FILED
APRIL 28, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JEFFREY WOOD and ANNA WOOD, husband and wife, Respondents, v. MILIONIS CONSTRUCTION, INC., a Washington corporation; STEPHEN MILIONIS, an individual, Respondents, CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY, an insurance corporation, Appellant.	)	No. 36286-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Cincinnati Specialty Underwriters Insurance Company (Cincinnati) appeals the trial court's finding that a covenant agreement entered into between its insured and the claimants was reasonable. The basis for the trial court's determination was its belief that the insured, itself, had valued the claimants' contract damages at $1.2 million, which was near the $1.7 million settlement amount. The record does not support this. Instead, the insured valued the claimants' contract damages at less than $350,000, which *includes* $200,000 for what the claimants asserted they previously paid for repairs. Because of the significant discrepancy between $350,000 and $1.2

million, substantial evidence does not support the trial court's finding of reasonableness. We therefore reverse and remand for a second reasonableness hearing.

FACTS

In July 2015, Jeffrey and Anna Wood hired Milionis Construction, Inc. (MCI) as their general contractor to build a new home in Newman Lake, Washington. As the general contractor, MCI had the responsibility to oversee, manage, supervise, and administer the building of the custom, single-family residence. The parties originally agreed to $1,356,000 as the contract price to complete the house.

MCI and its subcontractors started work in the summer of 2015. On November 1, 2016, work ceased, at which time the Woods claimed to have paid MCI more than $550,000.

Substandard work performed by various subcontractors left the house with multiple defects. Brian Hanson, the engineer who provided structural design plans for the house, provided the Woods with a list of defects and deviations caused by the subcontractors' work.

PROCEDURE

The Woods sued MCI and its president, Steve Milionis on November 18, 2016. They asserted claims for breach of contract, unjust enrichment, promissory estoppel,

breach of contractual duties of good faith and fair dealing, negligence, negligent misrepresentation, and violation of the Consumer Protection Act, chapter 19.86 RCW. The Woods also asserted a claim against MCI's bond.[1] MCI counterclaimed, seeking damages still owed under the contract.

Cincinnati had issued MCI a commercial liability insurance policy in the amount of $1 million. The broad claims asserted by the Woods invoked Cincinnati's duty to defend its insured. Cincinnati retained attorney Shane McFetridge to defend MCI.[2] Cincinnati also reserved its right to deny or limit coverage.

On December 12, 2016, the trial court entered an agreed stay of proceedings in accordance with the parties' contract for building the house. The contract required the dispute to be mediated and, if mediation failed, the dispute had to be arbitrated.

[1] Washington requires contractors to be bonded. RCW 18.27.040. A general contractor must maintain a bond in the amount of $12,000, which provides a limited remedy for a homeowner's successful breach of contract claim. RCW 18.27.040(1).

[2] In their trial and appellate briefs, the Woods repeatedly refer to McFetridge as Cincinnati's attorney. McFetridge did not represent Cincinnati. He represented MCI, and his duty was *solely* to MCI. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Although McFetridge later made various recommendations for Cincinnati to settle, he did so as MCI's attorney, not as Cincinnati's.

Unsuccessful Mediations

The parties mediated in May 2017 and again in September 2017, but both mediations were unsuccessful. They then scheduled the third and final mediation for October 19, 2017.

MCI experts' October 17, 2017 opinion of value

On October 17, just before the October mediation, McFetridge sent a letter to Cincinnati, requesting settlement authority:

> [Woods' expert] Edward Smith's total cost estimate for repairing the alleged Defect Nos. 1 through 43 is $761,234. The cost estimate . . . does not have adequate information to properly assess its reasonableness, as dollars [sic] amounts were provided with no specific line item detail. By contrast, [MCI's expert] Nick Barnes' current attached cost estimate includes a complete breakdown . . . and supporting subcontractor bids. . . .
>
> . . . Barnes . . . full pricing of all of the alleged Defect Nos. 1 through 43 totals $540,341.76. Please recall that we do not agree that all of the 43 alleged defects are legitimate. For example, Defect Nos. 36 and 37 pertain to exterior deck work that has not yet even been started. Moreover, the mediator-appointed general contractor, Paul Shelton, obtained a variance from the County with respect to the exterior grade elevation work that would be otherwise required for Defect No. 40.
>
> Please recall from the report previously provided by our architect expert, Scott Buckles, for purposes of mediation, he agreed that repairs should be performed with respect to Defect Nos. 1 through 14, 17, 18 and 19, 21, 23 through 27, 35 and 41 through 43. Adding up those items for which Mr. Buckles agrees that some responsibility lies with Milionis Construction for the alleged defects, using Nick Barnes' current estimate cost of repair, the total for all agreed repair items is $224,772.59. However, please also recall that Mr. Buckles only allocated approximately 65% liability to Milionis for these alleged defects, with the [remaining] balance

> of liability being allocated to the Woods', the architect and structural engineer. Thus, 65% allocation to Milionis for the agreed estimated cost of repair items totals $146,102.18. Please recall from my prior report, that I estimate the exposure for attorney's fees and costs to be approximately $180,000. These two amounts total $326,102.18. Therefore, I continue to recommend . . . settlement authority of up to **$350,000** to resolve this case.

Clerk's Papers (CP) at 414-15 (underlining added). Thus, excluding attorney fees and costs, MCI's experts believed the Woods' breach of contract claims totaled $146,102.18.

Contingent settlement agreement

The parties chose a general contractor, Paul Shelton, to assist in the third mediation. Rather than acting as a passive go-between, Shelton actively worked with the parties.

McFetridge wrote a postmediation letter to Cincinnati, describing the mediation and how the parties achieved a conditional settlement:

> The following is a recap of yesterday's mediation. We had a very long day, but were able to get an agreement signed. The deal is subject to Cincinnati's agreement to fund the settlement amount of $399,514.58. *This amount reflects the mediator appointed general contractor's recommended "Claim Amount" of $374,514.58, plus $25,000, which reflects a portion of the costs for repair already paid by the Woods to their general contractor . . . .*
>
> As previously discussed, the principle issues we had to overcome to reach a settlement were getting the Woods to come off of their inflated cost estimate numbers provided by [their expert] . . . . The mediator appointed general contractor, Paul Shelton's, cost estimate for Defect Nos. 1 through 43 totaled $562,327.12. . . . [W]e were able to convince the Woods that the

> cost estimate provided by [their expert] was unreasonably inflated. Thus, the agreed settlement reflects the estimate amounts provided by Mr. Barnes and Mr. Shelton, with Mr. Barnes agreeing to perform the repairs.
>
> Mr. Shelton arrived at his final "Claim Amount" by backing out the previous draws that had been paid by the lender to Milionis from the adjusted contract price . . . and by backing out the amounts owed to Milionis for Draw 8 and the unpaid change orders. As you know, I arrived at essentially the same place in terms of a recommended settlement amount by backing out the cost amounts in Nick Barnes' cost estimate for construction of the back deck and exterior grading work and then factoring in exposure for attorney fees and costs. Ultimately, the difference between Paul Shelton's "Claim Amount" [of $374,514.58] and my recommended settlement number [of $350,000] is only $25,514.58.
>
> . . . .
>
> In sum, I think we negotiated the best deal we possibly could given all of the issues in the case. . . . Therefore, I recommend that Cincinnati agree to fund the Settlement Amount . . . .

CP 419-20 (underlining and emphasis added).

The following day, Brook Cunningham, the corporate attorney for MCI, sent a letter to Cincinnati. In it, he demanded Cincinnati to fund the settlement amount and also accused Cincinnati of repeatedly placing its interest above that of its insured. Cunningham's letter concluded:

> If Cincinnati fails to fund [the] settlement amount, this insured will have no choice but to offer to stipulate to a judgment in favor of the plaintiffs in this matter in exchange for a release from individual liability and assign the bad faith insurance claim against Cincinnati to the plaintiffs.

CP at 299.

On October 25, Cincinnati responded to Cunningham and explained its reasons for not funding the full settlement amount. Cincinnati explained that its general commercial insurance policy with MCI did not cover the Woods' claims, but instead covered only "property damage" caused by an "occurrence." CP at 300. Cincinnati elaborated: [3]

> Washington law is . . . eminently clear that "[a] general liability policy is not intended to encompass the risk of an insured's failure to adequately perform work," and that "[p]ure workmanship defects are not considered accidents or occurrences, since commercial general liability policies are not meant to be performance bonds or product liability insurance." [*Big Constr., Inc. v. Gemini Ins. Co.*, 2012 WL 1858723 at *7 (W.D. Wash. 2012]. Thus, "[t]here is no coverage for repairing or replacing an insured's defective work [and for] faulty workmanship[. T]o give rise to property damage there must be property damage separate from the defective product itself." *Id.*
>
> Moreover, even though an insurer has an obligation to conduct good faith settlement negotiations, that duty does not require the insurer to disregard its coverage defenses or pay sums for damages that are not covered. *Berkshire Hathaway Homestate Inc. Co. v. SQI, Inc.*, 132 F. Supp. 3d 1275, 1290 (W.D. Wash. 2015) . . . .

