

No. 86109-9

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Petitioner.

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FARMERS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This case presents an opportunity for the Court to clarify that an insurer, like any other civil litigant, has a constitutional right to a jury determination of the amount of damages in a tort action. A reasonableness hearing is not a constitutionally viable substitute for a jury trial on damages.

In denying Farmers the right to a jury trial, the Court of Appeals misinterpreted existing precedent, including this Court's decision in *Besel v. Viking Insurance Co.*¹ The Court of Appeals opinion asserts, and its analysis depends upon, that court's determination that the reasonableness hearing was conducted by the trial court under authority of RCW 4.22.060 and, therefore, was something less than a determination of tort damages.² But RCW 4.22.060 does not provide authority to conduct a reasonableness hearing for purposes other than those contemplated by that statute, and this Court has never held it does. *Besel* did not hold that any court rule or statute, including RCW 4.22.060, specifically authorized a hearing in the liability action between the claimant and the insured to establish the measure of damages for a non-party insurer's bad faith ("Reasonableness Hearing Procedure"). *Besel* merely acknowledged that the trial court had

¹ 146 Wn.2d 730, 49 P.3d 887 (2002).

² *Bird v. Best Plumbing Grp., LLC*, 161 Wn. App. 510, 260 P.3d 209, 213 (2011).

conducted a reasonableness hearing as to which the insurer had not objected, either as to procedure or outcome.

Damages caused by insurer bad faith is an element of the tort claim against the insurer regardless what procedure is used to make that determination. The Washington Constitution, as this Court has repeatedly held, guarantees litigants the right to a jury on the question of tort damages.

The Reasonableness Hearing Procedure employed here has deprived Farmers of due process of law in two key ways. Because Farmers has not been afforded jury rights in the reasonableness hearing and the results of that hearing carry preclusive effect, the procedure effectively deprived Farmers of a right to trial by jury on damages. Moreover, although this Court has characterized a settlement between a claimant and an insured approved as reasonable as the “presumptive” measure of damages in a subsequent action against an insurer for breach of contract or bad faith, that presumption is effectively irrebuttable and violates due process principles.

The Court also has an opportunity to resolve a conflict in the Court of Appeals regarding whether a statutory trespass claim requires proof of intent to cause harm. Divisions Two and Three have correctly recognized that it does. The Court of Appeals in this case disagreed, ruling that, even

though there was no dispute that defendant had acted negligently, at worst, plaintiff could recover treble damages and attorney fees. This conclusion does not comport with the plain language of the statute or constitutional due process considerations.

II. ISSUES PRESENTED FOR REVIEW

1. Is an insurer's constitutional right to a jury trial violated by the court's determination of damages in a reasonableness hearing?

2. Is an insurer's constitutional right to due process violated by the court's denial of the insurer's demand for a jury trial and imposition of an irrebuttable presumption of harm?

3. Does RCW 4.24.630, which authorizes recovery of treble damages and attorney fees for "wrongful" injury to property, require an intent to cause harm?

III. STATEMENT OF THE CASE

James Bird's neighbor hired Best Plumbing to repair a leaking sewer line. CP 627. While making the repairs, Best Plumbing cut into what it incorrectly determined to be an abandoned sewer line on Bird's property. *Id.* Thereafter, with Bird's express permission, Best Plumbing made repairs to the sewer line on Bird's property. 7/23/09 RP at 262. Bird believed Best Plumbing's actions damaged his property and filed suit, asserting claims for negligence and common law trespass. CP 5-7.

Best Plumbing tendered Bird's claim to Farmers, and Farmers provided a defense. CP 13. Thereafter, Bird made a settlement demand for \$1.2 million. CP 2783. One month before trial and after close of discovery, Bird increased this demand to \$2 million—the limits of Best Plumbing's policy. CP 716. The new demand followed Bird's assertion of a claim for statutory trespass, which permits recovery of treble damages and attorney fees, even though the parties had previously stipulated that no new causes of action would be asserted.³ *Id.*, CP 492-94. Bird and Best Plumbing subsequently entered into a stipulated judgment for \$3.75 million, pursuant to which Best Plumbing agreed to assign its rights against Farmers to Bird and Bird agreed not to execute against Best Plumbing. CP 113.

