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Court of Appeals Case No. 64291-0

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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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STATE OF WASHINGTON
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PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Appellant, Farmers Insurance Exchange (“Farmers”), seeks review of the decisions described in Section II below.

II. CITATION TO COURT OF APPEALS DECISIONS

Farmers seeks review of the published opinion of the Court of Appeals and the Order Denying Motion for Reconsideration and Granting Motion to Publish filed April 27, 2011. Copies of these decisions are attached at Tabs A and B of the Appendix.

III. 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?

IV. 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 agreed no new causes of action would be asserted.¹ *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 in a

¹ Bird did not file a motion to amend his complaint; he simply asserted the new claim in a settlement demand letter. CP 716.

subsequent breach of contract/bad faith action against Farmers.² 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 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.³ Farmers then filed a motion for reconsideration, which the court denied.⁴ Farmers now seeks review of the Court of Appeals' decisions.

V. SUMMARY OF ARGUMENT

Bird sought a reasonableness hearing for one reason—to set the measure of damages for Farmers' alleged bad faith. In accordance with this Court's decisions in *Endicott v. Icicle Seafoods, Inc.*,⁵ and *Sofie v. Fibreboard Corp.*,⁶ Farmers was entitled to have this issue decided by a jury, whether in the reasonableness hearing or, preferably, in a subsequent

² Bird likely will allege both breach of contract and bad faith claims in a subsequent action against Farmers. The principles discussed below apply equally to both types of claims. For convenience, that action is characterized as one for bad faith.

³ *Bird v. Best Plumbing Group, LLC*, No. 64291-0-I (Wash. Ct. App. March 21, 2011) (Appendix, Tab A).

⁴ Appendix, Tab B. The court also granted a motion to publish filed by a third party.

⁵ 167 Wn.2d 873, 224 P.3d 761 (2010).

⁶ 112 Wn.2d 636, 771 P.2d 711 (1989).

bad faith action by the insured. The Court of Appeals' ruling to the contrary conflicts with *Endicott* and *Sofie* and deprives Farmers of its constitutional right to a jury trial on damages in the bad faith action, warranting review pursuant to RAP 13.4(b)(1) and (3). And, because the reasonableness hearing procedure approved by the Court of Appeals is now commonplace in Washington,⁷ a determination by this Court regarding an insurer's right to a jury trial in this situation is essential, in accordance with RAP 13.4(b)(4).

Review also is warranted under RAP 13.4(b)(3) and (4) because the Court of Appeals violated Farmers' due process rights. The court did so in two ways—first by denying Farmers' right to a jury trial and then by upholding a reasonableness hearing procedure that effectively creates an irrebuttable presumption as to the measure of damages for insurer bad faith.

⁷ There are numerous recent appellate decisions involving reasonableness hearings in the insurance context. *See, e.g., Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008); *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009); *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.2d 306 (2008); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 161 P.3d 406 (2007); *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007); *Villas at Harbour Pointe Owners Ass'n ex rel. Constr. Assocs., Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 154 P.3d 950 (2007); *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005).

Finally, the Court should grant Farmers' petition for review in accordance with RAP 13.4(b)(2) in order to resolve a conflict among the divisions of the Court of Appeals regarding the standard for imposing liability for statutory trespass under RCW 4.24.630. In the case below, the Court of Appeals ruled that negligent conduct was sufficient to trigger liability for treble damages and attorney fees. Divisions Two and Three have concluded otherwise. The Court of Appeals' imposition of treble damages for negligent conduct also violates the due process clause, warranting review under RAP 13.4(b)(3).

VI. ARGUMENT

A. **The Court of Appeals' denial of Farmers' right to trial by jury conflicts with decisions of this Court, raises constitutional issues, and raises issues of substantial public interest.**

Farmers asked the Court of Appeals to decide whether an insurer is entitled to have a jury decide the measure of damages caused by an insurer's bad faith.⁸ The answer to this question seems obvious—as this Court clearly and emphatically recognized in *Endicott* and *Sofie*, the right to a jury trial under the Washington Constitution is inviolate and encompasses the ability to have a jury decide the measure of damages in a

⁸ As explained in Section B below, a determination of reasonableness essentially creates an irrebuttable presumption regarding the measure of damages. And this Court has expressly held that an insurer may not challenge reasonableness in a subsequent bad faith action; a settlement determined to be reasonable may only be challenged for fraud or collusion. *T & G Constr.*, 165 Wn.2d at 258.

tort case.⁹ The Court of Appeals ignored this binding precedent, apparently concluding insurers do not have the same rights as other civil litigants. In order to reach this conclusion, the court misapplied this Court's decision in *Schmidt v. Cornerstone Investments, Inc.*,¹⁰ a case in which a jury *did* determine the measure of damages.

The Court of Appeals' determination that Farmers is not entitled to a jury trial conflicts with this Court's decisions in *Endicott* and *Sofie*, violates Farmers' constitutional rights, and is of substantial public interest to all liability insurers, claimants, and insureds. Review by this Court is therefore necessary and appropriate.

1. Because the reasonableness hearing determined the measure of damages for Farmers' alleged bad faith, this Court's decisions in *Endicott* and *Sofie* control.

In *Glover v. Tacoma General Hospital*,¹¹ this Court explained that a determination of reasonableness "must be placed in context of the *legal consequences* of [such a] determination."¹² 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.

⁹ *Endicott*, 167 Wn.2d at 884-85; *Sofie*, 112 Wn.2d at 638.

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

¹¹ 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).

¹² 98 Wn.2d at 715 (emphasis added).

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

In *Schmidt*, the trial court conducted a reasonableness hearing in accordance with RCW 4.22.060. This statute was adopted by the Washington Legislature in 1981 as part of the Tort Reform Act. That Act retained joint and several liability in Washington as a central principle but adopted contribution among joint tortfeasors to more fairly apportion fault among defendants. In the specific context of settlements between a plaintiff and one of several defendants, the Legislature provided (in RCW 4.22.060) for a hearing on the reasonableness of the settlement, which would provide an offset against plaintiff's recovery from non-settling defendants.¹³

¹³ Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1, 18–20 (1981); see also Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZAGA L. REV. 69 (1984/85).

Thus, in *Schmidt*, the Court ruled that there is no right to a jury trial in a reasonableness hearing held *for the purpose of allocating liability among tortfeasors*. The Court held that an offset to a damages award need not be decided by a jury.¹⁴ 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.

Contrary to the Court of Appeals' assumption, *Schmidt* does not answer the question here. That case 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. Nor has any other Washington Supreme Court decision reached that conclusion.¹⁵ 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

¹⁴ 115 Wn.2d at 161.

¹⁵ The Court of Appeals incorrectly asserted that this Court's decision in *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002), "held that a reasonableness hearing in this situation is appropriate." Slip op. at 12 (quoting *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004)). However, the *Besel* court did not reach this issue—in that case, the insurer did not challenge either the insured's settlement with the claimant or the use of the reasonableness hearing procedure. *Besel*, 146 Wn.2d at 379. It is black letter law that, when a legal theory is not discussed in an opinion, that case is not controlling in a future case where the issue is properly raised. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

Court's decisions in *Endicott* and *Sofie*, Farmers is entitled to a jury trial as a matter of right.

The only reason for the reasonableness hearing in this case was to determine the measure of damages for a bad faith claim against Farmers.¹⁶ 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.¹⁷ The Court recently reaffirmed this principle in *Endicott*.¹⁸ Because bad faith claims against an insurer constitute tort claims,¹⁹ and because the reasonableness determination in this case establishes the measure of damages for insurer bad faith, this Court's decisions in *Endicott* and *Sofie* require that the jury decide this issue.

The Court of Appeals' determination that Farmers is not entitled to a jury trial also reflects the court's failure to understand the preclusive effect of a determination of reasonableness in a subsequent bad faith action. Washington courts have determined that the amount of a

¹⁶ *E.g.*, *Werlinger*, 126 Wn. App. at 350-51 (2005) (“[T]he sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.”).

¹⁷ 112 Wn.2d at 645, 648.

¹⁸ 167 Wn.2d at 884-85.

¹⁹ *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).

settlement determined to be reasonable by a court becomes the “presumptive” measure of damages in any subsequent proceeding.²⁰ The presumption is conclusive, however, on the question whether the amount of the settlement is reasonable. The “presumption” can be rebutted only by showing that the settlement was the product of fraud or collusion.²¹

Consequently, if the determination of reasonableness in this matter is not overturned, Farmers cannot seek to have it reviewed in a subsequent suit against it by Bird. Farmers will be denied a jury trial on damages in the reasonableness hearing, and it will be denied a jury trial on damages in the bad faith action. It will lose its constitutional right to a jury trial on the question of damages. In accord with this Court’s decisions in *Endicott* and *Sofie*, (1) an insurer in Farmers’ position must be provided a jury trial in the reasonableness hearing or, better, (2) the insurer should be provided a jury trial in the bad faith action. The Court of Appeals’ decision violates Farmers’ constitutional right to a jury trial, as recognized by this Court, and requires review pursuant to RAP 13.4(b)(1) and (3).

