No. 104038-5

SUPREME COURT
OF THE STATE OF WASHINGTON

ANNA K. ANDREWS and ERIC J. ANDREWS,
husband and wife,

Respondents,

v.

PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

LUVERA LAW FIRM

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A. Introduction.

The Court of Appeals applied decades of well-established law and the plain language of petitioner PURE's own UIM policy to prevent PURE from relitigating the amount its insureds, respondents Andrews, were legally entitled to recover from an uninsured tortfeasor after PURE intervened in the action, participated in the statutory reasonableness hearing, and did not contest liability or object to the reasonableness findings, the final settlement amount, or entry of the final judgment. PURE not only fails to show any conflict with existing precedent, but as the Court of Appeals noted, would turn controlling precedent "on its head." (Op. 11)[1]

PURE contracted to promptly pay the amount its "insured is legally entitled to recover" from an underinsured tortfeasor, less the tortfeasor's liability limits, as "determined either by final judgment or

[1] Citations are to the unpublished slip opinion.

settlement with [PURE's] written consent." (CP 2621) Here, the trial court entered a final and unappealed judgment against an underinsured motorist in favor of Andrews. Neither the UIM statute, PURE's status as an intervenor, nor PURE's own contractual language supports PURE's claimed entitlement to "jury trial rights" (Pet. 1), let alone a jury determination of the undefined "true value" of Andrews' claim, as PURE argued below. (App. Br. 20)

PURE's petition in any event is moot. PURE chose to pay the amounts owed to Andrews—without condition or notice of reimbursement—following the Court of Appeals' well-reasoned decision. This Court should deny review of the unpublished opinion.

B. Restatement of Facts.

Anna Andrews was injured in a three-car accident when defendant Alexandra Fox pulled into an intersection, striking oncoming traffic. Andrews sued Fox and first impacted driver John McAlpine, and based on Fox's

insufficient liability limits made a demand to PURE for UIM benefits under Andrews' primary and excess policies. (CP 50)

PURE's primary and excess policies mirror RCW 48.22.030(2)'s requirement that PURE pay those "damages for bodily injury an 'insured' is legally entitled to recover from the operator of an underinsured motor vehicle," less the underinsured's liability limits. (CP 2231)[2] "The amount of damages is determined either by final judgment or settlement with [PURE's] written consent." (CP 2621)

Recognizing that "it may be bound by the results of this litigation," PURE sought leave, and was allowed to intervene in Andrews' tort action. (CP 24-28, 78-80) PURE chose not to oppose partial summary judgment establishing defendant Fox's liability and the absence of

[2] The excess policy uses the term "receive" rather than "recover." (CP 2630)

Andrews' comparative fault. (CP 679) While PURE filed motions in limine (CP 1055-65, 1832), responded to other motions (CP 1786-87, 1811-16, 1837-42), and submitted proposed jury instructions (CP 1324-56, 137-1405, 1441-73), PURE did not identify any expert witnesses to contest Fox's liability or any damages witnesses. (CP 1890-92)

PURE also did not challenge McAlpine's dismissal (CP 1028, 1900-02), and concedes the McAlpine settlement has no bearing on PURE's obligations to pay what Andrews was "legally entitled to recover" once Fox became liable and the sole defendant against whom a judgment could be entered. (CP 3170; RP 194) *See Allstate Ins. Co. v. Batacan*, 139 Wn.2d 443, 452, 986 P.2d 823 (1999).

PURE then declined Andrews' renewed offer to buy out their remaining liability claim, which would have given PURE the right to seek reimbursement by asserting Andrews' rights against Fox. (Op. 3, n.4) *See Hamilton v.*

Farmers Ins. Co. of Wash., 107 Wn.2d 721, 733 P.2d 213 (1987). And although Fox was indisputably underinsured, as Andrews' accrued medical expenses far exceeded Fox's liability limits, PURE never offered Andrews more than $300,000, which it conditioned on waiver of any additional benefits or claims. (CP 50, 2268, 3349)

Shortly before trial Fox agreed to a covenant judgment settlement that required entry of a partial judgment in the minimum amount of $600,000, with the full amount to be determined by agreement or arbitration. Fox assigned Andrews all her rights and claims against her liability insurer USAA. (CP 2268-69) Andrews and Fox thereafter agreed to a covenant judgment of $2.8 million. (Op. 4)

