# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| RSUI INDEMNITY COMPANY,<br><br>Intervenor Below and Appellant,<br><br>v.<br><br>VISION ONE, LLC,<br><br>Plaintiff and Respondent,<br>v.<br><br>PHILADELPHIA INDEMNITY INSURANCE COMPANY,<br><br>Defendant and Respondent,<br>And<br><br>D&D CONSTRUCTION, INC.,<br><br>Defendant, Third-Party Plaintiff, and Respondent,<br><br>v.<br><br>BERG EQUIPMENT & SCAFFOLDING CO., INC.,<br><br>Third-Party Defendant and Respondent. | No. 38411-6-II<br>(Consolidated with No. 41021-4-II)<br><br>ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND AMENDING OPINION |

Appellant has moved for reconsideration of the opinion in this case. After due consideration, this court grants the motion in part and amends the opinion as follows.

On page 12, at the end of the second complete paragraph, the court adds this footnote:

> 1. After RSUI made this claim of prejudice in its opening brief, the federal court ruled that RCW 48.30.015 does not apply because RSUI's denial of coverage occurred before the statute's effective date. Clerk's Papers at 149-51. This ruling weakens RSUI's claim of prejudice.

The remaining footnotes are renumbered accordingly. The motion for reconsideration is denied in all other respects. It is

**SO ORDERED.**

Dated this _____ day of _____, 2012.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J

No. 38411-6-II
(Cons. w/No. 41021-4-II)

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Armstrong, P.J. — RSUI, the excess insurance carrier for Berg Equipment & Scaffolding, intervened in the lawsuit between Vision One, LLC and Vision Tacoma, Inc. (collectively Vision), Philadelphia Indemnity Insurance Company, D&D Construction, and Berg to challenge the reasonableness of a settlement between Vision and Berg. The trial court denied RSUI's motion to continue the reasonableness hearing and upheld the settlement. Almost 19 months later, RSUI

moved to vacate the settlement under CR 60(b)(4) and (11). The trial court denied RSUI's motion to vacate and imposed CR 11 sanctions. RSUI appeals each ruling; we affirm.

## FACTS

RSUI issued a $1 million policy of excess insurance to Berg for July 1, 2005 to July 1, 2006. The policy excluded coverage for "any liability arising out of" Berg's operations or work "on any 'residential project.'" Clerk's Papers (CP) at 12,390. The policy's definition of "residential project" included "condominiums." CP at 12,390. Berg also had a $1 million policy with its primary insurer, Admiral Insurance Company.

### I. Accident and Litigation

During the course of developing a condominium in Tacoma, Vision contracted concrete work to D&D and D&D leased shoring equipment from Berg to support the concrete while it was poured and until it cured. On October 1, 2005, a section of newly poured concrete collapsed and injured several workers.

After Vision's insurer, Philadelphia Indemnity, denied coverage, Vision sued Berg, D&D, and Philadelphia; Philadelphia and D&D sued Berg; and Berg counterclaimed against D&D. Vision settled with D&D, which assigned its claims against Berg to Vision. Matthew Thompson, a subcontractor's employee, sued for personal injuries. His lawsuit was consolidated with the Vision-Philadelphia-Berg lawsuit, and issues of causation and damages were severed for later trial. Vision, Berg, and D&D stipulated that Thompson was not at fault and that any jury allocation of fault between Vision, Berg, and D&D would be binding for purposes of liability to Thompson.

After Vision settled with D&D, Vision sued Philadelphia for losses allegedly covered under its insurance policy for bad faith and attorney fees; Vision sued Berg for all actual, incidental, and consequential damages resulting from the collapse in its own right (under tort and product liability theories) and as the assignee of D&D's claims; and Berg sued D&D for breach of contract damages.

Berg notified RSUI of the incident and the resulting litigation. RSUI informed Berg in April 2007 that it was denying coverage under the policy's residential work exclusion. Despite that denial, Berg continued to send information and reports about the litigation to RSUI.

## II. Unsuccessful Mediation

In January 2008, after extensive discovery and motion practice and with the March trial date approaching, the parties agreed to mediate. Berg informed RSUI of the upcoming mediation and of its expectation that RSUI would fully participate. RSUI responded that it would attend even though it did not believe there was coverage. Before the mediation, RSUI's coverage counsel, David East, spent approximately two hours in the office of Michael Mullin, Berg's defense attorney, reviewing and copying documents.

At the February 2008 mediation, Vision sought $5.7 million in damages, not including Thompson's $4 million personal injury claim. RSUI attorney Michael Helgren attended the mediation, which was unsuccessful. Peter Petrich, Berg's corporate counsel, told Helgren after the mediation that Berg would likely assign its rights against RSUI if it settled with Vision.

On February 19, 2008, Berg received a settlement demand from Vision. It included a stipulated judgment against Berg for $2.5 million that was broken down as follows: $1 million

payable by Admiral; $500,000 payable by Berg personally; and the remaining $1 million payable by RSUI with a covenant not to execute on any of Berg's assets. The demand also provided that Vision's liability insurers would be responsible for all bodily injury claims and that all of Berg's claims against Vision and D&D would be dismissed with prejudice. Berg forwarded a copy of the settlement demand to RSUI, and when RSUI asked whether its terms were acceptable, Berg replied that they were not.

Helgren made no inquiries about the litigation or possible settlement after February 2008. He did write to Petrich in April and June 2008, however, asking whether Berg had any legal authority that would challenge RSUI's denial of coverage, and he also left phone messages pertaining to the letters. Petrich did not respond.

Following the failed mediation, Vision and Berg continued to battle over Berg's liability, with each side moving for summary judgment. The contract claims against Berg survived. Vision's claims against Berg based on product liability law also withstood summary judgment challenge, as did its delay of damages claims. Berg was able to eliminate Vision's $500,000 claim for lost sales but the trial court refused to rule that Vision, as the general contractor, was liable for the collapse as a matter of law. The trial court also denied Vision's motion for summary dismissal of the bodily injury claims. The trial date was then reset for September 8, 2008.

In early September, another personal injury lawsuit was filed against Berg with a demand for $800,000 in damages. Eight or nine additional bodily injury claimants had yet to sue and the statute of limitations had not expired. By September 4, Vision was preparing to prove clean-up expense damages of about $500,000 and consequential (construction and project delay) damages

of about $4 million. The trial court had yet to rule on whether a substantial portion of Vision's claimed delay losses qualified as losses covered by Philadelphia's policy, which raised the prospect of Berg being at risk for those losses. Consequently, Berg was facing approximately $10 million of exposure with only $1 million of primary coverage available.

III. Settlement Agreement and RSUI Intervention

With the assistance of a mediator, Vision and Berg settled for $3.3 million on September 5, 2008. Berg's primary insurer, Admiral, agreed to pay Vision its policy limits of $1 million, and the parties agreed to a $2.3 million covenant judgment enforceable against RSUI. Vision pledged its own assets and liability insurance for all bodily injury liabilities and agreed to indemnify and hold Berg harmless against such claims. Vision's liability insurance came from Gemini, its primary liability carrier, and ICSOP (AIG), its excess carrier. The settlement was conditioned on the court finding it reasonable.