²⁰ See, e.g., *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 755, 58 P.3d 276 (2002).

²¹ *Id.* As explained in Section B below (see n. 31), however, case law, including the Court of Appeals decision in this case, draws into question whether—and if so, how—an insurer can overturn a settlement on the ground of fraud or collusion when the settlement has been found to be “reasonable.”

2. The Court of Appeals' denial of Farmers' right to a jury trial raises an issue of substantial public interest.

In addition to conflicting with this Court's decisions and violating Farmers' constitutional right to a trial by jury, the Court of Appeals' decision raises issues of substantial public interest. As this Court is aware, plaintiffs and insureds often avail themselves of an opportunity to reach agreement on the amount of a settlement the insured has no obligation to pay and then, through a reasonableness hearing procedure in the liability action, to establish the amount of damages against the insurer.²² But the right to a jury trial is "inviolable" and no less so when asserted by insurers. Whether insurers have the right to a jury determination of a damages claim against them is a matter of substantial importance to liability insurers, their insureds, and claimants.

B. The Court of Appeals' denial of Farmers' due process rights raises constitutional issues as well as issues of substantial public interest.

The Court of Appeals declined to address Farmers' due process argument, equating it with Farmers' jury trial argument.²³ This issue

²² See cases cited in n.6, *supra*. As one Washington trial court observed, "the use of [consent judgments] has the potential to become a 'cottage industry' within the practice of law, undermining the respect owed to the honorable profession." *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, No. 05-2-03446-1, Ruling on Reasonableness Hearing at 3 (Clark Cnty. Jan. 29, 2008). (A copy of this decision is attached at Tab C of the Appendix).

²³ Slip op. at 13 n.6.

merits review under RAP 13.4(b)(3) and (4) as it presents a significant issue of constitutional and public importance that deserves ultimate determination by this Court.²⁴ There is no set of circumstances other than covenant judgments in which the rights of a party in a civil action to traditional discovery and trial by jury could be so readily disregarded. This Court should take review to exercise its proper supervisory role over Washington's civil justice system.

The Court of Appeals erred in concluding that Farmers' right to a trial by jury has not been violated, but Farmers' due process rights also have been violated, for two reasons. First, Farmers is deprived of due process when it does not receive a jury trial on a fundamental issue like damages. Farmers is deprived of due process in this case because, once

²⁴ A single case discusses RAP 13.4(b)(4), *State v. Watson*, 155 Wn.2d 135, 196 P.3d 672 (2008) (prosecutor's ex parte memo to all county judges on sentencing practice). But there are cases in which direct review under the analogous provision of RAP 4.2(a)(4) has been granted by this Court indicating that this Court will grant review where the systemic effect of an issue is key. *Sofie* is perhaps the best example of such a case. See also *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) (property division in dissolutions); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) (governmental liability/public duty doctrine); *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986) (application of Public Records Act to court records); *In re Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999) (handling of sex predator cases); *Thurston Cnty. v. City of Olympia*, 151 Wn.2d 171, 86 P.3d 151 (2004) (power to locate courts outside county seat); *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009) (time limits for Public Records Act cases).

the trial court establishes a presumption of reasonableness with respect to a certain amount, no jury decides the issue of damages.²⁵

Second, using the reasonableness hearing procedure set forth in RCW 4.22.060 to determine damages (as opposed to determining an offset, as was the case in *Schmidt*) violates due process because, in effect, it creates an irrebuttable presumption that a settlement crafted by an insured who has no financial stake in the outcome and a plaintiff whose financial interests are unchallenged by the insured is reasonable and constitutes the measure of damages caused by the potential fault of an insurer.²⁶

Due process principles abhor irrebuttable presumptions.²⁷ While Washington law theoretically provides that a settlement between an insured and the claimant approved as reasonable in a hearing constitutes the “presumptive damages” in a later bad faith action against the insurer,²⁸

²⁵ See *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910) (statutory elimination of insanity defense from jury’s purview violated due process as criminal intent is an essential element of a crime entrusted to jury’s decisionmaking under Washington Constitution).

²⁶ Such a situation is rife with opportunities for collusion, as evidenced by the trial court’s Ruling on Reasonableness Hearing in *Water’s Edge*, *supra*. Appendix, Tab C. In rejecting a stipulated settlement of \$8.75 million and finding \$400,000 to be a reasonable amount, the court acknowledged the due process implications of collusive settlements. *Id.* at 3-4.

²⁷ See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁸ *Besel*, 146 Wn.2d at 733.

the measure of damages cannot later be challenged. If the insurer is held to be liable, the “presumption” of damages cannot be rebutted.²⁹ This Court has also allowed an insured to argue that an insurer is estopped to raise issues in a subsequent coverage/bad faith action that could have been raised in the RCW 4.22.060 hearing.³⁰ This makes the irrebuttable nature of the presumptive damages even clearer. The insurer is barred from presenting evidence that the settlement was actually unreasonable. That is, the settlement amount is irrebuttably the damages sustained by the insured, which the insurer must pay if found liable.³¹

An irrebuttable presumption offends due process because it arbitrarily deprives a party affected by the presumption of any meaningful opportunity to rebut the presumption.³² Moreover, if forcing insurers to

²⁹ See *T & G Constr.*, 165 Wn.2d at 263 (2008) (insurer bound by findings, conclusions, and judgment entered in action against tortfeasor when it had notice of action and opportunity to intervene).

³⁰ *Id.*

³¹ Washington law apparently permits Farmers to contend, in defense of the bad faith claim against it, that the settlement was the product of collusion or fraud and is therefore unreasonable or, at least, unenforceable. See *VanPort Homes*, 147 Wn.2d at 755. The Court of Appeals’ decision does not make that clear, however, because the court did not address Farmers’ due process argument. Farmers fully expects that Bird will argue in his bad faith action against Farmers that the trial court’s determination on fraud/collusion carries preclusive effect, which would eliminate any challenge to the trial court’s determination of “presumptive” damages.

³² See, e.g., *Stanley*, 405 U.S. 645 (irrebuttable presumption that unwed father is unfit for child custody); *City of Seattle v. Ross*, 54 Wn.2d 655, 344 P.2d 216 (1959) (ordinance making it unlawful for anyone not lawfully authorized to be

submit to an abbreviated reasonableness hearing is treated under Washington law as a just sanction for an insurer's breach of its duties to an insured, such a "sanction" invades Farmers' property right. There are due process limitations, for example, on discovery-related sanctions that confer a default judgment upon a party affected by an opponent's failure to comply with discovery rules.³³ Similarly, in the context of reasonableness hearings, such an excessive sanction invades Farmers' property rights. Here, Farmers was effectively deprived of the right to contest the presumption of reasonableness.

The Court should grant review of Farmers' due process argument pursuant to RAP 13.4(b)(3) and (4).

C. The Court of Appeals' decision regarding Bird's statutory trespass claim conflicts with other decisions of the Court of Appeals, raises Constitutional issues, and raises issues of substantial public interest.

One month before trial, and after the parties had already agreed there would be no new causes of action, Bird attempted to assert a claim for statutory trespass pursuant to RCW 4.24.630. CP 492-93; 716. This

found in place where narcotics were unlawfully kept created irrebuttable presumption); *Ware v. Phillips*, 77 Wn.2d 879, 468 P.2d 444 (1970) (garnishment statute made a garnishee's failure to answer an admission a valid claim existed); see also *Wash. Cnty. Dep't of Soc. Servs. v. Clark*, 461 A.2d 1077 (Md. 1983) (presumption that best interest of child in continuous foster care for two years was termination of parental rights held unconstitutional).

³³ *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909) (court cannot deny to defendant the right to defend the action as "mere punishment").

statute authorizes recovery of treble damages and attorney fees for “wrongful” waste or injury to land.³⁴ 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 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.³⁵

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 it did not intend to cause harm.³⁶ The trial court rejected this 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.

³⁴ The statute is set forth in full at Tab D of the Appendix.

³⁵ As noted above, before asserting his statutory trespass claim, Bird made a settlement demand for \$1.2 million; following the assertion of that claim, the parties settled for \$3.75 million, a figure the trial court deemed to be reasonable. CP 2783, 3433.

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.

³⁷ Slip op. at 17-18.

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, the court concluded that 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 And the disagreement in the lower courts is further reflected by Division One's unpublished decision in *F. Feri LLC v. Roy St. Holdings, Inc.*,⁴³ in which the court refused to allow the plaintiff to amend his complaint to add a cause of action under RCW

³⁸ Wn. App. 231, 23 P.3d 520 (2001).

³⁹ *Id.* 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 violation of RCW 4.24.630 is analogous to an intentional tort).

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

⁴² 113 Wn. App. at 374.

⁴³ 2005 WL 894897 (Wash. Ct. App. 2005).