PURE received notice of the settlement and fully participated in two reasonableness hearings, over two days. The trial court found that the principal amount of the covenant judgment against Fox was reasonable, supported

by extensive findings under the *Glover/Chaussee* factors. (CP 3307-09; RP 306-09)

PURE did not contest entry of the judgment, which the trial court certified as final under CR 54(b). (CP 3373-76) The trial court certified for discretionary review under RAP 2.3(b)(4) only its subsequent order that the covenant judgment was binding on PURE. (CP 3524-26) PURE did not assign error to the judgment or any reasonableness findings. (App. Br. 4-5) The Court of Appeals affirmed the trial court's order in an unpublished decision on January 27, 2025.

In March 2025, with "no conditions whatsoever," PURE tendered to Andrews the amounts due under the covenant judgment. (Pet. App. C) Andrews' statutory and extra-contractual claims for PURE's delay and bad faith, the assigned claims against Fox's liability insurer USAA, and for attorney fees, remain outstanding on remand.

C. Restatement of Issue Presented for Review.

The Court of Appeals decided the following certified question:

Whether Andrews's UIM insurer, PURE, who intervened and participated in the reasonableness hearing that determined the covenant settlement between Andrews and Fox, the tortfeasor, to be reasonable, is entitled to a separate jury trial on damages. (Op. 2)

D. Why This Court Should Deny Review.

PURE's status as an intervenor gave it the right to stand in the shoes of Fox, the uninsured motorist, but not the right to relitigate to a jury the uncontested amount Andrews is "legally entitled to recover" after the trial court confirmed the reasonableness of a covenant judgment in a hearing under RCW 4.22.060 in which PURE fully participated.

This Court has "unambiguously approved of the use of reasonableness hearings to evaluate covenant

judgments," and to bind all affected entities, including insurers, who, like PURE, have had notice and opportunity to be heard. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 767, ¶21, 287 P.3d 551 (2012); *Mut. of Enumclaw Ins. Co. v. T&G Construction, Inc.,* 165 Wn.2d 255, 199 P.3d 376 (2008) (insurance coverage issues); *See Schmidt v. Cornerstone Investments, Inc.,* 115 Wn.2d 148, 159-61, 795 P.2d 1143 (1990) (setoff available to jointly liable defendants). PURE's status as an intervening UIM insurer participating fully in this litigation provides more, not less justification for adherence to this established principle. Settled precedent and the plain language of PURE's policies compelled the Court of Appeals' decision that PURE may not relitigate before a jury the unappealed judgment amount Andrews was legally entitled to recover.

1. Established case law binds PURE to the judgment entered and reasonableness determination made in the underlying tort action after it intervened.

PURE may not relitigate the amount its insured Andrews was legally entitled to recover from an underinsured tortfeasor. With notice to PURE, the trial court conducted a statutory reasonableness hearing and entered both unchallenged findings establishing the covenant judgment's reasonableness and an unappealed final judgment establishing what PURE's insured Andrews was "legally entitled to recover" from the underinsured motorist Fox. PURE is bound by those unchallenged determinations; they are now "verities on appeal." *Mueller v. Wells,* 185 Wn.2d 1, 9, ¶7, 367 P.3d 580 (2016).

"[O]nce an insured establishes she is 'legally entitled' to recover from the tortfeasor, the UIM carrier becomes obligated to pay the judgment less the insurance recovery from the tortfeasor." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 248, 961 P.2d 350 (1998) (quoting RCW

48.22.030(2). This Court in *Fisher* held that a UIM insurer with notice of its insured's lawsuit was obligated to pay UIM benefits based on an arbitration award in excess of liability limits. 136 Wn.2d at 242.

Two decades earlier, this Court affirmed the decision that a UIM insurer was bound by its insured's stipulated judgment against an uninsured tortfeasor entered after the insurer had notice of the action. *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 618, 586 P.2d 519 (1978), *aff'd*, 92 Wn.2d 748, 600 P.2d 1272 (1979). Relying on *Fisher* and *Finney,* this Court then held that a UIM insurer was obligated to pay damages established by an uncontested default proceeding after the insurer received notice of its insured's lawsuit against an underinsured defendant. *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 281, 996 P.2d 603 (2000).