Bird then sought, in the liability action, to have the settlement approved as reasonable in order to set the measure of damages for a subsequent breach of contract/bad faith claim against Farmers.⁴ CP 443-44. Although the trial court allowed Farmers to intervene, the court rejected Farmers' demand for a jury trial and denied Farmers' request to

³ Bird did not file a motion to amend his complaint; he simply asserted the new claim in a settlement demand letter. CP 716.

⁴ In a declaratory judgment action filed by Farmers against Best Plumbing and Bird at the conclusion of the reasonableness hearing, Bird asserted breach of contract, bad faith, and other extra-contractual claims against Farmers. The principles discussed below apply equally to both contractual and extra-contractual claims. For convenience, this brief characterizes the claims as bad faith claims.

exclude consideration of Bird's belated statutory trespass claim. CP 307, 478; *see* CP 3442-43. Following a bench hearing, the trial court found the settlement to be reasonable. CP 3433. Farmers appealed, and the Court of Appeals affirmed.⁵ Farmers then filed a motion for reconsideration, which the court denied. Farmers now seeks review of the Court of Appeals' decisions.

IV. ARGUMENT

A. **Farmers has been denied its constitutionally guaranteed right to a jury trial on the issue of damages.**

Under Washington law, the amount of a reasonable settlement between claimant and insured becomes the "presumptive" measure of damages for insurer bad faith.⁶ In this case, the trial court found the \$3.75 million settlement between Bird and Best Plumbing to be reasonable. That figure therefore represents the measure of damages if Farmers is held liable for bad faith, unless Farmers can show the settlement was the result of fraud or collusion.⁷

Contrary to the Court of Appeals' assertion, this Court has not determined that any court rule or statute provides authority for the

⁵ *Bird*, 260 P.3d at 211.

⁶ *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 755, 58 P.3d 276 (2002).

⁷ *See, e.g., Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 374-75, 89 P.3d 265 (2004). As a practical matter, and as discussed further below in Section IV.B, the presumption is essentially irrebuttable.

Reasonableness Hearing Procedure used by the trial court. Indeed, there is no rule or statute authorizing a trial court to determine damages against a non-party whose liability is not at issue in that action. Certainly, this Court has never decided that RCW 4.22.060 provides authority for determining tort damages against an insurer, nor has it decided that the Reasonableness Hearing Procedure employed here obviates the insurer's right to a jury on the question of tort damages. The trial court's reasonableness determination violates Farmers' constitutional right to a jury, and there are no legal, practical, or policy justifications for using a procedure never intended to apply in this context.

- 1. Because the reasonableness hearing determines the measure of damages for Farmers' alleged bad faith, Farmers has a constitutional right to have a jury determine reasonableness.**

In *Glover v. Tacoma General Hospital*,⁸ this Court explained that a determination of reasonableness “must be placed in context of the *legal consequences* of [such a] determination.”⁹ Where, as here, those consequences include an irrebuttable presumption as to the measure of damages in a subsequent bad faith action, the right to a jury trial exists.

The Court of Appeals ignored *Glover*'s directive. Instead of considering the effect of a reasonableness determination—i.e., that it set

⁸ 98 Wn.2d 708, 658 P.2d 1230 (1983), *overruled on other grounds*, *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

⁹ *Glover*, 98 Wn.2d at 715 (emphasis added).

the measure of damages for Farmers' alleged bad faith—the court focused solely on the procedure used to determine whether the settlement between Bird and Best Plumbing was reasonable. As a result, the court mistakenly concluded that this Court's decision in *Schmidt v. Cornerstone Investments*¹⁰ controls while ignoring the critical distinction that the damage award in *Schmidt* was decided by a jury—a constitutional right taken from Farmers here.