4.24.630 because “that [statutory trespass claim] would have introduced an added element of willfulness.”⁴⁴

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.”⁴⁵ By the plain language of the statute, the defendant acts “wrongfully” when he “*intentionally* and *unreasonably* commits *the act*”⁴⁶ The “act” at issue is the act of “caus[ing] waste or injury to the land.”⁴⁷ The trespasser, then, must intentionally and unreasonably cause waste or injury to land.⁴⁸ That is, the trespasser must intend to cause harm.⁴⁹

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

⁴⁴ *Id.*, at *1. Farmers cites this decision merely to highlight the uncertainty in the Court of Appeals regarding this issue, not as authority, in accordance with the requirements of GR 14.1(a).

⁴⁵ RCW 4.24.630 (emphasis added).

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 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.

for negligence, directly conflicts with the *Misich* and *Borden* decisions, and review by this Court is necessary to resolve the conflict.

Review also is warranted because the imposition of treble damages for negligent conduct constitutes a violation of the constitutional right to due process. Treble damages are a form of punitive damages,⁵⁰ 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.⁵¹ 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.”⁵² 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 warranting review pursuant to RAP 13.4(b)(3).

⁵⁰ See, e.g., *Ventoza v. Anderson*, 14 Wn. App. 882, 897, 545 P.2d 1219 (1965) (recognizing punitive nature of treble damages provision of timber trespass statute).

⁵¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

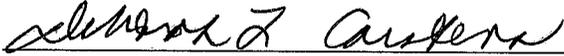
⁵² *Id.* at 419 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

VII. CONCLUSION

For the reasons set forth above, Farmers respectfully request that the Court GRANT its Petition for Review.

DATED: May 26, 2011.

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APPENDIX

TAB	DOCUMENT
A	Opinion in <i>Bird v. Best Plumbing Group, LLC</i> , No. 64291-0-I (Wash. Ct. App. March 21, 2011)
B	Court of Appeals Order Denying Motion for Reconsideration and Granting Motion to Publish dated April 27, 2011
C	<i>Water's Edge Homeowners Ass'n v. Water's Edge Assocs.</i> , No. 05-2-03446-1, Ruling on Reasonableness Hearing (Clark Cnty. Jan. 29, 2008)
D	RCW 4.24.630

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES A. BIRD,)	NO. 64291-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
BEST PLUMBING GROUP, LLC,)	
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
FARMERS INSURANCE EXCHANGE,)	FILED: March 21, 2011
)	
Appellant,)	

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2011 MAR 21 AM 8:37

LAU, J. — When a defendant whose liability insurer has acted in bad faith proceeds to make his own settlement with an injured plaintiff, the amount of that settlement may become the presumptive measure of damage in the bad faith lawsuit, but only if a trial court determines that the settlement is reasonable and not the product of fraud or collusion. Besel v. Viking Ins. Co. of Wisconsin, 146 Wn.2d 730, 733, 49 P.3d 887 (2002). Here, James Bird entered into a settlement that included a stipulated judgment and covenant not to execute with Best Plumbing, who assigned its rights

against its insurer to Bird. The trial court determined that the settlement was reasonable. Farmers Insurance Exchange (Farmers) seeks reversal of the trial court's reasonableness determination, arguing that the trial court erred by denying its jury trial demand and finding the settlement was reasonable. We affirm the finding of reasonableness because (1) a hearing to determine the reasonableness of a settlement under RCW 4.22.060 is an equitable proceeding with no right to trial by jury and (2) the trial court properly exercised its discretion in determining the reasonableness of the settlement.

FACTS

James Bird lives on hillside waterfront property on Perkins Lane in Seattle. In April 2005, Bird's next door neighbor contacted Best Plumbing to repair a leaking sewer line. A Best Plumbing employee, without Bird's consent, went onto Bird's property and cut Bird's pressurized sewage line in three places. When Bird returned home from work, his system "cycled on" and engulfed him in an explosion of sewage. Bird fell, cracked his elbow, and vomited.

Bird later learned from his neighbor that Best Plumbing's employee had cut the line. Bird demanded the line be fixed. Best Plumbing claimed it repaired the line. But over the next eight months, sewage continued to escape the line. According to Bird, this sewage flow caused hillside instability and extensive damage to his residence. Bird removed contaminated soil from his lot and attributes his subsequent heart attack to this physical labor. To determine the extent of damage and repair, Bird hired a geotechnical engineering firm, contractors, and others.

The City of Seattle issued a stop work order in January 2006 due to concerns about hillside instability. Bird's geotechnical engineer, William Chang, made several proposals to the City until they finally approved a soldier-pile retaining wall, which was estimated to cost \$851,176.78. Bird discovered that the pipe had discharged thousands of gallons of sewage onto his lot. Chang concluded that the sewage leak from the cut line, rather than Bird's soil excavations, caused the instability problem.

In May 2006, Bird notified Best Plumbing that the actions of its employee had caused significant damage to his residence and hillside lot. Best Plumbing's liability insurer, Farmers, appointed defense counsel, without a reservation of rights. Meanwhile, Allstate Insurance paid Bird \$262,000 under his homeowner's insurance policy for damage to his home.¹

Bird sued Best Plumbing on May 7, 2007, alleging trespass and negligence. Allstate separately asserted subrogation claims against Best Plumbing for the \$262,000 it paid. The court later consolidated the two cases. In July 2008, after Best Plumbing admitted its employee went onto Bird's property without permission, the court granted Bird's partial summary judgment motion on liability and proximate cause on his common law trespass claim. The nature and extent of Bird's damages remained for trial.

In November 2008, the parties' mediation efforts failed. Best Plumbing made no settlement offer. Later, Bird made a \$1.2 million settlement demand on Best Plumbing. Farmers countered with a \$350,000 settlement offer. Bird's counsel then wrote to Best Plumbing, asserting that its potential exposure exceeded the \$2 million policy limits based on the intentional trespass statute's treble damages provision. Bird made a \$2

¹ Bird, as part of his business, sold Allstate insurance.

million policy limits demand, which Farmers rejected. Concerned about the company and his potential exposure in excess of policy limits, Best Plumbing president, William Lilleness, retained personal counsel Richard Dykstra, with whom he had previously worked. Without Farmers' participation, Bird and Best Plumbing reached a \$3.75 million settlement agreement that included an assignment of Best Plumbing's claims against Farmers, a stipulated judgment, and covenant not to execute against Best Plumbing.

Bird moved for a determination that the settlement was reasonable. The trial court granted Farmers' motions to intervene, to continue the reasonableness hearing, and to conduct discovery. It denied Farmers' jury trial demand. The court conducted a reasonableness hearing over four days in July and September 2009. In its October 7, 2009 memorandum ruling, the court found that the \$3.75 million settlement was reasonable.

Farmers appeals the denial of its jury trial demand and the trial court's determination that the settlement was reasonable.

ANALYSIS

I. Jury Trial Right

Farmers contends that deciding the damages issue against the insurer in the liability action without a jury is unconstitutional and contrary to law and policy. Farmers further argues that because the reasonableness determination in the liability action sets the presumptive amount of damages in the bad faith action, the insurer is deprived of its article I, section 21 state constitutional right to have damages decided by a jury.

Farmers relies on Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989), which held there was a constitutional right for the jury to determine the

amount of noneconomic damages. Sofie struck down the cap on noneconomic damages under the tort reform act. Sofie, 112 Wn.2d at 669. Bird responds that the RCW 4.22.060 reasonableness hearing is equitable in nature, not legal, and therefore, no right to a jury trial attaches. Bird argues that this issue is controlled by Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 795 P.2d 1143 (1990).

"In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 368, 617 P.2d 704 (1980).

The Washington State Constitution, article 1, section 21 provides that the right to a jury trial shall remain inviolate. We have consistently interpreted this constitutional provision as guaranteeing those rights to trial by jury which existed at the time of the adoption of the constitution. Accordingly, there is a right to a jury trial where the civil action is purely legal in nature. Conversely, where the action is purely equitable in nature, there is no right to a trial by jury.

Brown, 94 Wn.2d at 368 (internal citations omitted).

In determining whether a party has a constitutional right to jury trial, we look to both the scope of the right and whether the cause of action is one to which the right to a jury trial applied at the time the state constitution was adopted in 1889. Wings of the World, Inc. v. Small Claims Court, 97 Wn. App. 803, 806-07, 987 P.2d 642 (1999). For causes of action that did not exist in 1889, we look for then-existing proceedings that are analogous to the present action. Kim v. Dean, 133 Wn. App. 338, 135 P.3d 978 (2006). There is no "right to a jury trial . . . in statutorily created actions without common law analogues." State v. State Credit Ass'n., 33 Wn. App. 617, 621, 657 P.2d 327 (1983).

The challenged statute here expressly states that the court shall determine reasonableness: "A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured." RCW 4.22.060 (emphasis added). "A statute is presumed to be constitutional and the challenger bears the burden of establishing the unconstitutionality of the legislation beyond a reasonable doubt." Brower v. State, 137 Wn.2d 44, 52, 969 P.2d 42 (1998).

