

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Jan 13, 2012, 9:22 am  
BY RONALD R. CARPENTER  
CLERK

*E*

No. 86109-9

RECEIVED BY E-MAIL

*bjh*

SUPREME COURT OF THE  
STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Petitioner.

FARMERS' ANSWER TO AMICI CURIAE BRIEF  
OF NATIONAL ASSOCIATION OF MUTUAL  
INSURANCE COMPANIES ET AL.

Submitted by:

Jerret E. Sale, WSBA #14101	Philip A. Talmadge, WSBA #6973
Deborah Carstens, WSBA #17494	TALMADGE/FITZPATRICK
BULLIVANT HOUSER BAILEY	18010 Southcenter Parkway
1601 Fifth Avenue, Suite 2300	Tukwila, WA 98188-4639
Seattle, Washington 98101-1618	Telephone: 206.574.6661
Telephone: 206.292.8930	

Attorneys for: Petitioner Farmers Insurance Exchange

ORIGINAL

**TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1
II. ARGUMENT .....	2
A. No statute, rule, or Supreme Court opinion authorizes the reasonableness hearing procedure .....	2
B. No public policy is advanced by employing the reasonableness hearing procedure .....	11
C. The reasonableness hearing procedure is unfair to insurers .....	12
III. CONCLUSION .....	13

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Besel v. Viking Ins. Co. of Wis.</i> , 146 Wn.2d 730, 49 P.3d 887 (2002) .....	4
<i>Fisher v. Allstate Ins. Co.</i> , 136 Wn.2d 204, 961 P.2d 350 (1998) .....	5, 7, 8
<i>Fox v. Sackman</i> , 22 Wn. App. 707, 591 P.2d 855 (1979).....	12
<i>Mut. of Enumclaw Ins. Co. v. T &amp; G Constr., Inc.</i> , 165 Wn.2d 255, 199 P.3d 376 (2008) .....	5
<i>Water's Edge Homeowners Ass'n v. Water's Edge Assocs.</i> , 152 Wn. App. 572, 216 P.3d 1110 (2009).....	6
<b>Statutes</b>	
RCW 4.22.060 .....	2, 3
<b>Other Authorities</b>	
BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995).....	5
WASH. R. CIV. P. 1 .....	12
WASH. R. CIV. P. 26-37.....	13

Amici Curiae American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America (“Amici”) have jointly filed a brief requesting that the Court take the opportunity this case presents to clarify and consider the practice where the insured and the claimant have the trial court determine the reasonableness of a settlement in a proceeding adjunct to their liability action (“the reasonableness hearing procedure”). Farmers hereby answers that brief.

## I. INTRODUCTION

Farmers agrees with Amici that this case affords the Court an opportunity to examine the legal and practical bases for the reasonableness hearing procedure that has been employed by numerous trial courts and endorsed by some Court of Appeals decisions. Specifically, Farmers’ assertion of the right to a jury trial on the issue of damages invites a comprehensive study of the creation of and rationale for the reasonableness hearing procedure.

As Amici point out:

- No statute, rule, or Supreme Court opinion authorizes the reasonableness hearing procedure;
- No public policy is advanced by employing the reasonableness hearing procedure; and
- The reasonableness hearing procedure is unfair to insurers.

## II. ARGUMENT

### A. **No statute, rule, or Supreme Court opinion authorizes the reasonableness hearing procedure.**

Amici's brief examines in detail the origin of the practice of holding a reasonableness hearing in the liability action at the behest of the settling parties. Amici explains and concludes that RCW 4.22.060 does not apply.

Amicus curiae Washington State Attorneys for Justice Foundation agrees.<sup>1</sup> Bird essentially avoids addressing the issue. (Bird does not address the issue in either his

---

<sup>1</sup> Brief of Amicus Curiae Washington State Association for Justice Foundation at 6 n.4 ("Use of the same factors for determining reasonableness in the covenant judgment context does not mean that RCW 4.22.060 otherwise applies in the covenant judgment context.").

response to the petition for review or his supplemental brief; in the Court of Appeals, Bird asserted that “[r]easonableness hearings under RCW 4.22.060 are an entrenched part of this state’s insurance law,”<sup>2</sup> but then recognized, more specifically and aptly, that “Washington courts have recognized the propriety of *the same kind of reasonableness hearing* for covenant judgments.”<sup>3</sup>) This Court has never held that RCW 4.22.060 authorizes a reasonableness hearing in a liability case to determine the amount of damages recoverable from an insurer.