CP at 300, 303.

Cincinnati explained an additional reason that precluded coverage. As a condition to coverage, the policy required MCI to obtain written contracts from each subcontractor

[3] The Woods' repeatedly argued to the trial court their claims were covered by Cincinnati's policy and Cincinnati's position to the contrary constituted bad faith. Because the Woods argued this below, we discuss Cincinnati's contrary position.

verifying the subcontractor had valid commercial liability insurance, agreeing to list MCI as an additional insured under its policy, and agreeing to defend, indemnify, and hold MCI harmless from any lawsuit relating to the subcontractors' work. MCI failed to do this. Had MCI obtained the required contracts, Cincinnati could have tendered its defense to the subcontractors' insurers because the defects claimed by the Woods were the subcontractors' work.

Cincinnati concluded its letter with an offer to fund $100,000 of the settlement. It warned, if its offer was not accepted, it would proceed with its recently filed declaratory action in federal court to determine the question of coverage.

Cincinnati's $100,000 offer was insufficient to resolve the dispute. Mediation failed, and the parties scheduled arbitration for May 29, 2018.

MCI experts' March 28, 2018 opinions of value

On March 28, 2018, in a supplemental case report, McFetridge informed Cincinnati he would soon be filing motions to dismiss Steve Milionis personally and to dismiss all claims except the breach of contract claim. He described the breach of contract claim as the "key issue to be decided by the arbitrator." CP at 423.

McFetridge also evaluated the Woods' breach of contract claim. He explained the Woods' expert would support a claim of $961,234.00, which did not include the Woods'

estimated attorney fees and costs of $180,000.00. He noted, "Many of the items identified in [the Woods' experts'] cost to repair, include items that were not included in the original plans and specifications . . . ." CP at 424.

McFetridge then reviewed defense expert Nick Barnes' opinion. Barnes' opinion still estimated total repair costs of $224,772.59 for agreed items of repair. MCI's architect still reduced that figure to $146,102.18, which reflected his continued view that the Woods' architect and structural engineer were 35 percent at fault for the defects. Adding $200,000.00, for what the Woods would testify they already spent on repairs, totaled $346,102.18.[4] McFetridge again recommended that Cincinnati pay $399,514.58.[5]

May 22, 2018 settlement

[4] In their arbitration brief submitted just prior to settlement, the Woods do not assert any claim for prior repairs, much less a claim for $200,000.

[5] The dissent claims Barnes "estimated the cost to repair deficiencies in the residence to be $540,341.76 and the cost to complete the home at $674,292.19, for total damages exceeding $1.2 million." Dissent at 32. The dissent is doubly wrong.

First, Barnes calculated it would cost $540,341.76 to repair all items listed by the Woods. MCI reduced this figure to $146,102.18 because many of the items involved claims outside of the original plans and specifications, and because MCI believed the Woods' architect and engineer bore 35 percent of the fault.

Second, Barnes did *not* add $674,292.19 for the Woods to complete their house. The Woods had paid MCI $550,000.00 of the $1,356,000.00 contract price. Adding $674,292.19 to complete the house would amount to a double recovery.

On May 18, 2018, McFetridge filed with the arbitrator a motion for partial summary judgment. The success of this motion would result in dismissal of the majority of the Woods' claims, leaving only the breach of contract claim and MCI's counterclaims for amounts due under the contract.

On May 22, Cunningham e-mailed McFetridge that the case had settled, but provided no details. McFetridge advised Cincinnati of this.

July 2018 hearings

On June 29, 2018, the Woods and MCI filed a joint motion for entry of a stipulated judgment. The proposed stipulated judgment included several findings of fact. A copy of the settlement agreement was not included in the papers. On July 3, counsel for Cincinnati received notice of the reasonableness hearing, which was noted for July 13.

Cincinnati requested that the Woods and MCI agree to continue the reasonableness hearing. The Woods refused. On July 6, the Woods provided Cincinnati a copy of the settlement agreement.

In the settlement agreement, MCI admitted full liability for all of the Woods' damages. On the condition that the trial court found the stipulated judgment reasonable, MCI also assigned to the Woods all causes of action against Cincinnati. The agreement also included a covenant not to execute, ensuring that MCI and Steve Milionis would pay

nothing. The parties stipulated to a settlement of $1.7 million "exclusive of attorney fees, costs and interest." CP at 352. Further, they agreed the stipulated judgment would bear postjudgment interest of 12 percent annually.

On July 9, Cincinnati filed a motion to intervene in order to participate in the reasonableness hearing, and a motion to continue the hearing to conduct discovery into the settling parties' negotiations. The Woods and MCI contested the motion to continue and claimed Cincinnati was not entitled to discovery because it had received all relevant materials throughout the litigation.

On July 13, the court heard Cincinnati's motion to intervene as well as its request to continue the reasonableness hearing. Cincinnati explained it did not want to conduct discovery on the parties' claims, but on how they reached the final settlement agreement. Cincinnati explained it suspected the parties colluded to reach an unreasonably high settlement.

During the hearing, the trial court expressed its belief that MCI's expert Barnes had provided an opinion that the Woods' contract damages were $1.2 million. This led the trial court granting Cincinnati's motion to intervene, but denying its motion to continue to conduct limited discovery. The trial court explained:

> Originally I thought we can continue this, but when you're looking at in the meantime CPA claims, individual liability, emotional claims *and the defense expert, yes, hired by Mr. McFetridge, is saying this is worth $1.2 million,*[6] *we're talking about $500,000 differen*[*ce*] *from your own* [*expert.*]

Report of Proceedings (RP) at 47. Due to time constraints, the parties continued the reasonableness hearing to July 20.

On July 19, Cincinnati filed an additional pleading that attached a federal district court's order in the declaratory relief action. In that order, the district court acknowledged, "[MCI] did not obtain written hold harmless agreements from its subcontractors and was not named as an additional insured on its subcontractors' policies." CP at 591. Cincinnati argued coverage was precluded on this basis.

On July 20, the Woods moved to strike the pleading. The court denied their motion to strike.

The court then heard testimony from McFetridge about his motion for partial summary judgment, filed shortly before the parties' settlement agreement. McFetridge testified he believed the arguments were meritorious. McFetridge also testified at length

[6] Early in the hearing, the trial court asked about an expert's opinion that the Woods' claims were worth $1.2 million. That opinion came from the *Woods'* expert. Cincinnati misspoke that the opinion came from "a defense expert." Report of Proceedings at 22. This is what led to the confusion throughout the entire hearing.

about the opinions Barnes and his other expert had with respect to the Woods' contract damages. His testimony was consistent with his two letters, previously quoted above.

At the end of the hearing, the trial court explained its decision for determining that the $1.7 million settlement was reasonable:

> When you look at what Mr. Milionis and the liability to the corporation and the officers of the corporation and the damages, I look at it in October, but since October, they did a lot more negotiations. They did depositions. *You got experts involved on the defense side, too, that gave a lot higher numbers than the $399,000 that happened in October.*

RP at 141 (emphasis added).

> When you look at the motions that were filed by Mr. McFetridge, I'm not sure from reading the case that those would have all succeeded. They may have reduced some of the liability down, but without having actually heard all the evidence, the Court's only speculating on whether or not those theories would have been successful.

RP at 142.

> Is there evidence of bad faith, collusion and fraud? The Court's concerned when Mr. McFetridge is involved in the three prior mediations and then they get to this new one and he's cut out of that, but the Court has some concerns where he testified that he asked Cincinnati for additional authority, and that wasn't forthcoming.

RP at 143.

> On the released persons ability to pay on the other case involving the bankruptcy, Mr. Milionis and the company have not filed bankruptcy. There hasn't been any testimony about his ability to pay other than he doesn't have—he isn't in bankruptcy.

> His liability, his personal liability with the additional claims, as well as the business, Cincinnati's argument is it looks like he could end up in bankruptcy, but at this point, I only have that he hasn't filed bankruptcy, and there still would be assets at this time.

RP at 143.

The court found the parties' settlement for $1.7 million reasonable and then signed the stipulated judgment, with its findings prepared weeks earlier.

On November 26, 2018, the federal district court granted Cincinnati partial summary judgment, ruling there was no insurance coverage under the policy. The district court concluded as a matter of law, MCI had failed to require its subcontractors to name MCI as an additional insured on their insurance policies, and this failure caused actual prejudice to Cincinnati. *Cincinnati Specialty Underwriters Ins. Co. v. Milionis Constr., Inc.*, 352 F. Supp. 3d 1049, 1055-56 (E.D. Wash. 2018).

ISSUES RAISED ON APPEAL

Cincinnati argues the trial court erred in not permitting discovery prior to the reasonableness hearing, and erred in finding the settlement to be reasonable. We address these issues together.