While Farmers cites Sofie correctly, its holding is not applicable here. Farmers does not contend that juries made determinations regarding a settlement's reasonableness at the time our constitution was adopted. Rather, Farmers asserts that because this reasonableness procedure, created by statute in 1981 and since interpreted by the courts, creates a damages presumption in a later action against an insurer, it unconstitutionally interferes with the jury's damages determination. And as the Sofie court made clear, we must resolve all doubt in the statute's favor. Sofie, 112 Wn.2d at 644.

Not long after our Supreme Court decided Sofie, it addressed a jury trial right challenge to RCW 4.22.060 in Schmidt, 115 Wn.2d 148.² There, real estate investors sued an appraiser and other defendants when their investment failed. The investors settled with the appraiser for \$50,000. But following a hearing to determine the reasonableness of the settlement under RCW 4.22.060, the trial court found \$50,000 unreasonable and determined \$150,000 a more appropriate settlement. Investors settled with the appraiser for \$50,000 despite the court's ruling. The court advised the

² Schmidt makes no mention of the Sofie decision.

parties it would consider a motion for reconsideration of its reasonableness ruling after the trial against the remaining defendants. After trial, the court denied reconsideration of its reasonableness ruling. Investors appealed. Defendants filed cross appeals. At the Supreme Court's request, the Washington State Trial Lawyers Association (WSTLA) and the Washington Defense Trial Lawyers (WDTL) submitted amici curiae briefs.

Relevant to our review here, investors challenged "whether RCW 4.22.060 is unconstitutional because it allows the trial court to reduce the total sum of an injured party's damage award by an amount determined by the trial court rather than by a jury." Schmidt, 115 Wn.2d at 159.

Schmidt rejected this contention on dual grounds, holding (1) the constitutional issue was not properly raised and (2) a reasonableness hearing is an equitable proceeding with no right to trial by jury. First, the court found plaintiffs had failed to properly raise this issue based on briefing inadequacies. Next, the court found In re MGM Grand Hotel Fire Litigation, 570 F. Supp. 913 (D. Nev. 1983) and Barretto v. City of Waukegan, 133 Ill. App. 3d 119, 129, 478 N.E.2d 581 (1985), cases cited by WSTLA and WDTL in support of rejecting plaintiff's constitutional challenge, highly persuasive. Our Supreme Court reasoned, "As both of these cases indicate, the right to jury trial does not extend to procedures in equity, such as whether the amount of a proposed settlement is reasonable. Such questions are properly within the province of the trial court to decide." Schmidt, 115 Wn.2d at 161.

Farmers, however, asserts Schmidt's holding on the jury trial right constitutes dictum and is distinguishable. It also argues Schmidt "held there is no right to a jury trial in a reasonableness hearing held **for the purpose of allocating liability among tort**

feasors.” Appellant’s Br. at 19. But Farmers misstates the holding. Notably, it omits any citation to the Schmidt case to support this alleged holding. As to Farmers’ assertion that Schmidt’s holding is mere dictum, we disagree. As our Supreme Court noted long ago, “It may be that the case could have been rested on the first ground suggested in the opinion . . . but both questions were clearly in the case, and simply because the court decided both does not necessarily mean that the one or the other is dictum.” Savage v. Ash, 86 Wash. 43, 46, 149 P. 325 (1915), Schmidt made two holdings when it rejected the investors’ jury trial right challenge.³

Farmers next attempts to distinguish Schmidt, claiming it was decided under pre-1986 law, while addressing RCW 4.22.060’s application to the joint tortfeasor situation, rather than the nonparty insurer situation involved here. Farmers acknowledges that applying RCW 4.22.060 to the joint tortfeasor context is equitable but argues that its application here in the nonparty insurer situation is legal. But as the Schmidt court’s holding quoted above makes clear, the determination of a settlement’s reasonableness is an equitable proceeding with no jury trial right. And nothing in the opinion limits this holding to a case involving a joint tortfeasor. As we reasoned in Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 847 (1991), “[there is] little difference between a determination of reasonableness in the context of the contribution statute and [a covenant judgment]. In both settings similar concerns exist regarding the impact of a settlement on other parties and the risk of fraud or collusion.”

In MGM, the court was asked to determine whether certain settlements in a wrongful death action were entered in “good faith” pursuant to Nevada statute. The

³ Bird correctly notes that Schmidt decided this issue “in response to the appellant’s urged disposition of the case.” Resp’t’s Br. at 34.

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nonsettling litigants argued that the court could not determine the good faith issue because good faith was a question for a jury to decide. MGM, 570 F. Supp. at 926. In ruling against trial by jury, the court reasoned:

There is no right to a jury trial under N.R.S. 17.245 because the issue of "good faith" and the amount of a credit to which a non-settling defendant would be entitled is one of "equity" for which there is no right to trial by jury. The policy of encouraging settlements under N.R.S. 17.245 would be impaired if multiple trials by jury would have to be held in order to determine whether a settlement was in "good faith." A non-settling party is fully protected by its ability to present counter-affidavits or evidence at a hearing on the issue of "good faith."

MGM, 570 F. Supp. at 927 (emphasis added).

In Barretto, the court held, "The right to trial by jury does not extend to special or statutory proceedings unknown at common law, and as this issue of good faith settlement arises under the Illinois Contribution Act where no provision granting the right to a jury trial is provided, no right to a jury trial attaches." Barretto, 133 Ill. App. 3d at 129 (citation omitted).

In addition, the type of determination to be made—the reasonableness of an award decided between two parties to be imposed on another—rests on traditional concerns of fairness that lie at the heart of a court's equitable powers. Indeed, other persuasive authority either directly holds or strongly supports that reasonableness determinations are the province of trial court judges. Alton M. Johnson Co. v. M.A.I. Co., 463 N.W.2d 277, 279 (Minn. 1990) (reasonableness determination "is more accurately portrayed as an action to enforce an agreement against an indemnifier who was not a party to the agreement. The decisionmaker is being asked to apply its sense of fairness to evaluate a compromise of conflicting interests, a characteristic role for equity. In short, this action is more like an action in equity, which traditionally is tried to

the court”); Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1495 (5th Cir. 1992) (trial court did not err in preventing insurers’ challenge to its denial of discovery into the reasonableness of settlement or refusing to submit this issue to the jury); Norris v. Nationwide Mut. Ins. Co., 55 S.W.3d 366, 370 (Mo. Ct. App. 2001) (“whether a settlement amount is reasonable is within the discretion of the trial court”); Fireman’s Fund Ins. Co. v. Imbesi, 361 N.J. Super. 539, 826 A.2d 735, 750 (Ct. App. Div. 2003) (“It is the court’s obligation to conduct an independent review of the settlement in order to determine whether it is reasonable and made in good faith.”); Midwestern Indem. Co. v. Laikin, 119 F. Supp.2d 831, 844 (S.D. Ind. 2000) (“[T]he court believes the Supreme Court of Indiana would instruct trial courts to resolve a challenge to the reasonableness of a consent judgment with a covenant not to execute . . .”).⁴ And the Arizona Supreme Court has framed this issue as one in which the trial court engages. Parking Concepts, Inc. v. Tenney, 207 Ariz. 19, 24, 83 P.3d 19 (2004) (“[W]hen evaluating a Morris^[5] settlement for reasonableness, the superior court should apply the same criteria that must be applied by the insurer under its implied contractual covenant of

⁴ Laikin case suggests that a party has a constitutional right to a jury determination of reasonableness, but the court there held that there was no jury trial right on reasonableness in that case. Laikin, 119 F. Supp. 2d at 844–45 (“A trial on the reasonableness of a settlement would effectively amount to a complex trial within a trial. . . . Such daunting prospects have led the Minnesota court that decided Miller v. Shugart, [316 N.W.2d 729 (Minn. 1982)] to hold that such issues of reasonableness should be tried only to a court, not to a jury. See Alton M. Johnson Co. v. M.A.I. Co., 463 N.W.2d 277, 279 (Minn. 1990). The Indiana courts are not likely to adopt that approach of taking such an issue away from a jury where it is genuinely disputed, but they would set a high bar before allowing an insurer who, by definition, has breached its duty to its insured, to impose such a trial on the parties who thought they had settled their dispute.”).

⁵ United Servs. Auto. Ass’n v. Morris, 154 Ariz. 113, 741 P.2d 246 (1987).

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good faith and fair dealing in evaluating a settlement proposal in the absence of a reservation of rights.”) (emphasis added).

Farmers cites two contrary cases—Great Divide Ins. Co. v. Carpenter, 79 P.3d 599, 613–14 (Ak. 2003) and Six v. Am. Family Mut. Ins. Co., 558 N.W.2d 205, 207 (Iowa 1997). But these cases provide no rationale or discussion to support its jury trial right conclusion. We find them unpersuasive.