Nor should it. The establishment of an offset pursuant to RCW 4.22.060 for the non-settling defendant(s) where joint and several liability prevailed stands in stark contrast to the insurance setting. The non-settling defendant in pre-1986 joint and several cases retained a jury right on damages and was an active party to the lawsuit both before and after settlement. The short notice

---

<sup>2</sup> Respondent’s Brief at 25.

<sup>3</sup> *Id.* at 27 (emphasis added).

and limited discovery was not a hardship where the non-settling defendant was a party all along.

No other statute or rule authorizes the reasonableness hearing procedure. That is, no rule or statute provides that, when a plaintiff and an insured settle the liability action, they can then move the trial court for a determination of reasonableness, an issue that is not in dispute between them. They are no longer adversaries; as between them, a determination of reasonableness is merely advisory.

This Court held in *Besel v. Viking Insurance Co. of Wisconsin*<sup>4</sup> that, *if* such a hearing is held and the insurer does not object to it, or to the determination of reasonableness, or indeed to the amount of the settlement, the insurer will be bound by the reasonableness determination. But neither in *Besel* nor in any other case did this Court identify any rule or statute that would authorize such a hearing at the request of the parties. There is none.

---

<sup>4</sup> 146 Wn.2d 730, 49 P.3d 887 (2002).

As Amici note, although there is no legal authority for holding a hearing in the liability action to determine an issue that is not in dispute in that action, a practice of permitting and holding such hearings has developed. Moreover, in *Mutual of Enumclaw Insurance Co. v. T & G Construction, Inc.*,<sup>5</sup> this Court stated, in dicta, that *if* such a hearing is held, a liability insurer with notice of and an opportunity to intervene in the hearing will be bound by the results, citing *Fisher v. Allstate Insurance Co.*<sup>6</sup>

The effect of this statement is to compel insurers to intervene in the adjunct proceeding in the liability action, even though (1) there is no legal authority for that hearing, (2) the issue to be decided in the hearing is not in dispute in that action, and (3) the insurer is not a party to that action. Currently, an insurer that receives notice of a reasonableness hearing scheduled by claimant and the

---

<sup>5</sup> 165 Wn.2d 255, 199 P.3d 376 (2008);

<sup>6</sup> 165 Wn.2d 255, ¶ 11, 199 P.3d 376 (2008) (citing *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 204, 961 P.2d 350 (1998)). The statement is dicta because, in *T & G Construction*, the insurer participated in the reasonableness hearing.

insured in the trial court is faced with a Hobson's choice.<sup>7</sup> The insurer can move to intervene in the liability action, with the likely outcome that the issue of damages will be determined on short (perhaps six days') notice and without the normal course of discovery and, unless this Court reverses the lower courts, with a forfeiture of the insurer's right to a jury trial.<sup>8</sup> Alternatively, the insurer can decline to participate in the reasonableness hearing, with the very real danger that the claimant and the insured will go forward with the hearing, without opposition, and the insurer will be held bound by the result.

The compulsion is unwarranted. The reasonableness hearing in the trial court is without legal authority to start

---

<sup>7</sup> That is (in the American usage of the term), insurers are faced with two choices, both of them bad. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 404 (2d ed. 1995).

<sup>8</sup> Discovery on potential insured-claimant collusion in setting the amount of settlement is particularly critical. See Appellant's Brief at 34-36 (indicating actual evidence obtained through additional discovery); *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, ¶¶ 53, 59, 216 P.3d 1110 (2009) (evidence of collusion significant determining factor in finding the settlement amount was unreasonable). Even an actual party to the liability action, which does not include the insurer, would not be able to adduce evidence of collusion or fraud at the time of the reasonableness hearing without additional discovery.

with; it should not gain legitimacy by expanding its reach. Moreover, the principles espoused in *Fisher* do not apply to force liability insurers to intervene in such reasonableness hearings, if held.

In *Fisher*, the question presented was whether a UIM insurer could decline to participate in the liability action by the UIM insured against the tortfeasor and then seek a separate determination of its obligation to pay. This Court's determination—that a UIM insurer that fails to participate in the underlying action of which it has notice and an opportunity to intervene would be bound by the results of that action—was based upon several considerations:

- The action against the tortfeasor establishes the amount to which the insured is “legally entitled” to recover from the tortfeasor, which is the exact same issue that determines UIM coverage<sup>9</sup>;
- There is sufficient identity of interest between the UIM insurer and the tortfeasor (i.e., they have an identical interest in defending against determination of liability and damages)<sup>10</sup>;

---

<sup>9</sup> *Fisher*, 136 Wn.2d at 247-48.

<sup>10</sup> *Id.* at 248.