LAW AND ANALYSIS

> When an insured defendant believes its insurer is refusing to settle a plaintiff's claims in bad faith, the insured can negotiate an independent pretrial settlement with the plaintiff. These settlements typically involve a

> stipulated judgment against the insured, a covenant not to execute on that judgment against the insured, and an assignment to the plaintiff of the insured's bad faith claim against the insurer. This is referred to collectively as a covenant judgment. If the settlement amount is deemed reasonable by a trial court, it becomes the presumptive measure of damages in the later bad faith action.

Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 761, 287 P.3d 551 (2012).

Washington courts consider nine factors, referred to as the "*Chaussee* factors," when determining whether a settlement amount is reasonable.

> "[(1)] [T]he releasing person's damages; [(2)] the merits of the releasing person's liability theory; [(3)] the merits of the released person's defense theory; [(4)] the released person's relative faults; [(5)] the risks and expenses of continued litigation; [(6)] the released person's ability to pay; [(7)] any evidence of bad faith, collusion, or fraud; [(8)] the extent of the releasing person's investigation and preparation of the case; and [(9)] the interests of the parties not being released."

Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (some alteration in original) (quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988)). "[N]o single criterion controls and trial courts must exercise their discretion in applying the criteria. All nine criteria will not necessarily be relevant in every case." *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002).

1. Standard of review

"A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence." *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995) (citing *Glover*, 98 Wn.2d at 718); *Mut. of Enumclaw Ins. Co. v. Paulson Constr., Inc.*, 161 Wn.2d 903, 925 n.22, 169 P.3d 1 (2007).

2. Burden of proof

Cincinnati first argues the trial court erred by assigning it the burden of proving the settlement was unreasonable.

Both parties agree on the law. The burden to establish the reasonableness of a settlement agreement rests with the settling parties. *Water's Edge Homeowners Ass'n v. Water's Edge Assocs*., 152 Wn. App. 572, 594-95, 216 P.3d 1110 (2009). But the parties disagree on whether the trial court properly allocated the burden. They cite the following comments by the trial court:

> I don't believe [Cincinnati] need[s] anymore discovery to argue against the reasonableness.
>
> *I know it's not your burden*, but . . . we're ready to move forward with the reasonableness hearing.
>
> . . . .
>
> So I'm granting [Cincinnati's] Motion to Intervene and [am allowing it to] be heard about why this settlement is not reasonable.

RP at 48-49 (emphasis added).

Taken as a whole, these remarks show the trial court understood the burden rested with the settling parties, not Cincinnati.

3. Failure to assign error to various findings of fact

Cincinnati did not assign error to the findings contained within the stipulated judgment, which the trial court signed immediately after its oral ruling. RAP 10.3(g) requires an appellant to assign error to all challenged findings of fact. The Woods contend the unchallenged findings are, thus, verities on appeal. The findings the Woods argue should be verities include:

> 3. Plaintiffs Wood have demonstrated they are likely to prove that a fact-finder will and would find that MCI has breached both tort and contract duties owing to Plaintiffs Wood and that MCI has proximately caused injuries to Plaintiffs.
>
> . . . .
>
> 7. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find the negligent actions and omissions by MCI have proximately caused Plaintiffs anxiety, grief, emotional distress and torment for a period of more than one and one-half years.[7]
>
> 8. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that MCI has violated the Consumer Protection Act, Chapter 19.86 RCW.

CP at 650-51.

[7] The Woods assume they may recover emotional distress damages for MCI's negligent management of its subcontractors. We question this assumption.

Here, the trial court commented it would need to speculate to determine which noncontract claims would have survived summary judgment. The above written findings are inconsistent with the trial court's comment. "We look to the trial court's written findings, rather than its oral statements, as a trial court is free to reconsider its determinations between the time it announces an oral decision and the time it enters written findings." *LK Operating, LLC v. Collection Grp. LLC,* 181 Wn.2d 48, 81 n.17, 331 P.3d 1147 (2014). Though undoubtedly true, very little time occurred between the trial court's comments here and entry of its written findings. For purposes of this appeal, we give effect to the trial court's written findings.[8]

4. The various Chaussee *factors at issue*

Cincinnati challenges the trial court's oral findings with respect to *Chaussee* factors 1 (the releasing party's damages), 2 (the merits of the releasing party's liability theory), 3 (the merits of the released party's defense theory), 6 (the released party's ability to pay), and 7 (any evidence of bad faith, collusion, or fraud).

[8] MCI also failed to assign error to finding of fact 12, which is the trial court's central finding that $1.7 million is a reasonable settlement. An appellant's failure to properly assign error may be excused if the nature of the challenge is clear in the appellant's briefing. *Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 299 n.2, 331 P.3d 60 (2014). Here, the nature of Cincinnati's challenge to finding of fact 12 is abundantly clear. We, therefore, excuse Cincinnati's failure to comply with RAP 10.3(g).

The trial court evaluated the *Chaussee* factors by first considering the October 2017 conditional settlement for $399,514.58, and then deciding whether there was a persuasive reason why that amount later increased to $1.7 million.

The October 2017 mediation was the third mediation between the parties. The experts had written detailed reports and the parties were prepared. The parties selected a general contractor mediator to assist them in resolving the Woods' 43 construction defect claims. The purpose of the *Chaussee* factors is to determine a fair settlement figure. For this reason, the trial court properly focused on the result of this mediation. After extensive efforts and negotiations, the mediation produced a conditional settlement of $399,514.58.[9]

The trial court then looked to see if the value of the Woods' breach of contract claim substantially increased after October 2017. At the very end of the reasonableness hearing, McFetridge began to leave the witness stand. But the trial court stopped him:

> THE COURT: Hang on just a second. I may have a question that was based on Mr. Pool's question. He asked you if your recommendations for settlement authority went up over time from November of '16 to May of '18. Did your recommendations to Cincinnati go up?

[9] The dissent claims we are directing the trial court to focus on Barnes' calculation of damages. Dissent at 33. We are not. Rather, we agree with the trial court's view that the October 2017 conditional settlement of $399,514.58 is the proper place to start its analysis of the reasonable value of the Woods' claims.

> [MR. McFETRIDGE]: Within that timeframe, my recommendation went up . . . to the 399 number as opposed to my prior recommendation that they fund up to 350.
>
> Beyond the 399 number . . . I didn't ask for anymore . . . settlement authority once I knew that the 399 settlement number was not going to be funded by [Cincinnati].
>
> THE COURT: When did you get the defense expert recommendation . . . of $1.2 million[?]
>
> . . . .
>
> [MR. McFETRIDGE]: Well, I don't recall ever getting a number from him that was $1.2 million. . . .

RP at 120-21.

The trial court nevertheless believed that Barnes' recommendation went up, if not to $1.2 million, then "a lot higher . . . than the $399,000 that happened in October [2017]." RP at 141. This was a significant reason for the trial court's contested rulings. It explains why the trial court did not continue the July 13 hearing to allow Cincinnati to take limited discovery. The trial court explained it was going to permit discovery, until it learned that the "*defense* expert . . . [said] this is worth $1.2 million." RP at 47.

This belief also explains why it was comfortable approving the $1.7 million settlement agreement. If the *defense* expert would substantiate a value "a lot higher . . .

than the $399,000," the $1.7 million settlement figure seemed reasonable. RP at 141.[10]

However, the evidence does not support the trial court's belief that Barnes had substantially increased his opinion of the Woods' contract damages after the October 2017 mediation. To the contrary, McFetridge's March 28, 2018 letter to Cincinnati confirmed Barnes had not budged off his previous opinion that the costs for agreed repairs totaled $224,772.59. McFetridge then discounted that figure to $146,102.18, based on his second expert's opinion that the Woods' architect and structural engineer were 35 percent at fault. Excluding attorney fees and costs, MCI's experts believed the Woods' contract damages were $146,102.18, and McFetridge added $200,000.00 for amounts the Woods claimed they already paid for repairs.

The record emphatically shows that nothing occurred after the October 2017 mediation that caused McFetridge or his experts to change their opinions as to the value of the Woods' breach of contract claim. The trial court's belief to the contrary is not supported by substantial evidence. Had the trial court known that the $1.7 million

[10] The dissent writes that the Woods' expert supported "a total sum exceeding $2.7 million." Dissent at 33. If the Woods' expert calculated damages in the method suggested by the dissent, the $2.7 million figure was arrived at by *twice* including the cost to complete the house and by failing to credit $806,000.00, the contract balance—contract price of $1,356,000.00, less $550,000.00 paid by the Woods. This $2.7 million figure stands in stark contrast to the $399,514.58 contingent settlement, the amount recommended by the contractor mediator, and accepted by the parties.

settlement was five or six times the October 2017 conditional agreement *and* MCI's continued belief in the value of the Woods' claims, we are confident that both of the trial court's contested rulings would have been different.[11]

CONCLUSION

We reverse the trial court's determination of reasonableness and remand for another hearing. We also suggest, consistent with the trial court's previous comments, that it permit Cincinnati to conduct limited discovery. The issue of collusion may be an important issue at the later reasonableness hearing.[12]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

I CONCUR:

Korsmo, A.C.J.