Farmers also relies on cases in which insurers are entitled to a jury trial to contest the damages amount in the coverage or bad faith action, unlike in Washington where a reasonable covenant judgment is the presumptive measure of damages. E.g., Hamilton v. Md. Cas. Co., 27 Cal. 4th 718, 41 P.3d 128, 117 Cal. Rptr. 2d 318 (2002) (Where insurer agrees to defend but is excluded from negotiating settlement and covenant not to execute, settlement amount will not be presumptive damages amount.); State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996) (stipulated judgment without adversarial trial not admissible as evidence against insurer in bad faith case); Pruyn v. Agric. Ins. Co., 36 Cal. App. 4th 500, 42 Cal. Rptr. 2d 295, 314 (1995) (insurer can contest settlement’s reasonableness in bad faith case).

But these cases conflict with Besel, 146 Wn.2d 730, which held that an insurer had no right to litigate the reasonableness and good faith issues as part of a subsequent bad faith action. “[T]he amount of a covenant judgment is the presumptive measure of an insured’s harm caused by an insurer’s bad faith if the covenant judgment is reasonable under the Chaussee criteria.” Besel, 146 Wn.2d at 733. In Howard v. Royal Specialty Underwriting, Inc., 121 Wn. App. 372, 89 P.3d 265 (2004), we addressed a similar argument raised by the insurer:

Royal also argues that the timing of the hearing was inappropriate because the reasonableness hearing was essentially the damages phase of the bad faith action. The court in Besel held that "the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable under the Chaussee criteria." Besel, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). The fact that a reasonableness determination may have this impact is not a basis to conclude that the procedure is not appropriate, as the Supreme Court in Besel has already held that a reasonableness hearing in this situation is appropriate.

Howard, 121 Wn. App. at 379.

And according to established case law, the court determines the reasonableness of a settlement "at the time the parties enter into it." Brewer v. Fibreboard Corp., 127 Wn.2d 512, 541, 901 P.2d 297 (1995) (emphasis omitted); Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 38, 935 P.2d 684 (1997). "Finally, the Chaussee criteria protect insurers from excessive judgments especially where, as here, the insurer has notice of the reasonableness hearing and has an opportunity to argue against the settlement's reasonableness." Besel, 146 Wn.2d 739.

Farmers next argues that because a reasonableness hearing sets the presumptive measure of damages caused by an insurer's tortious bad faith under Besel, the reasonableness hearing is in fact a legal proceeding to establish damages. Therefore, a jury trial right attaches. But as Farmers acknowledges, the jury trial analysis is a historical one. And Farmers cites no history that suggests such reasonableness proceedings existed in 1889. Nor has Farmers suggested that a comparable common law action was a legal one. Near the time our constitution was adopted, the mere fact that a court ruling affected the damages amount awarded to a plaintiff did not deprive plaintiff of the right to trial by jury. See Kohler v. Fairhaven & N.W. Ry. Co., 8 Wash. 452, 36 P.3d 253 (1894) (trial court did not err by reducing

excessive damages awarded under jury's passion or prejudice; appellate court did not adopt dissent's view that this judicial action interfered with plaintiff's jury trial right). For the reasons discussed above, we hold that the trial court properly denied Farmers' jury trial demand.⁶

II. Reasonableness Determination

Farmers argues the trial court abused its discretion in finding the covenant judgment reasonable. It contends (1) the settlement was "collusive as a matter of law," (2) the trial court erred when it included treble damages for statutory trespass under RCW 4.24.630, and (3) the trial court erred by finding the settlement value of the property damage claim was 100 percent of the repair cost.

Bird replies: (1) there is no such thing as "collusive as a matter of law," (2) the trial court correctly ruled that Bird would likely prevail on his treble damages claim, and (3) the trial court properly included 100 percent of repair costs in its reasonableness determination.

A. Standard of Review

This court reviews a trial court's determination regarding whether a settlement is reasonable under an abuse of discretion standard. Werlinger v. Warner, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Boguch v. Landover Corp., 153 Wn. App. 595, 619, 224 P.3d 795 (2009). "[D]iscretion is abused only where

⁶ Because the trial court properly denied Farmers' jury trial demand, we do not address its due process challenge. And Farmers does not contend "its procedural [due process] rights were violated in this matter." Appellant's Reply Br. at 16.

no reasonable person would have taken the view adopted by the trial court.” Carle v. McChord Credit Union, 65 Wn. App. 93, 111, 827 P.2d 1070 (1992).

“[T]he finding of reasonableness necessarily involves factual determinations” and “[f]actual determinations will not be disturbed on appeal, when . . . they are supported by substantial evidence.” Glover for Cobb v. Tacoma Gen. Hosp., 98 Wn.2d 708, 718, 658 P.2d 1230 (1983). “The trial court heard and saw the witnesses, and was thus afforded an opportunity, which is not possessed by this court, to determine the credibility of the witnesses.” Garofalo v. Commellini, 169 Wash. 704, 705, 13 P.2d 497 (1932). The trial court’s credibility determinations and its resolution of the truth from conflicting evidence will not be disturbed on appeal. Garofalo, 169 Wash. at 705; DuPont v. Dep’t of Labor & Indus., 46 Wn. App. 471, 479, 730 P. 1345 (1986).

In Glover, our Supreme Court set out nine factors courts should consider when determining whether a settlement is reasonable for the purposes of contribution among joint tort feasers under former RCW 4.22.060 (1981).

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

Glover, 98 Wn.2d at 717 (quoting Br. of Amicus, at 12).

In Chaussee, we adopted the same factors to determine the reasonableness of an assignment of coverage and bad faith claims by an insured in exchange for a covenant not to execute from a plaintiff. “No one factor controls and the trial court has the discretion to weigh each case individually.” Chaussee, 60 Wn. App. at 512. Using

these factors to determine whether a settlement is reasonable protects insurers from liability for excessive judgments. Besel, 146 Wn.2d at 738.

B. Collusion

Farmers first argues that the trial court erred by not finding collusion as a matter of law. Farmers relies on MP Med. Inc. v. Wegman, 151 Wn. App. 409, 213 P.3d 931 (2009) to support its claim that the trial court erred because the settlement here was collusive as a matter of law without regard for the remaining Glover/Chaussee factors. But Wegman bears no similarity in law or in fact to this case. There we held that the trial court should have exercised its supervisory authority to prevent an employee from using a writ of execution to take over the opponent's side of the appeal, destroying the process's adversary nature. Wegman, 151 Wn. App. at 417. The Glover line of cases makes clear that no one factor controls a trial court's determination regarding whether a settlement is reasonable. Glover, 98 Wn.2d at 718 ("no one factor should control"). And Farmers' reliance on Water's Edge Homeowners Ass'n v. Water's Edge Associates, 152 Wn. App. 572, 216 P.3d 1110 (2009) is misplaced. We explained that "[bad faith, collusion, or fraud] is but one of the Chaussee factors that trial courts must consider." Water's Edge, 152 Wn. App. at 595. The trial court correctly analyzed collusion as one of the nine factors in its reasonableness determination.⁷

Farmers next argues that no arm's-length negotiation occurred, making the settlement collusive. Farmers relies on Water's Edge, which held that the trial court did

⁷ Farmers also relies on Cont'l Cas. Co. v. Westerfield, 961 F. Supp. 1502, 1505 (D. N.M. 1997) where the court held that there was collusion as a matter of law. Westerfield cited several indicators of bad faith and collusion: "unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer." This case is neither controlling nor persuasive.

not err in finding collusion. Water's Edge, 152 Wn. App. at 596. But the facts found by the trial court here are materially dissimilar to the facts that plainly troubled the Water's Edge court and supported its collusion determination.

(1) counsel for the HOA contacted Associates and KPS, adverse parties, without notice to White, wrote a ghost letter for Associates and KPS to send to Farmers critical of White, and recommended that Associates and KPS contact Beal and Harper for independent representation; (2) coverage counsel undermined White's efforts to reduce Associates' and KPS's exposure, presumably by withdrawing White's pending summary judgment motion regarding the HOA's remaining claims; (3) the parties realigned their interests by stipulating that Associates and KPS could recover their \$215,000 contribution if the HOA prevailed in its malpractice and bad faith case; (4) the parties appeared to have a joint venture type relationship in which the HOA agreed to kick back some of the proceeds from any recovery from Farmers or White's firm; (5) Beal insisted that the settlement be binding, regardless of the trial court's reasonableness determination; and (6) neither Associates or KPS had any reason to care what dollar amount they agreed to, so long as they could sell it to the trial court as reasonable.

Water's Edge, 152 Wn. App. at 595-96.

As in Water's Edge, we note the trial court dedicated five pages of its reasonableness memorandum to the collusion factor. That ruling shows the court's deliberate and careful review of the relevant case authority, including Water's Edge and Westerfield and the evidence. It was well aware of the risk of fraud and collusion in these types of judgments. And its 14-page memorandum ruling⁸ reflects the trial court's balanced and thoughtful consideration of all the evidence presented on this question. We conclude substantial evidence supports the trial court's findings of fact on its collusion determination. See Memorandum Ruling at 3-8.