In *Schmidt*, the plaintiffs settled their claims against some, but not all, defendants.¹¹ The trial court then conducted reasonableness hearings pursuant to RCW 4.22.060 solely to determine the equitable offset that would be applied to legal damages to be determined by the jury.¹² The court found that, although the plaintiffs settled with one defendant for \$50,000, the reasonable value of that settlement was actually \$150,000.¹³

On appeal, the plaintiffs argued that RCW 4.22.060 was unconstitutional because it allowed the trial court to reduce the amount of a damage award instead of having the issue resolved by a jury.¹⁴ This Court rejected the plaintiffs' argument, concluding the right to a jury trial

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

¹¹ *Schmidt*, 115 Wn.2d at 156.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 159.

does not apply to equitable proceedings, such as a proceeding to determine the amount of an offset to a subsequent award of damages by the jury.¹⁵

Contrary to the Court of Appeals' assumption, *Schmidt* does not answer the question here—i.e., whether Farmers is entitled to have a jury decide damages. *Schmidt* does not stand for the proposition that the amount of damages to be awarded in a tort case is an equitable question to which the right to jury trial does not attach. The determination of reasonableness by the trial court in *Schmidt* did not prevent or limit either party from arguing the issue of damages to the jury at trial.

Nor has any other Washington Supreme Court decision reached this conclusion. A defendant has a constitutionally guaranteed right to a jury determination of damages in a tort action. If the Court of Appeals had examined the effect of a reasonableness determination rather than merely looking at the procedure for making this determination, it would have recognized that, in accordance with this Court's decisions in *Endicott v. Icicle Seafoods, Inc.*,¹⁶ and *Sofie v. Fibreboard Corp.*,¹⁷ Farmers is entitled to a jury trial as a matter of right.

¹⁵ *Id.* at 161. In contrast, the right to a jury trial *does* apply to a determination of the allocation of fault. *Edgar v. City of Tacoma*, 129 Wn.2d 621, 628, 919 P.2d 1236 (1996); *Geschwind v. Flanagan*, 121 Wn.2d 833, 839–40, 854 P.2d 1061 (1993).

¹⁶ 167 Wn.2d 873, 224 P.3d 761 (2010).

¹⁷ 112 Wn.2d 636, 771 P.2d 711 (1989).

The only purpose of the reasonableness hearing in this case was to determine the measure of damages for a bad faith claim against Farmers.¹⁸ The resolution of this issue is therefore governed by *Sofie*, in which this Court recognized that the measure of damages for a tort claim presents a question of fact to be decided by the jury.¹⁹ The Court recently reaffirmed this principle in *Endicott*.²⁰ Because bad faith claims against an insurer constitute tort claims,²¹ and because the reasonableness determination in this case establishes the damages for insurer bad faith, this Court's decisions in *Endicott* and *Sofie* require that the jury decide this issue.

2. RCW 4.22.060 does not apply.

RCW 4.22.060 does not consider or address the issue of damages for insurer bad faith; nothing in the language of the statute can be construed to authorize a reasonableness hearing to resolve this issue.

RCW 4.22.060 was enacted as part of the 1981 Tort Reform Act. The Act retained joint and several liability in Washington as a central principle, but it also adopted contribution among joint tortfeasors to more fairly apportion fault among defendants. In the specific context of

¹⁸ E.g., *Werlinger v. Warner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005) (“[T]he sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.”).

¹⁹ 112 Wn.2d at 645, 648.

²⁰ 167 Wn.2d at 884-85.

²¹ *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 630, 245 P.2d 470 (1952); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 259, 63 P.3d 198 (2003).

settlements between a plaintiff and a defendant where there are multiple defendants, the Legislature provided for a hearing on the reasonableness of the settlement.²² All “parties” are afforded an opportunity to present evidence.²³ A reasonable settlement amount becomes the offset entered against the nonsettling defendant(s).²⁴

RCW 4.22.060 was never intended to apply to the situation presented here—a determination of the damages recoverable from a non-party to the litigation. Nothing in the language of RCW ch. 4.22 or RCW 4.22.060 specifically mentions or authorizes a hearing to determine the reasonableness of a settlement as it might affect an entity that is not a party to the action or to establish the measure of damages against an insurer.²⁵

²² RCW 4.22.060(1).

²³ *Id.*

²⁴ RCW 4.22.060(2).

²⁵ The misperception that the RCW 4.22.060 reasonableness hearing should be used to determine the measure of damages for insurer bad faith can be traced back to the Court of Appeals’ decision in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). However, while the *Chaussee* court concluded the *factors* used to determine whether a settlement is reasonable for purposes of RCW 4.22.060 should be considered when evaluating whether a consent judgment is reasonable, the court did not adopt the reasonableness hearing *procedure*. 60 Wn. App. at 512. Thus, *Chaussee* does not stand for the proposition that a reasonableness determination made to decide the measure of damages for insurer bad faith should be made in an RCW 4.22.060 reasonableness hearing or that RCW 4.22.060 authorizes such a procedure.

