to set a reasonableness hearing as soon as possible.<sup>44</sup> The court set a reasonableness hearing for the afternoon of Friday, September 12,<sup>45</sup> and Berg and Vision notified RSUI that day (September 9) of the settlement

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<sup>42</sup> CP 329 (¶ 7). Mr. Petrich's estimate was, if anything, conservative. As of December 2008, less than four months after the settlement was reached, Thompson alone was claiming \$4 million and the total stated claims for bodily injury were \$6.9 million. CP 10602 (¶ 6).

<sup>43</sup> CP 7114-30, 13329-30; 9/08/08RP 4, 7-11, 33-34, 56-59; 9/09/08RP 68-83; 9/12/08RP 7, 10.

<sup>44</sup> 9/09/08RP 83-84.

<sup>45</sup> 9/09/08RP 87-91.

and the hearing.<sup>46</sup> Jurors were instructed to check in about whether to report to the courtroom the following Tuesday. CP 13330.

Edward Berg submitted a declaration explaining his company's financial resources and its decision, with advice of counsel, to enter into the settlement with Vision. CP 492-95. Mr. Petrich assured the court by declaration that the settlement was the product of arms' length bargaining and explained why it was in Berg's best interest: Berg's potential liability exposure (to bodily injury claimants as well as to Vision) was as much as \$10 million; Berg had "solid" defenses but could still be found 25% to 33% liable; it would be unable to pay any judgment in excess of its \$1 million primary insurance limit; and the terms reflected a compromise that was reasonable.<sup>47</sup> Vision's corporate counsel, Randy Aliment, attested by declaration to a complicated, time-consuming, arms' length, and often contentious series of negotiations culminating in the settlement. CP 206-221.

F. RSUI's intervention seeking to delay the reasonableness hearing.

RSUI moved to intervene and for a 14-day continuance of the September 12 reasonableness hearing. CP 6682-87. RSUI asserted that it had "no knowledge what claims against [Berg] are encompassed in the

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<sup>46</sup> CP 13330, 362 (¶ 2), 365-77.

<sup>47</sup> CP 329-30.

settlement,” or of “factors and considerations that went into [it],” CP 6896, because it had been “kept in the dark,” and “excluded from settlement negotiations since February 2008,” CP 6893. RSUI asserted that it had received no response to letters to Mr. Petrich “requesting additional information for the purpose of evaluating RSUI’s coverage position.”<sup>48</sup>

Mr. Petrich responded by advising the court that he had received letters from RSUI asking about coverage but not about litigation issues, and had not considered it his job to convince RSUI it had coverage after RSUI had already denied coverage.<sup>49</sup> Berg’s litigation counsel, Daniel Mullin, advised the court that RSUI had been kept apprised and provided with copies of his confidential reports from the case’s inception through the February 2008 mediation, when RSUI made it clear it was not going to provide coverage.<sup>50</sup> Mr. Mullin’s colleague, Tracy Duany, related how Mr. East had visited their office before the mediation, spent two hours reviewing their file, and selected documents to be copied. CP 6951-58. The court continued the reasonableness hearing to September 15 at 1:30.<sup>51</sup>

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<sup>48</sup> CP 6891 (citing CP 12371 (¶ 8), 12373, and 12375).

<sup>49</sup> 9/12/08RP 107.

<sup>50</sup> 9/12/08RP 105-07; CP 6864.

<sup>51</sup> 9/12/08RP 148-49; CP 511.

G. Finding by trial court that settlement is reasonable.

On September 15 the trial court heard again from counsel, including Mr. East's statement that "until we get the documents, anything related to what's gone on with the settlement negotiations – we won't know if we need to do additional discovery," and that "[w]e may need to do depositions with the parties involved because the information is directly germane to whether or not they can satisfy the standards of the reasonableness."<sup>52</sup> When asked "[h]ow come you didn't go look at the files this morning?", Mr. East described emails with Messrs. Mullin and Petrich.<sup>53</sup> Asked what RSUI was looking for as evidence of collusion, Mr. East (Mr. Helgren having returned to his firm's office but not appearing at the reasonableness hearing<sup>54</sup>) told the court:

We're looking for any information either to verify that this is a reasonable settlement, or determine if it is not. The fact is, we don't know either way. We had received case reports and the like, prior to mediation. Since then we have been excluded from information relating to the case, including any of the insured's evaluations of what had gone on. So, again, we're from the standpoint of all we see is one million dollars to 2.3 million dollars, and we have nothing to connect the dots between the two.<sup>55</sup>

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<sup>52</sup> 9/15/08RP 198 Mr. East advised the court that Mr. Helgren had returned to the office and that "[w]e no longer take the position that this can't proceed without Mr. Helgren present." 9/15/08RP 190-91. Mr. Helgren had been gone on vacation. *RSUI Br. at 10.*

<sup>53</sup> 9/15/08RP 198-99.

<sup>54</sup> 9/15/08RP 190.

<sup>55</sup> 9/15/08RP 19.

Mr. East did not dispute Mr. Petrich's representation that RSUI had what he had.<sup>56</sup> Mr. Mullin stressed the need to get approval of the settlement to eliminate any further exposure to Berg.<sup>57</sup> Philadelphia sided with Vision in opposing a delay of trial.<sup>58</sup>

Following argument by counsel,<sup>59</sup> review of 18 listed documents,<sup>60</sup> and application of factors the law required it to consider,<sup>61</sup> the court found the settlement reasonable and found that there is no evidence of collusion.<sup>62</sup>

It observed:

[T]here has been an awful lot of investigation and preparation, and the interests of the parties that are arguing against this, RSUI, and I think that they've been able to be involved as much as they wanted to. I don't think that it's Berg's responsibility to continually ask them to provide coverage. I think once an insurance company says, we're denying coverage, you don't have to keep working with them, necessarily.

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<sup>56</sup> 9/15/08RP 193.