This Court in *T&G Construction*, relying on *Fisher, Lenzi* and *Finney*—all cases involving UIM insurers—

applied these same preclusion principles to pure coverage determinations made in a RCW 4.22.060 reasonableness hearing. This Court reasoned that "[w]hat the insured is legally obligated to pay is the exact issue determined in the liability suit," *T&G,* 165 Wn.2d at 263, ¶12, and that an insurer is bound even if the disputed issues are resolved not by trial or arbitration, but by a trial court's findings in the liability suit that the parties' settlement is reasonable and not the product of fraud or collusion. "Allowing an insurer to relitigate in the coverage suit once liability has been evaluated an a judicially approved settlement runs afoul of the very policy concerns articulated in *Fisher* and *Lenzi*." *T&G*, 165 Wn.2d at 264, ¶15.

This Court then held in *Bird* that in insurance cases, RCW 4.22.060 requires "reasonableness hearings where settlements involve '[a] release, covenant not to sue, covenant not to enforce judgment, or similar agreement." 175 Wn.2d at 767, ¶20, quoting RCW 4.22.060(1). The *Bird*

Court held that the reasonableness determination is not subject to relitigation by an insurer that had notice and the opportunity to participate in the hearing. 175 Wn.2d at 776, ¶44; *see also Besel v. Viking Ins. Co. of Wisconsin,* 146 Wn.2d 730, 738-39, 49 P.3d 887 (2002) (reasonableness hearing establishes presumptive measure of damages in subsequent bad faith action against insurer).

Established case law binds PURE to the unchallenged final judgment and reasonableness determination made in the underlying tort action after it intervened. The Court of Appeals' unpublished decision warrants no further review.

2. The plain language of PURE's policies controls PURE's liability for the amount Andrews is legally entitled to recover under a "final judgment".

The Court of Appeals relied on the plain language of PURE's UIM policies obligating PURE to pay the amount its insureds are "legally entitled to recover" or "receive" once established by a "final judgment." PURE's petition

fails to acknowledge, let alone address, the terms of its own policies that provide coverage for "compensatory damages which an 'insured' is legally entitled to recover" (CP 2231) as "determined either by final judgment or settlement with [PURE's] written consent." (CP 2621)

Andrews obtained a "final judgment," unchallenged on appeal, that established "the monetary amount [Andrews] is legally entitled to recover" from Fox. (CP 2231, 2630) Contrary to PURE's argument (Pet. 8, 12), its policies contain no language even suggesting, let alone requiring, that final judgment must be entered only after a trial to a judge, to a jury, or to an arbitrator. The Court of Appeals correctly rejected PURE's argument that it was entitled to relitigate "the 'true value'" of Andrews' damages by trial to a judge, to a jury or after arbitration. (Op. 17, n.16) That term is not in PURE's policies or in RCW 48.22.030.

PURE's argument that "settling parties cannot bind a nonconsenting third party" (Pet. 16) is contrary to PURE's policy language, which, in the disjunctive, defines damages as the amount determined "*either* by final judgment *or* settlement with our written consent." (CP 2633) (emphasis added) Because "the trial court entered a final judgment after determining the covenant judgment was reasonable," the Court of Appeals did not need to address whether PURE was contractually obligated to pay UIM benefits to Andrews under this alternative basis in its policy. (Op. 16-17 & n.15)

PURE's "consent" argument in any event is contrary to public policy. "[A] provision within an underinsured motorist policy which requires consent of the insurer before an injured insured may settle with a tortfeasor is contrary to public policy and is void." *Hamilton*, 107 Wn.2d at 728; *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 552-53, 707 P.2d 1319 (1985).

PURE pays lip service to this rule, but its claimed entitlement to relitigate the amount to which Andrews is legally entitled because PURE did not consent or stipulate to Andrews' covenant judgment settlement with Fox ignores what has been settled Washington public policy for half a century. *Hawaiian Ins. & Guaranty Co. v. Mead,* 14 Wn. App. 43, 51, 538 P.2d 865 (1975) ("policy provision requiring the written consent of the insurer before the insured can make settlement with any person liable for his injury is contrary to public policy and invalid") (cited Pet. 18, n.3), *rev. denied*, 86 Wn.2d 1009 (1976).

