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No. 64291-0

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Appellant.

REPLY BRIEF OF APPELLANT

Attorneys for Appellant Farmers Insurance Exchange

Douglas G. Houser, OSB #600384,
pro hac vice
Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
Janis C. Puracal, WSBA #39234
BULLIVANT HOUSER BAILEY PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930
Facsimile: 206.386.5130

Philip A. Talmadge, WSBA #6973
Sidney C. Tribe, WSBA #33160
TALMADGE/FITZPATRICK PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4639
Telephone: 206.574.6661
Facsimile: 206.575.1397

2010 JUN -2 PM 2:44
COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

Bird availed himself of an opportunity to avoid trying a case against Best Plumbing by settling with Best Plumbing for 100% of Bird's property damage claim, plus treble damages and attorney fees under authority of a cause of action Bird had not pled. Bird negotiated the settlement with an attorney for Best Plumbing, Richard Dykstra, who did not know the merits of his client's case and was incapable, therefore, of asserting them in negotiations. Having settled in excess of the policy limits, Bird then sought to prove an element of a bad faith claim against Farmers (i.e., the amount of a reasonable settlement as damages) in a reasonableness hearing in the liability action, and Bird asserted that Farmers had and has no right to have a jury determine that issue.

The amount of damages recoverable from Farmers for the tort of bad faith is a legal question as to which the Washington Constitution guarantees the right to trial by jury. In the course of defending itself against Bird's claims, Farmers is entitled to have the issue of damages, as well as its liability for alleged bad faith, decided by a jury.

Because empaneling one jury in the liability action to determine damages and another in the bad faith action to determine liability is wasteful and inefficient—moreover, because there is no legal basis for determining bad faith damages against an insurer in a liability action

against the insured and the procedure for doing so (the “Reasonableness Hearing Procedure”¹) is neither justifiable nor justified in any court decisions—the trial court’s determination of reasonableness should be vacated and the action dismissed.

In addition, the moral hazard presented by consent judgments, where the parties may not be adversaries in their negotiations, is protected only by proof that the settlement was negotiated in good faith at arm’s length. When, as here, the facts are undisputed that the insured’s attorney did not know or deign to know the merits of the claims and defenses, negotiations could not have been at arm’s length and the settlement is collusive as a matter of law. For that reason also, the trial court’s determination of reasonableness should be vacated and the action dismissed.

II. ARGUMENT

A. Farmers is entitled to a jury trial.

1. The Washington Constitution guarantees the right to have legal actions for damages tried to a jury.

Article 1, § 21, of the Washington Constitution guarantees the right to a jury trial. That right applies to the determination of damages in an

¹ As in Farmers’ opening brief, “Reasonableness Hearing Procedure” means a hearing, not subject to the Civil Rules, in the liability action (to which the insurer is not a party) to determine whether the settlement between the parties to the action was reasonable and, therefore, constitutes the measure of damages recoverable from the insurer.

action at law.² The Washington courts have “jealously guarded” litigants’ valuable right to have tort damages determined by a jury.³

Washington courts have recognized that bad faith actions are tort actions,⁴ and the courts have recognized that damages recoverable for an insurer’s bad faith can include the amount of a reasonable settlement entered into between the claimant and the insured.⁵

Very simply, the Washington Constitution guarantees Farmers’ right to have a jury decide the question of what damages can be recovered from Farmers for its alleged bad faith. To give effect to the constitution, the jury right must be granted in whatever proceeding determines the amount of bad faith damages.

2. A hearing to prove an element of damages recoverable from Farmers in a bad faith action is an action at law; it is not an equitable action.

Bird restates the first issue on appeal as follows: “Does Farmers have a constitutional right to a jury in an *equitable* reasonableness hearing?” (Resp. Br. at 4 (emphasis added)) Having stated the issue such, Bird then asserts that the Washington Supreme Court’s decision in

² *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, ¶ 21, 224 P.3d 761 (2010) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-48, 771 P.2d 711 (1989)).

³ *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941).

⁴ E.g., *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992).

⁵ *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 509, 803 P.2d 1339 (1991); *Werlinger v. Warner*, 126 Wn. App. 342, 350-51, ¶ 21, 109 P.3d 22 (2005).

Schmidt v. Cornerstone Investments, Inc.,⁶ (involving a proceeding under RCW 4.22.060 to determine a settlement setoff among joint tortfeasors) is controlling.

Bird's argument essentially begs the question; Bird starts in the middle of the discourse, relying upon a premise he fails to establish. Bird fails to understand or acknowledge that a hearing pursuant to RCW 4.22.060 is not the same as a proceeding to determine an element of damages against the defendant. Bird argues that *Schmidt* applies because, he asserts, this case involves a reasonableness hearing pursuant to RCW 4.22.060, and *Schmidt* decided that reasonableness hearings under RCW 4.22.060 were equitable proceedings as to which the constitutional right to a jury did not apply. But Bird avoids addressing the first part of the analysis, which is whether the issue of reasonableness in the context of a bad faith claim presents a legal, rather than an equitable, question.

As addressed in Farmers' opening brief and above, an action to determine the amount of damages in a bad faith claim—including whether a settlement and consent judgment is reasonable—is an action at law. *Chaussee v. Maryland Casualty Co.*,⁷ the seminal case involving bad faith damages arising out of a settlement, establishes that point. Although Bird

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

⁷ 60 Wn. App. 504, 803 P.2d 1339 (1991).

cites and quotes *Chaussee* numerous times in his brief, he fails to discuss the context and what, indeed, was decided in that case.

In *Chaussee*, the insureds (“the Chaussees”) settled with the claimants (“the Nodells”) for \$2.5 million and assigned their claims against their liability insurer, Maryland Casualty, to the Nodells. The parties did not hold a reasonableness hearing in the liability action.

The Nodells, as assignees, sued Maryland Casualty alleging bad faith, CPA violations, and other causes of action. At trial, the Nodells did not present evidence of the reasonableness of the settlement. The jury returned a verdict against Maryland Casualty, but the trial court granted the insurer judgment notwithstanding the verdict because “the Nodells did not introduce sufficient evidence to prove damages, that is, the reasonable settlement amount of the underlying claim.”⁸ This Court affirmed.