[11] Had the trial court found that the Woods' emotional distress damages—likely recoverable only under their CPA claim—were significantly greater than their contract damages, the result here would be different. Apportionment of these damages would be helpful in the event of a subsequent appeal.

[12] *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 704-05, 187 P.3d 306 (2008).

NO. 36286-8-III

FEARING, J. (dissenting) — The superior court did not misunderstand the evidence before it and did not abuse its discretion when adjudging the settlement between Jeffrey and Anna Wood, on the one hand, and Milionis Construction, on the other hand, to be reasonable. I would affirm the trial court. Thus, I dissent.

FACTS

Another dream house turned into a nightmare. In July 2015, Jeffrey and Anna Wood hired Milionis Construction, Inc. as general contractor to build a new home in Newman Lake. As general contractor, Milionis Construction assumed the responsibility for management, supervision, and administration of the building of the custom, single-family residence. The building contract established a price of $1,356,000 to complete construction. The contract demanded mediation and arbitration of any disputes.

Milionis Construction promised to complete construction of the home by Labor Day weekend 2016. Jeffrey and Anna Wood's daughter planned her wedding to occur at the residence during that early September weekend.

Construction commenced in the summer of 2015. On November 1, 2016, Milionis Construction ceased work, by which date the Woods had paid $550,000 of the contract price to the construction company. Milionis Construction's poor performance created structural problems and damage to the home. The structure suffered weathering and warping.

Jeffrey and Anna Wood sued Milionis Construction and Stephen Milionis on November 18, 2016. The Woods alleged, among other things, that the construction company failed to follow architectural and structural designs, failed to properly construct segments of the home, initiated change orders without authorization, and installed lesser quality or incorrect materials. The Woods asserted causes of action in contract, unjust enrichment, promissory estoppel, breach of contractual duties of good faith and fair dealing, negligence, negligent misrepresentation, and violation of the Consumer Protection Act.

Milionis Construction tendered the defense of Jeffrey and Anna Wood's lawsuit to its insurer, Cincinnati Specialty Underwriters Insurance Company. Cincinnati retained attorney Shane McFetridge to defend Milionis Construction while reserving the right to deny or limit coverage.

Jeffrey and Anna Wood and Milionis Construction mediated on two separate dates in May and September 2017. Cincinnati Specialty Underwriters participated in the mediations. Before the first session, attorney Shane McFetridge requested, from Cincinnati, $350,000 in authority to settle the Woods' claims against Milionis Construction. Nevertheless, Cincinnati only approved payment of $60,000. The two 2017 mediation dates proved unsuccessful.

On September 11, 2017, Milionis Construction expert Nick Barnes reviewed Jeffrey and Anna Wood's uncompleted residence and estimated repairs and damages resulting from Milionis Construction's performance. Barnes counted forty-three defects, the cost of which to repair would be $540,341.76. Barnes also estimated the remaining cost to complete the home to be $674,292.19, for a total damage amount of $1,241,633.95.

Jeffrey and Anna Woods' expert Andy Smith estimated that the cost to remedy the damage caused to the dwelling and to remove the risk of other damage to be $761,234.09. Smith further estimated the cost to complete the home, after repairs, to be $1,941,965.02. Thus, the Woods sought recovery from Milionis Construction of $2,703,199.11, not including emotional distress damages, treble damages under the Consumer Protection Act, chapter 19.86 RCW, and reasonable attorney fees and costs as afforded under the construction contract.

On October 17, 2017, defense counsel Shane McFetridge again requested settlement authority, from Cincinnati Specialty Underwriters, to pay the Woods $350,000 to settle the Woods' claims against Milionis Construction. McFetridge explained to Cincinnati his reasoning for this amount by noting that Cincinnati's architectural expert, Scott Buckles, allocated sixty-five percent liability of damages to the home to Milionis Construction. Attorney McFetridge wrote:

> Thus, 65% allocation to Milionis for the agreed estimated cost of repair items totals $146,102.18. Please recall from my prior report, that I estimate the exposure for attorney's fees and costs to be approximately $180,000. These two amounts total $326,102.18. Therefore, I continue to recommend that consideration be given to providing settlement authority of up to **$350,000** to resolve this case.

Clerk's Papers (CP) at 415 (emphasis in original).

Milionis Construction and Jeffrey and Anna Wood reconvened for mediation on a third day, October 19, 2017. Cincinnati Specialty Underwriters counsel Gary Sparling attended the mediation. During this third day of mediation, the Woods and Milionis Construction agreed to a settlement contingent on Cincinnati's promise to pay $399,514.58 to the Woods on behalf of the construction company.

On October 20, 2017, attorney Shane McFetridge wrote to Cincinnati Specialty Underwriters acknowledging the settlement amount represented a $49,000 increase from his suggested authority, but explained that yet another expert, mediator-appointed general contractor Paul Shelton, estimated $562,327.12 to be the cost to repair all alleged defects. McFetridge recommended that Cincinnati Specialty Underwriters pay the $399,514.58.

On October 24, 2017, Brook Cunningham, personal counsel for Milionis Construction, sent a demand letter to Cincinnati Specialty Underwriters. Cunningham warned of the risk of a stipulated settlement if Cincinnati refused to pay the settlement amount. Cunningham wrote:

> [O]n 3 separate occasions Attorney McFetridge has requested authority of $350,000 in settlement authority . . . .
>
> Cincinnati has placed it's [sic] insured at risk for both individual exposure and exposure beyond its policy limits. . . .
>
> . . . .
>
> If Cincinnati fails to fund such settlement amount [$399,514.58], the insured will have no choice but to offer to stipulate to a judgment in favor of the plaintiffs in this matter in exchange for a release from individual liability and assign the bad faith insurance claim against Cincinnati to the plaintiffs.

CP at 298-99. Cunningham accused Cincinnati of bad faith and predicted a damage award exceeding $1 million. Cincinnati then knew that Milionis Construction's own expert estimated damages to the structure exceeding $1.2 million.

On October 25, 2017, Cincinnati Specialty Underwriters refused to tender $399,514.58, while insisting it held no obligation to indemnify Milionis Construction in the Woods' lawsuit. Cincinnati, however, offered to pay $100,000 in an act of good faith.

As a result of Cincinnati Specialty Underwriters' rebuff of the $399,514.58 settlement amount, mediation failed. Pursuant to the construction contract, Jeffrey and Anna Wood and Milionis Construction scheduled an arbitration hearing for May 29, 2018. During the interim, the Woods hired forensic accountant, Kemper Rojas. The parties conducted depositions of Jeffrey and Anna Wood, structural engineer Brian Hanson, Stephen Milionis, Scott Milionis, Sam Milionis, and Nick Barnes.

On March 28, 2018, in a supplemental case report, Shane McFetridge again recommended to Cincinnati Specialty Underwriters to pay $399,514.58 to settle the claim of Jeffrey and Anna Wood against Milionis Construction. McFetridge also recommended that he file a motion for summary judgment to the arbitrator on a number of the Woods' claims, including negligence, breach of good faith and fair dealing, the Consumer Protection Act, unjust enrichment, and promissory estoppel. He further recommended a partial summary judgment motion to dismiss claims against Stephen Milionis as an individual. Attorney McFetridge noted that the arbitrator would need to determine the method of assessing damages suffered by the Woods.

In his March 28 report to Cincinnati Specialty Underwriters, Shane McFetridge warned that, based on the Woods' claims and expert Andy Smith's projection of damages, the net award to Jeffrey and Anna Wood, including an award for reasonable attorney fees and costs, could total $1,141,234.00.

> With $807,135.97 remaining on the contract, our experts believe that there should be sufficient funds remaining to complete construction of the home without regard to the construction defects. Plaintiffs' consultant, Edward Smith, estimates that the total cost to repair the alleged defects is in the amount of $761,234.00. Many of the items identified in Edward Smith's cost to repair, include items that were not included in the original plans and specifications, and further includes work that has not yet even been started on the home. In addition, the Woods are claiming that they previously paid their consultants approximately $200,000.00 to perform prior repairs, which would result in a total recovery of $961,234.00. An additional recovery of attorney's fees and costs of my previously estimated

> amount of $180,000.00 would result in a total, net award to the Woods in the amount of $1,141,234.00.

CP at 424. In his March 28 report, Shane McFetridge panned Andy Smith's estimate of damages of $761,234.00. He deemed Nick Barnes' estimate of $540,341.76 to be more accurate. Of course, neither estimate included the cost to complete construction, emotional distress damages, or costs of litigation.

On May 18, 2018, Shane McFetridge, on behalf of Milionis Construction, filed a motion for partial summary judgment before the arbitrator. A successful motion would have eliminated all claims of Jeffrey and Anna Wood against the construction company except the breach of contract claim.