<sup>57</sup> 9/15/08RP 185.

<sup>58</sup> 9/12/08RP 149; 9/15/08RP 222-23; CP 485 (¶ 7).

<sup>59</sup> 9/15/08RP 173-209.

<sup>60</sup> CP 484 (line 9) and CP 486-87.

<sup>61</sup> The court referred to *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), and *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.3d 306 (2008), *rev. denied*, 165 Wn.2d 1029 (2009). 9/15/08RP 52-53; CP 484(¶ 1).

<sup>62</sup> CP 483-87; 9/15/08RP 52-55. The trial court also made the requested ruling as to Philadelphia's subrogation rights, CP 484-85 (¶ ¶ 3-5), 216 (¶ 7).

9/15/08RP at 212. RSUI appealed prematurely. CP 500-518. Trial proceeded between Vision and Philadelphia and, following entry of final judgment, RSUI's appeal was treated as timely filed.

#### IV. ARGUMENT

##### A. The Standard of Review is Abuse of Discretion.

A trial court's determination as to the reasonableness of a settlement made by a defendant whose insurer has denied coverage is reviewed for abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22, *rev. denied*, 155 Wn.2d 1025 (2005); *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, \_\_\_ Wn. App. \_\_\_, 216 P.3d 1110, 1117 (2009). A trial court considers nine factors in determining whether such a settlement is reasonable:

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

*Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487, *rev. denied*, 117 Wn.2d 1018 (1991)<sup>63</sup>; *Besel v. Viking Ins.*

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<sup>63</sup>Quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, *rev. denied*, 756 P.2d 717 (1988).

Co., 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002). Vision will be referring to the factors as “the *Chaussee/Besel* factors.”

No single *Chaussee/Besel* factor is controlling; each is not necessarily relevant in every case. *Besel*, 146 Wn.2d at 739 n.2. When the record indicates that the trial court considered the *Chaussee/Besel* factors but the record is vague as to how it weighed each one, a determination of reasonableness will be affirmed if, considering the factors, there is “enough evidence to support” the trial court’s finding of reasonableness. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 401, 161 P.3d 406 (2007), *rev. denied*, 163 Wn.2d 1055 (2008).

A trial court’s ruling on a motion to continue a hearing or trial is reviewed for abuse of discretion. *Howard v. Royal Specialty Underwriters, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004), *rev. denied*, 153 Wn.2d 1009 (2005) (reasonableness hearing); *In re V.R.R.*, 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006) (trial).

A trial court’s discretion is abused when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

A trial court ruling may be affirmed on any ground supported by the record, whether or not the ground was considered by the trial court. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

B. Footnotes 1 and 4 in RSUI's Brief Should be Disregarded.

RSUI is appealing the trial court's refusal to grant it more than the three-day continuance of the reasonableness hearing. RSUI did not bring a CR 59(a)(4) or CR 60(b)(3) (newly discovered evidence) motion, but in footnote 1 to its brief, RSUI says it is asking "for the opportunity to present to the trial court the evidence it obtained in [its separate] federal [court coverage] action. . ." *RSUI Br. at 2*. In footnote 4, at page 13, RSUI makes further allusion to evidence not of record.

RSUI's allusions to not-of-record evidence should be disregarded as attempts to circumvent Commissioner Skerlec's August 26, 2009 Ruling denying RSUI's motion to add to the record what RSUI represented was newly discovered evidence from its federal coverage lawsuit. RSUI insinuates in footnotes 1 and 4 that evidence of collusion would have been available had RSUI been given the 14-day continuance it requested. Because RSUI brought its RAP 9.11(a) motion in late July 2009, it knew of the purported newly discovered evidence in plenty of time to seek relief in the trial court under CR 60(b)(3) by the one-year deadline, *i.e.*, September 15, 2009. RSUI may not seek relief under CR 59(a) or CR 60(b) for the first time on appeal.<sup>64</sup>

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<sup>64</sup> RSUI contended in its RAP 9.11(a) motion (p. 7) that it could not seek postjudgment relief in the trial court because it is only an intervenor and was not party to the main action, but RSUI cited no authority to support the contention and logic says otherwise. If

C. If RSUI Was “In the Dark” About the Litigation As of September 2008, That Was Due to Choices It Made.

1. RSUI declined coverage to Berg and never retracted its denial of coverage.

When an insurer – in this appeal RSUI – refuses to settle a claim against its insured, the insured – in this case Berg – does not need the insurer’s consent to negotiate a settlement with the claimant. *See, e.g., Villas at Harbour Pointe Owners Ass’n v. Mutual of Enumclaw Ins. Co.*, 137 Wn. App. 751, 759, 154 P.3d 950 (2007), *rev. denied*, 163 Wn.2d 1020 (2008).<sup>65</sup> Such an insurer, having denied coverage and left its insured to fend for itself, will be presumptively liable for whatever reasonable amount the insured sees fit to settle with the claimant for, even if the denial of coverage was made in good faith and thus was merely incorrect. *Mutual of Enumclaw Ins. Co. v. T&G Const., Inc.*, 165 Wn.2d 255, 267 and 274, 199 P.3d 376 (2008). (Liability may exceed policy limits if the insurer denied coverage in bad faith. *Villas at Harbour Pointe*, 137 Wn. App. at 759; *Besel*, 146 Wn.2d at 739-40.) An insured’s settlement for an amount within the range of the evidence is reasonable.

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RSUI’s intervention enables it to appeal, it had standing to seek relief in the trial court from the same rulings it is asking this Court to review.

<sup>65</sup> RSUI includes in its statement of facts the assertion that “excess insurers owe no duties to insureds until primary insurance limits are exhausted.” *RSUI Br. at 6*. That misstates the law. At best, the decision RSUI cites, *Rees v. Viking Ins. Co.*, 77 Wn. App. 716, 719, 892 P.2d 1128 (1995), might support the proposition that RSUI was not obliged to take a coverage position until Berg’s underlying primary insurance was exhausted.