In its opinion, the Court of Appeals noted that an insurer can be liable to its insured when it fails to settle a claim within its policy limits if that failure is attributable to bad faith or negligence.⁹ Addressing a matter of first impression in Washington, this Court held that, in order to recover damages, the insured has the burden of proving the reasonableness of the

⁸ 60 Wn. App. at 509.

⁹ *Id.*

settlement.¹⁰ The Court expressly rejected the Nodells' argument that Maryland Casualty had the burden of proving that the amount of the settlement negotiated between the Nodells and Chaussees was unreasonable or in bad faith.¹¹

This Court further held that the *Glover* factors, adopted in the context of RCW 4.22.060 hearings, should be used to determine reasonableness in the context before the Court: "We believe the factors identified by the Supreme Court in *Glover* would logically apply to a determination that a settlement was reasonable in the context of a failure to settle claim."¹²

Notably, ***the Chaussee court did not apply the procedures of RCW 4.22.060 to the determination.*** *Chaussee* presented a straightforward bad faith suit by the insureds' assignees against the insurer, tried to a jury. The Court's opinion recognized that the factors making a settlement reasonable in the context of RCW 4.22.060 would apply equally in the context of a failure to settle claim, but it did not confuse or conflate the two different procedures.

Second, the *Chaussee* court did not decide, imply, or provide grounds to infer that the reasonableness issue was anything but a

¹⁰ *Id.* at 510.

¹¹ *Id.*

¹² *Id.* at 512.

determination of damages recoverable from Maryland Casualty for its bad faith. Specifically, this Court did not suggest that the determination of damages involved an equitable determination to be decided by the court. Quite the contrary, the determination of damages was for the jury as finder of fact, and the Nodells' failure to offer evidence invalidated the jury's verdict.

Thus, consistent with the opinion in *Chaussee*, the question presented to the trial court in this matter was, ultimately, the question of what damages are recoverable from Farmers in the event Farmers is found to have acted in bad faith.

The fact that other damages, such as emotional distress, may also be recovered from an insurer that acts in bad faith does not mean, as Bird suggests (Resp. Br. at 26), that the amount of a reasonable settlement is not an element of the insured's damages. As recognized in *Chaussee*, the amount of a reasonable settlement is an element of damages recoverable for insurer bad faith.¹³

The cases from other jurisdictions cited by Bird (Resp. Br. at 39-41) are not on point. In *American Casualty Co. of Reading, Penn. v.*

¹³ *Id.* at 509.

Kemper,¹⁴ a federal trial court judge, sitting in Arizona, decided in an unpublished decision that a declaratory judgment action to determine whether an insured's settlement was reasonable was a "creature[] of equity." In *Alton M. Johnson Co. v. M.A.I. Co.*,¹⁵ the Supreme Court of Minnesota considered whether an insurer, defendant in a garnishment action to determine coverage under a liability policy, was entitled to a jury trial on the question of the reasonableness of the settlement between the injured claimant and defendant insured.¹⁶ The court determined that the substantive issue—whether the insurer owed indemnity—was traditionally an equitable issue. Because the issues in both cases were characterized equitable, both courts held the defendants were not entitled to a jury trial.

The present case, in contrast, involves an issue of damages for insurer bad faith, an action at law. As in *Chaussee*, that question is one for the jury to determine. The right to have the jury decide the question is guaranteed by the Washington constitution.

¹⁴ 2009 WL 1749388 (D. Ariz. 2009). The court relied upon *Schmidt*, among others, as support for its analysis. 2009 WL 1749388 at *3. *Schmidt*, as explained below, involved reasonableness hearings under RCW 4.22.060, a completely different context, and could not provide authority for the trial court's conclusion in *American Casualty v. Kemper*.

¹⁵ 463 N.W.2d 277, 279 (Minn. 1990).

¹⁶ Bird also quotes *Alton M. Johnson* for the proposition that reasonableness determinations are "best understood and weighed by a trial judge." (Resp. Br. at 41) As discussed at greater length in the following section of this brief, a party's right to a jury trial is a constitutionally guaranteed right that does not depend upon considerations of convenience, efficiency, or policy.

3. ***Schmidt*, involving an equitable proceeding, is not on point; *Sofie* confirms Farmers’ constitutional right to a jury trial.**

As explained in Farmers’ opening brief, *Schmidt* is not on point.

The court in *Schmidt* stated, first, that the question of reasonableness ***presented in an RCW 4.22.060 hearing to determine the setoff among joint tortfeasors*** is addressed to the equitable powers of the court and involves special, statutory proceedings unknown at common law—i.e., not extant when the Washington Constitution was adopted.¹⁷ Accordingly, the constitutional right to a jury trial does not extend to those procedures.¹⁸

Bird argues that a determination of reasonableness in “the contribution setting” (i.e., the context presented in *Schmidt*) is “the same in all material respects” as a determination of reasonableness in the bad faith setting (e.g., *Chaussee*). (Resp. Br at 36-37) Bird is wrong. Bird is wrong most particularly because a reasonableness determination in the context of RCW 4.22.060 does not determine what amount of damages is recoverable from a tort defendant. In the context presented in *Schmidt*, the hearing does not deprive a tort defendant of a jury trial; a non-settling defendant retains a constitutional right to have its damages determined by

¹⁷ 115 Wn.2d at 160-61.

¹⁸ *Id.* at 161.

a jury. In contrast, the Reasonableness Hearing Procedure precludes the insurer defendant from having its damages determined by a jury.

Addressing Bird's arguments in particular:

1. Bird argues that both types of hearing are adversarial: While this assertion is true on its face, the actual contexts are very different. In an RCW 4.22.060 hearing, both the settling and non-settling defendants are parties to the lawsuit. As a general matter, both have achieved an equal ability to evaluate the merits of settlement and to contest the settlement on the merits, as necessary. That is, both have equal access to information generated through discovery, as well as work product of their respective counsel, experts, and investigators. In the bad faith context, by contrast, the insurer is not a party to the lawsuit and must seek permission to advocate against the position taken by the parties to the litigation. The insurer may not be fully apprised of all relevant information—certainly not to the extent the adversaries and their counsel are apprised—and even if it were, the insurer will not have had counsel of record involved in the case to that point and prepared to act on its behalf. The insurer's involvement in the litigation is not so deep as the litigants', and its attorney's involvement is, until settlement, nil. That is to say, in one proceeding the adversarial process is between the litigants; in the other proceeding, the adversarial process is between the litigants and an entity

that becomes a party only by intervention and does not share the litigants' exposure to the case.

