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No. 86109-9

SUPREME COURT OF THE
STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Petitioner.

FARMERS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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I. INTRODUCTION

The brief of Amicus WSAJ Foundation (“WSAJF”) demonstrates a fundamental misunderstanding of the jury trial issue, and its efforts fail to assist this Court. WSAJF argues that, because the claimant (Bird) and the insured (Best Plumbing) have agreed to settlement terms between themselves, the insurer (Farmers) has effectively confessed judgment and thereby lost its right to trial by jury.

In fact, Washington law provides that the settling parties bear the burden to prove, not only that the insurer is liable to pay the amount of a reasonable settlement, but also that the amount of the settlement is reasonable, consistent with the *Glover* factors. Washington law does not provide that an insured can confess judgment on its insurer’s behalf. Nor should it: the purpose of scrutinizing settlements is to ensure that the insured can claim as damages only the amount of a settlement that is reasonable and not collusive, not whatever amount the insured agreed to.

With regard to Farmers' due process claim, WSAJF argues that imposition of an irrebuttable presumption against an insurer does not violate due process whenever the insurer has notice and a right to intervene in an adjunct proceeding in the liability action against its insured after the insured has settled. But due process is lacking if such a procedure can, by imposing an irrebuttable presumption, deprive an insurer of an effective defense on the issue of damages and a jury trial on that issue.

II. LEGAL ARGUMENT

A. **Preliminarily, resolution of the jury trial issue does not resolve the treble damages issue.**

In footnote 3 of its brief, WSAJF states that the Court need not address interpretation of the trespass statute (RCW 4.24.630) unless it determines that Farmers is entitled to a jury trial. That is wrong.

Even if this Court were to determine that Farmers was not entitled to a jury on the question of whether the "covenant judgment" was reasonable, the question of the reasonableness of the settlement remains at issue. Regardless of how this Court rules on the jury question, it

can nevertheless determine that the lower courts erred in holding that a “reasonable” settlement could include any substantial amount for treble damages and attorney fees when (1) no intentional trespass claim had been pled after all applicable deadlines had expired, (2) all claims other than those pled had been waived, and (3) an intentional trespass claim requires an intent to cause injury.

B. WSAJF agrees with Farmers and other amici that the proceeding in the trial court is not authorized by or conducted pursuant to RCW 4.22.060.

Significantly, WSAJF recognizes that the reasonableness hearing held in this case—and in all similar cases—is not conducted under the auspices of RCW 4.22.060. In footnote 4, WSAJF agrees with Farmers that neither *Besel*¹ nor *Chaussee*² applied RCW 4.22.060 to the “covenant judgment reasonableness proceedings.” As WSAJF states, “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

¹ *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 49 P.3d 887 (2002).

² *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991).

judgment context.” Whatever legal authority might exist for conducting such a hearing (and Farmers asserts there is none other than the parties’ willingness to allow the procedure), RCW 4.22.060 is not that authority.

Amici Curiae National Association of Mutual Insurance Companies et al. agree.³

The Court of Appeals, however, assumed that the reasonableness hearing was conducted in accordance with RCW 4.22.060,⁴ and held, therefore, that this Court’s decision in *Schmidt v. Cornerstone Inv., Inc.*,⁵ applied to the jury trial issue. WSAJF’s conclusion that RCW 4.22.060 does not provide authority for the hearing conducted in the trial court supports Farmers’ argument that the Court of Appeals erred in relying upon *Schmidt*.

³ See Amici Curiae Brief of National Association of Mutual Insurance Companies et al. at 3-12.

⁴ *Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510, ¶¶ 15-19, 260 P.3d 209 (2011). Farmers had argued that RCW 4.22.060 did not authorize such a hearing (*see* Brief of Appellant at 22-29; Reply Brief of Appellant at 19-20; *see also* Appellant’s Motion for Reconsideration at 3-6). The Court of Appeals opinion fails to address that argument in any respect, instead assuming without analysis or explanation that RCW 4.22.060 applies.