*Martin v. Johnson*, 141 Wn. App. 611, 621, 170 P.3d 1198 (2007). By definition, a refusal to *settle* a claim occurs when an insurer completely denies *coverage* as to the claim, as RSUI did with respect to Vision's and D&D's claims against Berg.

RSUI cites RCW 5.60.070(1) and 7.07.030-.070 as authority for its effort to evade an admission that it refused to participate in the February 2008 mediation. The confidentiality argument is not well taken, but also not important. RCW 5.60.070 does not apply to mediations agreed to after January 1, 2006. RCW 5.60.060(3). RCW 7.07.030 makes confidential a "mediation communication," which RCW 7.07.010(2) defines as "a statement . . . that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." RSUI communicated the intention *not* to participate in mediation.

But it ultimately makes no difference whether RSUI's refusal to participate in the mediation is confidential or not, because RSUI does not claim to have ever offered to cover Berg or contribute to settlement.

2. RSUI was provided with access to any information about the case it desired.

The record shows that Berg sent its counsel's reports about the case to RSUI and invited RSUI to the February 2008 mediation,

9/12/08RP 105-07; CP 6864, and that RSUI attorney East visited Berg's litigation counsel's office in February, reviewed counsel's file, and had copies made of whatever he wanted, CP 6951-58; 9/12/08RP 106. Mr. East's later protestations that he and his client "know nothing" about the case, 9/12/08RP 102-03, properly failed to convince the court.

3. RSUI never asked for information about the case or settlement negotiations after February 2008, and apparently did not monitor case filings.

RSUI complains that after February 2008 Berg ignored "RSUI's repeated requests for information." *RSUI Br. at 8, 11*. RSUI cites CP 427 and 448-49, and to the 9/12/08 East and Frye declarations (CP 12367-68 and 12369-12400, respectively). The citations do not bear out RSUI's assertions that it made any request for "information," much less that it made "repeated" requests. RSUI challenged Berg to cite legal authority against RSUI's *coverage* position, not to provide "information." *See* CP 12373 ("Do you have any authority for your position that product liability claims are outside the scope of the residential exclusion? If so, I would appreciate receiving it"); and CP 12375 ("To date, I have received nothing from you. Should the insurer assume that you are unable to find any legal authority to support your position?").

4. As RSUI would have known had it chosen to pay attention, Berg's potential liability exposure to Vision did not materially diminish between February and September 2008.

When the parties mediated in February 2008, Berg understood Vision was claiming \$5.7 million in delay damages. CP 3347, 3363 (¶ 3), 3366. Had RSUI asked Berg or simply monitored court filings on its own after February 2008, it would have known by September 2008 that Vision was claiming over \$4 million and that Berg faced at least one major bodily injury claim. RSUI would also have known that Vision had evidence that Berg had leased D&D faulty shoring equipment.<sup>66</sup> RSUI also would have known that Berg had failed to get contract and product liability claims against it dismissed on summary judgment,<sup>67</sup> and had had only modest success getting Vision's delay damages claims reduced. CP 4994.

5. Whether RSUI received information after February 2008 or not is beside the point, because it never retracted its denial of coverage.

RSUI's professed lack of "information" is belied by the record but also beside the point. RSUI has never contended that it would have offered its \$1 million policy limits had it known Vision was willing to take an assignment of, and prosecute, coverage and bad-faith claims against it for a larger amount.

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<sup>66</sup> CP 1756 (¶ C), CP 1777 (¶ 10), CP 1778 (¶ 13), CP 1780 (¶ 19), CP 1878-1885.

<sup>67</sup> CP 1520-35, 12643-49, 4998-5000.

D. The Settlement's Timing and Structure Were Not Unusual, Not Surprising, and Not Suspicious.

1. Eve-of-trial settlements are commonplace and litigants typically compromise from previous settlement positions.

Litigants usually soften their respective settlement positions as their trial date approaches. As Samuel Johnson put it:

Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.

Thomas Boswell, *Life of Samuel Johnson* (1791).

2. "Covenant judgment" settlements are necessary, legitimate, and commonplace in denied-coverage cases.

There was and is nothing nefarious or even unusual about Berg settling by assigning his rights against its insurer, RSUI, in return for Vision's covenant to enforce the \$2.3 million stipulated judgment only against the insurer. Settlements structured that way have become *de rigueur*. *E.g.*, *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992) (a covenant not to execute coupled with an assignment and settlement agreement is simply "an agreement to seek recovery only from a specific asset – the proceeds of the insurance policy and the rights owed by the insurer to the insured"); *Water's Edge*, 216 P.3d at 1123 ("these types of [stipulated] settlements are . . . necessary").

RSUI has never argued that there existed a source from which Vision could have hoped or expected to collect on a judgment against or

settlement with Berg except for (1) Berg's own assets, (2) the primary liability insurance coverage Berg had with Admiral, or (3) the excess liability coverage Berg had with RSUI. It is undisputed that Admiral's primary policy limits were \$1,000,000. CP 6860-61 (¶¶ 5 and 9); *RSUI Br. at 7*. Edward Berg testified that Berg would have been bankrupted by a judgment for more than its primary coverage limits. CP 492-95. RSUI does not express doubt about the truth of Mr. Berg's testimony. A competent insurer in RSUI's position would have appreciated that Vision or Berg would have to look to it and challenge its denial of coverage if Vision obtained a judgment against Berg, or if Vision settled with Berg, for more than \$1,000,000. And Berg's coverage counsel, Peter Petrich, *told* RSUI that Berg probably would make such an assignment as part of any settlement with Vision. 9/12/08RP 106-07.