2. Bird argues that both types of hearing affect the amount of the resulting award: Again true, but very different. As noted above, an RCW 4.22.060 hearing addresses the appropriate reduction from a damages award, and it does so in a special, statutory proceeding not recognized at common law. The purpose and effect of the hearing is to protect a non-settling defendant from “‘sweetheart’ releases with favored parties,”¹⁹ without affecting the terms of the settlement reached between the claimant and the settling defendant(s). The RCW 4.22.060 hearing does *not* decide what damages are recoverable from the non-settling defendant, and the hearing does not deprive a defendant of its right to have the question of those damages tried to a jury.

Moreover, the effect of a reasonableness determination in an RCW 4.22.060 hearing is limited to the amount of the setoff. Recently, the Washington Supreme Court has said that issues decided in the course of a bad faith reasonableness hearing may have preclusive effect in a subsequent bad faith action.²⁰

¹⁹ See *Schmidt*, 115 Wn.2d at 157 (quoting the final report of the Senate Select Committee on Tort and Product Liability Reform).

²⁰ See *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 268, ¶ 20, 199 P.3d 376 (2008).

3. Bird argues that, in both contexts, the court enters judgment in a later proceeding: The statement is true, but not germane. Judgment is always entered after all issues are decided; that fact does not mean that all proceedings in which judgment is entered are the same or similar. In an RCW 4.22.060 proceeding, the reasonableness hearing determines only the amount of a setoff, with liability and damages to be determined separately in the same action. In the Reasonableness Hearing Procedure, the hearing determines the amount of an element of damages, with liability (and other elements of damages) to be determined in a separate lawsuit against the insurer. Although judgment is entered later in both contexts, the proceedings are not the same or even similar.

4. Bird argues that, in both contexts, the hearing promotes settlement, efficiency, certainty, and compensation: Not true. In the context of RCW 4.22.060, the reasonableness hearing promotes settlement; one of multiple joint and several tortfeasors can settle and be released, without concern that he will later be liable for contribution despite the settlement. Similarly, in the bad faith context, the Washington courts promote settlement and compensation of deserving persons by permitting insureds or their assignees to recover the amount of a reasonable settlement from an insurer, when the insured/assignee has proven his claim against the insurer. But neither Bird nor any Washington

court has addressed why an abbreviated, expedited reasonableness hearing in a liability action makes the parties to the settlement more or less likely to settle—i.e., why the Reasonableness Hearing Procedure fosters legitimate settlements. Even if the Reasonableness Hearing Procedure were not available, the insured (or its assignee) needs to establish the insurer’s liability before he can recover the amount of a reasonable settlement from the insurer. Early determination of one part of that burden does not increase efficiency or certainty and does nothing to promote the public’s interest in settlements and just compensation. In fact, as addressed in Farmers’ opening brief (Opening Br. at 38, 46-48), attempting to prove a bad faith claim against an insurer in two separate proceedings can, and likely will, be inefficient and cumbersome.

5. *Bird argues that the trial judge is better suited to make the reasonableness determination:* Irrelevant, and not necessarily true. The constitutional right to a jury trial cannot depend upon the convenience of the courts or parties. As the Washington Supreme Court has said, “[W]hile we strive for efficiency in [the] courts . . . , we must also fashion procedures which adequately protect the constitutional right to jury trial.”²¹ “The mere fact that the evidence may present complicated questions of fact, or even questions involving figures difficult to carry in

²¹ *City of Seattle v. Williams*, 101 Wn.2d 445, 452, 680 P.2d 1051 (1984).

the mind, is not a sufficient reason for the denial of a trial by jury.”²² Moreover, juries are well suited to determining questions about damages and reasonableness, and juries often decide difficult issues based upon expert testimony and proper jury instructions. Decision by a jury, following full discovery and presentation of evidence, is the constitutional paradigm, and there is no data to suggest a judge can achieve a fairer, better result in an abbreviated hearing.

As set forth in Farmers’ opening brief, the *Sofie* opinion, among others, states the applicable principles relating to the constitutional provision that “[t]he right of trial by jury shall remain inviolate” Because claims for damages caused by torts were recognized at common law at the time the state constitution was adopted, “the question of damages is an integral component of the right to jury trial and thus falls squarely within the scope of this part of our constitution.”²³

Bird’s assertion (Resp. Br. at 37-38) that the Washington Supreme Court’s decision in *Nielson v. Spanaway General Medical Clinic, Inc.*,²⁴ decided after *Sofie*, applies to the present facts—and thereby rejected Farmers’ “line of argument” that reasonableness hearings should not decide damages at issue in a separate tort action—is inapt. The facts in

²² *Gatudy v. Acme Constr. Co.*, 196 Wash. 562, 569, 83 P.2d 889 (1938).

²³ 135 Wn.2d 255, 270, 956 P.2d 312 (1998) (Sanders, J., dissenting) (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989)).

²⁴ 135 Wn.2d 255, 956 P.2d 312 (1998).

Nielson do not raise the same issues. In that case, the plaintiff obtained a judgment of approximately \$3 million against the United States in federal court after a full trial on the merits of liability and damages. Under federal law, the plaintiff was not entitled to a jury. A state court action against other defendants, arising out of the same event, was pending at the same time in a Washington superior court but went to trial later. Our Supreme Court held that the plaintiff was bound in state court by collateral estoppel on the issue of damages determined in federal court.²⁵ Accordingly, a fact question on damages was not presented to the state trial court.²⁶ Because the issue of damages was not before the trial court, the plaintiff had no right to have a jury determine that question.²⁷

Bird's argument that *Nielson* applies assumes that the state court considered the issue of damages. He misses the significance of the fact that, in *Nielson*, the question of damages was determined in a proceeding, the federal court action, as to which the plaintiff had no right to jury trial. Here, by contrast, there is no proceeding, comparable to the federal action, as to which Farmers' right to a jury trial does not apply. Under the terms of the state constitution, Farmers is entitled to a jury in whatever proceeding will determine damages.