On or before May 22, 2018, and before the arbitrator entertained the summary judgment motion, Milionis Construction and Jeffrey and Anna Wood settled their claims against one another. Milionis Construction agreed to waive defenses and admit liability for all of the Woods' damages in the sum of $1.7 million, plus attorney fees and costs, and exclusive of general damages. On the condition that the trial court found the settlement amount reasonable, Milionis Construction also assigned to the Woods all causes of action against Cincinnati. The Woods agreed not to execute on any judgment against Milionis Construction, but only to seek collection from Cincinnati Specialty

Underwriters. Defense counsel Shane McFetridge did not take part in the negotiations that led to the settlement.

The home scheduled to be completed by September 2016 remained unfinished in May 2018. The daughter of Jeffrey and Anna Wood needed to find another venue for her wedding. The Woods suffered anxiety, grief, and emotional distress from the construction delays and from attending to the construction defects.

PROCEDURE

On June 29, 2018, Jeffrey and Anna Wood and Milionis Construction filed a joint motion for entry of judgment and determination of the reasonableness of the settlement amount. On July 2, Cincinnati Specialty Underwriters received notice of a reasonableness hearing and a copy of the settlement agreement.

On July 9, 2018, Cincinnati Specialty Underwriters filed a motion to intervene in order to participate in the reasonableness hearing and a motion to continue the reasonableness hearing in order to conduct discovery into the settling parties' negotiations. In response, the Woods and Milionis Construction claimed Cincinnati had no right to discovery because it had participated in mediation and possessed the information on which the parties based the settlement amount.

The superior court conducted a hearing as scheduled on July 13. The court first entertained Cincinnati Specialist Underwriters' motion to intervene and request to

continue the reasonableness hearing. In requesting the continuance, Cincinnati identified the discovery sought focused on the final settlement negotiations, in which it and Shane McFetridge did not participate. It sought written communications between the parties or between their attorneys. Cincinnati also sought to depose those persons involved in the final negotiations, presumably Jeffrey Woods, Stephen Milionis, and counsel for the Woods and Milionis Construction.

The trial court granted Cincinnati's motion to intervene, but denied the request for a continuance of the reasonableness hearing. The trial court reasoned that the discovery sought would not address the reasonableness of the settlement. The court also highlighted the extent of discovery previously performed regarding the claims of the parties. The trial court, in its oral ruling, remarked:

> So when the Court looks at that on whether I grant the continuance, I think there's enough in discovery for Cincinnati to give the Court an idea of why it's not reasonable.

Report of Proceedings (RP) at 47-48. The court later added:

> I don't believe you need any more discovery to argue against the reasonableness.
>
> I know it's not your burden, but reading over the paperwork that was provided . . . we're ready to move forward with the reasonableness hearing.

RP at 48.

Due to time constraints, the reasonableness hearing started on July 13, 2018, and the parties reconvened on July 20 to conclude the hearing. On July 19, Cincinnati Specialty Underwriters submitted 169 pages of pleadings and documents, by which it argued against the reasonableness of the settlement sum. In response to Cincinnati's filing, the Woods asked the trial court to strike Cincinnati's pleadings. The court denied the motion to strike and considered the pleadings.

During the July 13 reasonableness hearing, attorney Shane McFetridge testified regarding Milionis Construction's pending motion for partial summary judgment submitted to the arbitrator in anticipation of arbitration. McFetridge deemed the motion meritorious. McFetridge continued his testimony on July 20 and also testified about never asking for more authority to settle beyond $399,000:

> It [the amount requested] did go up immediately following the October mediation because we had learned some additional information in terms of expenses that were claimed to have been paid. So that's how we got the [sic] to the 399 number as opposed to my prior recommendation that they fund up to 350.
>
> Beyond the 399 number to tell your Honor my complete thinking, I didn't ask for anymore—I did not at that point in time ask for any increase in settlement authority once I knew that the 399 settlement number was not going to be funded by the carrier.

RP at 121.

During argument at the reasonableness hearing, counsel for Milionis Construction noted that the construction company's own expert concluded that Jeffrey and Anna Wood

suffered damages of $1.2 million. Milionis Construction's counsel noted that the Woods' expert witness measured damages of $2 million. Milionis Construction's counsel and Cincinnati Specialty Underwriters' attorney both conceded that an expert hired by Cincinnati assessed damages of $1.2 million. Counsel for the Woods stated that Milionis Construction would likely file bankruptcy in order to avoid the effect of a judgment.

In an oral ruling at the conclusion of the July 20 hearing, the trial court analyzed the factors under *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991), and concluded that the $1.7 million settlement amount was reasonable. Among other comments, the superior court remarked:

> When you look at the motions that were filed by Mr. McFetridge, I'm not sure from reading the case that those would have all succeeded. They may have reduced some of the liability down, but without having actually heard all the evidence, the Court's only speculating on whether or not those theories would have been successful.
>
> When you look at those defenses and then you look at the released person's relative faults, there is not only the liability for the contract issue, the tort claims, the possible CPA claims and with the other officers liability, it could have exceeded well over a million dollars.

RP at 142. The court also commented:

> On the released persons ability to pay on the other case involving the bankruptcy, Mr. Milionis and the company have not filed bankruptcy. There hasn't been any testimony about his ability to pay other than he doesn't have—he isn't in bankruptcy.
>
> His liability, his personal liability with the additional claims, as well as the business, Cincinnati's argument is it looks like he could end up in

> bankruptcy, but at this point, I only have that he hasn't filed bankruptcy, and there still would be assets at this time.
>
> So, if there was a $2 million judgment, that would probably push him into bankruptcy if he doesn't have enough assets to cover that.

RP at 143. Finally, the court remarked:

> Is there evidence of bad faith, collusion and fraud? The Court's concerned when Mr. McFetridge is involved in the three prior mediations and then they get to this new one and he's cut out of that, but the Court has some concerns where he testified that he asked Cincinnati for additional authority, and that wasn't forthcoming. He didn't ask for additional authority because he knew it wasn't going to come.
>
> That concerns the Court on whether or not his ability to actually negotiate the case at that point on behalf of Cincinnati concerns the Court. If you're going in and there's no authority to settle the case, you already know numbers have gone up. . . .

RP at 143-44.

In its ruling, the trial court emphasized the presence of claims under the Consumer Protection Act, claims for emotional distress, and the exposure for individual liability against Stephen Milionis. The court mentioned that the Woods still could not occupy their home. The court underscored the cost of litigation, including the expense of numerous expert witnesses. The summary judgment motion before the arbitrator would not likely succeed in dismissing all of the claims.

In a stipulated judgment, the trial court entered the following findings of fact:

> 3. Plaintiffs Wood have demonstrated they are likely to prove that a fact-finder will and would find that MCI [Milionis Construction, Inc.] has

breached both tort and contract duties owing to Plaintiffs Wood and that MCI has proximately caused injuries to Plaintiffs.

4. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that (1) MCI had no employees, (2) MCI performed no labor on the subject construction project, and (3) the injuries and damages suffered by Plaintiffs were proximately caused by MCI's negligence in the management, supervision, and administration of services associated with the construction of the subject residence. Among other things, such proof would establish that MCI failed to make use of the proper construction plans and negligently overdrew funds from the Plaintiffs' construction loan to Plaintiffs' harm and detriment.

5. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that the negligent actions and omissions by MCI have proximately caused the Plaintiffs' lender to discontinue further lending toward Plaintiffs' construction project, and among other things, this caused the home to remain in an unfinished state since November 1, 2016. Additionally, among other things, the negligence by MCI proximately caused irreparable delay in the completion of the home and an associated loss of use.

6. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that the negligent actions and omissions by MCI have proximately caused the structure and associated materials comprising the partially-completed improvement to suffer damage, to include, but not limited to, weathering and warping, and such damages are continuing to be suffered.

7. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find the negligent actions and omissions by MCI have proximately caused Plaintiffs anxiety, grief, emotional distress and torment for a period of more than one and one-half years.

8. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find that MCI bas violated the Consumer Protection Act, Chapter 19.86 RCW.

9. Plaintiffs Wood have demonstrated they are likely to prove and that a fact-finder would and will find damages, to include both special and general damages, in Plaintiffs' favor in excess of $1,700,000.

. . . .

> 12. The amount of the Stipulated Judgment is a reasonable calculation of what a fact-finder might and would reasonably award Plaintiffs as damages based on the allegations and claims made by Plaintiffs.

CP 650-52. The court added additional findings:

> 1. Plaintiffs, Defendant MCI and Defendant Stephen Milionis, personally, have complied with RCW 4.22.060(1), and the Stipulated Judgment presented against MCI is reasonable under Chaussee v. Maryland Cas. Co., 60 Wn. App. 504 (1991), and Besel v. Viking Ins. Co., 146 Wn.2d 730[, 49 P.3d 887] (2002), and based on what a fact-finder might and would reasonably award Plaintiffs as damages in this case.
>
> 2. MCI has breached tort duties owed to Plaintiffs under Donatelli v. D.R. Strong Consulting Engineers, Inc., 179 Wn.2d 84[, 312 P.3d 620] (2013), Pointe at Westport Harbor Homeowners' Ass'n v. Engineers Nw., Inc,, P.S., 193 Wn. App. 695[, 376 P.3d 1158] (2016), Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442[, 243 P.3d 442] (2010), and Nichols v. Peterson NW, Inc., 197 Wn. App. 491[, 389 P.3d 617] (2016). Plaintiffs are entitled to general damages because of MCI's liability in tort.
>
> 3. MCI, on a more probable than not basis, is liable to Plaintiffs under Chapter 19.86 RCW, and Plaintiffs would be and are entitled to a trebling of damages, costs and attorney fees under RCW 19.86.090.
>
> 4. Under RCW 4.84.330, and pursuant to the written contract at issue between Plaintiffs and MCI, Plaintiffs are entitled to their reasonable attorney fees and costs.