3. Berg's potential bodily injury liability exposure had not diminished between February and September 2008.

Between February and September 2008, the parties learned of at least five bodily injury claimants other than Thompson. CP 6745 (¶ 6); *and see* CP 10601 (¶ 6) and 9/12/08RP 136-40 (suggesting the possibility of even more claims). That had boosted Berg's potential exposure to bodily injury liability to what Mr. Petrich estimated to be \$5 million. CP 6860-61 (¶ 7). By September 2008, with the approach of trial, with RSUI

having denied coverage, and with Berg's increasing, a covenant judgment settlement was likely than one had been in February.

E. The Settlement Amount and Terms Fell Well Within the Range of the Parties' Litigation Exposures, and the Record Supports the Trial Court's Finding That It Was Reasonable Based on Consideration of the *Chaussee/Besel* Factors.

1. Even after vigorous pretrial motion practice, Vision's damages claim against Berg had been whittled down only modestly, and Berg was facing a possible \$4.5 million adverse verdict plus bodily injury liability exposure.

Berg's potential liability exposure was \$4.5 million to Vision and another \$5 million to bodily injury claimants. Vision's contract and product liability theories were complicated and provided alternative ways for Vision to win or lose at trial. Berg's defenses – particularly its UCC-based defenses – were likewise complicated, and provided Berg with alternative ways to prevail or lose. Myriad issues of fact had prevented each side from significantly limiting the other's legal theories by summary judgment. The amount for which Vision and Berg settled, \$3.3 million, was well within the range of the evidence that the court's pretrial rulings had allowed Vision to present, and based on which a jury could have found Berg liable to Vision alone for \$4.5 million. It was reasonable for Vision and Berg to settle at \$3.3 million, and Berg had every right to settle on terms that required it to pay no money of its own. *Martin*, 141 Wn.

App. at 618 and 623. For those reasons alone it would have been within the court's discretion to find the settlement reasonable.

The settlement was much more than a compromise at \$3.3 million within a range of possible trial outcomes ranging from a \$0 to a \$4.5 million recovery by Vision. At stake in any trial would have been an apportionment of fault that would have bound the parties for purposes of Mr. Thompson's bodily injury claims. CP 1011. Berg faced the possibility of being assigned *all* of the causal fault for the collapse, or at least a substantial portion of the fault. How fault was apportioned at trial would likely have had collateral estoppel effect for purposes of bodily injury claimants other than Thompson. *See Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (collateral estoppel can be used offensively to prevent a defendant from relitigating an issue that the defendant previously litigated and lost against another plaintiff). To get the \$1 million from Admiral and the right to pursue RSUI's excess coverage, Vision had to pledge its own assets, and not just its insurance coverage, to hold Berg harmless against bodily injury claims. CP 214(¶ 6).

Berg faced the possibility of losing at trial on the undismissed breach-of-contract/warranty claims that Vision was asserting as D&D's assignee. The jury's apportionment of "fault," even if mostly to Vision, would not have applied to reduce Berg's liability for contract damages. It

was reasonable for Mr. Petrich to conclude and advise Berg that its gross liabilities could reach \$10 million and that, even with an apportionment to Berg of only 25% to 30% of the fault, Berg faced bankruptcy.

2. Because the trial court had thoroughly scrutinized Vision's legal theories, Berg's defenses, and the nature of and evidence supporting Vision's claimed damages, the court required no "expert analysis" or comparative verdicts data in order to see the settlement for the compromise it was.

In many cases, litigants settle without having been before a judge on discovery or dispositive motions, and the court is nowhere near as familiar with the case as Judge van Doorninck was with this case. In such cases, in order to enable the court to evaluate the settlement under the *Chaussee/Besel* factors, a settling party may be well advised to submit expert testimony concerning the litigation exposure and risks each side had faced. Here, however, Vision and Berg had already presented Judge van Doorninck with waves of motions, declarations, and proposed jury instructions as they battled over what theories of liability Vision could pursue against Berg and what kinds and amounts of damages Vision could present evidence of. *E.g.*, CP 3960-67, 5073-74, 12928-35. As Judge van Doorninck noted, "we've argued about those facts at every legal issue that I had to decide." 9/15/08RP 211. As she would observe later, when it came time to rule on Vision's fee application against Philadelphia:

Lots and lots of pretrial motions. I think I made 100 decisions pretrial. Part of that was my schedule and my inability to take 100 issues in one day and try to resolve them, given how aggressive the parties were. I think that most of the issues were absolutely intertwined, and they cannot be segregated out. . .”

2/13/09RP 32-33.

As of September 4, 2008, with the dust of pretrial motions having settled, a jury was about to hear and weigh evidence of \$4.5 million in damages, and Judge van Doorninck was well-positioned to recognize as a *bona fide* compromise Vision’s agreement to settle for \$3.3 million and indemnify Berg against as much as \$5 million in bodily injury claims. Thus, contrary to what RSUI contends, *RSUI Br. at 14, 22-23*, the court did not need as a practical matter, and was not required by law to have before it, “expert analysis” of the strengths and weaknesses of the parties’ cases or data about verdicts in “similar cases” before it made such a determination.

3. There is no reason to conclude that the court’s reasonableness finding was based on factors other than the *Chaussee/Besel* factors.