²⁵ 135 Wn.2d at 264.

²⁶ *Id.* at 268-69.

²⁷ *Id.* at 269.

4. The trial court's denial of Farmers' right to a jury trial also violates constitutional due process.

In its opening brief (Opening Br. at 2 (Issue 2), 21-22 (section VI.A.5)), Farmers argued that the violation of the right to trial by jury is also a violation of due process, as guaranteed by the Washington Constitution, Article 1, § 3. Farmers did not argue that, under the circumstances of this case, it had insufficient notice or opportunity to be heard.²⁸

In his response (Resp. Br. at 41-42), Bird argues, first, that Farmers had sufficient notice and opportunity to be heard. Other than to mention the irony that Bird resisted Farmers' attempts to gain time and information, and that Farmers' success in overcoming Bird's resistance is what now gives Bird the grounds for his argument, Farmers will not here address an issue it has not raised.

Bird argues, second, that Judge Coughenhour's unpublished decision in *Encompass v. Lennon* is well reasoned authority that a court's denial of a jury trial in a reasonableness hearing does not amount to a denial of due process. The *Encompass* opinion is a slim reed for at least

²⁸ Farmers argued that the Reasonableness Hearing Procedure "can and often does impair an insurer's ability to defend its interests." (Opening Br. at 33-38) Farmers does not, however, argue its procedural rights were violated in this matter.

three reasons. First, it is an unreported decision by a federal trial court judge on a question of Washington state law.

Second, and most significant, the foundation of the court's opinion is flawed. The court begins its analysis: "Wash. Rev. Code § 4.22.060 does not create a right to a jury in a reasonableness hearing," without citation to authority. (Order at 5, ll. 23-24²⁹) That statement reveals no recognition or comprehension of the fact that a hearing to determine reasonableness of a settlement in the context of RCW 4.22.060 is not, and should not be considered, the same as a determination of reasonableness in the context of a bad faith claim. As discussed at length above, the latter determines tort damages recoverable from the defendant as to which the right to jury trial is inviolate.

Third, the court misses the point that, if reasonableness is decided without a jury in a reasonableness hearing, then the issue is thereafter irrebuttable in the sense that defendant is afforded no opportunity to present the question of reasonableness to the jury. When the court says, "To claim that the amount of the settlement is irrebuttable is to pretend that the reasonableness hearing does not exist" (Order at 6, l. 4), it assumes the question of reasonableness was properly decided—i.e., that it

²⁹ The court's order is attached as Exhibit A to Declaration of Isaac Ruiz in Support of Respondent's Brief.

could be decided without a jury. But as the court states, “The settlement was approved, and it operates with the normal preclusive effect of a final state judgment.” (Order at 6, l. 13) That is, the damages determination by the court is as preclusive as a state judgment on that issue, and yet the insurer has had no jury trial and, according to the court, never will.

For the reasons addressed above, Farmers was entitled to a jury trial on the question of reasonableness, and the court’s failure to grant that request constitutes a denial of due process under our state’s constitution.

5. The Reasonableness Hearing Procedure is not an appropriate mechanism for deciding damages.

Farmers expressly recognizes and acknowledged in its opening brief that an insured may, to protect his interests, enter into a stipulated judgment with a covenant not to execute and that the amount of a reasonable settlement can be recovered from an insurer that has acted in bad faith. (Opening Br. at 9) Farmers also noted, citing Washington cases, that this situation presents a recognized moral hazard, because the insured has no incentive to limit the amount of a judgment against him that he has no obligation to pay. (Opening Br. at 30-31) For that reason, Washington courts have required that the reasonableness of the settlement

be scrutinized, and only a reasonable, non-collusive settlement can be enforced.³⁰ (Opening Br. at 33)

But Farmers noted that, because Farmers must be afforded a jury trial on the question of damages, the question whether the matter should be sent back to the trial court may be pertinent. (Opening Br. at 22) For that reason, Farmers has challenged the Reasonableness Hearing Procedure employed here and in other cases.

Bird argues that (1) “[r]easonableness hearings under RCW 4.22.060 are an entrenched part of this state’s insurance law” (Resp. Br. at 25) and (2) holding abbreviated, expedited hearings in the liability case is a necessary part of the “Washington courts’ carefully calibrated balance between the interest of insurers and insureds” (Resp. Br. at 32) Neither assertion is correct, and neither argument directly addresses Farmers’ arguments on appeal.

a. The legal basis for the Reasonableness Hearing Procedure has never been analyzed or identified by the Washington Supreme Court.

Farmers’ opening brief explained that *Besel* did not purport to establish RCW 4.22.060 as legal authority for reasonableness hearings in the bad faith context. (Opening Br. at 25-26) In *Besel*, the parties held a

³⁰ *E.g., Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736, 738, 49 P.3d 887 (2002) (“Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer’s liability for settlement amounts is all the more important.”); *Chaussee*, 60 Wn. App. at 510.

reasonableness hearing without objection from the insurer; RCW 4.22.060 was not mentioned and was not at issue. No other Supreme Court decision has held that RCW 4.22.060 applies.

It is, moreover, abundantly clear from the language of the statute that its only application is to determine the proper amount of the setoff to which non-settling defendants are entitled when a joint and several tortfeasor settles with the plaintiff and obtains a release. There was no indication in the legislative history, in commenting law review articles, or in related case law that the statute has any application but that apparent from its language—i.e., to determine a setoff.

Chaussee first determined that the *Glover* criteria, developed in the context of RCW 4.22.060, would also apply to determine reasonableness in the context of a bad faith claim. *Chaussee* did not decide that RCW 4.22.060 applied. Subsequent cases have stated that RCW 4.22.060 applies in the bad faith context, but none of them has explained why the statute could or would apply in a context different from that addressed by the language of the statute.

Bird fails to address those arguments. Bird fails to apprise this Court *why* RCW 4.22.060 could or should apply in the context of a bad faith claim. Bird fails to acknowledge that even those cases that have said RCW 4.22.060 applies do not explain how or why the statute could apply

or provide analysis to support the statute's application. Moreover, Bird fails to respond to Farmers' argument that there is no legal basis upon which a reasonableness hearing can be held separate from a bad faith action filed against the insurer.

b. The Reasonableness Hearing Procedure is neither necessary nor helpful to protect a settling insured's interests in proving damages against the insurer.