⁸ This opinion refers to the trial court's order on reasonableness as a "memorandum ruling."

C. Reasonableness

Farmers contends, “[T]he trial court misconstrued RCW 4.24.630 and erroneously concluded that Bird’s claim for statutory trespass had substantial settlement value.” Appellant’s Br. at 49. It cites two grounds to support this claim: (1) “RCW 4.24.630 requires an intent to cause harm, not simply an intent to act,” Appellant’s Br. at 50, and (2) “Bird did not plead and could not reasonably have pled or proved a statutory trespass claim.” Appellant’s Br. at 54. We disagree.

RCW 4.24.630(1) provides:

Every person who goes onto the land of another and who . . . wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste or injury. For purposes of this section, a person acts “wrongfully” 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.

First, Farmers “intent to cause harm” argument misconstrues our recent decision in Clipse v. Michels Pipeline Constr., Inc., 154 Wn. App. 573, 225 P.3d 492 (2010). In Clipse, we addressed “what elements are required to establish statutory trespass under RCW 4.25.630.” Clipse, 154 Wn. App. at 576. “Given the context of related statutes, legislative history, and the statute’s interpretation by other courts, we hold that RCW 4.24.630 requires a showing that the defendant intentionally and unreasonably committed one or more acts and knew or had reason to know that he or she lacked authorization.” Clipse, 154 Wn. App. at 580. And Farmers’ reliance on Standing Rock Homeowners Ass’n v. Misich, 106 Wn. App. 231, 23 P.3d 520 (2001) is likewise misplaced. There, we reasoned “ ‘Defendant’s actions in destroying the gates were wrongful in that defendant acted intentionally and while having reason to know that he lacked authorization to so act.’ ” Misich, 106 Wn. App. at 244 (quoting Conclusion of

Law 9). Neither case stands for the proposition urged by Farmers.⁹ And Farmers cites no controlling Washington authority that holds an RCW 4.24.630 claimant must establish an intent to cause harm as an element of its statutory trespass claim.

We turn next to Farmers' pleading deficiency claim. While Farmers argues, "[t]he trial court found that . . . Bird could have amended his complaint to include a claim for statutory trespass under RCW 4.24.630 . . .," no such finding exists in the trial court's memorandum ruling. Appellant's Br. at 54.

Under the circumstances here, whether Bird could have amended his complaint is not material.¹⁰ The trial court is directed by CR 54(c) to grant relief to a party entitled to relief even if the party has not demanded such relief in his pleadings. CR 54(c) provides, "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Thus, if the trial court finds merit in a claim, the court is obligated by CR 54(c) to grant that relief even though the claim has not been included in the original pleadings. State ex rel. A.N.C. v. Grenley, 91 Wn. App. 919, 930, 959 P.2d 1130 (1998).

In addition, if a party argued a claim to the trial court that was not included in the original pleadings, the court may treat that claim as if it had been pleaded. See Allstot v. Edwards, 114 Wn. App. 625, 60 P.3d 601 (2002) (claim for special damages that was

⁹ We also note that a trial court granted summary judgment in favor of Bird on his common law trespass claim and left for trial the nature and extent of damages.

¹⁰ CR 9(g) requires that any demand for special damages be specifically stated in the pleadings.

argued and ruled on in trial court treated as if it had been pleaded even though claim was not included in original pleadings; decision based on CR 54 rather than CR 15).¹¹

Our review of the record shows substantial evidence to support the trial court's findings that "Bird had a 75% chance of prevailing on a claim for statutory trespass." Appellant's Br. at 3. Because Farmers' assertion that "the trial court lacked substantial evidence to find Bird had a 75% chance of prevailing on a claim for statutory trespass" (Appellant's Br. at 54) is premised on an erroneous legal standard—"Bird would have had to prove that Best Plumbing intended to cause harm"—as discussed above, this claim fails. Appellant's Br. at 57.

Farmers next contends, "There is no evidence to support the trial court's finding that the settlement value of Bird's property damage claim against Best Plumbing was 100% of Bird's alleged cost of repair." Appellant's Br. at 58. "A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence." Brewer, 127 Wn.2d at 524. But Farmers did not assign error to the trial court's findings on this point. Thus, they are verities on appeal. Zunino v. Rajewski, 140 Wn. App. 215, 220, 165 P.3d 57 (2007).

The damage done to Mr. Bird's property and to his and his wife's enjoyment of life because of the slide damage were stunningly depicted both by his own testimony and by the exhibits prepared for trial. No persuasive evidence emerged that there were historical problems with respect to the stability of his property. The assertions that Mr. Bird himself caused the slides and resulting damage lacked a theory as to intent. Furthermore, ample expert testimony supported Plaintiff's theory that a pipe leaking over time caused the devastating damage. On the other hand, Defense experts' changing theories weakened their claims, and Defendant's original trial counsel assessed their chances at trial as

¹¹ Bird's complaint pleaded a trespass cause of action and a trial court granted summary judgment on liability and proximate cause to Bird on this claim, leaving the damages' question for trial.

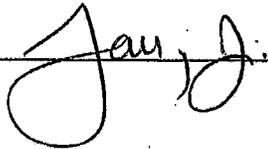
worsening as of December, 2008. Therefore, the settlement reflecting a 100% recovery on this issue was reasonable.

Memorandum Ruling at Clerk's Papers 3444. And our review of the record, which exceeds 3,000 pages, demonstrates the trial court's finding of reasonableness is amply supported by the record.

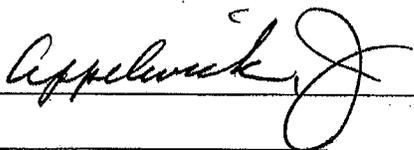
CONCLUSION

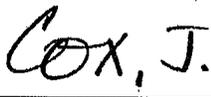
Here, the trial court examined the Chaussee/Glover factors and specifically found in light of those factors that the settlement was reasonable and not the product of fraud or collusion. In its memorandum ruling, the trial court examined each of the Chaussee/Glover factors and specifically addressed those factors in its ruling. The evidence submitted in support of the motion for a finding of reasonableness was voluminous, constituting well over several thousand pages, and included testimony from several witnesses. The trial court had sufficient information before it to make an informed reasonableness determination. Given the extent of damages, Best Plumbing's liability and financial circumstances, and the risks and costs of future litigation, the trial court did not abuse its discretion in determining that \$3,989,914.83 was a reasonable settlement.¹² And the trial court properly denied Farmers' jury trial demand.

We affirm.



WE CONCUR:





¹² The consent judgment was \$3.75 million, but the trial court concluded \$3,989,914 was a reasonable settlement.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES A. BIRD,)
)
 Respondent,)
)
 v.)
)
 BEST PLUMBING GROUP, LLC,)
)
 Respondent,)
)
 v.)
)
 FARMERS INSURANCE EXCHANGE,)
)
 Appellant,)
 _____)

NO. 64291-0-1

DIVISION ONE

ORDER DENYING MOTION FOR
RECONSIDERATION AND GRANTING
MOTION TO PUBLISH

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 APR 27 PM 3:36

Appellant Farmers Insurance Exchange moved for reconsideration of opinion filed March 21, 2011. The court determines that the motion should be denied.

Nonparty Paul Lindenmuth moved for publication of the opinion. Farmers' response opposes publication and respondent Bird's response agrees to publication. The court determines that the motion to publish should be granted. Therefore, it is

ORDERED that appellant's motion for reconsideration is denied and the nonparty motion for publication is granted.

DATED this 27th day of April 2011.



Judge

APPENDIX C

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FILED

JAN 29 2008

Sherry W. Parker, Clerk, Clark Co.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

WATER'S EDGE HOMEOWNERS
ASSOCIATION, a Washington
nonprofit corporation,

Plaintiff,

vs.

WATER'S EDGE ASSOCIATES, a
Washington general partnership;
PAUL A. NELSON and "JANE DOE"
NELSON, and their marital
community; LARRY PRUITT and
"JANE DOE" PRUITT, and their
marital community; BURKE M.
RICE and "JANE DOE" RICE, and
their marital community; SALMON
CREEK DEVELOPERS, INC., an
Oregon corporation; KEY
PROPERTY SERVICES, INC., a
Washington corporation,

Defendants.

) Case No.: 05-2-03446-1
)
) RULING ON REASONABLENESS
) HEARING

236
m

1 Plaintiffs and Defendants (hereafter "settling parties")
2 entered into a settlement of a long and drawn out litigation,
3 near the eve of trial. That settlement involved entry of a
4 stipulated judgment in the amount of \$8,750,000.00 which
5 included a cash payment by Defendants of \$215,000.00. Included
6 in the settlement was a covenant by Plaintiffs not to execute on
7 the judgment against Defendants, whether or not the settlement
8 was determined to be reasonable, and an assignment to Plaintiffs
9 of Defendants' interest in a bad faith lawsuit against
10 Defendants' insurers (intervenor herein) and of Defendants'
11 rights under a legal malpractice lawsuit against Defendant's
12 appointed counsel, Bruce White and his firm.