Vision reported to the trial court on Monday, September 8, that a settlement was imminent but needed one additional party's approval. The court observed that because 100 potential jurors were on hand, it would proceed with jury selection until any settlement was final. When the proceedings resumed the next day, Vision reported that the settlement was waiting for Berg's final approval. A short time later, Vision informed the court that a settlement had been reached. The court delayed impaneling a jury and set a reasonableness hearing for Friday, September 12. Vision and Berg notified RSUI of the settlement and the reasonableness hearing.

RSUI moved to intervene and to continue the September 12 hearing to September 26. RSUI asserted that it knew nothing of the claims against Berg that were included in the

settlement, nor of the factors and considerations that went into the settlement, and it argued it had been excluded from settlement negotiations. It also sought the continuance because Helgren, allegedly the only RSUI attorney with knowledge of the litigation, was vacationing until September 15.

Philadelphia also protested the timing of the reasonableness hearing and asked the court to delay it until Philadelphia could address legal issues arising from the proposed settlement. Philadelphia refused, however, to agree to postpone the trial pending a reasonableness hearing.

Berg and Vision did not object to RSUI's intervention but did object to a two-week continuance of the reasonableness hearing. They advised the court that RSUI had refused to participate in settlement negotiations in February and that it had not sought information about the litigation since.

At the September 12 hearing, the court granted RSUI's motion to intervene. East represented RSUI. Claiming to know nothing of the case, he protested that RSUI had no basis for contesting the settlement. The court was concerned about putting the jury "on hold" and was not inclined to continue the hearing to September 26. Report of Proceedings (RP) (Sept. 12, 2008) at 7. But the court agreed to postpone the trial so that RSUI could look at the agreement over the weekend; the court continued the hearing to 1:30 p.m. on Monday, September 15.

The September 12 hearing concluded at 4:06 p.m. At 4:30 p.m., RSUI e-mailed all parties, asking them to forward "all information pertaining to the liability of insured, Berg, the claims against Berg that have been resolved in the proposed settlement[, and] how the figure of $3.3 million was determined," no later than 9:30 a.m. on Monday, September 15. CP at 456.

Vision did not respond. Petrich replied a few minutes later that RSUI could review the non-privileged litigation documents in his possession until 5:00 p.m. Mullin, Berg's defense counsel, responded on Saturday afternoon that he was in his office and that RSUI could come over and review the files.

On Sunday, September 14, East responded to Petrich's e-mail, stating that he had been unable to comply with the Friday deadline and was requesting the following by e-mail: all case status reports since January 2008, all case valuations, and all documents since February 2008 relating to the final settlement. East also sent a message to Mullin, explaining that he had not been available on Saturday but could be available Sunday or early Monday. He added that he would prefer receiving e-mailed copies of the same documents he had requested from Petrich. Petrich responded by phone and informed East that he had only a few early drafts of the agreement. Mullin apparently did not respond to the Sunday message.

## IV. Reasonableness Hearing

At the September 15 hearing, Berg asked for approval of the settlement, noting that the court had "been with us for months now, seeing the complexity and difficulty of this case." RP (Sept. 15, 2008) at 29. East complained that he had gotten no information over the weekend; Petrich responded that his settlement file contained nothing RSUI did not already have. East did not dispute that RSUI had denied coverage in April 2007, but he stated that the insurer "at every point" had asked for additional information to reevaluate its coverage position as necessary. RP (Sept. 15, 2008) at 37. East explained that RSUI had no information as to why the potential judgment against it had gone from $1 million to $2.3 million, and he asked for time to take

depositions and conduct additional discovery.

The court refused to continue the hearing and found the settlement reasonable. In its written order, the court listed the 18 documents, including briefs, memoranda, and declarations, that it reviewed in reaching its decision.

RSUI appealed the reasonableness determination, and the other parties continued to trial. The jury entered a verdict in favor of Vision and against Philadelphia, and both parties appealed that verdict. We resolved the trial issues in a separate opinion. *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 158 Wn. App. 91, 241 P.3d 429 (2010), *review granted*, 171 Wn.2d 1001, 249 P.3d 182 (2011).

### V. CR 60 Proceedings

Almost 19 months after the trial court found the settlement between Vision and Berg reasonable, RSUI moved to vacate under CR 60(b)(4) and (11). This motion was based on RSUI's discovery during the parties' federal court litigation of four e-mails between Vision and Berg during the last weeks of settlement negotiations. The trial court denied RSUI's motion to vacate and imposed CR 11 sanctions against it. We consolidated RSUI's appeal of those rulings with its reasonableness determination appeal. We first discuss the trial court's reasonableness decision, and then its CR 60(b) rulings.

## ANALYSIS: REASONABLENESS OF SETTLEMENT

### I. Standard of review

We review a trial court's reasonableness decision for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). A court abuses its discretion when its

decision rests on untenable grounds or is manifestly unreasonable. *Green v. City of Wenatchee*, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009). We review a trial court's factual findings in support of its decision for substantial supporting evidence. *Green*, 148 Wn. App. at 368. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the stated premise. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 158, 795 P.2d 1143 (1990).

Generally, we review a trial court's denial of a continuance for an abuse of discretion. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 321, 116 P.3d 404 (2005); *see Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004) (appellate courts review decision to limit discovery and deny motion for continuance of reasonableness hearing for abuse of discretion). But, where a party claims that a denial of a continuance violates its right to due process, this claim raises a question of law, which we review de novo. *Red Oaks*, 128 Wn. App. at 321.

II. Motion for Continuance

RSUI contends that it received notice of the settlement on September 9, only three days before the reasonableness hearing, and that the trial court abused its discretion in refusing to continue the hearing to September 26. RSUI complains that the parties settled on September 4 but waited until September 9 to reveal their agreement, and that the three days' notice it received was inadequate under RCW 4.22.060(1) and the Pierce County local rules. RSUI adds that continuing the hearing to September 15 did not help because both Berg and Vision failed to provide it with any information.

RCW 4.22.060(1) provides that prior to entering into a settlement agreement, a party shall

give five days' notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. RCW 4.22.060(1). This statute does not apply to RSUI because it was not a party to the lawsuit when settlement was reached. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 407, 161 P.3d 406 (2007) (insurer not entitled to statutory notice of settlement because it was not a party to the suit between the settling parties), *review denied*, 163 Wn.2d 1055 (2008). The same fact disposes of RSUI's complaint that it did not receive six days' notice of the reasonableness hearing as the local rules require. *See* PCLR 7(a). Where an insured settles with a claimant after the insurer has denied coverage, the insured is not obligated to provide notice to the insurer of the pending reasonableness hearing, since the insurer technically is not a party to the underlying litigation. 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 12.44, at 176 (2010-11 Pocket Part).

The record shows that the parties did not finalize the settlement until September 9. The trial court scheduled the reasonableness hearing for September 12 because of its concern about the waiting jurors and because Philadelphia wanted to proceed with the trial despite the need to approve the settlement. RSUI ultimately received six days' notice of the hearing after the court continued it from September 12 to September 15. In support of their argument that this notice was sufficient, Berg and Vision cite *Red Oaks*, 128 Wn. App. 317.