RSUI asserts that “the court assumed the settlement was reasonable simply because the litigation had been contentious.” *RSUI Br. at 17*. The fact that the case had been “hard fought” and “hotly contested,” *id.* at 53, was a reason why the court found the settlement reasonable and non-collusive, but it was hardly the sole reason. It was relevant that Vision and

Berg had been litigating vigorously, because that tended to show that each party had thoroughly assessed the merits and weaknesses of its own and the other's case and had evaluated its litigation risks soberly. Indeed, one of the *Chaussee/Besel* factors that the court was bound to consider was "the extent of the releasing person's [Vision's] investigation and preparation of the case." Judge van Doorninck gave, among other reasons for approving the settlement, that "there has been an awful lot of investigation and preparation" of the case by the parties,<sup>68</sup> and that the merits of the case and damages issues had presented "huge questions of fact."<sup>69</sup>

When a trial court record indicates that the trial judge was apprised of the need to consider the *Chaussee/Besel* factors, an appellate court will not speculate that the trial court found the settlement reasonable on some basis other than those factors. *Sharbono*, 139 Wn. App. at 407. The trial court was asked to consider the *Chaussee/Besel* factors, and it did.<sup>70</sup> Judge van Doorninck noted that there had been negotiation of the releasing person's (Vision's) damages, the merits of the releasing person's (Vision's) liability theory, and the released person's (Berg's) relative fault, each of which, she noted, had involved "huge" questions of fact.<sup>71</sup> She

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<sup>68</sup> As the court aptly noted, the case's preparation had been "extreme." 9/15/08RP 212.

<sup>69</sup> 9/15/08RP 211.

<sup>70</sup> CP 6721-22; 9/15/08RP 207-11; CP 484 (¶ 1).

<sup>71</sup> 9/15/08RP 211.

considered the risks and expenses of continued litigation (characterizing them as “very high” because the litigation was “very expert-intense” and trial would have taken at least six weeks)<sup>72</sup>, the released person’s (Berg’s) ability to pay (agreeing that Berg had “no ability to pay”), whether there was any evidence of bad faith, collusion, or fraud (finding none), the extent of the releasing person’s (Vision’s) investigation and preparation of the case (and terming it “extreme”), and the interests of the parties not being released (noting that RSUI had denied coverage and had been “involved as much as [it] wanted to [be]”).<sup>73</sup>

RSUI argues that it follows “without saying” that the settlement cannot have been reasonable because of Judge van Doorninck’s observation that liability issues presented “huge questions of fact.” Any it-follows-without-saying argument is at least suspect; that one is absurd. Judge van Doorninck’s point, which the record more than bears out, was that the myriad factual issues surrounding Vision’s, D&D’s, and Berg’s liabilities and respective shares of fault, coupled with the magnitude of the damages claims that had survived summary judgment, made the outcome of trial highly uncertain and difficult to predict – exactly why compromise *was* appropriate and why the figure at which Vision and Berg had arrived

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<sup>72</sup> 9/15/08RP 211.

<sup>73</sup> 9/15/08RP 211-12.

at *was* reasonable. It hardly would square with this state's firm policy to encourage settlement, *American Safety Cas. Surety Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007); *Martin*, 141 Wn. App. at 623, to make settlements unreasonable *per se* unless the out-come of a trial was highly *predictable*.

F. Because RSUI Failed to Make a Case for Being Given More Time to Go Fishing for Evidence of Collusion, It Was Not An Abuse of the Court's Discretion to Give RSUI a Three-Day But Not a 14-Day Continuance of the Reasonableness Hearing.

1. Collusion is fraud by two or more actors, and is never presumed.

RSUI offers no discussion of what covenant-judgment decisions mean when they refer to "evidence of bad faith, collusion, or fraud." *E.g.*, *Chaussee*, 60 Wn. App. at 512. Fraud, of course, involves intent to deceive, is never presumed, and has to be established by clear and convincing evidence. *Pedersen v. Bibioff*, 64 Wn. App. 710, 722-23, 828 P.2d 113 (1992). Because settlement is encouraged, "[w]e cannot infer bad faith, collusion, or fraud [in a covenant-judgment settlement] merely based on innuendo and speculation alone." *Martin*, 141 Wn. App. at 623.

Dictionaries define collusion as meaning "an agreement to defraud another or to do or obtain something forbidden by law,"<sup>74</sup> or "a secret agreement between two or more persons to defraud another of his rights

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<sup>74</sup> Brian Garner, *Black's Law Dictionary* (8<sup>th</sup> ed.), at 281.

often by the forms of law.”<sup>75</sup> Thus, “collusion” seems to mean fraud with at least two perpetrators. In light of what little case law there exists on the subject, but also based on common sense, it appears that “bad faith, collusion, or fraud” are redundancies that refer to two kinds of settlements. The first kind are settlements so clearly inflated that they cannot have been the product of arms’ length negotiation. In that context, a settlement is collusive because unreasonable; the concepts of collusion and unreasonableness merge. Kentucky law seems to take that view, holding that a collusive settlement is an inflated settlement reached collusively. *Ayers v. C&D Gen. Contractors*, 269 F. Supp.2d 911, 914 (W.D. Ky 2003) (a settlement should be disapproved “if it appears ‘that the plaintiff and the insured are cooperating together to create an inflated collusive judgment’”) (quoting *O’Bannon v. Aetna Cas. and Sur. Co.*, 678 S.W.2d 390, 393 (Ky. 1994)). And an Indiana federal court thinks that state’s highest court would overturn a settlement only if “the agreement is so unreasonable in its terms that it must have been the product of bad faith or collusion.” *Midwestern Indem. Co. v. Laikin*, 119 F. Supp.2d 831, 834 (S.D. Ind. 2000). Similarly, in Minnesota, “collusion” seems to refer to lack of hard bargaining: “[c]ollusion, for purposes of a *Miller-Shugart* settlement is a lack of opposition between a plaintiff and an insured that

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<sup>75</sup> *Webster’s Third New Intern’l Dictionary*, (1986) at 446.

otherwise would assure that the settlement is the result of hard bargaining.” *Independent Sch. Dist. No. 197 v. Accident and Cas. Ins. of Winterthur*, 525 N.W.2d 600, 607 (Minn. Ct. App. 1995) ((referring to *Miller v. Shugart*, 316 N.W.2d 792 (Minn. 1982)<sup>76</sup>).

The second kind of settlement to which decisions refer as “collusive” are ones that include provisions for “kickbacks” to the defendant or other terms that make the defendant’s ostensible concessions substantially illusory. Thus, a settlement is collusive when the insured and the claimant have agreed to share what the claimant recovers from the insurer. See *Chomat v. Northern Ins. Co. of New York*, 919 So.2d 535, 538 (Fla. Ct. App.), *rev. denied*, 937 So.2d 123 (Fla. 2006).