⁵ 115 Wn.2d 148, 795 P.2d 1143 (1990).

C. The issue of reasonableness, which Farmers contests, is an issue to which a jury right attaches; the parties' settlement agreement does not waive Farmers' right.

Unfortunately, WSAJF's brief confuses rather than clarifies the jury trial issue before this Court. WSAJF notes that the settlement—a settlement between Bird and Best Plumbing, to which Farmers was not a party—eliminates the need to adjudicate any disputed issues of liability and damages between the parties.⁶ WSAJF then notes that those issues, resolved between the parties, are *not* the same as the unresolved issue being asserted against Farmers, which is “whether the covenant judgment amount is reasonable.”⁷ Farmers agrees. The distinct, unresolved question of whether the settlement amount was reasonable determines the measure of damages in an action against Farmers.

Rather than recognizing that such question is one to which the right to a jury attaches, however, WSAJF asserts that Farmers is in a position analogous to a default with

⁶ Amicus Brief at 7.

⁷ *Id.*

regard to that issue.⁸ But, of course, Farmers has *not* defaulted. Nor does Best Plumbing's covenant judgment effect a default by Farmers. Even WSAJF recognizes that under this Court's decisions an insurer may still rebut the reasonableness presumption where insured-claimant fraud or collusion is present. The possibility of rebuttal contradicts the very concept of "default" here. The settling parties cannot fairly or constitutionally diminish Farmers' right to a determination of the claims against it on the merits. Farmers has vigorously asserted all its rights to contest the reasonableness of the settlement, including its right to a jury trial on that issue.

Farmers does not here dispute WSAJF's assertion, based upon *Johanson v. United Truck Lines*,⁹ that a jury right does not attach to a determination of damages after default. But the situation in that case is not the situation here. Farmers is not in default, by analogy or otherwise.

⁸ *Id.* at 7-10. Specifically, WSAJF states, "The post-settlement determination of reasonableness is analogous to post-default determinations of damages, to which the right to jury trial does not attach." *Id.* at 7.

⁹ 62 Wn.2d 437, 383 P.2d 612 (1963).

Indeed, WSAJF's assertion that the "confession" by the insured in a covenant judgment applies "explicit[ly]" to an insurer in Farmers' position is preposterous.

Farmers itself has not defaulted: Farmers contests Bird's claim that the settlement between Bird and Best Plumbing was reasonable. Farmers' insured cannot "confess" on behalf of Farmers: Farmers and its insured's interests conflict regarding the reasonableness of the settlement; Best Plumbing's actions—in its own interests and in conflict with Farmers' interests—cannot diminish Farmers' constitutional rights.

Although Farmers agrees with WSAJF that determining whether a settlement is reasonable differs from determining liability and damages in the liability action, and agrees that the former determination is "less exacting" than the latter in the sense that a settlement is a compromise, rather than a determination, of liability and damages issues,¹⁰ Farmers disagrees that the difference means that it loses its right to a jury trial on the question of

¹⁰ Amicus Brief at 8-9.

the reasonableness of the settlement. When the amount of a reasonable settlement constitutes the amount of damages recoverable from an insurer in tort, the right to a jury trial remains inviolate on that issue.¹¹

WSAJF and Farmers agree that, if the court rather than a jury decides the issue of reasonableness in the liability case, then case law provides that Farmers will not have a jury decide the issue of reasonableness in the subsequent bad faith or contract action against Farmers directly.¹² Both WSAJF and the Court of Appeals, however, fail to appreciate the significance of that fact. If Farmers is not entitled to a jury trial in the reasonableness hearing, and if the determination of damages in the reasonableness hearing is preclusive, then Farmers will never obtain a jury determination on the issue of damages.

The Court of Appeals held that Farmers was not entitled to a jury trial in the reasonableness hearing

¹¹ Farmers notes the irony that WSAJF generally espouses “an interest in the right of litigants in civil cases to trial by jury” (Amicus Brief at 1) but, in this instance, opposes the right of Farmers to a trial by jury.