- Having only one proceeding rather than two decide the same issue avoids redundant litigation, with the attendant delay, and the possibility of anomalous results<sup>11</sup>;
- Relitigation of the same issue provides an unwarranted benefit to UIM insurers.<sup>12</sup>

None of these considerations applies in the context of the reasonableness hearing procedure to justify binding an absent liability insurer.

In the UIM context, a genuine dispute exists between the UIM insured and the tortfeasor, the resolution of which will decide the identical issue in dispute between the UIM insured and UIM insurer. By contrast, in the reasonableness hearing procedure, the issues of liability and damages are no longer in dispute between the claimant and insured. Upon reaching settlement, there are *no* issues in dispute between them. Specifically, there is no dispute between them as to whether their settlement is reasonable. Unless a special hearing is created (one for which no authority exists), there is no decision to be made in the

---

<sup>11</sup> *Id.* at 248-49.

<sup>12</sup> *Id.* at 249.

liability action that can resolve any issue in dispute between the insured and its insurer.

Also, in the UIM context, the defenses of the tortfeasor are the same defenses as those of the UIM insurer. By contrast, in the reasonableness hearing procedure, no party to the liability action has an identity of interest with the liability insurer. Unlike in the UIM context, where the tortfeasor will dispute the subject issues (liability and damages), there is no party in the reasonableness hearing who shares the insurer's interest in challenging the subject issue (reasonableness). To the contrary, the parties' interests are in conflict with the liability insurer's. That is, the liability insurer's goal is to minimize the amount of a reasonable settlement, the claimant's goal is to maximize the amount of the settlement, and the insured's goal is to make the case go away, which can best be achieved by maximizing the amount of a settlement it will have no obligation to pay.

In the reasonableness hearing procedure, unlike the UIM context, redundancy is *created* by holding a special

hearing in the liability action. Because the only purpose of the reasonableness hearing in that context is to establish the amount of damages that can be recovered from the insurer—an issue that is in dispute between the insured (or its assignee) and the insurer and is *not* in dispute between the parties to the liability action—the hearing exists only to decide an element in the insured’s claim against the insurer, which claim must in any event be litigated in a separate action. Moreover, as discussed in the briefing before the Court of Appeals,<sup>13</sup> deciding the issue of damages in the liability action and the issue of insurer’s liability in a separate action can lead to simultaneous litigation in two venues on the same claim when, as here, one party appeals from the reasonableness hearing, or it can lead to sequential appeals, one each from each proceeding. And the awkwardness arising from having the issue of fraud/collusion “considered” in the reasonableness hearing as one of the *Glover* factors, yet raised again as a defense in the subsequent action against the insured, is minimized

---

<sup>13</sup> Brief of Appellant at 38.

or avoided altogether if the claim against the insured is presented in only one action.<sup>14</sup>

An examination of the reasonableness hearing procedure should lead this Court to the conclusion that there is no authority for its use and, in addition, no legal basis to bind an insurer by its results if it occurs in the insurer's absence.

**B. No public policy is advanced by employing the reasonableness hearing procedure.**

No court has expressed or attempted to express a rationale that justifies creating a special hearing adjunct to in the liability action to determine the reasonableness of a settlement, even before an action is brought against the insurer. Nor has Bird.

The reasonableness hearing procedure is cumbersome and unnecessary, and it can be unfair to insurers. For the procedure to be justified, there must be some legitimate benefit gained by the procedure that offsets the detriments. None is apparent, and no legitimate justification has been expressed by the courts or counsel.

---

<sup>14</sup> *Id.* at 46-48.

**C. The reasonableness hearing procedure is unfair to insurers.**

Both Amici and Farmers have pointed out how the reasonableness hearing procedure can be and is unfair to insurers. Even if constitutional due process is met, an insurer who is given notice of a reasonableness hearing can and often is given short notice, may not and likely will not have counsel at the ready, and may be precluded from conducting discovery or sufficient discovery on the settlement's reasonableness, particularly the critical collusion/fraud issue.

In general, the civil rules establish an orderly and fair procedure for the parties to conduct discovery and to present their issues for decision to the court on the merits.<sup>15</sup> The rules are intended "to secure the just, speedy, and inexpensive determination of every action."<sup>16</sup> There is no sound reason, and certainly none has been expressed, why those procedures should not be accorded insurers on the

---

<sup>15</sup> *Cf. Fox v. Sackman*, 22 Wn. App. 707, 709, 591 P.2d 855 (1979) ("Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.").