13 Pursuant to RCW 4.22.060, the settling parties sought a
14 judicial determination of reasonableness, so as to establish
15 presumptive prejudice and damages in the bad faith suit. This
16 court received extensive briefing and heard oral argument from
17 the settling parties and the intervenors. Under Glover v.
18 Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983), and
19 Chaussee v. Maryland Casualty Co., 60 Wn.App. 504, 803 P.2d 1339
20 (1991), the court is to consider several factors in determining
21 the reasonableness of the settlement. These are discussed
22 below.

23 Evidence of Collusion

24 The intervenors devote much of their briefing and argument
25 to the issue of collusion. After reviewing the parties'

1 extensive submissions, my conclusion is that the record before
2 me raises grievous doubts as to the reasonableness and propriety
3 of this settlement. The manner in which the case shifted,
4 abruptly, from litigation to collaboration is highly suspect,
5 and troublesome. As a result, and coupled with an analysis of
6 the Glover/Chaussee factors, the court has no confidence in the
7 integrity of this settlement, and the court has grave concern
8 that, as evidenced by the facts of this case, the use of such
9 settlements with covenants not to execute has the potential to
10 become a "cottage industry" within the practice of law,
11 undermining the respect owed to the honorable profession.
12

13 In this case, the structure and history of the settlement
14 has the appearance of a joint effort to create, in a non-
15 adversarial atmosphere, a resolution beneficial to plaintiffs
16 and defendants, yet highly prejudicial to the intervenors.

17 The adversary system assumes an honest and actual
18 antagonistic assertion of rights to be adjudicated; a safeguard
19 essential to the integrity of the judicial process. United
20 States v. Johnson, 319 U.S. 302, 87 L.Ed. 413. 63 S.Ct. 1075
21 (1943)

22 Despite its criticisms, the adversary system of justice
23 utilized in all 50 states has persevered over the centuries,
24 because it has as its goal the ascertainment of the truth.
25 That goal is best accomplished by the full and fair opportunity

1 of both sides to explore the merits of a controversy, with the
2 motive of self interest in mind. The courts and society can
3 place greater confidence in the integrity of a decision reached
4 in such a system, than can be experienced in a collusive
5 undertaking. When, in the context of an adversary proceeding,
6 the parties, heretofore at odds, unite for the purpose of mutual
7 benefit, and for the purpose of shifting the risk of loss to a
8 third party, the truth's protections inherent in a truly
9 adversary proceeding are lost, and that confidence is eroded.
10

11 In the Anglo-American adversary system, the parties to a
12 dispute, or their advocates, square off against each other and
13 assume roles that are strictly separate and distinct from that
14 of the decision maker, usually a judge or jury. The decision
15 maker is expected to be objective and free from bias. Our modern
16 adversary system reflects the conviction that everyone is
17 entitled to a day in court before a free, impartial, and
18 independent judge. Adversary theory holds that requiring each
19 side to develop and present its own proofs and arguments is the
20 surest way to uncover the information that will enable the judge
21 or jury to resolve the conflict.
22

23 The appellate courts repeatedly have cautioned the trial
24 courts to skeptically and carefully evaluate such arrangements.
25 Where a stipulated judgment with covenant not to execute is
coupled with an assignment of a legal malpractice claim, the

1 courts of this nation, and of Washington have looked askance at
2 such devices.

3 "To allow such assignments would serve two principal
4 goals: enabling the defendant-client to extricate himself
5 from liability, and funding the original plaintiff's
6 judgment. But to allow assignments would exact high costs:
7 the plaintiff would be able to drive a wedge between the
8 defense attorney and his client by creating a conflict of
9 interest; in time, it would become increasingly risky to
10 represent the underinsured, judgment-proof defendant; and
11 the malpractice case would cause a reversal of the
12 positions taken by each set of lawyers and clients, which
13 would embarrass and demean the legal profession." Zuniga v.
14 Groce, Locke & Hebdon, 878 S.W.2d 313 (Tex. Ct. App.)

15 "...(B)ut we do find the other public policy concerns that
16 the courts of Indiana, Kentucky, the federal district in
17 New Jersey, and Texas have raised in the cases discussed
18 above to be both legitimate and persuasive, namely (1) that
19 permitting the assignment of legal malpractice claims to an
20 adversary in the same litigation that gave rise to the
21 legal malpractice claim ought to be prohibited because of
22 the opportunity and incentive for collusion in stipulating
23 to damages in exchange for a covenant not to execute
24 judgment in the underlying litigation..." Kommavongsa v.
25 Haskell, 149 Wn.2d 288. P.2d (2003)

17 Plaintiffs' reliance upon Safeco Insurance v. Butler, 118
18 Wn.2d 383, 823 P.2d 499(1992), for the proposition that the
19 Washington Supreme Court has determined that stipulated
20 judgments with covenants not to execute are "fully legal" and
21 proper is a bit overstated. The issue (among others) in that
22 case was whether or not a defendant who has entered into such an
23 agreement is thereby insulated from liability, and therefore
24 cannot demonstrate any harm occasioned by the insurer's alleged
25 bad faith, such that the assignee plaintiff has no claim to

1 bring. At best, Washington has recognized that under certain
2 circumstances, such as when an insurer defends under a
3 reservation of rights, such arrangements can be a necessary
4 evil. Still, however, the settlement must be reasonable in
5 order to bind the insurer.
6

7 The appearance of impropriety in this matter became
8 unavoidable in the incipience of the settlement maneuvering,
9 when Mr. Zimberoff contacted the defendants, adverse parties,
10 behind the back of Mr. White. The fact that contact was made
11 through Mr. Hughes, an attorney who was not representing the
12 Defendants in this matter, is immaterial, and no different than
13 if contact had been made directly to the Defendants, or through
14 the Defendants' spouses, accountants, or any other
15 intermediaries. The contact, in order to be acceptable, had to
16 occur through the Defendants' attorney of record, Mr. White.
17 Failure to do so is strong evidence of a motive, plan and scheme
18 to undermine the attorney-client relationship with Mr. White,
19 and to prejudice the interests of the Defendants' insurers.
20

21 "In representing a client, a lawyer shall not
22 communicate about the subject of the representation with a
23 party the lawyer knows to be represented by another lawyer
24 in the matter, unless the lawyer has the consent of the
25 other lawyer or is authorized by law to do so." RPC 4.2
 (a).

1 The settling parties argue that no collusion occurred, and
2 that the intervenors have been unable to present evidence of
3 collusion, nor of conspiracy between the settling parties.

4 Agreements of the type alleged are seldom susceptible of
5 direct testimony. Their existence is postulated from
6 circumstantial evidence and reasonable inferences. The blatantly
7 improper referral to Mr. Beal and Mr. Harper, and the course of
8 action taken thereafter by them, such as the transparent
9 professional attack on Mr. White, a very experienced and
10 capable, and in this litigation, successful attorney is strong
11 evidence of improper motive. I agree with the intervenors that
12 Mr. White, from what I saw in court, was skillfully litigating
13 the matter to his clients' benefit. Further, based upon his
14 skill, experience, and reputation, Mr. White's analysis of the
15 case is entitled to great weight. This court had no opportunity
16 to hear and rule upon the summary judgment motion envisioned by
17 Mr. White, involving the economic loss doctrine, as it appears
18 that Mr. White's efforts to further reduce his clients' exposure
19 were undermined by coverage counsel.
20

21
22 Mr. Todd, however, felt that such an argument would be
23 successful. His later evaluations of the potential exposure
24 were based upon a worst case scenario, ignoring the prior
25 successes and potential future successes of Mr. White's efforts.