3. There is no practical or policy justification for using an abbreviated, expedited procedure to determine damages against an insurer.

An insured is entitled to recover damages to compensate for harm caused by an insurer's bad faith. In Washington, as discussed above, those damages may be the amount of a reasonable settlement between plaintiff and insured, even when the settlement results in a consent judgment.²⁶ But this Court has never discussed or analyzed the reason, or the legal authority, for using reasonableness hearings to determine tort damages, as opposed to an equitable offset, in advance of suit against the insurer.

Washington courts have, however, expressly recognized the moral hazard presented by holding an insurer liable for the amount of a settlement negotiated between the claimant and insured. In *Chaussee v. Maryland Casualty Co.*, for instance, the Court of Appeals acknowledged that "an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement."²⁷

The insured defendant who is willing to accept entry of a judgment against him has no incentive to limit the amount of the judgment since he

²⁶ *Besel*, 146 Wn.2d at 738.

²⁷ *Chaussee*, 60 Wn. App. at 510; *see also Nw. Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. 546, 555, 997 P.2d 972 (2000) (recognizing that when interests of plaintiff and insured are aligned, "one cannot be confident that the litigation accurately established the value of the claim").

has no responsibility to pay it. Indeed, if difficult negotiations as to the amount of settlement would jeopardize the insured's opportunity to be released from financial risk, the insured has a significant incentive not to assert the merits of his claim in negotiations. The insured has no incentive to drive the settlement down nor, unless the insured puts the plaintiff at risk of trial, any leverage to do so. The plaintiff, on the other hand, has a legitimate incentive to maximize the amount of the settlement, and he has the leverage to achieve that goal because he can offer the insured almost everything the insured wants at no cost to the insured. Under the circumstances, neither party has a *real* interest in minimizing the amount of the settlement. At most, the settling parties are constrained by the possibility a court or jury may determine the amount of the settlement is so high within or beyond a conceivable settlement range as to be unreasonable. This is a process fraught with incentives for collusively inflated settlements, given the absence of a real financial stake for the insured to participate seriously in settlement negotiations.

Washington courts have accepted the moral hazard—they have determined that the potential for fraud or collusion must be balanced against the value of promoting reasonable settlements—but they recognize that court scrutiny of the settlement's reasonableness is required to

maintain the balance.²⁸ Significantly, no court has expressed that, much less explained how, the critical balance between the interest of the insured in obtaining a release of liability through settlement and the insurer's interest in paying only reasonable settlements is maintained by the Reasonableness Hearing Procedure. That is, no court decision discussing the Reasonableness Hearing Procedure has expressed that an abbreviated and expedited procedure is necessary or even useful to protect the *legitimate* interests of the insured. No court has identified a valid reason why the measure of damages needs to be determined even before the insurer's liability has been pled, much less put in issue.²⁹

On the other hand, the Reasonableness Hearing Procedure can and often does impair an insurer's ability to defend its interests. In this case, Bird objected to Farmers' requests for discovery and postponement of the hearing and would have had a hearing on five days' notice, if the trial court had allowed. CP 3737. Although the trial court granted Farmers additional time and the opportunity to conduct discovery, such rights are not always afforded to insurers. In other cases, the Court of Appeals has held that six days' notice of a hearing is sufficient notice for the insurer—neither a party to, nor represented by counsel in, the liability action—to

²⁸ See *Chaussee*, 60 Wn. App. at 510; *Nw. Prosthetic*, 100 Wn. App. at 555.

²⁹ By contrast, the procedure created by RCW 4.22.060 to determine the amount of the offset(s) must be completed prior to judgment in the liability action.

adduce and present evidence on the *Glover* factors.³⁰ The court has also upheld a trial court's denial of an insurer's request for discovery regarding the reasonableness of a settlement³¹ and ruled that, as a non-party, an insurer is not even entitled to notice of an intent to settle that a represented party to the action would receive pursuant to RCW 4.22.060(1).³²

In the absence of any sound, articulable reason why the Reasonableness Hearing Procedure serves an interest of the courts or the parties, its use exacerbates the moral hazard the courts have warned against. The procedure benefits settling parties, who have an interest in exaggerating the value of their settlement, and disfavors insurers, who have had little time to address the relevant issues. In sum, the critical balance necessary to support the imposition of an agreed settlement as the insured's damages is compromised by the Reasonableness Hearing Procedure.