In *Red Oaks*, an owners association and a developer settled two days after the suit was filed. The developer stipulated to a settlement amount and assigned its rights against its insurer, which had denied coverage, to the owners association in exchange for a covenant not to execute

and dismissal of the claims against the individual defendants. *Red Oaks*, 128 Wn. App. at 320. The owners association requested a reasonableness hearing and delivered a copy of the motion to the insurer six days before the hearing. *Red Oaks*, 128 Wn. App. at 320. After receiving a copy of the settlement agreement three days before the hearing, the insurer moved to intervene and requested a continuance to prepare and conduct discovery. *Red Oaks*, 128 Wn. App. at 320-21. The trial court denied the motion for a continuance and ultimately approved the settlement without the insurer's participation. *Red Oaks*, 128 Wn. App. at 321. The insurer appealed, asserting that six days' notice, with only three days to review the settlement agreement, was so inadequate as to deprive it of due process. *Red Oaks*, 128 Wn. App. at 321.

Division One observed that, to be consistent with due process, notice must afford a reasonable time for those interested to make their appearance. *Red Oaks*, 128 Wn. App. at 324. Reasonableness is measured by the circumstances. *Red Oaks*, 128 Wn. App. at 324. In *Red Oaks*, the insurer was not a stranger to the case. It was notified of the claims against the developer almost a year before the hearing, and it was aware of ongoing settlement negotiations. *Red Oaks*, 128 Wn. App. at 326. Comparing the case to another in which the insurer received 30 days' notice of the reasonableness hearing, the court concluded that under the circumstances, 6 days' notice was consistent with due process because it was a reasonable amount of time for the insurer to appear and defend its interests. *Red Oaks*, 128 Wn. App. at 325-26 (citing *Howard*, 121 Wn. App. 372).

Consequently, due process requires not a specific number of days but an evaluation of whether the notice provided was reasonable under the circumstances. RSUI contends that it was

denied due process because, in contrast to the insurer in *Red Oaks*, it was unaware of any ongoing settlement negotiations and had been kept in the dark about the case in general. RSUI cites cases where insurers were given an extended opportunity to explore settlement agreements. *See Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 757, 761, 154 P.3d 950 (2007) (no due process violation where trial court continued reasonableness hearing so intervening insurer could conduct discovery), *review denied*, 163 Wn.2d 1020 (2008); *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 821, 156 P.3d 240 (2007) (one month's notice of hearing provided to insurer).

Berg and Vision respond that RSUI is responsible for its alleged ignorance of the proceedings. They argue that RSUI demanded and received the documents it wanted before the February 2008 mediation, and that after mediation failed and Berg refused Vision's subsequent settlement demand, RSUI made no further inquiries about the litigation. RSUI points to two letters it wrote in April and June 2008, asking whether Berg had additional legal authority for its position that the residential exclusion did not preclude coverage. As Berg asserts, however, those letters did not request further information about the status of the litigation, even though Petrich had informed Helgren that Berg would likely assign its rights against RSUI if it settled with Vision.

RSUI also claims that the prejudice it suffered from being denied additional time to investigate the settlement outweighed any potential prejudice that could have resulted from a two-week continuance. As RSUI states, the settlement established the presumptive measure of its potential liability to Vision, which then was subject to tripling under RCW 48.30.015. *See* RCW

48.30.015(2) (after finding that insurer acted unreasonably in denying coverage, superior court may increase the total award of damages to three times the actual damages); *but see Howard*, 121 Wn. App. at 380 (insurer may defend itself in bad faith action by arguing it did not act unreasonably and is not liable for any of the settlement amount).

Berg responds that it would have been prejudiced by being required to participate in the trial for an additional 11 days after agreeing to a settlement and that the issues before the jury would have been unnecessarily confused by its withdrawal had the court approved the settlement on September 26. Moreover, the court was concerned about the waiting jury, and Philadelphia did not want to postpone the trial pending a reasonableness hearing. *See* 16 Washington Practice, *supra*, § 12.44, at 370 (whether to permit hearing on less than five days' notice depends partly on whether settlement is reached before trial or in the middle of jury trial where time is of the essence).

RSUI argued during the reasonableness hearing that it had no information explaining why the potential judgment against it had gone from $1 million to $2.3 million and that until it had such information, it would not know whether it needed additional discovery to investigate possible collusion as well as the other reasonableness standards. But RSUI was not entitled, under the constitution or court rule, to more than the six days it received to come up with evidence supporting the suspension of trial for 11 more days. The trial court gave RSUI the weekend to investigate the settlement, and its efforts in that regard were less than exhaustive. We conclude that the trial court did not abuse its discretion in refusing to continue the reasonableness hearing until September 26.

## III. The Settlement's Reasonableness

### A. Reasonableness Factors

The burden of proving a settlement reasonable is on the party requesting the settlement, and the court should consider the following:

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

*Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)); *Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 703, 187 P.3d 306 (2008), *review denied*, 165 Wn.2d 1029 (2009). No single factor controls and all are not necessarily relevant in all cases. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002). Although the burden is on the settling parties to establish reasonableness, it is incumbent on a party with a significant interest in having the settlement found unreasonable to present some evidence to controvert the settling parties' evidence. *Pickett v. Stephens-Nelsen, Inc.*, 43 Wn. App. 326, 332-33, 717 P.2d 277 (1986).

### B. Bad Faith, Fraud, or Collusion

#### 1. Burden of Proof

The trial court referred to the *Glover* factors in approving the settlement. In finding no evidence of fraud or collusion, the court also referred to *Heights*. In *Heights*, no evidence showed that the insured failed to vigorously negotiate the settlement, and the insurer provided no

evidence of bad faith, collusion, or fraud. *Heights*, 145 Wn. App. at 706-07. Consequently, the trial court did not abuse its discretion in finding the settlement reasonable. *Heights*, 145 Wn. App. at 707.

The trial court cited *Heights* in stating that it was RSUI's burden to show "some kind of fraud or collusion" after it gave the insurer the weekend to do "whatever it needs to do, homework-wise." RP (Sept. 12, 2008) at 53-54. RSUI now argues that the trial court erred in giving it the burden to show fraud, and cites as support *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009), *review denied*, 168 P.3d 1019 (2010). In *Water's Edge*, 152 Wn. App. at 594, we rejected the assertion that the insurer has the initial burden of proving that the settlement was a product of fraud or collusion. Whether there is evidence of bad faith, collusion, or fraud is just one factor to consider in assessing a settlement, and the settling parties have the burden of proving that the settlement was reasonable. *Water's Edge*, 152 Wn. App. at 594-95. This holding does not necessarily conflict with either *Heights* or the trial court's directive. Although the burden of proof is on the settling parties, it is incumbent on an intervening insurer to present some evidence to challenge the settlement's reasonableness. *Pickett*, 43 Wn. App. at 332-33.

2. Settling Parties' Evidence

Vision and Berg submitted briefs, memoranda, and declarations to support their argument that there was no evidence of fraud or collusion and that their settlement agreement was reasonable. RSUI argues that this evidence was inadequate. As support, it cites *Water's Edge*, where the trial court evaluated a considerable amount of testimony, documents, and briefing,

including thousands of pages of the litigation record, before concluding that the settlement was unreasonable. *Water's Edge*, 152 Wn. App. at 582, 586. Similarly, the trial court considered "extensive briefing" on the issues of fault and liability in *Martin v. Johnson*, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007).