CP at 652-53.

ASSIGNMENTS OF ERROR

Cincinnati Specialty Underwriters assigns four errors to the trial court's rulings. First, the trial court erred when it denied Cincinnati's request for discovery about the circumstances leading to the $1.7 million settlement. Cincinnati believes the

circumstances strongly suggest bad faith collusion between Jeffrey and Anna Wood, on the one hand, and Milionis Construction, on the other hand. Second, the trial court mistakenly required Cincinnati to disprove the reasonableness of the settlement rather than requiring the Woods and Milionis Construction to bear the burden of establishing reasonableness. Third, the trial court permitted the Woods to insert the irrelevant issue of insurance bad faith during the reasonableness hearing. Fourth, the trial court misguidedly approved the $1.7 million settlement sum. I address the second, third, and fourth assignments of error together. The numerous assignments of error by Cincinnati Specialty Underwriters and the need to address the minutiae of the claimed damages in order to show error in this court's majority ruling prolong this opinion.

REASONABLENESS HEARINGS

Before tackling the assignments of error, I provide background behind the superior court's authority to assess and approve the reasonableness of a tort settlement amount. This backdrop informs my dissent.

RCW 4.22.060 empowers the superior court to review and determine the reasonableness of a tort settlement. The statute declares:

> (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. 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. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.
>
> The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.
>
> (2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.
>
> (3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

(Emphasis added.)

Contrary to initial expectations, Washington courts have extended RCW 4.22.060 reasonableness hearings beyond the context of pending contribution claims by a settling tortfeasor against another tortfeasor and to the setting of a settlement between an insured defendant and a plaintiff, when one or both contemplate a suit against the insurer for bad faith. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 766-67, 287 P.3d 551 (2012); *Mutual of Enumclaw Insurance Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 264, 199 P.3d 376 (2008); *Besel v. Viking Insurance Co. of Wisconsin*, 146 Wn.2d 730, 738-39,

49 P.3d 887 (2002); *Heights at Issaquah Ridge Owners Association v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.3d 306 (2008); *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (2004). The settlement between Jeffrey and Anna Wood and Milionis Construction included a covenant not to execute judgment against Milionis Construction. The statute implicates reasonableness hearings when settlements involve a release, covenant not to sue, covenant not to enforce judgment, or similar agreement. RCW 4.22.060(1); *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d at 767. The superior court applies the same substantive standards for determining reasonableness in the context of the claimant or insured later seeking payment from the insurer as in the settling of potential contribution claims between joint tortfeasors. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d at 767.

When an insurer refuses, in bad faith, to defend a claim brought against its insured, the insured may protect its interests by settling with the plaintiff and then seek recovery from the insurer in a bad faith action. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. at 374-75. Often, the injured plaintiff enters a settlement with a defendant, which includes a covenant not to execute against the defendant, who assigns its rights against its insurer to the plaintiff, including rights to a bad faith cause of action. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. at 375. When a defendant,

whose liability insurer acted in bad faith, proceeds to settle with an injured plaintiff, the amount of that settlement becomes the presumptive measure of damage in the bad faith lawsuit if a superior court determines the settlement to be reasonable. *Sykes v. Singh*, 5 Wn. App. 2d 721, 726, 428 P.3d 1228 (2018), *review denied sub nom.*, 192 Wn.2d 1025, 435 P.3d 265 (2019). Nevertheless, the insurer still receives a full opportunity to defend itself in the bad faith action by arguing that it did not act in bad faith and is, therefore, not liable for any of the settlement amount. *Besel v. Viking Insurance Co. of Wisconsin*, 146 Wn.2d at 739-40 (2002); *Truck Insurance Exchange v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002). In any bad faith action, the insurer may also challenge the reasonableness of the settlement and argue collusion between the third party claimant and the insured. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372 (2004).

Because of the possibility that an insured may settle for an inflated amount to escape exposure, Washington courts recognize the need for a mechanism to prevent collusion in settlements containing covenants not to execute. *Sykes v. Singh*, 5 Wn. App. 2d at 726; *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991). The Washington Supreme Court views the process of considering the RCW 4.22.060 factors as sufficient to protect insurers from collusive settlements and excessive judgments if the insurer has notice of the reasonableness hearing and has an

opportunity to argue that the settlement is not reasonable. *Besel v. Viking Insurance Co. of Wisconsin*, 146 Wn.2d 730, 739 (2002); *Sykes v. Singh*, 5 Wn. App. 2d at 726.

DISCOVERY

I now address Cincinnati Specialty Underwriters' assignments of error, beginning with its request for discovery. Cincinnati contends that the circumstances under which the parties reached the $1.7 million settlement amount suggest that Woods and Milionis Construction colluded to the prejudice of Cincinnati. Those circumstances, as portrayed by Cincinnati, include Milionis Construction's defense counsel previously estimating a reasonable settlement amount of $399,514.58, a pending partial summary judgment motion that purportedly would have substantially offset amounts Milionis Construction owed, and the concealment of the final negotiations from defense counsel hired by Cincinnati. Cincinnati emphasizes that one factor in assessing the reasonableness of a settlement is collusion between the insured and the third party claimant. Therefore, according to Cincinnati, the trial court should have afforded it an occasion to engage in discovery concerning the final negotiations before the court conducted the reasonableness hearing.

Jeffrey and Anna Wood respond that Cincinnati's involvement in the three mediations leading to the settlement negated any need for discovery. The Woods also emphasize that Cincinnati could have subpoenaed records for the reasonableness hearing

and called the parties and their counsel to testify at the reasonableness hearing to ask the questions it otherwise would have asked during discovery. Therefore, the superior court did not abuse its discretion when denying discovery. Based on Washington precedent, I agree with Jeffrey and Anna Wood.

This court reviews a trial court's decision to permit or deny discovery for an abuse of discretion. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. at 379 (2004). We reverse a trial court's discovery order only if the order is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *T.S. v. Boy Scouts of America*, 157 Wn.2d at 423; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Five Washington decisions involving reasonableness hearings in the context of an insurance company's intervention control the first assignment of error: *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 287 P.3d 551 (2012); *Sykes v. Singh*, 5 Wn. App. 2d 721 (2018); *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009); *Red Oaks Condominium Owners Association v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005); and *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372 (2004). I first mention decisions, in which the superior court afforded the insurer the opportunity for discovery before a reasonableness hearing.

In *Bird v. Best Plumbing Group, LLC*, the trial court granted the defendant's insurance company's motion to intervene, granted a motion to continue by the insurer, permitted discovery, heard live witnesses, and conducted a four-day reasonableness hearing. The trial court held a $3.75 million settlement to be reasonable. The Supreme Court did not review the extent to which the insured could conduct discovery, if any. Instead, the court ruled that the insurer was not entitled to a jury trial on the reasonableness of the settlement amount, despite the amount becoming the presumptive measure of damages in a later bad faith claim against the insurance company.

Cincinnati Specialty Underwriters highlights the facts and ruling in *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572 (2009). In *Water's Edge*, the trial court permitted limited discovery. The trial court found the settlement amount unreasonable. The court further found the settling parties to have engaged in collusion, although the court did not base its ruling of unreasonableness solely on collusion. The decision does not address whether the trial court must always allow discovery. The decision does not disclose the extent of discovery allowed by the trial court.

I now examine three decisions in which the superior court denied the insurer an opportunity for discovery and wherein the appeals court affirmed the superior court's determination of reasonableness. In *Red Oaks Condominium Owners Association v.*

Sundquist Holdings, Inc., 128 Wn. App. 317 (2005), the third party claimant gave notice to the defendant's insurer six days in advance of the reasonableness hearing. The claimant delivered a copy of the settlement agreement to the insurer three days later. The insurer asked for a continuance of the hearing and argued it needed additional time to conduct discovery in order to prepare for the hearing. The trial court denied a continuance and confirmed the reasonableness of the settlement sum. The reviewing court determined that six days' notice afforded due process because the time sufficed for the insurer to appear in the litigation and defend its interests. The court emphasized that the insurance company knew of the claims against its insured one year in advance of the hearing, defended the insured under a reservation of rights, and knew of ongoing settlement negotiations. The insurer possessed an opportunity to participate at the reasonableness hearing.