PURE had no right to interfere with Andrews' settlement with Fox or any other tortfeasor. PURE had only the right to "succeed to the rights of its insured against the tortfeasor by (1) paying the underinsurance benefits prior to release of the tortfeasor and (2) substituting a payment to the insured in an amount equal to the tentative settlement." *Hamilton*, 107 Wn.2d at 734. PURE chose not

to exercise that right when it declined to buy out the settlement once receiving notice of its terms.

The Court of Appeals correctly relied on PURE's own policy language and followed established case law. Its unpublished decision holding PURE bound by a reasonable final judgment against the underinsured tortfeasor that PURE neither challenged nor appealed warrants no further review in this Court.

3. A UIM insurer has no "independent" rights as an intervenor, and no greater rights because it intervened.

A UIM insurer intervening in its insured's action has no greater rights than the tortfeasor in whose shoes it stands. PURE relies on a hodge podge of cases that did not

involve covenant judgments or insurers[3] to claim it nevertheless has "full litigation rights" "after the original parties resolve their claims," "includ[ing] the right to a jury trial." (Pet. 8) PURE goes so far as to claim it was not bound by the covenant judgment found reasonable after it intervened in the underlying action *because* it intervened. (Pet. 9) These arguments are without merit.

PURE's status as an intervenor was governed by statutes and caselaw governing insurers. By statute, a UIM insurer does not have the traditional rights of subrogation granted liability insurers, but only a statutory right of reimbursement from any excess recovery by the insured

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[3] The cases PURE relies on include *Fairfield v. Binnian*, 13 Wash. 1, 42 P. 632 (1895) (Pet. 1, 8-9), which dismissed an appeal in a chattel mortgage foreclosure because there was no proof intervenor had been served with the notice of appeal, and *Dumas v. Gagner,* 137 Wn.2d 268, 295, n.98, 971 P.2d 17 (1999) (Pet. 1, 8-9, 12, 15), an election contest that stands for the unremarkable proposition that an intervenor can appeal "as an original party." PURE did not, of course, appeal or otherwise challenge the final judgment establishing the amount Andrews is "legally entitled to recover" from Fox.

from any settlement or judgment. RCW 48.22.040(3); *see Hamilton*, 107 Wn.2d at 731.

Similarly, PURE's rights as an intervenor are no greater than any other party seeking to challenge a settlement under RCW 4.22.060. No party, let alone an intervening insurer, has the right to a jury trial on any and all issues it wishes to contest once that issue is resolved in a statutory reasonableness hearing.

In *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 716, 658 P.2d 1230 (1983), for instance, this Court held that a settlement found to be reasonable established the non-settling defendant's offset upon entry of judgment. In *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 159-61, 795 P.2d 1143 (1990), this Court rejected a non-settling defendant's argument that the reasonableness determination violated its right to a jury assessment of damages.

In addressing the rights of intervening insurers, this Court in *T&G* held the insurer had no right to relitigate a coverage issue resolved in a reasonableness hearing, even absent bad faith, 165 Wn.2d at 263, ¶11.[4] And in *Bird,* the Court held the intervening insurer's due process rights were satisfied by the insurer's participation, after notice, in the proceedings establishing the reasonableness of the covenant judgment. 175 Wn.2d at 774, ¶37.

PURE's intervention in Andrews' lawsuit against Fox fully "protect[ed] its interests against a collusive or otherwise artificially excessive result." *Lenzi*, 140 Wn.2d at 275. PURE's contention that it now has the additional right to assert "the same defenses that the tortfeasor could have

[4] PURE attempts to distinguish *T&G* because the insurer, which had defended its insured but challenged coverage, intervened only in the reasonableness hearing. (Pet. 14) That is a distinction without a difference given the extent of PURE's participation in all aspects of Andrews' lawsuit. (*See* Arg., at 20-21, *infra*)

asserted," including the right to a jury trial on damages (Pet. 7), ignores this settled law.[5]

PURE's rights as an intervening UIM insurer are subject to the principles of preclusion that underlie the *Finney-Fisher* rule. *See Lenzi*, 140 Wn.2d at 279-80 (*Finney-Fisher* rule based on principles of claim preclusion as well "'[c]onsiderations of fairness and the avoidance of redundant litigation[,] the prevention of anomalous results,]' and 'preventing insurers from picking and choosing their judgments'") (quoting *Fisher*, 136 Wn.2d at 248). As the Court of Appeals held, PURE's argument that