The procedures for handling evidence at reasonableness hearings are within the trial court's discretion. *Pickett*, 43 Wn. App. at 335; *see also Schmidt*, 115 Wn.2d at 159 (court did not err in denying expert an opportunity to testify during reasonableness hearing; parties themselves had provided ample material for decision). Expert testimony is not required; the reasonableness of the settlement amount is generally supported by the declarations of the parties to the settlement. *Glover*, 98 Wn.2d at 718 n.3; 9 David E. Breskin, Washington Practice: Civil Procedure Forms and Commentary § 7.69, at 166 (2000). Attorney affidavits based on personal knowledge are entitled to the same consideration as any other affidavit. *Pickett*, 43 Wn. App. at 333.

The trial judge here was familiar with the case and with the expert testimony already provided in conjunction with the numerous pretrial motions. *See Zamora v. Mobil Corp.*, 104 Wn.2d 211, 223, 704 P.2d 591 (1985) (approving of settlement hearing on shortened notice where trial judge was familiar with all aspects of the case). The judge stated in a post-trial hearing that she had made 100 decisions pretrial, and her order approving the settlement confirmed that she was "familiar from extensive pre-trial proceedings with the nature and complexity of the claims and defenses herein." CP at 484.[1] Additional evidence was not required in evaluating the

[1] RSUI faults Berg and Vision for citing some of these claims and defenses as justification for the settlement, arguing that we are not to consider post-settlement information when evaluating a reasonableness determination. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 38, 935

settlement's reasonableness.

The Berg and Vision declarations asserted that the difficulty of the settlement negotiations showed that the final agreement was not the result of fraud or collusion. Randy Aliment, an attorney for Vision, took the lead in settlement negotiations with Berg, Admiral, Gemini, and ICSOP. "It was a complicated factual and legal mix which took a tremendous amount of time to resolve and all against the backdrop of Philadelphia's and RSUI's steadfast refusal to participate in any meaningful way." CP at 207. Settlement negotiations began with a Seattle mediator in February 2008 and continued, with the mediator's help almost to the end,

P.2d 684 (1997). In reviewing this case for abuse of discretion, however, we find it reasonable to acknowledge the trial court's familiarity with the underlying litigation.

until September 5, 2008. Those negotiations were complicated by the fact that Berg's primary insurance policy had a limit of $1 million and that RSUI denied coverage early on. "Significantly complicating the negotiations was the existence of several bodily injury claims and the prospect of the parties' exposure to damages over and above policy limits." CP at 208. Aliment added:

> In my 28-year legal career, I have been involved in numerous complicated and lengthy settlement negotiations in multi-million dollar cases. This case stands out in my mind as one of the more difficult I have ever handled. . . . As this Court is well aware of how fiercely this case has been litigated, it should be no surprise to learn that the settlement discussions were of a similar nature.

CP at 208-09.

Roger Hebert, Vision's principal, confirmed that the negotiations had been difficult:

> The negotiations with Berg have been very time consuming, intense and hard fought. . . . The negotiations were complicated by the one million dollar limits of Berg's primary insurer (Admiral) and the refusal of Berg's excess carrier (RSUI) to accept coverage. Berg's limited assets and the outstanding bodily injury claims further complicated the negotiations. There have been numerous iterations of settlement agreements. At every turn, Berg's counsel has fought for changes they believed benefited their client.
> . . . .
> I believe that both Philadelphia and RSUI have pursued their own self-interests, leaving [Vision] to fend for itself. Because of this, [Vision] has pursued the best course possible.

CP at 224-25.

Berg attorney Petrich provided this explanation for the settlement:

> [Vision's] total claims amount to approximately $5.5 million dollars. Although I believe that Berg's defense to these claims is solid, even if Berg were found to be 25%-33% at fault, the company's excess exposure would bankrupt the company unless there was a successful bad faith claim against RSUI.
> The potential outstanding bodily injury claims were a substantial concern in evaluating the settlement terms. The amount of these potential claims are almost impossible to calculate with any degree of objectivity because the number of claimants is not known. However, those that have joined in the litigation to date have aggregate claims of nearly $5 million. The statute of limitations expires on

> October 1, 2008, so additional suits could be filed. Again, as with the construction damage claims, even if Berg was found to be 25%-33% at fault, the Company's exposure exceeds its net assets.

CP at 329-30.

Mullin added in his declaration that he communicated with RSUI and shared confidential reports and information with it on a regular basis up to the February 2008 mediation. RSUI did not assist in settling the claims, and the mediation failed. After refusing Vision's subsequent settlement demand, Berg understood that RSUI was denying coverage. After that, according to Mullin, RSUI never asked for more information, and provided no assistance or input as the case moved toward trial. An associate who assisted with East's review of documents in February 2008 was unaware of any further review requests RSUI made through either Mullin or Petrich.

3. RSUI's Evidence

RSUI responds that although it had no opportunity to discover direct evidence of collusion, circumstantial evidence of fraud in the settlement is shown by these facts: Berg quit communicating with RSUI at the same time it apparently began negotiating with Vision; Berg communicated regularly with RSUI until March 2008, despite RSUI's coverage denial in April 2007; Berg agreed to settle with Vision for $800,000 more than it sought six months earlier; the damages Berg agreed to attribute to RSUI went from $1 million to $2.3 million during the six months Berg refused to communicate with RSUI; Berg and Vision provided no information to RSUI even when the trial court directed them to do so; Berg misrepresented the nature and extent of RSUI's settlement involvement to the trial court; and Berg made no attempt to provide RSUI with information showing why its residential work exclusion did not apply.

Mullin and Petrich explained why Berg ceased communicating with RSUI: the insurer denied coverage, did not assist in the mediation, and did not request further information about the ongoing litigation or any settlement negotiations. It is the insurer's affirmative duty to investigate a claim before it denies coverage, not the insured's duty to continue supplementing the record to an uninquisitive insurer. *Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1236 (W.D. Wash. 2008). The trial court agreed that once the insurer denied coverage, it was not Berg's responsibility to convince RSUI that coverage existed. Moreover, as Vision asserts, RSUI could have discovered the claims and potential liability Berg faced by monitoring court filings.

As for the settlement amount, which was $800,000 higher than Berg would accept six months earlier, the record shows that at the time of settlement, the number of personal injury claimants was unknown, the statute of limitations had not yet run on such claims, and a claim for $800,000 in damages had just been filed. The record also shows that although the trial court dismissed the tort claims against Berg in March 2008, that dismissal did not affect claims brought under the Washington Product Liability Act, chapter 7.72 RCW, or the contract claims against Berg.

RSUI emphasizes that the potential judgment against it went from $1 million to $2.3 million in six months. Despite an insured's authority to settle a claim after an insurer has refused a defense, a plaintiff may not collect any amount desirable if it appears that the plaintiff and the insured cooperated in creating an inflated collusive judgment. *Ayers v. C&D Gen. Contractors*, 269 F. Supp. 2d 911, 914 (W.D. Ky. 2003). Because a covenant not to execute raises the specter of collusive settlements, the limitation on an insurer's liability for settlement amounts is important.