Not only does the Reasonableness Hearing Procedure fail to supply the critical balance necessary to promote reasonable settlements and to prevent fraudulent ones, but it is wasteful. First, because an insurer who demands it is entitled to a jury trial, it is cumbersome and unnecessary to

³⁰ *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 326, 116 P.3d 404 (2005).

³¹ *Howard*, 121 Wn. App. at 379-80.

³² *Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 761, 154 P.3d 950 (2007).

empanel two juries, one in the liability action and one in the bad faith action, to try the case against the insurer. Second, as here, the procedure can result in two actions proceeding at once in the form of an appeal from the liability action and prosecution of the coverage/bad faith action.

Third, as discussed in the following section, the procedure raises unnecessary complications regarding how decisions in the reasonableness hearing can or should affect decisions in the bad faith action.

To summarize, there is no policy reason to support the use of a special proceeding, not recognized by statute or court rule, to determine the measure of damages against an insurer, particularly when the special proceeding serves only to compromise the insurer's ability to defend its interests. The issue of an insurer's damages should be decided—by a jury, unless waived—in the bad faith action brought against the insurer.

B. Farmers has been denied the right to due process.

Farmers was denied its right to trial by jury on damages for the reasons already discussed in this brief and was therefore deprived of due process. But the Reasonableness Hearing Procedure, by its nature, deprives insurers like Farmers of due process.

Utilizing the Reasonableness Hearing Procedure under the purported authority of RCW 4.22.060 to determine an insurer's damages (not just an offset as in *Schmidt*) violates due process. The result of that

process carries preclusive effect, as this Court determined in *Mutual of Enumclaw Insurance Co. v. T & G Construction, Inc.*³³ The Reasonableness Hearing Procedure creates an irrebuttable presumption as to damages with respect to a settlement crafted by a claimant whose sole interest is to inflate the settlement amount and an insured who has no interest in limiting the amount because *that insured will never pay it*. This result occurs after procedures that are innately unfair to an insurer—short notice, limited discovery, and truncated hearings.

That the presumption is irrebuttable can readily be seen in the fact that the settling claimant has the burden of proving the absence of fraud or collusion under *Glover*. If the claimant sustains that burden and a court approves that settlement as reasonable, an insurer may thereafter *be precluded* from proving the settlement was the product of fraud or collusion, under authority of *T & G Construction*.

Irrebuttable presumptions like the one created by this Court in the Reasonableness Hearing Procedure violate due process.³⁴

³³ 165 Wn.2d 255, 263, 199 P.3d 376 (2008).

³⁴ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Ware v. Phillips*, 77 Wn.2d 879, 886, 468 P.2d 444 (1970); *City of Seattle v. Ross*, 54 Wn.2d 655, 660, 344 P.2d 216 (1959).

C. **In order to prevail on a claim for statutory trespass under RCW 4.24.630, the plaintiff must establish that the defendant intended to cause harm.**

One month before trial, and after the parties had already stipulated that there would be no new causes of action, Bird attempted to assert a claim for statutory trespass pursuant to RCW 4.24.630.³⁵ CP 492-93, 716. This statute authorizes recovery of treble damages and attorney fees for “wrongful” waste or injury to land. A person acts “wrongfully” under RCW 4.24.630 “if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.” Whether RCW 4.24.630 applies is critical to a determination of reasonableness in this case because, without the potential for treble damages and attorney fees, the amount of the settlement between Bird and Best Plumbing could not possibly be deemed to be reasonable.

Farmers argued that Best Plumbing did not act “wrongfully” for purposes of RCW 4.24.630 when it cut the pipe on Bird’s property because Best Plumbing did not intend to cause harm.³⁶ That is, Best Plumbing thought it was fixing a plumbing problem; it intended to prevent, rather than cause, property damage. Best Plumbing’s intent was

³⁵ As noted above, Bird did not file a motion to amend his complaint but simply asserted the new claim in a settlement demand letter. CP 716.