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[5] PURE's participation in the proceedings that determined the amount its insureds were entitled to recover and entry of a final judgment distinguishes this case from those cited by PURE. (Pet. 16, citing *Green v. City of Wenatchee*, 148 Wn. App. 351, 366-67, 199 P.3d 1029 (2009); *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 14 Wn. App. 557, 562, 544 P.2d 763 (1975), *rev. denied*, 86 Wn.2d 1011 (1976). As the Court of Appeals held, "these cases demonstrate the unremarkable proposition that insurers are bound by a settlement only to the extent it determined any material finding of fact essential to the judgment of tort liability." (Op. 11, n.9)

a UIM insurer is only bound by rulings in the underlying litigation when the UIM insurer is given notice and opportunity but chooses *not* to intervene (Pet. 4) would "turn the *Finney-Fisher* rule on its head." (Op. 11)

Traditional notions of claim preclusion and res judicata make it more, not less, likely a party, including an intervenor, will be bound by the prior adjudication when the party has participated in the underlying action. *See Restatement (Second) of Judgments* §34 (1982) ("a party [to an action] is bound by and entitled to the benefits of the rules of res judicata with respect to determinations made while he was a party."). PURE had notice and the opportunity to contest the tortfeasors' liability, Andrews' comparative fault, and damages. It chose not to. PURE had the opportunity to appeal the reasonableness findings but did not do so. It also had the opportunity to appeal the final judgment entered against its insured, but again did not do so.

PURE fully availed itself of its right as an intervenor, participating when the trial court considered Andrews' motions for summary judgment on liability, to exclude any expert testimony, and for a reasonableness determination of the covenant judgment that established what Andrews was "legally entitled to recover" from the underinsured tortfeasor Fox. The Court of Appeals correctly held that PURE's participation in the proceedings below made it more, not less, fair to bind PURE to the reasonable final judgment in favor of its insured. The unpublished decision presents no issue for this Court's review.

4. PURE's claimed entitlement to relitigate the amount its insured is entitled to recover undermines other public policies.

PURE's petition raises no issue of substantial public interest under RAP 13.4(b)(4) that has not already been addressed by this Court. PURE's challenge to the Court of Appeals' well-reasoned decision instead undermines important public policies, including a UIM insurer's

statutory and contractual obligations to promptly protect its insureds and to exercise good faith in dealing with them, to prevent costly and wasteful relitigation, and favoring settlement of disputed claims.

"The [UIM] statute embodies a strong public policy to ensure the availability of a source of recovery for an innocent automobile-accident victim when the responsible party does not possess adequate liability insurance." *Fisher*, 136 Wn.2d at 245. An "injured insured is entitled to compensation from his underinsurer without regard to any recovery obtained from other sources and without regard to whether such recovery exhausts any coverage provided by the liability insurers of the tortfeasor, until the injured insured's underinsurance policy limits are reached or he is fully compensated for his damages, whichever occurs first." *Hamilton*, 107 Wn.2d at 727. The UIM statutory scheme encourages both settlement and prompt payment, and "prohibits policy provisions which attempt to limit the

insured's right to full compensation." *Hamilton*, 107 Wn.2d at 728. PURE ignores these policies.

The claimed "adversarial relationship" between an UIM insurer and its insured (Pet. 7) is no reason to change the well-established rules governing PURE's obligations to Andrews. "[A]lthough the relationship becomes adversarial, the insured still has "the 'reasonable expectation' that he will be dealt with fairly and in good faith by his insurer." *Ellwein v. Hartford Acc. and Indem. Co.*, 142 Wn.2d 766, 780, 15 P.3d 640 (2001) (quoted case omitted). *See also Fisher*, 136 Wn.2d at 244 (UIM insurer subject to statutory duty to act in "good faith, abstain from deception, and practice honesty and equity" under RCW 48.01.030); *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 980, 948 P.2d 1264 (1997) (identifying public policy encouraging "prompt payment of claims" as basis for equitable rule shifting fees to insurer).

Establishing the amount of the insured's right to recover by a reasonable covenant judgment furthers the public policy favoring settlement that underlies RCW 4.22.060. *See Besel,* 146 Wn.2d at 738-39 ("If a reasonable and good faith settlement amount of a covenant judgment does not measure an insured's harm, our requirement that such settlements be reasonable is meaningless."). Granting the UIM insurer the right to buy out its insured's claim by paying a proposed settlement and stepping into its insured's shoes—a right PURE repeatedly declined—similarly promotes settlement. *Hamilton,* 107 Wn.2d at 721.