*Sharbono*, 139 Wn. App. at 401; *see also Red Oaks*, 128 Wn. App. at 322 (where settlement contains covenant not to execute, insured may be persuaded to settle for inflated amount in exchange for immunity from personal liability). On the other hand, when insurance coverage is in doubt, it is in an insured's best interest to accept a settlement offer that effectively relieves it of personal liability. *Martin*, 141 Wn. App. at 618. "An insurer that is disputing coverage cannot compel an insured to forego a settlement that is in [the insured's] best interests." *Martin*, 141 Wn. App. at 618; *see also Ayers*, 269 F. Supp. 2d at 915-16 (if insureds are offered settlement that effectively relieves them of personal liability when their insurance coverage is in doubt, it is in their best interests to accept offer).

The settlement that Berg accepted eliminated the $500,000 for which it was personally liable in the February settlement demand. In the September agreement, unlike the earlier demand, Vision, D&D, and Berg mutually released all claims against each other. And, unlike the earlier demand, Vision pledged its own assets as well as its liability insurance for all bodily injury claims and agreed to indemnify and hold Berg harmless against those claims. The settlement agreement also stated that all costs and fees incurred in pursuing the assignment against RSUI were Vision's sole responsibility, and it quantified the value of the extra contractual rights Vision would seek to enforce against RSUI. Berg's total liability exposure for both property damage and bodily injury liability increased between February and September, and Vision's litigation costs rose during the same period. Vision argues that its agreement with Berg to a higher-value settlement and less cash than it asked for earlier is contraindicative of collusion. Berg adds that the settlement was a true compromise: it was for an amount substantially less than Vision was prepared to present at

trial; it eliminated any personal exposure to Berg; and it required Vision to pledge its own assets and its insurers' assets to indemnify and hold Berg harmless for all of the personal injury claims. Philadelphia complained that Berg settled for too little, rather than too much.

As for the claim that Berg and Vision did not provide information to RSUI as the court directed, the trial court only directed the insurer to do its homework. And RSUI did not make the most of its opportunity to review the desired documents over the weekend.

4. Additional Considerations

Because settlement is encouraged, courts cannot infer bad faith, collusion, or fraud based on innuendo and speculation alone. *Martin*, 141 Wn. App. at 622-23. Factors that may show the presence of collusion include the lack of arm's length bargaining between the parties; an unrealistic damages baseline; the absence of discounting in the settlement amount; and secrecy. Stephen S. Ashley, Bad Faith Actions: Liability and Damages, § 3:39, at 3-114 —3-116 (2d ed. 1997).

Here, the evidence shows that the settlement was the result of arm's length bargaining. *See Ayers*, 269 F. Supp. 2d at 917 (evidence that settlement amount is reasonable supports finding that it was negotiated at arm's length). In the *Heights* case, Division One referred to the "protracted negotiations" as evidence that the parties did not collude in order to defraud the insurer. *Heights*, 145 Wn. App. at 707; *see also Indep. Sch. Dist. No. 197 v. Accident & Cas. Ins. of Winterthur*, 525 N.W.2d 600, 607 (Minn. Ct. App. 1995) (collusion is lack of opposition between plaintiff and insured that otherwise would assure settlement is result of hard bargaining). Berg and Vision provided ample evidence of the protracted negotiations that led to their

agreement. The potential for a $10 million judgment against Berg was not unrealistic. *See Water's Edge*, 152 Wn. App. at 589 (finding collusion in settlement amount of $8.75 million where former attorney for released party estimated its liability as no more than $500,000).

Furthermore, any apportionment of fault at trial would have bound the parties for the purposes of Thompson's bodily injury claims, and possibly other bodily injury claims as well. Vision informed the court that there were 129 potential liability claims for the workers injured when the slab collapsed. That the settlement was for $3.3 million shows that discounting occurred. Although the agreement was reached without RSUI's participation, Berg had warned the insurer that it would likely attempt to settle with Vision and assign its rights against RSUI, and RSUI had seen the original demand from Vision that contained such an assignment. Substantial evidence supports the court's finding that the settlement was not the product of fraud or collusion.

C. Vision's Damages and Liability Theory; Berg's Relative Fault

The trial court considered additional *Glover* factors in assessing the settlement's reasonableness, including the releasing person's damages, the releasing person's liability theory, and the released person's relative fault. The court described these factors as "huge" questions of fact that were hotly contested. RP (Sept. 15, 2009) at 53. RSUI contends that if they were such huge issues of fact, they could not assist in determining whether the settlement was reasonable. It points to a case where approval of a consent judgment between a plaintiff and her former attorney was reversed because the trial court failed to consider the merits of the settling parties' claims and defenses. *Green*, 148 Wn. App. at 369. The key problem in *Green*, however, was the court's

reliance on agreed findings of fact and conclusions of law entered as part of the settlement agreement. *Green*, 148 Wn. App. at 369.

Moreover, the claims and defenses at issue here were far more complicated than those in *Green*. In a case that turns on complicated issues and jury questions, a decision to settle for an amount within the range of evidence is reasonable. *Martin*, 141 Wn. App. at 621. The potential stakes for Berg were high, given the potential $10 million in damages that Vision and Thompson sought, in addition to the other personal injury claimants. A jury award cannot be predicted, and it appears that Berg considered the full range of possible verdicts in negotiating the settlement. *See Sharbono*, 139 Wn. App. at 405.

D. Expense of Continued Litigation

The court also referred to the "very high" risk and expenses of continued litigation. RP (Sept. 15, 2009) at 53. "This is very expert-intense litigation, and we had originally mapped out six weeks for it, and that, obviously, is very expensive and difficult." RP (Sept. 15, 2009) at 53-54. Vision's principal addressed this factor:

> Because our own insurance coverage is a wasting policy, the more litigation expenses that are incurred means a greater chance that additional [Vision] assets, in addition to amounts incurred for attorneys' fees, costs and expert witness fees, will be at risk (because of several bodily injury claims that have been filed and/or threatened) and we are trying to avoid that situation.

CP at 225. D&D's president was "very interested in having D&D out of this lawsuit. There is no insurance coverage of the claim made by Berg against D&D. Therefore, D&D had to hire a private lawyer . . . and has had to pay him directly from corporate funds." CP at 227. Berg's corporate counsel added that "[b]y accepting Berg's assignment of its bad faith claim against

RSUI, [Vision] is relieving Berg of the additional expense of that litigation as well as the possibility of an adverse verdict." CP at 330.

E. Berg's Ability to Pay

The trial court also addressed the released person's ability to pay: "I think the Berg declaration [from its board chairman] makes it clear that Berg has done what they could, and would certainly have no ability to pay, at least with liquid assets." RP (Sept. 15, 2009) at 54. Petrich explained that even if Berg were found only partly at fault, the company's excess exposure would bankrupt it unless there was a successful bad faith claim against RSUI. Vision's principal stated that the company's goal in settling was to collect as much money up front as possible and then seek additional money from other insurance carriers. "We knew that just going after Berg's corporate assets could force Berg to become insolvent which would not help [Vision]." CP at 224. As Vision informed the trial court, "[B]asically, Berg has no funds to pay for this, other than its insurance. And, if they go forward, they'll be gone." RP (Sept. 12, 2009) at 47. This evidence supports the court's evaluation of Berg's ability to pay a judgment against it. *See Sharbono*, 139 Wn. App. at 405-06 (record supports Sharbonos' belief that an adverse verdict in excess of their liability coverage would likely force them into bankruptcy).