The decision closest to this appeal is *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372 (2004). R.L. Alia Company, the insured, and Debra Howard, the claimant, entered into a settlement agreement for $20 million. The agreement included an assignment of Alia's claims against its insurer and a covenant not to execute against Alia in excess of $6 million. Howard requested a reasonableness hearing. Under the trial court's scheduling order, the discovery cutoff date had passed. The insurer moved to intervene to contest the reasonableness of the settlement and requested the opportunity to

conduct discovery. The court granted the motion to intervene, but did not reopen discovery. The trial court observed that, because the insurer provided a defense for its insured, it had a full opportunity to conduct discovery through the insured. At the reasonableness hearing, the insurer presented evidence challenging the reasonableness of the settlement figure. The trial court found that the $20 million settlement was unreasonable, but stated that a settlement of $17.4 million would be reasonable. The court specifically found that the settlement was not the product of fraud or collusion. Howard and Alia entered into a new settlement agreement for $17.4 million, with the same covenant not to execute and assignment of rights. The trial court entered judgment against Alia.

On appeal, in *Howard v. Royal Specialty Underwriting, Inc.*, the insurer, Royal Specialty Underwriting, argued that the timing of the hearing was inappropriate because the reasonableness hearing was essentially the damages phase of the bad faith action. Nevertheless, the court concluded that the fact that a reasonableness determination may impact the outcome of a bad faith action does not render the procedure inappropriate. Royal next argued that due process and fundamental fairness required permission to conduct discovery into the reasonableness of the settlement. The court responded that the superior court held discretion to limit discovery, and the superior court did not abuse its discretion. Royal received notice of the reasonableness hearing thirty days before the

hearing. Royal was not a stranger to the case, since it had provided counsel to its insured and the insured participated in discovery. The insurer had the claimant's medical records and copies of the correspondence between the settling parties. The court noted that Royal will also have a full opportunity to defend itself in the bad faith action by arguing that it did not act in bad faith and is, therefore, not liable for any of the settlement amount.

In *Sykes v. Singh*, 5 Wn. App. 2d 721 (2018), the insurance company denied the tender of defense of an injury suit from its insured. The injured party and the insured thereafter entered a settlement agreement that included a covenant not to execute judgment against the insured personally. This court affirmed the superior court's confirmation of the settlement amount as reasonable. The parties notified the insurer of the reasonableness hearing. According to the court, the insurer could not have been surprised of the settlement because of the insured's previous tender of the defense and because of a suit for bad faith. The superior court permitted the insurer to intervene in the suit for purposes of the reasonableness hearing. Thus, the insurer had the opportunity to argue against the reasonableness of the settlement, and, as an intervening party, the insurer possessed authority to subpoena witnesses for the hearing. The trial court scheduled a second day of the hearing for one week later so that the insurer could gain additional time to prepare and call witnesses. The insurer argued that it lacked time to prepare its argument that the parties colluded to defraud it. This court deemed the court's

review of the reasonableness factors under RCW 4.22.060 to protect insurers from collusive settlements.

I follow the reasoning behind *Red Oaks Condominium Owners Association v. Sundquist Holdings*, *Howard v. Royal Specialty Underwriting*, and *Sykes v. Singh*. Cincinnati Specialty Underwriters had in its possession expert reports at least weeks, if not months, earlier that detailed the damages sustained by Jeffrey and Anna Wood. In *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372 (2004), perhaps unlike the pending appeal, the insurer had in its possession written communications that led to the final settlement. Nevertheless, Cincinnati could have subpoenaed the parties and their attorneys to testify at the reasonableness hearing and could have subpoenaed, for production at the hearing, recent communications between the parties and their counsel. Cincinnati could have questioned the witnesses about the circumstances leading to the $1.7 million settlement. The trial court did not abuse its discretion when denying discovery.

Cincinnati Specialty Underwriters suggests that the reasonableness hearing presented it the only opportunity to determine whether the Woods and Milionis Construction colluded. The Washington Supreme Court disagrees. Cincinnati may still present this argument in any bad faith action against it. *Bird v. Best Plumbing Group,*

LLC, 175 Wn.2d 756, 765 (2012); *Mutual of Enumclaw Insurance Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 264 (2008).

REASONABLENESS OF WOODS – MILIONIS SETTLEMENT

I move now to the remaining assignments of error concerning the reasonableness of the $1.7 million settlement between Jeffrey and Anna Wood and Milionis Construction. We review a trial court's determination of the reasonableness of a settlement for abuse of discretion. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d at 774. A reviewing court may not find abuse of discretion simply because it would have decided the case differently. *Gilmore v. Jefferson County Public Transportation Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). The appellate court must be convinced that no reasonable person would take the view adopted by the trial court. *Gilmore v. Jefferson County Public Transportation Benefit Area*, 190 Wn.2d at 494.

The trial judge faced with the task of reviewing the reasonableness of a settlement must have discretion to weigh each case individually. *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). The inquiry necessarily involves factual determinations that will not be disturbed on appeal when supported by substantial evidence. *Bird v. Best Plumbing Group, LLC*, 175 Wn.2d 756, 774-75 (2012).

The majority does not base its ruling on the trial court purportedly applying a wrong standard. The majority instead rules that the superior court either misunderstood the evidence or ignored some evidence. In so ruling, the majority analyzes the facts as if it sits as the superior court, and the majority usurps the role of the trial court.

The settling parties bear the burden of establishing reasonableness. RCW 4.22.060(1); *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572, 594 (2009). Cincinnati Specialty Underwriters contends the trial court improperly placed the burden to disprove reasonableness on it. I disagree.

In claiming the trial court interchanged the burden of proof, Cincinnati Specialty Underwriters takes out of context the following comments from the trial court:

> So when the Court looks at that on whether I grant the continuance, I think there's enough in discovery for Cincinnati to give the Court an idea of why it's not reasonable.

RP at 47-48. Nevertheless, the court uttered the remark during the motion for discovery, not when assessing the reasonableness of the settlement. The court shortly thereafter added:

> I don't believe you need any more discovery to argue against the reasonableness.
>
> I know it's not your burden, but reading over the paperwork that was provided . . . we're ready to move forward with the reasonableness hearing.

RP at 48. The superior court knew the proponents of the reasonableness bore the burden.

When confirming the reasonableness of the settlement amount, the superior court entered findings of fact. The court found that a fact-finder would likely rule Milionis Construction to be liable to Jeffrey and Anna Wood in both tort and contract, that Milionis Construction negligently supervised the construction contract, that Milionis Construction overdrew funds from the Woods' construction loan, that Milionis Construction violated the Consumer Protection Act, that Milionis Construction caused the Woods damages, that Milionis Construction's actions caused the Woods' lender to cease financing the project, that Milionis Construction's negligence has caused the home to remain in an unfinished state, that the Woods have suffered a loss of use of the residence, that the negligent actions of Milionis Construction has caused damage to the present structure, that the structure will continue to undergo damage, that the conduct of Milionis Construction has caused Jeffrey and Anna Wood anxiety, grief, emotional distress, and torment for one and one-half years, that Jeffrey and Anna Wood have suffered damages in a sum exceeding $1.7 million, and that the fact-finder would likely award the $1.7 million amount. This reviewing court ignores the import of all of these critical findings of fact. The court concluded that, based on some of the claims of the Woods, the fact-finder would award the Woods special damages. Based on the findings, the court concluded that $1.7 million was a reasonable settlement.

On appeal, Cincinnati Specialty Underwriters challenges none of the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). I recognize that the trial court placed the findings in the judgment rather than a separate pleading captioned "findings of fact." Nevertheless, I know of no rule that requires trial court findings to be captioned accurately. The lack of a challenge to this critical finding of fact should alone lead the majority to affirm the trial court.

Cincinnati Specialty Underwriters faults the trial court for entering no findings of fact specific to the *Chaussee* factors and, therefore, according to Cincinnati, there are no verities on appeal. I agree that the trial court did not enter a finding addressing every factor. I disagree that the trial court entered no findings as to the relevant factors. I illuminate my disagreement later.

Washington courts consider nine factors when assessing the reasonableness of a settlement amount:

> "(1) [T]he releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released."

Bird v. Best Plumbing Group, LLC, 175 Wn.2d 756, 766 (2012) (quoting *Mutual of Enumclaw Insurance Company v. T&G Construction, Inc.*, 165 Wn.2d 255, 264 (2008)); *accord Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover*, 98 Wn.2d at 717). The parties refer to these gauges as the *Chaussee* factors. No single criterion controls, and trial courts must exercise their discretion in applying the criteria. *Besel v. Viking Insurance Company of Wisconsin*, 146 Wn.2d 730, 739 n.2 (2002). All nine criteria will not necessarily be relevant in every case. *Besel v. Viking Insurance Company of Wisconsin*, 146 Wn.2d at 739 n.2.

Cincinnati argues the trial court failed to properly consider five of the nine *Chaussee* factors. I disagree. Regardless, Washington courts have found a trial court's reasonableness determination to be valid even when the trial court failed to list any of the *Chaussee* factors and instead mentioned that the parties addressed the factors in their briefs and the trial court considered the briefs. *Hidalgo v. Barker*, 176 Wn. App. 527, 548-49, 309 P.3d 687 (2013); *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. at 585. The trial court is not required to explain how it applies each factor. *Hamblin v. Castillo Garcia*, 9 Wn. App. 2d 78, 86, 441 P.3d 1283 (2019).