The Washington courts have strived to reach a balance between the interests of insurers and insureds by permitting insureds to recover from at-fault insurers the amount of a settlement with the claimant determined to be reasonable. Bird fails to recognize or acknowledge the difference between (1) an insured's right to prove the reasonableness of the settlement and (2) an insured's right to prove reasonableness in an abbreviated, expedited hearing. There is a difference, and neither Bird nor the Washington courts have addressed that difference.

Besel makes clear both that (1) an insured may protect its interests by settling with the plaintiff³¹ and (2) an insurer is protected by the requirement that such settlement be reasonable.³² Because the trial court in *Besel* found that the settlement was reasonable in consideration of the *Glover* factors, that issue was determined. The insurer did not argue to the

³¹ 146 Wn.2d at 735-36.

³² *Id.* at 738.

contrary. But *Besel* did not intimate that the *procedure* used in that case advanced the public's interest in promoting settlements. The parties did not raise the issue, and the court did not address it. Farmers has discovered no other Washington case proposing that an abbreviated, expedited hearing on the question of reasonableness is merited for reasons of efficiency or policy.

As explained at length in Farmers' opening brief, the insureds' and insurers' interests are balanced by permitting insureds to enter into good faith consent judgments that are determined to be reasonable under the *Glover* factors. That balance is lost when the insured's ability to defend itself is compromised.

B. The Stipulated Judgment was collusive as a matter of law.

1. The issues presented by Farmers are subject to de novo review.

Bird summarily asserts that the standard of review regarding collusion is abuse of discretion. But Bird fails to consider what, in fact, this Court is being asked to review. First, Farmers addressed the meaning of the term "collusion"—that the failure to negotiate at arm's length constitutes collusion. Bird does not challenge that statement, only whether collusion can be found as a matter of law. In any event, a trial court's

interpretation of the applicable law is reviewed de novo.³³ Second, Farmers addressed whether, if the settlement was not negotiated at arm's length, the trial court in the liability action needs to undertake a determination of reasonableness. That presents a question of law to be reviewed de novo.³⁴ Third, Farmers challenged whether Bird and Best Plumbing engaged in arm's length negotiations when the evidence is undisputed that Dykstra did not evaluate the merits of the case in order to advocate the defense position during negotiations. This issue presents a mixed question of law and fact that may be decided by this Court as a matter of law if reasonable minds could reach but one conclusion.³⁵

2. Collusion exists as a matter of law when the parties enter into a one-sided settlement that fails to reflect arm's length negotiations.

As our Supreme Court has indicated, failure to negotiate at arm's length is the same as collusion.³⁶ Bird does not argue to the contrary.

³³ *Mathioudakis v. Fleming*, 140 Wn. App. 247, 252, ¶ 15, 161 P.3d 451 (2007) (“We review a trial court's interpretation of case law de novo.”) (citations omitted); *cf. State v. Shumaker*, 142 Wn. App. 330, 333, ¶ 14, 174 P.3d 1214 (2007) (“Whether a jury instruction correctly states the applicable law is a question of law that we review de novo.”) (citation omitted).

³⁴ *See MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 415, ¶ 10, 213 P.3d 931 (2009) (questions of law reviewed de novo).

³⁵ *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 355, ¶ 26, 223 P.3d 1180 (2009) (citing *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)).

³⁶ *See Besel*, 147 Wn.2d at 739; *T & G Constr., Inc.*, 165 Wn.2d at 257 (settlement negotiated at arm's length not fraudulent or collusive); *see also Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn.

Bird argues, however, that there is no such thing as “collusion as a matter of law.” (Resp. Br. at 43-49) No reported Washington case has decided as a matter of law that collusion vitiates a settlement. The Washington courts, including the Court of Appeals in *Water’s Edge Homeowners Association v. Water’s Edge Associates*,³⁷ have simply never had the opportunity to address the issue. Federal courts, however, have held that collusion exists as a matter of law when the parties fail to reach a good faith settlement negotiated at arm’s length between true adversaries.³⁸

Bird’s attempt to distinguish *Continental Casualty v. Westerfield*³⁹ is ineffectual. (Resp. Br. at 46-49) The court in *Westerfield*, just as the trial court here, addressed collusion as a matter of law in the context of a covenant judgment with an assignment of rights against the settling defendant’s insurer.⁴⁰ In *Westerfield*, the settling plaintiff and defendant, like Bird and Best Plumbing here, entered into a covenant judgment. The settling parties then presented the plaintiff’s case to the court in the liability action in order to obtain the court’s approval of the settlement

App. 698, 706, ¶ 17, 187 P.3d 306 (2008) (finding of no collusion or fraud was supported by evidence of “vigorous” settlement negotiations).

³⁷ 152 Wn. App. 572, 216 P.3d 1110 (2009), *rev. denied*, 168 Wn.2d 1019 (2010).

³⁸ See *Cont’l Cas. v. Westerfield*, 961 F. Supp. 1502, 1506 (D.N.M. 1997); *Spence-Parker v. Md. Ins. Group*, 937 F. Supp. 551, 562 (E.D. Va. 1996).

³⁹ 961 F. Supp. 1502 (D.N.M. 1997).

⁴⁰ *Id.* at 1503-04.

amount.⁴¹ The court in the liability action was “provided with a copy of the settlement agreement” and “understood that the purpose for the proceeding was to ‘set up a bad faith claim against the nonparticipating carriers.’”⁴²

The court in the subsequent bad faith action ruled on summary judgment that the settlement was collusive as a matter of law. *Westerfield* is directly on point for its discussion of the standard for collusion. “Collusion may be found where the evidence demonstrates an absence of conflicting interests—the ‘lack of opposition between a plaintiff and an insured that otherwise would assure that the settlement is the result of hard bargaining.’”⁴³ The settlement in *Westerfield* was collusive as a matter of law because the defendant and his counsel abdicated any responsibility to argue the defense position.⁴⁴ A federal court in Virginia granted an insurer summary judgment finding collusion as a matter of law under similar facts.⁴⁵

⁴¹ *Id.*

⁴² *Id.* at 1507.

⁴³ *Id.* at 1506. The *Westerfield* court lists “indicators” of bad faith and collusion. *Id.* at 1505.