¹² Amicus Brief at 10-11.

because no such procedure existed at common law in 1889.¹³ Neither WSAJF nor the Court of Appeals recognizes that, if Farmers has a constitutional right to a jury trial on the issue of whether the amount of a settlement claimed as damages is reasonable, such right cannot be abrogated by adoption of a procedure that establishes an irrebuttable presumption on the issue as to which Farmers' jury right attaches.¹⁴

D. Imposing an irrebuttable presumption upon Farmers on the issue of damages violates due process.

WSAJF argues that, because Farmers participated fully in the reasonableness hearing, the irrebuttable presumption imposed by that procedure does not violate Farmers' due process rights. WSAJF asserts that the principles of preclusion applied in the context of UIM claims and collateral estoppel apply equally in the present

¹³ *Bird v. Best Plumbing*, 161 Wn. App. 510, ¶¶ 25, 27.

¹⁴ This principle applies all the more forcefully because the procedure whereby an insurer intervenes to defend itself in the liability action to which it is not a party is not a procedure authorized by statute or rule.

circumstances.¹⁵ WSAJF ignores the fact that, unless Farmers is given all the process it is due when the irrebuttable presumption is established, it has been denied due process.

In the UIM context, a UIM insurer who has notice of an action against the tortfeasor and an opportunity to intervene will be bound by the determinations made in the action against the tortfeasor.¹⁶ In that situation, however, the UIM insurer's opportunity to litigate the issues is commensurate with the tortfeasor's. That is, an insurer who participates in the action by the UIM insured against the tortfeasor will, like the tortfeasor, have the benefit of the civil rules, including all attendant discovery, and the right to trial by jury, unless waived.¹⁷ The insurer will not

¹⁵ Amicus Brief at 11-12.

¹⁶ WSAJF cites *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998); and *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 279, 996 P.2d 603 (2000).

¹⁷ The extent of the insurer's right to trial by jury in this context has not been considered by the courts. Although an insurer would have waived its right to trial by jury if the arbitration provision in the policy applied, when the insurer must participate in an action against the tortfeasor, the insurer would, presumably, have the same right to trial by jury as the tortfeasor.

be required to compromise its right to fully litigate the issue of damages.

In the collateral estoppel context, estoppel applies only when its application will not work an injustice on the party against whom the doctrine is to be applied.¹⁸ If that party has requested but been denied an opportunity to have a jury determine the issue of damages, an estoppel cannot justly be enforced because doing so would deprive the party of its right to a jury trial.

Neither doctrine can apply to Farmers when Farmers has requested and been denied its right to a jury trial on the issue of damages. *Chaussee* makes clear that the reasonableness of a settlement is an element of the insured's burden in an action against the insurer.¹⁹ Farmers has asserted its constitutional right to a jury trial on that issue. If the damages question can be resolved by application of an irrebuttable presumption hatched in an adjunct proceeding to a liability action as to which Farmers

¹⁸ See *Lenzi*, 140 Wn.2d at 279.

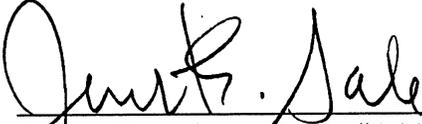
¹⁹ *Chaussee*, 60 Wn. App. at 510 (in a suit by the insured's assignees against the insurer, the plaintiffs had the burden to prove that the settlement entered into was reasonable).

has been denied a jury, then the use of that adjunct proceeding to create the presumption violates Farmers' due process rights.

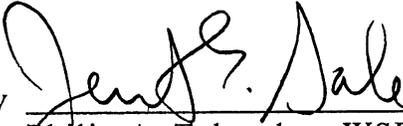
In sum, because Farmers is entitled to a jury trial on the issue of damages, its request for a jury in the reasonableness hearing should have been granted. If Farmers is not permitted a jury in the reasonableness hearing, then its due process rights have been violated because it will have been precluded from having a jury decide the measure of damages.

DATED: January 13, 2012

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