In that same vein is the recent decision in *Water’s Edge*, 216 P.3d 1110. There, a homeowners association had sued a former owner and property manager because of faulty remodeling work on condominium buildings. The trial court had found the parties’ settlement *unreasonable* due partly to provisions in the agreement requiring the plaintiff association to pursue, and the defendants to share in the proceeds of, a legal

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<sup>76</sup> See *Jorgensen v. Knutson*, 662 N.W.2d 893, 904 (Minn. 2003) (explaining that a *Miller-Shugart* settlement is one in which an insured whose insurer has denied coverage settles a claim with the plaintiff for a stipulated sum, conditioned on the plaintiff’s seeking recovery solely from the defendant’s insurer if coverage is established).

malpractice claim against a defendant's initial litigation defense counsel.<sup>77</sup>

There were several other indications of collusion in *Water's Edge* as well:

- Behind-the-scenes machinations by plaintiff's counsel to induce the defendants to hire specific attorneys as coverage counsel because of their supposed expertise in negotiating settlements that "obtain[ed] thousands of dollars [for defendants insureds] in addition to full indemnity to the plaintiff;" to replace the defense counsel hired by the insured defendant's insurer; and to take positions concerning the case's merits that differed from the replaced defense counsel, in order not to undermine a legal malpractice claim against that counsel<sup>78</sup>;
- Settlement for \$8.75 million even though the causes of action that might have allowed recovery of a seven-figure damages award had been dismissed on summary judgment<sup>79</sup>;
- A settlement reached through negotiation between coverage counsel for the parties before replacement defense counsel could file a planned motion to exclude any evidence of substantial damages based on the economic loss rule, and with coverage counsel having apparently responsible for the defense motion not being filed<sup>80</sup>;
- A settlement that obligated defendants' coverage counsel to testify that the settlement amount was reasonable<sup>81</sup>;

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<sup>77</sup> Public policy prohibits the assignment of a legal malpractice claim to an adversary in the litigation that gave rise to the alleged legal malpractice. *Kommavongsa v. Kaskell*, 149 Wn.2d 288, 291, 67 P.3d 1068 (2003).

<sup>78</sup> *Water's Edge*, 216 P.3d at 1115-16, 1123.

<sup>79</sup> *Id.*, at 1118-20.

<sup>80</sup> *Id.*, at 1119-20, 1123.

<sup>81</sup> *Id.*, at 1116, 1123.

- A settlement that obligated the defendants to pursue legal malpractice claims against their former appointed defense counsel, with the plaintiffs having the right to execute on any proceeds<sup>82</sup>;
- Replacement defense counsel filing a brief *opposing* a finding that the settlement was reasonable<sup>83</sup>; and
- Lack of a provision in the settlement agreement conditioning its effectiveness on court approval.<sup>84</sup>

Even so, the Court of Appeals reviewed the trial court's finding of unreasonableness for abuse of discretion, *Water's Edge*, 216 P.3d at 1117-18 and 1125, suggesting that a different trial judge could have found the settlement reasonable on the same facts.

2. RSUI admits there is no direct evidence of collusion.

RSUI does not argue that the Vision-Berg settlement includes kickbacks, and tacitly admits it had no direct evidence of collusion between Vision and Berg. *RSUI Br. at 15* (“the trial court rejected RSUI’s concerns . . . , apparently because RSUI had no direct evidence of fraud or collusion [but] ignored RSUI’s circumstantial evidence . . .”).

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*, at 1120.

<sup>84</sup> *Id.*, at 1116, 1123.

3. It would have been impermissible for Judge van Doorninck to infer collusion merely because two litigation adversaries had suddenly settled on the eve of trial.

No respectable authority exists for the proposition that “collusion” may be inferred merely from the fact that litigation adversaries have compromised and agreed to a settlement figure in the midrange of what a trial court’s pretrial rulings have allowed the plaintiff to try to prove as damages. Allowing such an inference would exalt self-serving speculation at the expense of this state’s policy with regard to settlement, which is to encourage it. *American Safety*, 162 Wn.2d at 772.

4. The trial court was entitled, based on its experience with the litigation, to credit testimony by both parties’ principals and counsel that the settlement was the product of arms’ length negotiation.

Corporate counsel for both Berg and Vision swore that the settlement had been negotiated at arms’ length. CP 6737-6740, CP 6859-6861. The trial court itself was in a position to verify that the parties’ litigators had been pulling no punches right up to the date of settlement, because it had presided over the case since early February 2008 and had ruled on numerous contested motions between Vision and Berg. The court held in *Heights at Issaquah Ridge*, 145 Wn. App. at 706-07, that, if the insurer provides no evidence of bad faith, collusion, or fraud, or failure of the insured to negotiate the settlement vigorously, a trial court that is in a position to confirm that the settling parties engaged in “fierce debate”

while litigating does not abuse its discretion in finding that a settlement is reasonable and not collusive. For that reason alone, Judge van Doorninck acted within her discretion in finding no evidence of collusion.

5. Nothing in the timing or terms of the settlement suggest collusion.

a. The gross settlement amount was a third of what Berg's counsel estimated its total exposure to be, and Vision compromised at least as much as Berg did.

As noted above, eve-of-trial settlements are commonplace. It hardly suggests collusion when a plaintiff, whose liability theories and damages claims have been tested vigorously on summary judgment, accepts \$1 million and the possibility of another \$2.3 million (or more if it can prove bad faith) in return for dropping a \$4.5 million damages claim and agreeing to hold the defendant harmless against future bodily injury claims that the defendant's counsel estimates could expose the defendant to another \$5 million in damages liability.

b. There was nothing suspicious about Berg deciding to settle in September for \$3.3 million even though Vision had offered to settle in February for \$2.5 million.