Binding a participating insurer to its insured's reasonable settlement also furthers the policies underlying the rules of preclusion. PURE's asserted right to relitigate damages would result in inconsistent determinations—the amount owed to Andrews under PURE's policy would be different from what they are "legally entitled to recover"

from Fox. What the insured is "legally entitled to recover" "is the exact issue determined in the liability suit," even though it was adjudicated in a reasonableness hearing, and not at trial. *T&G*, 165 Wn.2d at 263, ¶12.

"Forcing the insured to relitigate liability and damages against the UIM carrier only fosters inconsistent judgments and additional delay and expense for the insured," *Fisher*, 136 Wn.2d at 249, while creating "a perverse incentive for carriers to wait until liability and damages had been established before deciding whether it is cost-effective to intervene." *T&G*, 165 Wn.2d at 263, ¶11; *see also Finney*, 21 Wn. App. at 618.[6] "A tort judgment against the tortfeasor establishes conclusively the damages to which the UIM insured is 'legally entitled':"

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[6] Division One recently recognized these well-established rules in *Hawkins v. ACE American Ins. Co.*, 32 Wn. App. 2d 900, 914, ¶20, n.12, 558 P.3d 157 (2024), *rev. denied* (May 6, 2025). Unlike PURE, the insurer in *Hawkins* had not been given notice of the reasonableness hearing and therefore was not bound by it.

> Once an insured establishes she is "legally entitled" to recover from the tortfeasor, the UIM carrier becomes obligated to pay the judgment less the insurance recovery from the tortfeasor.

Fisher, 136 Wn.2d at 248.

PURE's claimed right to relitigate what Andrews is legally entitled to recover raises no issue of substantial public interest. PURE had the right to contest the amount that Fox was legally obligated to pay in the reasonableness hearing. *See Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339, 812 P.2d 487 (no presumption in favor of agreed amount of damages at reasonableness hearing; burden is on settling parties to prove reasonableness), *rev. denied*, 117 Wn.2d 1018 (1991). Here, PURE's only objection to the proposed covenant judgment was to the assessment of prejudgment interest. (CP 3328-32)

This Court has "considered this [reasonableness determination] process and concluded it adequately

protects the interest of insurers against excessive judgments." *Besel*, 146 Wn.2d at 739. *Bird*, 175 Wn.2d at 774, ¶36. The *T&G* Court similarly recognized the "insurer's interest in fully litigating its insured's legal obligations" and rights with respect to its duty to pay, 165 Wn.2d at 258-59, ¶1, but on balance favored the insured's right to a prompt determination of disputed issues resolved in a reasonableness hearing under RCW 4.22.060.

As a matter of public policy, binding an insurer to a covenant judgment found to be reasonable following a hearing in which the insurer fully participated is "a settled and appropriate means of balancing the multiple interests of plaintiffs, insureds, and insurers." *Bird*, 175 Wn.2d at 773, ¶35. The Court of Appeals appropriately recognized these important public policies and followed the settled case law that implements them.

5. This case is both moot and a poor candidate for review of the issues raised by PURE.

Even were this Court inclined to overturn decades of case law governing the obligations of UIM insurers and the consequences of reasonableness determinations (it should not), this case is a particularly poor candidate for consideration of the issues PURE raises—both because PURE has unconditionally paid the unchallenged amount of damages the trial court found reasonable, and in any event PURE has no evidence challenging Andrews' damages that it could submit to a jury.

a. PURE cannot seek reimbursement of amounts it tendered Andrews "with no conditions whatsoever."

After facing a hostile panel in the Court of Appeals, but before the Court issued its decision, PURE moved to dismiss review on the grounds that payment of the damage amount found by the trial court to be reasonable would moot its appeal. Andrews resisted dismissal because of its

pending statutory and extra-contractual bad faith claims and right to fees. When PURE finally did pay the amounts due Andrews under the covenant judgment in March 2025, after the Court issued its decision, it placed "no conditions whatsoever on the acceptance of the tendered sum." (Pet. App. C) Andrews accepted PURE's tender "[i]n reliance that there are no conditions" on PURE's payment. (App. A)

PURE failed to "clearly advis[e]" Andrews that it would "require reimbursement" of their UIM benefits, and cannot do so now:

> No insurer shall make a payment of benefits without clearly advising the payee, in writing, that it may require reimbursement, when such is the case.