⁴⁴ *Id.* at 1507-09.

⁴⁵ See *Spence-Parker*, 937 F. Supp. at 562 (covenant judgment with an assignment of rights against the settling defendant’s insurer was product of “fraud or collusion” because parties failed “to advise Judge Bryan that the settlement they asked the Court to approve was not the product of arms-length negotiation in an adversarial setting”).

3. Because collusion as a matter of law may vitiate the reasonableness determination, it can be addressed in advance of the reasonableness determination.

Bird argues that the trial court considered collusion as one of the *Glover* factors and “could not possibly have abused its discretion by undertaking the nine-part reasonableness analysis.” (Resp. Br. at 44) Bird’s argument, once again, misses the point. As discussed in Farmers’ opening brief, in the context of the Reasonableness Hearing Procedure, evidence of collusion can be considered in two separate forums at two separate times. First, the trial court in the liability action considers evidence of collusion as one of the *Glover* factors to determine whether the settlement was reasonable.⁴⁶ The amount of settlement deemed reasonable becomes the presumptive measure of damages against the insurer.⁴⁷ Once that presumption is established, the insurer may present evidence of collusion as a defense to the presumption.⁴⁸ If the insurer proves collusion, then the settlement amount is not the presumptive measure of damages.

Bird fails to acknowledge the fact that, if collusion can be established as a matter of law in the liability action, there is no reason to proceed with the reasonableness determination. It is futile to determine

⁴⁶ *Chaussee*, 60 Wn. App. at 512.

⁴⁷ *Besel*, 146 Wn.2d at 738.

⁴⁸ *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765-66, 58 P.3d 276 (2002).

the reasonable value of settlement in the liability action only to discard it in the bad faith action because the settlement was collusive, if it can be established at the time of the liability action that the settlement was collusive.

Because collusion as a matter of law renders the reasonableness determination meaningless, the court in the liability action should avoid the unnecessary task of considering the *Glover* factors. On appeal, this Court should vacate the reasonableness determination.

Moreover, Bird makes no attempt to respond to Farmers' point that having two forums decide the same issue at different times with different burdens of proof is unmanageable, impractical, inexplicable, and unexplicated. The amount of damages recoverable from Farmers, and whether any damages can be recovered from Farmers, should be addressed in a single action against Farmers.

4. Because Best Plumbing abdicated its responsibility to argue the defense position, the Stipulated Judgment is a one-sided agreement, making it collusive as a matter of law.

As discussed in Farmers' opening brief, Best Plumbing made no effort to seriously negotiate liability and damages. The trial court found that Best Plumbing's personal counsel (Dykstra) "did negotiate and evaluate the claims prior to settlement and the terms of the agreement

changed during those negotiations with regard to amounts, post settlement obligations of the defendant, factual recitations, scope of participation of counsel appointed by Farmers, and assignment of experts and privileges. He did review drafts of the Motion in Limine and trial briefs.” (CP 3439)

In fact, the court’s recitation is incorrect or incomplete:

- Dykstra did not “negotiate and evaluate the claims prior to settlement” sufficiently to constitute an arm’s length negotiation. Dykstra admitted he never reviewed any discovery, deposition transcripts, expert reports, witness interviews, or evaluation letters. He did not conduct any legal research or assess the credibility of either side’s witnesses. Dykstra spent less than three hours reviewing file materials before agreeing to the settlement. Dykstra’s lack of knowledge meant he did not—could not—assert Best Plumbing’s defenses to Bird’s disadvantage. Dykstra had no tools to leverage a settlement in Best Plumbing’s favor. (CP 1052–54, 1084–1107, 3136–38)
- Dykstra did not seriously negotiate the terms of the agreement with regard to:
 - The settlement amount: Dykstra testified he never conducted any independent analysis or investigation into the range of settlement proposed by Bird. (CP 3292–94)
 - The “post settlement obligations of the defendant”: Best Plumbing’s only post settlement obligation was to cooperate with Bird in the Reasonableness Hearing, consistent with Bird’s interests. (CP 90)
 - The “factual recitations”: A redlined version of the Stipulated Judgment shows that the factual revisions did not address the substance of the settlement. Moreover, comments on the draft by Bill Lilleness,

Best Plumbing's president, were ignored. (Bird's Reasonableness Hearing Exhibits 26 and 27; CP 82)

- The “scope of participation of [Defense Counsel]”: Defense Counsel was not asked to assist with negotiations, even to provide factual information, and was not involved in negotiations. (CP 82; RP 7/23/09, 348:3–349:11)
- The “assignment of experts and privileges”: The agreement required Best Plumbing to assign all rights to experts, privileged information, and work product to Bird. Again, this provision was entirely consistent with Bird's interests. (CP 89)
- Dykstra did not “review drafts of the Motion in Limine and trial briefs.” Dykstra's billing records show that reviewed only one trial brief, for less than (perhaps much less than) .8 hour.⁴⁹ (CP 3136–38)

The point is that, on the undisputed evidence, Dykstra did not know enough about the litigation to be able to bargain. He had no tools to provide leverage in arm's length negotiations; he could not engage in “hard bargaining”⁵⁰ without knowing where the chips were. Dykstra admittedly did not attempt to apprise himself sufficiently to assert Best Plumbing's best case against Bird. (See Opening Br. at 43-46)

It is not enough that Dykstra, based upon his experience, thought the settlement might fall within a certain range. An insurer is not

⁴⁹ The time entry pertaining to this task is block billed, so it is impossible to determine how much of the entry is attributable to Dykstra's review of the trial brief.

⁵⁰ See *Westerfield*, 951 F. Supp. at 1506.

protected from collusive settlements when the insured “ball parks” a settlement; as the courts make clear, the balance between the insurer’s and insured’s interests is maintained only when the insured negotiates a reasonable settlement at arm’s length. Dykstra must be able to bargain, and, on his own testimony, he could not, and therefore did not, do so.

Because reasonable minds cannot disagree that Best Plumbing and its counsel were effectively absent during the “negotiation” of the Stipulated Judgment, this Court should rule that, as a matter of law, Bird and Best Plumbing did not engage in an arm’s length negotiation.⁵¹ The absence of the defense position makes the agreement one-sided and thereby collusive, and the trial court’s determination of reasonableness should be vacated as a matter of law.