The fact that Vision offered in February 2008 to settle for \$2.5 million (with Berg paying \$500,000 of that amount and Vision collecting \$1,000,000 from RSUI if Vision could prevail on Berg's assigned coverage claim) creates no inference that the ultimate settlement for \$3.3

million was unreasonable and not the product of arms' length negotiations. RSUI did not offer to contribute to settlement on the terms Vision offered in February. It denied coverage. Berg could not contribute to a settlement itself, and its total liability exposure for both property damage and bodily injury liability increased during the six months between February and September, and Vision's litigation costs had risen during that same period. That Vision and Berg would agree on the eve of trial to a higher-value settlement and that Vision would agree to take less sure cash than it asked for six months earlier is *contraindicative* of collusion, not circumstantial evidence *of* collusion. Moreover, Vision yielded at least as much if not more ground as Berg did between February and September 2008 (a) by pledging its own assets to back up its indemnification of Berg against bodily injury liability, and (b) by agreeing to take \$500,000 less in cash up front and to accept more risk that it could collect the difference from RSUI on assigned coverage and bad faith claims.

- c. Vision and Berg's settlement agreement does not include the kinds of provisions that contributed to the trial court's discretionary decision in *Water's Edge* to disapprove an \$8.75 million settlement.

No lawyers in this case connived to have an adversary's counsel replaced. Summary judgment rulings had not gutted Vision's case. The agreement did not require Berg's counsel to support the settlement; Berg's

coverage and litigation counsel, Messrs. Petrich and Mullin, respectively, both chose to testify in support of the settlement's reasonableness. The agreement did not obligate Berg to pursue an unassignable legal malpractice, or any type of claim, against a third party for the mutual benefit of Vision and Berg. The settlement here *was* conditioned on court approval. Thus, this case is not like *Water's Edge*, and a finding that the Vision-Berg settlement was *unreasonable* would not have found support in the record as the one in that case did.

6. RSUI was not constitutionally entitled to more than the six days it was given to come up with evidence or reasons why trial suspended for 11 more days while RSUI went fishing for evidence of collusion.

RSUI asserts that that RCW 4.22.060(1) requires that affected parties be given five days' notice, that Pierce County rules require six days' notice for a hearing, and that three days' notice of a settlement and reasonableness hearing is constitutionally inadequate. *RSUI Br. at 19-20*. RCW 4.22.060(1) does not apply to notices given to insurers of insureds' settlements, *Villas at Harbour Pointe*, 137 Wn. App. at 761-62, and Pierce County LR 7(j)(1) permits courts to conduct hearings on fewer than six days' notice. In any event, September 15, when the hearing was held in this case, RSUI had been on notice *for* six days.

In *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn.2d 317, 324, 116 P.3d 404 (2005), the court held that an insurer is entitled to a reasonable time to appear and challenge a settlement, and that reasonableness "is measured by the particular circumstances," which in that case made six days' notice of a reasonableness hearing and *three* days to review the actual settlement agreement sufficient. To the extent RSUI argues that it was entitled to more time than the insurer in *Red Oaks* was afforded because the insurer in *Red Oaks* had been "fully involved" in the litigation and it had not been, RSUI glosses over the fact that its own lack of involvement was entirely voluntary and that its claimed ignorance about the case was self-inflicted. RSUI could have "involved" itself by requesting updates from Berg after February 2008 (or by monitoring case filings on its own) and/or by indicating a willingness to contribute to settlement.<sup>85</sup> *Red Oaks* does not suggest that, once an insured that has been denied coverage settles and seeks a reasonableness hearing, its insurer, despite having chosen to remain in the dark, has a right to demand that the

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<sup>85</sup> The *Red Oaks* court also noted that the insurer had been allowed to examine witnesses who testified at the reasonableness hearing. 128 Wn. App. at 408-09. RSUI did not ask the court for an opportunity to call and examine the lawyers who had knowledge of the settlement negotiations or any other persons, nor has RSUI complained that the trial court failed to take live testimony at the reasonableness hearing and, in any event, no decisions hold that live testimony must be taken at a reasonableness hearing on an insured's settlement that provides for a covenant judgment against the insured's liability insurer.

court to turn the lights on and suspend proceedings so the insurer can go fishing for evidence of collusion.

If it would ever be an abuse of discretion for a trial court to deny the insurer an opportunity to do “discovery” to obtain information the insurer has been content not to have, it would have to be because the court ignored at least a plausible showing by the insurer that there is *reason* (similar to probable cause) to suspect collusion. RSUI had reviewed Berg’s litigation counsel’s file in February 2008, 9/12/08RP 105-06 and CP 6951-58, and was afforded an opportunity in September – six days – to call the \$3.3 settlement amount into question or to point to indicia of collusion. RSUI failed to cast doubt on the reasonableness of the parties’ decision to compromise on \$3.3 million. RSUI also failed to make a plausible case that “discovery” would yield evidence of collusion by Vision, Berg, and the lawyers for each who had sworn that the settlement had been negotiated at arms’ length.

RSUI asserts in its statement of facts that there was “circumstantial evidence” of collusion consisting of:

[1] Berg having stopped communicating with RSUI at the same time it engineered a settlement potentially subjecting RSUI to \$2.3 million (or potentially up to \$6.9 million, if actionable under the IFCA) in liability and [2] Berg’s attorneys having stonewalled RSUI’s attempts to acquire information from March 2008 through the September 15 hearing.

*Br. at 16.* RSUI lists in its argument other things that it claims are circumstantial evidence of collusion. *RSUI Br. at 25-26.* None of what RSUI refers to constitutes “circumstantial evidence” that Berg and Vision – and their lawyers – engaged in collusion or fraud. RSUI does not fairly characterize the record.