RSUI argues that the assessment of Berg's assets should have included the existence of other insurance policies that might have covered Vision's claims. It cites a provision in its policy with Berg stating that "[t]his insurance is excess over any other valid and collectible insurance whether primary, excess, contingent or any other basis, except other insurance written specifically to be excess over this insurance." CP at 12,384. RSUI contends that its policy was thus in excess of Philadelphia's insurance as well as the Gemini and ICSOP policies referred to in the settlement, and that the court could not evaluate the settlement without considering how much of this

insurance was available to Berg.[2]

If Berg had lost at trial, the only collectible insurance would have come from Admiral and RSUI. It was obvious that Berg's total liability could have exceeded that coverage and all remaining assets. As for RSUI's argument that the entry of a stipulated judgment afforded a potential windfall to Vision, the operative word is "potential." Any windfall depended on Vision's success against Philadelphia and the bodily injury claimants, as well as its success against RSUI in a bad faith action, and such success was impossible to predict at the time of settlement.

F. Vision's Investigation and Preparation

Finally, the trial court referred to the extent of the releasing person's investigation and preparation of the case, which it termed "extreme." RP (Sept. 15, 2009) at 54. There is no question that both Vision's and Berg's investigation and preparation were extensive.

Washington law strongly favors settlement over litigation. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007); *Martin*, 141 Wn. App. at 622. Trial courts consider the provable liability of the released party and the liability limits of its insurance in an attempt to avoid "sweetheart deals." *Pickett*, 43 Wn. App. at 334. The trial court was aware of Berg's potential liability as well as its insurance coverage and did not abuse its discretion in concluding that the settlement was reasonable.

We now turn to RSUI's appeal of the trial court's CR 60 rulings.

## ADDITIONAL FACTS: CR 60 PROCEEDINGS

[2] RSUI's subsequent briefing on the CR 60 rulings undermines this argument, as it asserts that Admiral's tender of its $1 million limit would have triggered RSUI's excess policy.

I. Federal Litigation

Shortly after the trial court upheld the settlement in September 2008, RSUI sued Berg in federal court, seeking a declaration that its excess policy did not cover Berg's shoring-collapse-related liabilities. Vision, as Berg's assignee under the settlement agreement, then filed a bad faith action against RSUI.

The federal litigation prompted Vision to produce four e-mails that Vision and Berg had exchanged shortly before reaching final settlement. On August 25, 2008, Vision e-mailed Berg these proposed settlement terms:

> - Admiral pays $1,000,000 to Vision.
> - Vision and its carriers will provide a complete indemnity to Berg against the bodily injury claims.
> . . . .
> - There will otherwise be a complete release between Berg, D&D and Vision.
> - A stipulated judgment against Berg in the amount of $2,000,000 although we are willing to discuss some other way to access this policy that does not involve a judgment. The settlement agreement would include an assignment of coverage and extr[a][ ]contractual rights against RSUI. The remaining $1,000,000 to be paid only by RSUI, with a covenant not to execute on any assets of Berg other than the RSUI policy.

2 CP at 672-73.

On August 27, 2008, Berg sent a counteroffer to Vision and the mediator, which proposed in relevant part:

> 7. Berg will assign its rights against RSUI with the condition that there is a stipulated judgment (not filed) in the amount of $3.3 million which can only be executed and collected [against] RSUI, and further that Berg receive 33% of any recovery from RSUI for its bad faith refusal to provide coverage.

2 CP at 679. The mediator responded by expressing his appreciation for Berg's direct contact.

Vision responded with its own counteroffer on August 28, 2008, putting its changes in bold type:

> 7. Berg will assign **all its rights including its coverage and extra contractual rights** against RSUI with the condition that there is a stipulated judgment (not filed) **unless necessary** in the amount of **$5.5** million which can only be executed and collected against RSUI.

2 CP at 681.

Berg negotiator Daniel Mullin replied the same day:

> I was a little surprised by this counter. Before I forward it to my clients, I wanted to be sure this is the direction you want me to tell them it is headed. As you know, the assignment is an important issue to Berg in a number of ways. As a small business, the idea of a $5.5 million assignment is daunting and could break the deal. Berg was agreeing to the risks associated with the assignment with the understanding that they may receive 33% of any recovery against RSUI. This helped to balance their concerns. Your counter may be perceived as a step backwards, rather than forward. Please give this consideration and let me know if this is truly the counter you want me to suggest to the clients.

2 CP at 685.[3] On August 29, Vision replied that it was willing to modify paragraph 7 as follows:

> 7. Berg will assign all its rights including its coverage and extra contractual rights against RSUI with the condition that there is a stipulated judgment (not filed) unless necessary in the amount of $3.3 million which can only be executed and collected against RSUI.

2 CP at 684.

The final settlement on September 5 included this provision. None of these e-mails had been disclosed during the reasonableness proceedings, which were on appeal when Vision produced the e-mails in August 2009.

Back in federal court, and following its receipt of the e-mails in August 2009, RSUI deposed the two attorneys who had exchanged them. When asked whether he and Berg's

[3] This communication is provided to explain the negotiation sequence but is not one of the four e-mails on which RSUI based its CR 60(b) motion.

attorneys had ever discussed splitting proceeds, Vision attorney Aliment stated that while Berg wanted to pursue the claim "in some shared fashion . . . ultimately my clients decided, no, that wasn't going to happen. I think the parties had been in combat too long and too hard to suddenly proceed together, so it didn't happen." 2 CP at 715. When asked specifically about the e-mail from Berg stating that a $5.5 million assignment could break the deal and that Berg wanted to share in any recovery, Aliment replied, "[W]e were not going to get into bed on that claim with our adversary, and we said, no, it wasn't going to happen, and so the 5.5 million ultimately was negotiated down." 2 CP at 718.

When deposing Berg attorney Mullin, RSUI asked when he and Vision discussed the possibility of Berg's sharing in any recovery against RSUI. Mullin responded, "[P]robably somewhere . . . around these communications in August." 2 CP at 702. Mullin added that at the time of Vision's August 25 e-mail, the parties had yet to agree on a specific value for the extra contractual rights against RSUI:

> Like I said before, RSUI, from the mediation forward, was always on the table as an assignment of rights. As we got into August, the method by which the assignment is done and its value and everything were part of the negotiation process and developing, and the concept of the extra[ ]contractual rights were in addition to Berg's claim for coverage under the policy. It had clearly ripened . . . in our mind that there were [exponential] extra[ ]contractual rights that would have value in trying to resolve this case in Berg's favor.