WAC 284-30-350(7).

RAP 12.8, which allows an appellant to satisfy a judgment and seek restitution if the judgment is reversed, has no application here. (Pet. 18-20) "RAP 12.8 by its terms provides for restitution if an unsuperseded *judgment* is collected but later reversed on appeal." *Interstate Prod.*

Credit Ass'n v. MacHugh, 90 Wn. App. 650, 656, 953 P.2d 812 (emphasis added; denying a party recovery under RAP 12.8 when "[n]o judgment was ever enforced against them."), *rev. denied*, 136 Wn.2d 1021 (1998).

Here, PURE's appeal was not from the final covenant judgment against Fox (CP 3373-76), which it in no way challenged. PURE sought review only from the trial court's interlocutory order that PURE was bound by the reasonableness determination. (CP 3808-19) WAC 284-30-350(7) bars PURE from seeking recovery of its unconditional payment of Andrews' UIM benefits.

"[W]here only moot questions or abstract propositions are involved, [review] should be dismissed." *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152, ¶18, 437 P.3d 677 (2019). Now that PURE has paid the amounts owed under the reasonableness determination with "no conditions whatsoever," its appeal is moot.

b. PURE has no evidence to present to a jury.

PURE had no evidence to allow a jury to assess Andrews' damages. After intervening, PURE did not contest Fox's liability, conceded Andrews was fault-free, and asserted no claims against any party. It did not challenge partial summary judgment against Fox (CP 678-79), had no liability or damage experts (CP 1890-92), and no evidence to present to a jury challenging either Fox's liability for 100% of Andrews' damages or the severity of those damages. (CP 2185-87; *see* CP 2475-87, 2807-08)

Even were a UIM insurer in the abstract entitled to a jury trial to resolve the disputed facts on what its insured was "legally entitled to recover," PURE is not entitled to that relief in this case. Accepting review to consider that issue on this record, after the close of discovery, would only deepen the injustice to Andrews, PURE's insureds.

6. Andrews are entitled to fees for responding to this petition.

The Court of Appeals awarded Andrews fees under *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). Pursuant to RAP 18.1(j), this Court should award Andrews fees for responding to PURE's petition for review.

E. Conclusion.

The Court of Appeals' unpublished decision does not conflict with any relevant precedent nor raise any issue not controlled by well-settled law governing the consequence of reasonableness determinations and the liability of UIM insurers to their insureds. This Court should deny review and award Andrews RAP 18.1(j) fees.

I certify that this answer is in 14-point Georgia font and contains 4,912 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 4th day of June, 2025.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 4, 2025, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-File
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Nicole B. Jackson Bullivant Houser Bailey, P.C. 925 4th Avenue, Suite 3800 Seattle, WA 98104 nicole.jackson@bullivant.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

DATED at Brooklyn, New York this 4th day of June, 2025.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

From: "David Beninger" </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=10A8CC6521724AEC9A642114C629A87D-DAVID>
Date: March 13, 2025 at 3:27:55 PM PDT
Subject: Re: Anna K. Andrews, et ux. v. PURE Insurance

Thank you.

In reliance that there are no conditions on the checks provided and to be provided, we will proceed to deposit.

David Beninger
206-467-6090 work
206-920-7000 cell

> On Mar 13, 2025, at 12:16 PM, Robin Lindsey <RLindsey@mcnaul.com> wrote:
>
> Good afternoon Mr. Beninger,
>
> Please see the attached letter to you from Malaika Eaton today.
>
> Best regards,
>
> ~Robin
> **Robin M. Lindsey**
> **Legal Assistant to**
> **Robert M. Sulkin, Malaika M. Eaton,**
> **Charles Wittmann-Todd & Eli B. Sulkin**
>
> 600 University Street, Suite 2700 | Seattle, WA 98101-3134
> T (206) 467-1816 | F (206) 624-5128 | D (206) 389-9359
> www.mcnaul.com | rlindsey@mcnaul.com
>
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SMITH GOODFRIEND, PS

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Appellate Court Case Number:	104,038-5
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