C. **Bird is not entitled to a 75% chance of recovery on a statutory trespass claim.**

1. **Preliminarily, this Court must review de novo the trial court’s determination of legal questions.**

As Bird notes in the response brief (Resp. Br. at 52), the trial court held that Bird could have presented a statutory trespass claim at trial without amending the complaint. Whether statutory trespass is a separate claim that needs to be specifically pled is a question of law to be reviewed

⁵¹ *Ki Sin Kim*, 153 Wn. App. at 355, ¶ 26.

de novo.⁵² In addition, this Court reviews de novo the trial court's interpretation of the level of intent required to satisfy a claim for statutory trespass.⁵³ Because, as a matter of law, Bird would need to have amended his complaint and to prove intent to cause damage as required by statute, for which Bird had no evidence, the trial court abused its discretion when it found Bird had a 75% chance of recovering punitive damages and attorney fees under a statutory trespass cause of action.

2. Statutory trespass is a separate claim that would have required Bird to amend his complaint.

Contrary to Bird's argument, common law trespass and statutory trespass under RCW 4.24.630 are two separate and distinct causes of action. Common law trespass simply requires evidence of an intrusion onto the property of another that interferes with the other's rights of exclusive possession.⁵⁴ Common law trespass does not necessarily require proof of either negligence or intent.⁵⁵ Statutory trespass, on the other

⁵² See *MP Med.*, 151 Wn. App. at 415, ¶ 10 (citation omitted) ("We . . . review questions of law de novo.").

⁵³ *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000) ("An appellate court's review of a trial court's interpretation of a statute is de novo.") (citations omitted).

⁵⁴ *Bosteder v. City of Renton*, 155 Wn.2d 18, 50, ¶ 59, 117 P.3d 316 (2005) (citations omitted).

⁵⁵ *Fordney v. King County*, 9 Wn.2d 546, 558, 115 P.2d 667 (1941) (citations omitted).

hand, incorporates an element of willfulness and an intent not simply to act, but to cause harm.⁵⁶

Washington courts treat the two claims as independent causes of action. In *Saddle Mountain Minerals, LLC v. Santiago Homes, Inc.*,⁵⁷ the plaintiff, Saddle Mountain, pled a claim for common law trespass and a separate claim for statutory trespass against the defendant, Santiago.⁵⁸ Saddle Mountain was the owner of mineral rights on certain properties,⁵⁹ and it sued Santiago for interfering with the mineral rights.⁶⁰ The trial court addressed separate motions for summary judgment on Saddle Mountain's common law trespass claim and statutory trespass claim.⁶¹ The Washington Court of Appeals separately analyzed the causes of action for common law trespass and statutory trespass and found genuine issues of material fact to preclude summary judgment.⁶² Statutory trespass does not, as Bird contends, simply provide a civil remedy for common law trespass.

⁵⁶ RCW 4.24.630.

⁵⁷ 146 Wn. App. 69, 189 P.3d 821 (2008).

⁵⁸ 146 Wn. App. at 73, ¶ 9.

⁵⁹ *Id.* at 72, ¶ 3.

⁶⁰ *Id.* at 73, ¶ 9.

⁶¹ *Id.* at 73, ¶ 10.

⁶² *Id.* at 74–79, ¶¶ 12-36.

Bird, then, would need to have amended his complaint to recover on a claim for statutory trespass. *Allstot v. Edwards*,⁶³ a case relied upon by Bird, does not apply. *Allstot* allows the trial court to conform the pleadings to the evidence presented at trial, but Bird could not present evidence of a willful trespass at trial, over Best Plumbing's objection, when he had not pled such a claim.

3. Even if Bird could have amended his complaint, he could not have satisfied the standard to prove statutory trespass.

The plain language of RCW 4.24.630 requires that the defendant intend to cause harm, not simply intend to act. The legislative history of the statute and case law interpreting the statute confirm the level of intent required. (Opening Br. at 51-54) Farmers, in its opening brief, raised the due process concerns of awarding punitive damages without the level of egregious behavior required by the United States Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.⁶⁴ Bird responds that interpreting the statute to require the simple intent to act complies with due process because the statute uses only a single-digit multiplier to award punitive damages. (Resp. Br. at 57) Bird avoids addressing the point Farmers raised. The multiplier is not the issue. Under *Campbell*, a statute

⁶³ 114 Wn. App. 625, 60 P.3d 601 (2002).

⁶⁴ 538 U.S. 408, 419 (2003).

awarding punitive damages must require a “degree of reprehensibility” in the defendant’s conduct itself, *regardless* of the multiplier used.⁶⁵ Absent the elevated level of conduct, an award of punitive damages violates due process.

Despite all authority to the contrary, Bird continues to insist that RCW 4.24.630 requires a simple intent to act and not the intent to cause harm. Bird’s attempt to rely on this Court’s recent decision in *Clipse v. Michaels Pipeline Construction, Inc.*,⁶⁶ is inapt. In *Clipse*, this Court decided that the statutory language required that the defendant intentionally and unreasonably commit an act while knowing or having reason to know he lacked authorization.⁶⁷ The Court was not asked to address the level of intent required under the statute and did not decide that question.

The plain language of the statute, however, requires an intent to cause harm. RCW 4.24.630 provides that a person acts “wrongfully” when he “intentionally and unreasonably commits the act” The “act” at issue is the act of “caus[ing] waste or injury to the land.” The trespasser, then, must intentionally and unreasonably cause waste or injury to land. That is, the trespasser must intend to cause harm.

⁶⁵ *Id.* at 419.

⁶⁶ 154 Wn. App. 573, 225 P.3d 492 (2010).

⁶⁷ 154 Wn. App. at 580, ¶ 15.

Indeed, even a claim for mere intentional trespass (a variation of common law trespass) requires the intent to cause harm and not simply the intent to act. This Court, in *Washington Natural Gas Co. v. Tye Construction Co.*,⁶⁸ affirmed a trial court decision dismissing a claim for intentional common law trespass because the plaintiff failed to present any evidence that the defendant intended to cause harm. In that case, Washington Natural sued Tye to recover for damage to Washington Natural's underground gas lines.⁶⁹ Washington Natural alleged that Tye had damaged the gas lines when Tye was attempting to lay some power lines.⁷⁰ The Court of Appeals found that "[t]here was no question that Tye intended to dig the necessary ditches and lay the power lines. But the intent necessary to find a trespass is the intent to cause the damage or to intermeddle with the lines."⁷¹ Thus, it was not sufficient that Tye had simply intended to act by digging the ditches. In order to prevail on its intentional common law trespass claim, Washington Natural had to prove that Tye intended to cause harm to Washington Natural.