2 CP at 704.

RSUI sought discovery from the Mullin Law Group as well as Vision during the federal litigation, but Mullin objected that RSUI's request was an overbroad attempt to obtain privileged documents. Ultimately, however, Mullin agreed that the court could inspect the records in

camera. Before that occurred, the federal court held that Berg was covered under the RSUI policy and that Vision could proceed to trial on some of its bad faith and Consumer Protection Act claims. The court noted that "RSUI is facing approximately $7 million in damages, plus attorney's fees." 2 CP at 397. On January 10, 2010, RSUI obtained a stay of the federal action pending the outcome of the settlement reasonableness appeal in state court.

II. CR 60(b) Motion

On April 7, 2010, RSUI moved in Pierce County Superior Court to vacate the 2008 reasonableness determination under CR 60(b)(4) and (11). RSUI contended that the August 2008 e-mails proved that Vision and Berg entered "a collusive agreement to inflate the amount [of the settlement] in order to accommodate a proposed kickback scheme hatched by Berg." 2 CP at 3. RSUI added that it had received no document showing that Vision actually rejected Berg's kickback proposal or that the parties did not enter a "side agreement" with that provision. 2 CP at 8. The disappearance of the kickback language from the e-mails implied "that Vision and Berg realized the kickback scheme was unseemly and that any further discussions should not be in writing." 2 CP at 8. RSUI accused Vision and Berg of misleading the court, making false statements to the court, and "pull[ing] the wool over [the trial court's] eyes." 2 CP at 9. RSUI argued that there was no question that Vision and Berg had engaged in clear misconduct, if not fraud.

In support of its motion, RSUI submitted a declaration from attorney David Linehan. Linehan declared, based on his personal knowledge, that the August 2008 e-mails showed that the Vision and Berg attorneys colluded in their settlement negotiations. He added that after Berg

proposed "the kickback scheme," "the subject was apparently deemed to[o] 'hot' to mention [further] in writing because it suddenly disappears from all further correspondence without comment." 2 CP at 23-24.

On April 13, RSUI attorney Helgren called Aliment to propose that RSUI and Vision settle the federal court action. Aliment expressed his disappointment in the CR 60(b) motion. Two days later, RSUI filed an amended CR 60(b) motion. Noting that the "kickback scheme" was only a proposal, RSUI reiterated that the $3.3 million settlement figure was based not on Vision's damages but on Berg's and Vision's "undisclosed agenda [that Vision and Berg used] just long enough for them to pull the wool over this Court's eyes." 2 CP at 336-37. The amended motion again accused the Berg and Vision attorneys of making false statements and misrepresentations and of repeatedly misleading the court. It added that the kickback proposal was a "red flag" about which Berg and Vision had been obliged to tell the trial court, and it referred to "substantial evidence of collusion, misrepresentation and misconduct." 2 CP at 331, 344. The amended motion again cited the unaltered Linehan declaration as support.

Vision responded to RSUI's motion and moved for CR 11 sanctions. Mullin wrote RSUI that Berg planned to join Vision in seeking sanctions and that RSUI should consider mitigating possible sanctions by withdrawing the offending papers. Berg then responded to RSUI's motion and joined Vision's motion for CR 11 sanctions; RSUI never withdrew its motion.

During the hearing on these motions, RSUI argued that although the case had been "hard fought and fully negotiated" until August 27, 2008, the ensuing e-mails showed that Berg negotiated the settlement amount upward, and Berg and Vision should have disclosed these e-

mails to RSUI and the court before the September 2008 reasonableness hearing. RP at 6, 8-12. RSUI reminded the court that Berg attorney Petrich had stated during the 2008 hearing that he had no settlement documents RSUI did not have.

RSUI maintained that Berg could have accepted Vision's August 25 offer and settled the entire case for $2 million instead of the $3.3 million it agreed to four days later. When the trial court responded that $3.3 million seemed reasonable given the amount of money at stake in the litigation and the parties' assurances that they did not collude, RSUI acknowledged that the settlement appeared objectively reasonable:

> [The settlement] came out at the 3.3 [million dollars]. So as Your Honor quite rightly noted, based on the information you had, yeah, that looks like the number roughly in the middle of what the parties' positions were. And that would obviously look reasonable if you didn't know these important details about what had actually happened to make it go from a 2 million dollar settlement to a 3.3 million dollar settlement.

RP at 22. Vision's attorney responded to RSUI's inflated settlement theory:

> Opposing counsel is simply ignoring . . . very specific language that says the settlement agreement, not the settlement, the settlement agreement would include an assignment of coverage and extra contractual rights. Whatever someone else may think, extra contractual rights refers to claims in excess of policy limits. The 2 million was only policy limits.

RP at 26-27. Mullin added that "[t]o stand here and say that on August 27th we could have simply accepted that offer is absurd." RP at 35. Petrich agreed: "That was just the tip of the iceberg. There [were] other parts to the settlement that had to be negotiated." RP at 56.

The trial court denied RSUI's amended CR 60(b) motion, explaining, "I don't think there was anything improper that was done in September of 2008, and I don't think any of the new information changes my mind about that." RP at 30. After argument on the CR 11 motion, the

court found RSUI's statements sanctionable. Vision subsequently requested fees and costs of $130,085 and Berg requested fees and costs of $52,000. The trial court entered findings of fact and conclusions of law to support an award of $44,250 to Vision and $18,500 to Berg.

ANALYSIS: CR 60 PROCEEDINGS

I. Standard of Review

We review a trial court's decision on a CR 60(b) motion for abuse of discretion. *Mitchell v. Wash. St. Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). RSUI sought relief under CR 60(b)(4) and (11). These provisions allow a court to relieve a party from a final order or judgment because of fraud, misrepresentation, or other misconduct of an adverse party, and for any other reason justifying relief from the judgment. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 307, 863 P.2d 1377 (1993); CR 60(b)(4), (11). The moving party must prove the misconduct by clear and convincing evidence. *Mitchell*, 153 Wn. App. at 825.

II. Relief Under CR 60(b)(4)

RSUI argues that the trial court erred in considering the effect of the August 2008 e-mails on its reasonableness determination and in denying relief under CR 60(b)(4) after deciding that the new information would not have changed that determination. According to RSUI, the fact that misconduct occurred is sufficient to warrant relief; the effect of that misconduct is irrelevant. As support, it cites cases holding that a new trial based on the prevailing party's misconduct does not require the moving party to show that the new evidence would have materially affected the first trial's outcome. *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004) (citing *Taylor v.*

*Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985)). In so holding, the *Taylor* court cited a federal case explaining that "a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'" *Taylor*, 39 Wn. App. at 836-37 (quoting *Seaboldt v. Penn. R.R.*, 290 F.2d 296, 300 (3d Cir. 1961) (internal citation omitted)).

But these cases were concerned with the speculative impact of new evidence on a jury verdict. Such concern is not present here because the trial court did not need to speculate about the impact of the August 2008 e-mails on its own reasonableness determination. Moreover, RSUI repeatedly invited the court to consider the impact of the e-mails on its earlier decision. RSUI's amended motion asserted that the September 15 reasonableness order was infected by fraud, misrepresentation, or other misconduct, that the Vision and Berg misstatements about settlement negotiations "presumably affected this Court's rulings on reasonableness and RSUI's discovery requests," and that "there can be no dispute that Berg and Vision's misrepresentations affected this Court's reasonableness determination." 2 CP at 331, 337, 340. At the CR 60(b) hearing, RSUI stated that the August e-mails raised a question about whether the settlement should be approved. Consequently, we reject its argument that the trial court improperly considered whether the e-mails undermined its reasonableness determination. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (to justify relief under CR 60(b)(4), fraudulent conduct must cause entry of judgment); 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 60 at 554 (5th ed. 2006) (fraud or misconduct that is harmless will not support motion to vacate).