I dissect Cincinnati Specialty Underwriters' criticisms of the trial court's review of each of the nine *Chaussee* factors in their numerical order. Cincinnati first contends that the trial court failed to evaluate the $1.7 million settlement in light of damages the Woods

may actually have been able to recover, the amount of damages being criterion one. Cincinnati argues, that, as in *Water's Edge Homeowners Association v. Water's Edge Associates*, 152 Wn. App. 572 (2009), an evaluation by defense counsel is important in this determination. Cincinnati emphasizes that the counsel it hired to defend Milionis Construction evaluated the Woods' claim at $399,000.

In *Water's Edge*, the trial court rejected a settlement as reasonable after discounting one of plaintiff expert's $9,950,386 repair estimate and plaintiff's own estimation of $10 million. The trial court instead looked to summary judgment motions submitted to the trial court by defense counsel, which it granted. The granting of these motions significantly reduced the potential award of damages. *Water's Edge* does not support the proposition that the trial court must always accept the evaluation of defense counsel when assaying potential damages.

Cincinnati Specialty Underwriters' insistence that Shane McFetridge evaluated Jeffrey and Anna Wood's claim at $399,000 does not tell the entire story. McFetridge's evaluation occurred months before the final settlement and new expert reports of damages appeared thereafter. Shane McFetridge did not update his evaluation and thereby ask for more authority, because he knew that Cincinnati Specialty Underwriters would not approve any amount beyond $100,000.

Contrary to defense counsel's purported evaluation of $399,000.00, the expert hired by counsel to assist Milionis Construction, Nick Barnes, estimated the cost to repair deficiencies in the residence to be $540,341.76 and the cost to complete the home at $674,292.19, for total damages exceeding $1.2 million.

This court's majority emphasizes that Milionis Construction's other expert, architect Scott Buckles, allocated thirty-five percent of the damages to the responsibility of Jeffrey and Anna Wood and the Woods' architect. But Jeffrey and Anna Wood and their experts never conceded any responsibility for any of the damages. The superior court was free to ignore this discount claimed by Buckles. During the reasonableness hearing, Cincinnati never explained to the court why the Woods would be responsible for a portion of their damages. The majority weighs the evidence when it relies on Buckles' opinion.

This court's majority correctly notes that Jeffrey and Anna Wood did not pay the full contract price. Thus, according to the majority, the amount remaining owed on the price should be deducted from the damages sought by the Woods. The record does not show, however, whether the damage experts failed to deduct the amount owed on the construction contract. Cincinnati Specialty Underwriters does not contend on appeal that any expert failed to deduct the unpaid contract price from the damages.

This court's majority also implies that the superior court must focus on the calculation of damages rendered by the defense's own expert, because the majority focuses on the calculation of Nick Barnes. The superior court was free to conclude that Jeffrey and Anna Woods' expert calculation was the more likely amount to be accepted by a jury. The Woods' expert Andy Smith estimated that the total amount to remedy the damages caused to the property, repair structural damage and failures, remedy and remove the risk of other damages, and to complete the project as no less than $761,234.09. Smith further projected the cost to complete the home to be $1,941,965.02, for a total sum exceeding $2.7 million. Even if one deducted the $800,000.00 unpaid contract price to the amount, the damages would exceed $1.9 million. By ignoring the opinions of Andy Smith, the majority again reweighs the evidence.

In its ruling, this court's majority also ignores that Jeffrey and Anna Wood could recover emotional distress damages and reasonable attorney fees and costs against Milionis Construction. The trauma resulting from delays and damages to one's dream home could lead a jury to award a substantial sum for emotional distress. Such delays and damage often leads to a ruined marriage. The attorney fees award to the Woods could have exceeded a hundred thousand dollars. The Woods' award could have exceeded $2.7 million with fees and costs.

As part of its submittals for the reasonableness hearing, Cincinnati filed defense counsel's partial summary judgment motion and an arbitration brief. The summary judgment motion argued that all claims, with the exception of a contract claim, should be dismissed. Cincinnati contends the pending motion decreased significantly the value of Jeffrey and Anna Wood's claim and the superior court erroneously failed to consider the pending summary judgment motion. I disagree. The trial court reviewed the materials and was not convinced of the likelihood of the success of the motion. Regardless, the $2.7 million estimate from the Woods' expert would fall in the category of contract damages, such that any success in the motion would not appreciably diminish the Woods' damages.

This court's majority mentions a dispute as to coverage afforded Cincinnati Specialty Underwriters under its liability policy issued to Milionis Construction. This dispute lacks relevance to the reasonableness of the settlement between the Woods and Milionis Construction. In the end, Cincinnati may not need to pay any sums despite the trial court's finding of reasonableness.

Cincinnati Specialty Underwriters next faults the trial court for failing to properly address *Chaussee* factors two and three, the merits of the Woods' liability theories, and the merits of Milionis Construction's defense theories. I have already mentioned the trial court's consideration of the defense theories in my discussion concerning the pending

summary judgment motion before the arbitrator. The motion would not dismiss the contract claim, which alone supported damages higher than $1.7 million. When the superior court commented about the defenses of Milionis Construction, the court, by necessity, also commented on the strength of Jeffrey and Anna Wood's claims.

Cincinnati Specialty Underwriters next faults the superior court for failing to properly analyzing factor six, the ability of the insured, Milionis Construction, to pay damages. I question the applicability of this factor, when the case law refers to the ability of "the released party" to pay. Jeffrey and Anna Wood never released Milionis Construction from liability or responsibility. To the contrary, Milionis Construction conceded liability.

Cincinnati Specialty Underwriters cites two cases, *Werlinger v. Warner*, 126 Wn. App. 342 (2005) and *Aspen Grove Owners Association v. Park Promenade Apartments, LLC*, 842 F. Supp. 2d 1298 (W.D. Wash. 2012). In each decision, the trial court found the settlement amount unreasonable or reduced the settlement amount in part because of the insured's inability to pay any judgment. Neither decision requires the trial court to always deem a settlement unreasonable if the insured is judgment proof.

I agree with Cincinnati Specialty Underwriters that, during the reasonableness hearing, Jeffrey and Anna Wood's attorney remarked that Milionis Construction would likely file bankruptcy in order to avoid the effect of a judgment against it. Nevertheless,

the trial court noted that Milionis Construction had not filed bankruptcy. Also, Stephen Milionis faced possible personal liability. The superior court was not required to place controlling effect on the likelihood of bankruptcy when assessing the reasonableness of the settlement.

Finally, Cincinnati Specialty Underwriters criticizes the superior court for failing to consider any evidence of bad faith, fraud, or collusion between the settling parties. I disagree that the trial court ignored the potential for collusion. To the contrary, the court expressed some concern that Shane McFetridge did not participate in the final negotiations.

Cincinnati Specialty Underwriters cites a number of cases supporting the proposition that bad faith or collusion can be demonstrated by lack of serious, arms-length negotiations on damages, by the insured's waiver of or failure to assert defenses, by concealment, or by the insured's agreement to an unsupportable amount of damages. *Mutual of Enumclaw Insurance Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 267, 199 P.3d 376 (2008); *Fireman's Fund Insurance Co. v. Imbesi*, 826 A.2d 735, 752-58, 361 N.J. Super. 539 (App. Div. 2003); *Andrew v. Century Surety Co.*, 134 F. Supp. 3d 1249, 1268 (D. Nev. 2015); *Safeco Insurance Co. v. Parks*, 170 Cal. App. 4th 992, 1013-14, 88 Cal. Rptr. 3d 730 (2009). I have already concluded that the evidence amply supported a $1.7 million settlement amount. I add that the parties included Cincinnati in settlement

negotiations for months. Cincinnati, because of its settlement position, shared some blame for its absence and Shane McFetridge's nonappearance from the final negotiations because of its settlement negotiation tactics.

In addition to assigning error to the superior court's review of the *Chaussee* factors, Cincinnati Specialty Underwriters complains that Jeffrey and Anna Wood inserted at least one irrelevant factor into the calculation of the reasonableness of the settlement. Cincinnati protests that the Woods criticized Cincinnati for its purported bad faith during settlement negotiations, and the Woods thereby impliedly asked the superior court to punish, rather than protect Cincinnati. I agree that Jeffrey and Anna Wood improperly painted Cincinnati as engaging in bad faith, at least during the reasonableness hearing. The record, however, does not suggest that the superior court considered any bad conduct of Cincinnati when assessing the reasonableness of the settlement. Cincinnati does not cite the record to show that the Woods' contention influenced the court's decision.

In short, when considering the damages suffered by Jeffrey and Anna Wood, the trial court reasonably exercised its discretion by declaring $1.7 million to be a fair resolution. The majority errs when concluding that no reasonable person could conclude the settlement amount to be reasonable.

Fearing, J.

Fearing, J.