1 The premise set forth by intervenors, that Mr. White's efforts
2 were so damaging to Plaintiffs that they had to refer the
3 Defendants to counsel who, they knew, would be skilled and
4 experienced in structuring a settlement favorable to Plaintiffs,
5 is consistent with the evidence presented to this court.
6

7 The fact that Defendants retained the right to recover
8 their \$215,000.00 contribution toward the settlement, against
9 the insurers and Mr. White's firm, if Plaintiffs prevailed in
10 the malpractice case and/or bad faith case, is further
11 indication of the realignment of interests in the case created
12 by the interjection of coverage counsel. The proposal to kick
13 back proceeds of any recovery from the insurers and from Mr.
14 White's firm defined the relationship as a joint venture. The
15 inclusion of a term whereby the settlement was binding,
16 regardless of any finding of reasonableness by the court,
17 removed any motive from Defendants to keep the settlement figure
18 down. Upon reaching the settlement agreement, Defendants could
19 not care less whether the recovery amount was 8.75 million or
20 100 million. The only limit on the amount was from the
21 Plaintiffs' perspective, that is, that they would have to sell
22 it to the judge.
23
24
25

1 Beal, apparently having obligated himself to support the
2 settlement, starts with Plaintiffs' demand of over
3 \$17,000,000.00 and works from there. The intervenors argue that,
4 given that potential exposure, a settlement for half that amount
5 must be reasonable. That argument depends entirely, however,
6 upon the premise that Defendants' exposure approximated the
7 greater amount. Mr. Beal, I am told, has never tried a
8 construction defect case, and his introduction to the case came
9 very late in the history of the litigation. Mr. White, on the
10 other hand, was in the case from its beginning, and he is
11 significantly experienced in such litigation. I give great
12 weight to Mr. White's analysis, and conclude that, if this was
13 an arm's length negotiation between parties, with the Defendants
14 actually having to spend their own money to pay damages, the
15 Defendants would not have evaluated Plaintiffs' damages at
16 anything near \$8,750,000.00. I accept Mr. White's estimate of
17 exposure not exceeding \$500,000.00 as a reasonable evaluation on
18 a worst case scenario.
19
20

21 Merits of Plaintiffs' Liability Theory and Defendants'

22 Defense Theory

23
24 The original parties had, and now, likewise, the settling
25 parties and the intervenors, who, in effect step into the pre-
settlement shoes of the Defendants, have widely disparate views

1 on liability. The settling parties disregard Mr. White's
2 efforts, successes and advice, and present a worse case scenario
3 claim in support of the settlement. Reasonable defendants, in
4 assessing their chances at trial, would have taken into account
5 that the warranty and construction defect claims had been
6 excised, and may have been desirous of getting a judicial
7 determination of the economic loss defense pled in Mr. White's
8 answer, prior to mediating the case. Of course, it may have been
9 in the Defendants' best interests to avoid such a determination
10 if it appeared that the economic loss defense was doomed to
11 failure. I have seen nothing in the record, however, that
12 indicates that the Defendants were so advised by counsel, such
13 as Mr. White or Mr. Todd, who were actually interested in
14 minimizing Plaintiffs' recovery. In this regard, I must note
15 that Mr. Beal and Mr. Harper did an exceptional job in
16 representing their clients' interests, by structuring a
17 settlement whereby the Defendants escaped from the litigation
18 with a \$215,000.00 liability, which could have been recouped,
19 and which, in fact, was satisfied by the insurers. The
20 settlement in this case was reasonable for the Defendants and
21 for the Plaintiffs, subjectively, but the test is whether it was
22 objectively reasonable, given the Glover/Chaussee factors. If
23 the court is left to wonder as to whether the settlement was
24
25

1 reasonable, then the settling parties have failed to satisfy
2 their burden of proof on this issue.

3
4 My conclusion is that an objectively reasonable settlement
5 process would have placed more emphasis on the strength of the
6 defense case, and less emphasis on the best case scenario of the
7 Plaintiff's case. Without a trial on the merits and full and
8 fair litigation, however, the exact measure of the relative
9 strengths is necessarily inexact and speculative. Because the
10 settling parties chose to negotiate while forestalling the
11 efforts of Mr. White to further refine the issues by summary
12 judgment, further uncertainty of result was interjected into the
13 process.

14
15 The Released Party's Relative Fault

16
17 This factor has no applicability. This factor has as its
18 genesis the Glover case, a tort case involving a non-settling
19 joint tortfeasor, and the amount of offset available to the
20 settling defendant. This factor applies when the court is
21 determining the reasonableness of a settlement between one or
22 more co-defendants with a plaintiff, the effect of which is to
23 cast liability on the non-settling co-defendant, rather than the
24 relative fault between defendants and plaintiffs.

1 The Risks and Expenses of Continued Litigation

2
3 Certainly, there were substantial risks and expenses
4 associated with proceeding to trial. The settling parties refer
5 to the potential of a larger verdict than otherwise justified,
6 due to the fact that Mr. White's belated withdrawal in December,
7 2006 left very little time for new counsel to prepare. The
8 necessity for new counsel to be appointed to represent
9 Defendants, however, was a direct result of the manipulation and
10 posturing by coverage counsel, and not Mr. White nor the
11 insurers.

12
13 It is my finding that the delay in appointing new counsel
14 was orchestrated to sabotage any chance that the case would be
15 defended properly on the merits. Nevertheless, if the case had
16 gone to trial with Mr. White, there still would have been
17 substantial costs to prepare and present the case to a jury. The
18 record before me, however, fails to support a dollar amount as
19 to a reasonable estimate of this expense. Neither the
20 declaration of Mr. Beal, nor the collaborative Joint Motion
21 authored by Mr. Beal, Mr. Harper, and Mr. Zimberoff, counsel for
22 the parties with the burden of proof, set forth any evidence
23 from which I can make such a finding.
24
25

1 The Released party's Ability to Pay

2
3 As pointed out by counsel for the intervenors, this factor
4 is somewhat misplaced in this type of litigation. The statute
5 authorizing reasonableness hearings is part of the Tort Reform
6 Act, RCW 4.22, and was intended to assist in the determination
7 of parties' rights in cases involving joint tortfeasors who
8 elect to go separate ways in settling their case. When applied
9 to a situation of codefendants uniting to cast liability upon an
10 insurer by way of a bad faith claim, the Glover factors can have
11 an awkward application. Where one of two or more joint
12 tortfeasors settles a case for less than their proportionate
13 share of damages (see discussion of released party's relative
14 fault, above,) thereby casting a disproportionate share of
15 liability onto a non-settling tortfeasor by limiting the set-off
16 available to that party, such conduct may be reasonable in light
17 of the settling defendant's inability to pay its proportionate
18 share. In such a case the reviewing court may determine that a
19 settlement lower than otherwise appropriate may be justified.
20 Here, however, the settling parties are seeking to justify the
21 amount of the settlement, \$8,750,000.00 by the fact that, they
22 claim, the Defendants could not pay a greater amount. The logic
23 falls apart, however, where Defendants, by settling, are
24 obligated to pay only \$215,000.00, rather than the full amount
25

1 of the settlement. Any nexus between the Defendants' ability to
2 pay and the amount of the settlement is nonexistent.

3
4 The Interest of Third Parties Not Being Released

5 Again, under the Tort Reform Act and the Glover case, this
6 factor is intended to assess the effect on non-settling
7 tortfeasors, whom, by reason of the settlement, could
8 potentially be subjected to liability in excess of their
9 proportionate share.
10

11 In the context of settlements with a covenant not to
12 execute and assignment of bad faith rights, the court must then
13 examine the rights of the insurers. It was clear from the start
14 in this process that the insurers were at a disadvantage. The
15 effect of a determination of reasonableness is to create a
16 presumed measure of damages in a separate litigation. Our
17 Supreme Court has held that a statute which limits general
18 damages in tort cases deprives a litigant of the right of a jury
19 trial, in violation of the state constitution. It is not clear
20 to me why the same could not be said of a judicial process which
21 establishes presumptive damages in anticipation of bad faith
22 litigation.
23

24
25 RCW 4.22.060 provides that a reasonableness hearing may be
held on 5 days notice to the non-settling parties. This period

1 may be sufficient for parties who are involved in the
2 litigation, and presumably fully apprised of the issues and
3 evidence, before the settlement is reached. Insurance companies
4 are generally not true "parties" as such in this type of
5 litigation. When applied to non-parties, the five day period is
6 ludicrous, even given the fact that an insurer is probably
7 following the progress of the litigation. Following the progress
8 of the litigation is a far cry from being actively involved in
9 the day to day legal and factual specifics of a case, especially
10 when the insurer must scramble to hire independent counsel.
11

12 Even to the extent that the settling parties argue that
13 Bruce White was looking out for the interests of the insurers,
14 his exclusion from the settlement negotiations further removed
15 the insurers from any meaningful participation in the resolution
16 of the matter. To be fair, a settlement process which deprives
17 an insurer of the right to a jury trial on damages, and which
18 potentially can result in a determination of reasonableness on
19 five days notice, with limited discovery rights, must be
20 eminently fair and cognizant of the insurer's interests. It is
21 my conclusion that in this case, the interests of the insurers
22 were systematically neglected, ignored and grossly violated by
23 this settlement.
24
25

APPENDIX D

C

West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.24. Special Rights of Action and Special Immunities (Refs & Annos)

→ **4.24.630. Liability for damage to land and property--Damages--Costs--Attorneys' fees--
-Exceptions**

(1) Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" 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. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, *79.01.756, 79.01.760, 79.40.070, or where there is immunity from liability under RCW 64.12.035.

CREDIT(S)

[1999 c 248 § 2; 1994 c 280 § 1.]

HISTORICAL AND STATUTORY NOTES

***Reviser's note:** RCW 79.01.756, 79.01.760, and 79.40.070 were recodified as RCW 79.02.320, 79.02.300, and 79.02.340, respectively, pursuant to 2003 c 334 § 554. RCW 79.02.340 was subsequently repealed by 2009 c 349 § 5.

Severability--1999 c 248: See note following RCW 64.12.035.

Laws 1999, ch. 248, § 2, at the end of subsec. (2), added the language beginning " , or where there is immunity from liability".

LIBRARY REFERENCES