Vision and Berg did not reach agreement “once Berg ceased communicating with RSUI” or “at the same time Berg began negotiating with Vision.” *RSUI Br. at 16, 25-26.* The parties reached agreement on September 4, months after RSUI had stopped *inquiring* of Berg. No evidence supports the charge that Berg “misrepresented” RSUI’s settlement involvement to the trial court. *RSUI Br. at 26.*

The settlement was not “engineered” (whatever that means), *RSUI Br. at 16*; it was negotiated by counsel for each side. The charge that Berg “stonewalled” RSUI between September 12 and the September 15 afternoon reasonableness hearing, *RSUI Br. at 19*, was refuted at the hearing, 9/15/08RP 190-99 (and RSUI has never before charged, as it seems to now, *Br. at 26*, that *Vision* kept information from it).

According to a leading treatise, when an insured settles with a claimant under terms providing for enforcement of a judgment only against an insurer that has denied coverage, indications of possible collusion include: lack of arms’ length bargaining; an unrealistically high

calculation of the plaintiff's damages or the absence of a substantial discount by the plaintiff to reach the settlement amount; and consummation of the settlement in secret, with no opportunity for a court hearing at which its reasonableness can be challenged. Ashley, *Bad Faith Actions: Liability and Damages*, (2d ed., 1997), § 3.39 at pp. 3-115 to 3-116. No such indicia of collusion exist in this case. A court may not infer collusion in the negotiation of a covenant judgment based on innuendo and speculation. *Martin*, 141 Wn. App. at 623. Innuendo and speculation, however, are all RSUI ever offered below and all it offers on appeal.

7. If RSUI was unable during September 9-15 to evaluate the settlement's reasonableness, that was not Vision's or Berg's fault.

If RSUI was ignorant about the case and with Berg's litigation risks when Berg settled with Vision on the eve of trial, it is unfair for RSUI to blame its predicament on Berg, and it is grossly unfair and irresponsible for RSUI to cite its ignorance as a basis for suspecting that Vision and Vision's counsel colluded with Berg to defraud RSUI.

8. It is not true that the court could have continued the reasonableness hearing and tried the case without Berg while RSUI went fishing for evidence of collusion.

At page 21 of its brief RSUI seems to contend, bizarrely and for the first time, that trial could have proceeded without Berg while RSUI was given time to do "discovery" to fish for evidence of collusion because

Berg had been irrevocably released. *RSUI Br. at 21*. To the contrary, the settlement was explicitly conditioned on court approval and a reasonableness determination.<sup>86</sup> The court set the September 12 date and time for the reasonableness hearing on September 9, and RSUI was notified that same day,<sup>87</sup> and Vision and Berg did not oppose RSUI's motion to intervene.<sup>88</sup> Denial of court approval would have voided the settlement, and Vision would have had to proceed to trial against Berg on product liability and contract claims, as well as Philadelphia on the issue of what its covered losses were and whether Philadelphia was guilty of bad faith. Because the settlement agreement was conditioned on court approval, the court either had to address the settlement's reasonableness, as well as its effect on Philadelphia's subrogation rights, before proceeding to hold a trial without Berg, or force Vision to litigate with Philadelphia and then, if the settlement was not approved, try its claims against Berg in a second trial and tell the story of the slab collapse all over again to a different jury. Because RSUI offered no plausible reason to think there had been collusion, it was not an abuse of discretion for the trial court, if it had to try both sides of Vision's case, to do so in one trial.

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<sup>86</sup> CP 215 (¶ 7); 9/15/08RP 185.

<sup>87</sup> CP 13330, 362 (¶ 2), 365-77.

<sup>88</sup> CP 6851-54; 9/12/08RP 99-100.

9. Vision and Berg did not have to “explain what claims the settlement encompassed”.

RSUI asserts in its statement of facts that Vision and Berg “failed to . . . explain what claims the settlement encompassed (personal injury vs. construction delay vs. costs of repair, etc.).” *RSUI Br. at 14*. Because RSUI offers no actual argument and no citation to authority, any implied argument may be ignored. *See King County v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007), *rev. denied*, 163 Wn.2d 1054 (2008) (When party has cited no authority, court of appeals “must presume it has found none,” and court “will not consider an issue absent argument and citation to legal authority”). There is no requirement that settling parties explain what the settlement terms “encompass” when their settlement agreement itself answers any question. Vision expressly released Berg with respect to *all* claims, and vice versa, and Vision agreed to hold Berg harmless against any and all bodily injury claims.<sup>89</sup>

G. The Merits of Bad Faith Claims Against RSUI Have Nothing to Do with How Such Claims Came to be Assigned to Vision.

RSUI suggests Vision and Berg “worked together to manufacture a bad faith/IFCA claim against RSUI,” *Br. at 15*, and engaged in a “concerted attempt to create grounds for a bad faith claim and seek treble damages [from RSUI] under the IFCA.” *Br. at 25*. That argument is

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<sup>89</sup> CP 6743 (¶ 1), 6745 (¶ 6).

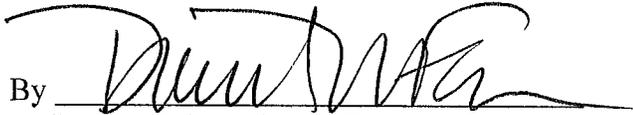
unfounded and fallacious. If RSUI has bad faith liability, it is not because Vision and Berg “work[ing] together. . . manufactured” it. Bad faith liability can exist only because of how RSUI chose to treat Berg.

V. CONCLUSION

The trial court’s order determining the settlement between Vision and Berg Equipment to be reasonable should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of November, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 5th day of November, 2009, I caused a true and correct copy of the foregoing document, "Brief of Vision Respondents in Response to Appellant RSUI's Opening Brief," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

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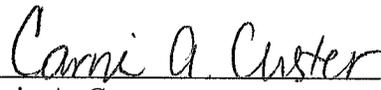
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