Similarly, in order to prevail on his statutory trespass claim, Bird had to prove that Best Plumbing intended to cause harm to Bird. There is no evidence of an intent to cause harm. As Bird's own counsel said in a

⁶⁸ 26 Wn. App. 235, 241-42, 611 P.2d 1378 (1980).

⁶⁹ *Id.* at 236.

⁷⁰ *Id.*

⁷¹ *Id.* at 241.

private email to Bird: “[T]he plumber just went onto the wrong property. He did so without the intent to cause harm or damage. *To the contrary – he did so with the intent to fix a problem, he just screwed up.*” (CP 710) (emphasis added)

Because the statute requires an intent to cause harm, of which there is no evidence, Bird did not have a 75% chance of prevailing on a claim for statutory trespass, and the trial court abused its discretion in so finding.

D. Bird is not entitled to a 100% chance of recovery on his alleged cost of repair.

Bird spends much of his argument on this issue recounting his best evidence. Bird, once again, fails to address the issue raised in Farmers’ opening brief. *Chaussee* made clear that the “settlement value” of a claim is different from the “pure exposure value” of a claim; the settlement value not only reflects “the potential liability” of a party, but also “the risks or costs of going to trial that a reasonable person would consider in determining a reasonable settlement.”⁷² The trial court awarded Bird the “pure exposure value” of his alleged cost of repair, failing to discount the amount to reflect the risk, however small, that Bird might not prevail on his claim. This was error.

⁷² *Chaussee*, 60 Wn. App. at 514.

Best Plumbing intended to present evidence at trial to prove that the sewer pipe did not leak for eight months and that the slope failure was, in fact, caused by Bird's attempt to landscape his hillside. For example:

- Best Plumbing's mechanical expert, Jacobson, would have testified that his tests proved that the pipe leaked **during the test**, but could not have leaked in that way when it was in the ground. Jacobson believed the pipe had been altered after it was pulled out of the ground by Bird. Although Jacobson alluded to this opinion during his deposition, Bird's counsel failed to explore it. (RP 7/23/09, 291:19–298:11; RP 9/8/09, 359:11–366:20, 368:16–369:8, 376:13–377:6)
- In 2004, Bird had planned to remodel his garage located at the top of the hillside. The City Department of Planning and Development ("DPD") inspected the property and noted that the "steep slope . . . seems to show some signs of a set down." DPD instructed Bird to hire a geotechnical engineer to "address slope stability." Bird hired Chang to stabilize the hillside eight months **before** Best Plumbing set foot on Bird's property. (RP 561:19–566:23; CP 2728, 3349–50)
- After the slope failed, Chang reported that the failure was caused by Bird's excavation in 2005. Chang later amended his report, based solely on what Bird told him, to say that Best Plumbing's conduct was an **additional** cause of the slope failure. Chang never tested the sewer pipe to determine whether it leaked, and his boring samples never found evidence of sewage in the soil. Chang, instead, found the presence of slow groundwater seepage on the hillside. (CP 1486, 1489–90, 1501, 1544–45; RP 566:1–567:4, 571:19–572:14)

In addition:

- Bird's counsel assumed that Jacobson's tests would establish causation. Bird never designated a causation expert and never listed Jacobson on his witness list. Best Plumbing had the option of not calling Jacobson at trial in order to leave Bird

without an expert and without an opportunity to cross examine Best Plumbing's expert. (RP 9/8/09, 433:12-434:1)

Farmers believes the evidence and strategy substantially support Best Plumbing's defense. Regardless, Bird faced at least *some* risk that a jury would believe that Bird caused or contributed to the hillside's failure. A truly reasonable settlement would have reflected this risk. The trial court abused its discretion when it awarded Bird 100% of his alleged cost of repair, confusing the "pure exposure value" of the claim for the "settlement value" of the claim.

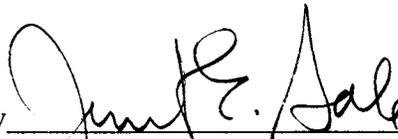
III. CONCLUSION

For the reasons stated in Farmers' opening brief and above, Farmers requests that the trial court's determination that the settlement between Bird and Best Plumbing was reasonable be vacated and the action dismissed.

DATED: July 1, 2010

BULLIVANT HOUSER BAILEY PC

By



Douglas G. Houser, OSB #600384

pro hac vice

Jerret E. Sale, WSBA #14101

Deborah L. Carstens, WSBA #17494

Janis C. Puracal, WSBA #39234

TALMADGE/FITZPATRICK PLLC

By 
Philip A. Talmadge, WSBA #6973
Sidney C. Tribe, WSBA #33160

Attorneys for Appellant Farmers Insurance Exchange

CERTIFICATE OF SERVICE

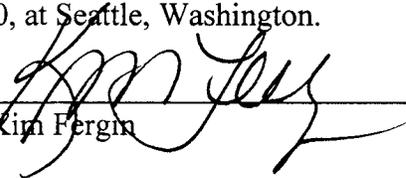
The undersigned certifies that on this 1st day of July, 2010, I caused to be served this document to:

William C. Smart via hand delivery.
Keller Rohrback, LLP via first class mail.
1201 - 3rd Ave., Ste. 3200 via facsimile.
Seattle WA 98101-3052

Jeffrey I. Tilden via hand delivery.
Gordon Tilden Thomas & Cordell LLP via first class mail.
1001 Fourth Ave., Ste. 4000 via facsimile.
Seattle WA 98154-1007

Gavin W. Skok via hand delivery.
Riddell Williams P.S. via first class mail.
1001 Fourth Ave., Ste. 4500 via facsimile.
Seattle WA 98154-1192

I declare under penalty of perjury under the laws of the state of Washington this 1st day of July, 2010, at Seattle, Washington.


Kim Fergin

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