³⁶ Of course, Best Plumbing’s subsequent attempts to repair the damage were with Bird’s express permission and thus do not fall within the scope of RCW 4.24.630. See 7/23/09 RP at 258-59.

not disputed. The trial court rejected Farmers' argument (CP 3443), as did the Court of Appeals.³⁷ Thus, according to the Court of Appeals, Best Plumbing could be liable for treble damages and attorney fees even though its conduct could be characterized as negligent, at worst. *See* CP 397-99, 402-05.

Divisions Two and Three have recognized that RCW 4.24.630 applies only to intentional, rather than negligent, conduct. In *Standing Rock Homeowners Association v. Misich*,³⁸ Division Three explained that the wrongful conduct prohibited under RCW 4.24.630 is analogous to an intentional tort.³⁹ Thus, RCW 4.22.070 did not apply to preclude the imposition of joint and several liability on the defendant because that statute applies only to negligent, rather than intentional, torts.⁴⁰ Similarly, in *Borden v. City of Olympia*,⁴¹ Division Two ruled that the defendant could not be held liable in the absence of evidence establishing that it intentionally, as opposed to negligently, caused injury to the plaintiffs' property.⁴²

³⁷ *Bird*, 260 P.3d at 218-19.

³⁸ 106 Wn. App. 231, 23 P.3d 520 (2001).

³⁹ *Misich*, 106 Wn. App. at 246.

⁴⁰ *Id.*; *see also Colwell v. Ezzell*, 119 Wn. App. 432, 438, 81 P.3d 895 (2003) (citing *Misich* for the proposition that a violation of RCW 4.24.630 is analogous to an intentional tort).

⁴¹ 113 Wn. App. 359, 53 P.3d 1020 (2002).

⁴² *Borden*, 113 Wn. App. at 374.

The *Misich* and *Borden* decisions are in accord with the plain language of RCW 4.24.630. By its terms, the statute requires the plaintiff to prove that the defendant trespassed upon the land and “*wrongfully* cause[d] waste or injury to the land.”⁴³ The defendant acts “wrongfully” when he “*intentionally* and *unreasonably* commits *the act*”⁴⁴ The “act” at issue is the act of “caus[ing] waste or injury to the land.”⁴⁵ The trespasser, then, must intentionally and unreasonably cause waste or injury to land. That is, the trespasser must intend to cause harm.⁴⁶

In sum, Divisions Two and Three have correctly recognized that a defendant cannot be held liable under RCW 4.24.630 absent an intent to cause harm. The Court of Appeals decision in this case, imposing liability for negligence, disregards the plain language of the statute and must be reversed.

In addition, the Court of Appeals’ imposition of treble damages for negligent conduct constitutes a violation of the constitutional right to due

⁴³ RCW 4.24.630 (emphasis added).

⁴⁴ *Id.* (emphasis added).

⁴⁵ *Id.*

⁴⁶ The legislative history of RCW 4.24.630 confirms this interpretation. That history makes clear that the intent of the legislation was to respond to vandalism, theft, and illegal dumping—i.e., intentional misconduct. *See* CP 3253, 3258, 3261, 3263-68.

process. Treble damages are a form of punitive damages,⁴⁷ and the United States Supreme Court has recognized that an unreasonable punitive damages award constitutes an arbitrary deprivation of property in violation of the due process clause.⁴⁸ Punitive damages should be awarded “only if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”⁴⁹ Clearly, that standard has not been satisfied here. The undisputed evidence establishes that Best Plumbing believed the pipe on Bird’s property to be abandoned and that Best Plumbing sought to repair damage to the pipe with Bird’s express permission. The imposition of treble damages for Best Plumbing’s negligent conduct constitutes a violation of the right to due process and requires reversal.

V. CONCLUSION

For the reasons set forth above, Farmers respectfully requests that the Court of Appeals decision in this case be REVERSED.

⁴⁷ See, e.g., *Ventozad v. Anderson*, 14 Wn. App. 882, 897, 545 P.2d 1219 (1965) (recognizing punitive nature of treble damages provision of timber trespass statute).

⁴⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

⁴⁹ *Id.* at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

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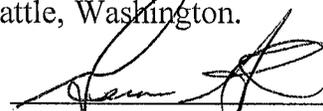
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