<sup>16</sup> CR 1.

issue of reasonableness. Specifically, there is no reason why the discovery procedures set forth in Rules 26-37, which apply to all civil proceedings,<sup>17</sup> should not apply to a proceeding to determine the reasonableness of a settlement when that determination constitutes the amount of damages recoverable from the insurer.

A single action against the insurer, conducted with all the process provided by the civil rules, is fair to all parties. Such an action does not prejudice the legitimate interests of the insured or his assignee, and it protects the insurer from overreaching.

### III. CONCLUSION

When an insured enters into a covenant judgment, it can seek to recover from its liability insurer the amount of the settlement, if the insured can prove (1) the insurer was at fault and (2) the settlement amount was reasonable upon consideration of the *Glover* factors. The insured can readily and fairly do so in a single proceeding, as to which

---

<sup>17</sup> *Id.* (“These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity . . .”).

both the insurer and insured have the protections of the civil rules and the right to a jury trial.

No reason has been expressed, by counsel in this action or by any court, why another hearing, conducted in the liability action, serves the interests of the public or the legitimate interests of any party. Because there is no legal authority for such a hearing, because it serves no legitimate purpose, because it is cumbersome and unnecessary, and because it almost always prejudices the interests of insurers, this Court should clarify that such hearings are not authorized and should not be used to determine the amount of damages in a claim against an insurer.

DATED: January 13, 2012

BULLIVANT HOUSER BAILEY PC

By

  
Jerret E. Sale, WSBA #14101  
Deborah L. Carstens, WSBA #17494

TALMADGE/FITZPATRICK

By

  
Philip A. Talmadge, WSBA #6973

Attorneys for Petitioner Farmers  
Insurance Exchange

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 13th day of January, 2012, I caused to be served Farmers' Answer to Amici Curiae Brief of National Association of Mutual Insurance Companies et al. to:

Andrew J. Kinstler  
Helsell Fetterman  
1001 Fourth Ave., Ste. 4200  
Seattle WA 98154

via hand delivery.  
 via first class mail.  
 via facsimile.

William C. Smart  
Isaac Ruiz  
Keller Rohrback, LLP  
1201 Third Ave., Ste. 3200  
Seattle WA 98101-3052

via hand delivery.  
 via first class mail.  
 via facsimile.

A Richard Dykstra  
Stafford Frey Cooper  
3100 Two Union Sq.  
601 Union St.  
Seattle WA 98101

via hand delivery.  
 via first class mail.  
 via facsimile.

Jeffrey I. Tilden  
Gordon Tilden Thomas & Cordell LLP  
1001 Fourth Ave., Ste. 4000  
Seattle WA 98154-1007

via hand delivery.  
 via first class mail.  
 via facsimile.

Gavin W. Skok  
Riddell Williams P.S.  
13001 Fourth Ave., Suite 4500  
Seattle, WA 98145-1065

via hand delivery.  
 via first class mail.  
 via facsimile.

Diane L. Polscer  
Gordon & Polscer, L.L.C.  
9755 SW Barnes Rd., Suite 650  
Portland, OR 97225

via hand delivery.  
 via first class mail.  
 via facsimile.

Michael I. Neil, President  
The Federation of Defense & Corporate  
Counsel  
1010 Second Ave., Suite 2500  
San Diego, CA 92101

via hand delivery.  
 via first class mail.  
 via facsimile.

Michael B. King  
Justin P. Wade  
Carney Badley Spellman, P.S.  
701 Fifth Ave., Suite 3600  
Seattle, WA 98104-7010

via hand delivery.  
 via first class mail.  
 via facsimile.

Bryan P. Harnetiaux  
Attorney at Law  
517 E. 17<sup>th</sup> Ave.  
Spokane, WA 99203

via hand delivery.  
 via first class mail.  
 via facsimile.

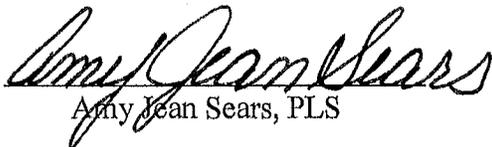
Gary N. Bloom  
Harbaugh & Bloom PS  
P. O. Box 1461  
Spokane, WA 99210-1461

via hand delivery.  
 via first class mail.  
 via facsimile.

George M. Ahrend  
Ahrend Law Firm PLLC  
100 E. Broadway Ave.  
Moses Lake, WA 98837-1740

via hand delivery.  
 via first class mail.  
 via facsimile.

I declare under penalty of perjury under the laws of the state of  
Washington this 13th day of January, 2012, at Seattle, Washington.

  
Amy Jean Sears, PLS

13657682.1