RSUI contends that Berg and Vision committed fraud by withholding material evidence

from an adverse party and the court and by representing in open court that they had provided all material evidence to RSUI. To support this claim, RSUI cites case law emphasizing the importance of full discovery. *See In re Marriage of Maddix*, 41 Wn. App. 248, 249-52, 703 P.2d 1062 (1985) (CR 60(b)(4) could authorize trial court to set aside dissolution decree where husband failed to disclose value of business). And, despite its argument that the fact of misconduct and not its possible effect is dispositive, RSUI addresses cases that have considered the type of collusion that undermines the reasonableness of a settlement.

As stated, one factor to consider in assessing reasonableness is whether there is any evidence of bad faith, collusion, or fraud. *Chaussee*, 60 Wn. App. at 512. RSUI cites a federal court's list of collusion indicators:

> Among the indicators of bad faith and collusion are unreasonableness, misrepresentation, concealment, secretiveness, lack of serious negotiations on damages, attempts to affect the insurance coverage, profit to the insured, and attempts to harm the interest of the insurer. They have in common unfairness to the insurer, which is probably the bottom line in cases in which collusion is found.

*Cont'l Cas. Co. v. Westerfield*, 961 F. Supp. 1502, 1505 (D. New Mexico, 1997) (quoting Stephen R. Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L. J. 705, 727-28 (1994)), *affirmed*, 4 Fed. Appx. 703 (10th Cir. 2001). Although we have already addressed collusion in upholding the settlement, we re-examine this issue in light of RSUI's CR 60(b) arguments and evidence.

A. Unreasonableness

Although RSUI argues that any settlement that exceeded policy limits is unreasonable, Washington cases have upheld settlement agreements that include the value of an insured's extra contractual claims against an insurer. Indeed, Division One of this court recently described such

agreements as part of a "pattern frequently seen in litigation over bad faith by an insurance company." *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 919, 250 P.3d 121 (2011).

> A defendant is sued and seeks coverage. The defendant's insurer refuses to defend. The defendant enters into a settlement agreement with the plaintiff. The defendant stipulates to entry of a judgment and assigns to the plaintiff any claims against the insurer in exchange for the plaintiff's promise not to execute the judgment against the defendant. This is called a covenant judgment. The plaintiff, now standing in the defendant's shoes, sues the insurer for bad faith and related claims, seeking to recover the agreed settlement amount. If the insurer is liable for bad faith and the covenant judgment is reasonable, the presumptive measure of damages is the amount in the covenant judgment.

*Unigard Ins. Co.*, 160 Wn. App. at 919 (citations omitted); *see also Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 759, 154 P.3d 950 (2007) (insured's assignment of bad faith claims allows claimant to seek more than policy limits) (citing *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 49 P.3d 887 (2002)).

In defending the reasonableness of the covenant judgment here, Vision argues that Berg successfully negotiated the noncoverage part of the settlement package down, rather than up. When Berg proposed on August 27 that it would retain a one-third interest in extra contractual claims, and Vision insisted on a full assignment instead, Berg bargained that part of the settlement package down to $1.3 million. The trial court rejected RSUI's interpretation of these negotiations: "I'm still having a hard time seeing how there's collusion in any way, shape or form. It makes sense to me in terms of how it all got resolved." RP at 23.

B. Misrepresentation

RSUI's misrepresentation claim focuses on Berg's assurances to the court in September

2008 that it had provided RSUI with all relevant information concerning the settlement negotiations despite its failure to produce the August 2008 e-mails. RSUI acknowledged during the CR 60(b) hearing that it was not arguing that parties had to produce every settlement communication to establish reasonableness, but it insists that the August 2008 e-mails were material to that determination and should have been disclosed.

Vision and Berg respond that the August 2008 e-mails were not material and dispute RSUI's assertion that the sharing proposal was a "red flag" warranting careful consideration. *See Chomat v. N. Ins. Co.*, 919 So. 2d 535, 538 (Fla. App. Ct. 2006) (settlement may be collusive when it contains agreements between the insured and a claimant to share the claimant's recovery from the insurer). Vision and Berg argue that Washington courts have supported such sharing agreements. *See Howard*, 121 Wn. App. 372 (settlement was reasonable where plaintiff could receive 60 percent of any recovery); *but see Water's Edge*, 152 Wn. App. at 595 (trial court critical of settlement agreement to "kick back" proceeds of recovery from insurers to insureds that showed realignment of parties and joint venture).

The attorney for Vision's liability carriers maintained that such sharing proposals are not uncommon and can be legitimate:

> Settling parties often propose such relief in one form or another, and as long as it is for a reasonable exchange of consideration, and is disclosed to the court at any reasonableness hearing, I do not consider such a term problematic or inherently wrong. In any case, here, it was specifically rejected by my clients and Mr. Aliment, as reflected in Mr. Aliment's August 28, 2008 e-mail.

2 CP at 561. Similarly, Vision attorney Aliment observed that "[t]he fact that Mr. Mullin had proposed a sharing agreement was not something I considered inherently wrong, since Berg had

exposure to substantial damages and, had the sharing proposal been agreed to, we would have made it a part of the settlement agreement whose terms were subject to this court's approval." 2 CP at 382. Moreover, the mediator thanked Berg for directly communicating the sharing proposal without commenting otherwise.

Vision and Berg also assert that they were not required to disclose all rejected proposals to either RSUI or the court. They argue that they did not preclude RSUI from discovering the August e-mails and that RSUI did not make a reasonable effort to do so before the reasonableness hearing. Mullin told the trial court at the 2008 hearing that he had nothing to provide RSUI that would show collusion or fraud, and Vision and Berg now insist that because the August 2008 e-mails did not show collusion, it was not misconduct to fail to produce them. At the CR 60(b) hearing, Petrich stood by his 2008 assertion to the court that his settlement file did not contain anything RSUI did not have. We see no abuse of discretion in the trial court's determination that the August 2008 e-mails were a means to an end and not material in light of the final settlement terms.

C. Concealment

One of RSUI's concealment arguments focuses not on the final e-mails but on the fact that Berg never told RSUI that Admiral had tendered its limit of $1 million, which would have triggered RSUI's excess policy. But RSUI's position as of April 2007 was that its policy did not provide coverage, regardless of Admiral's actions. As Mullin stated in his deposition, "RSUI denied coverage. They had cut ties with Berg and le[f]t Berg to float alone in the litigation with Admiral." 2 CP at 137. RSUI again complains that Berg did not advise it of ongoing settlement

negotiations. We have addressed this claim.

RSUI also complains about Berg's resistance to discovery in federal court and to the allegedly vague deposition responses the Vision and Berg attorneys gave to questions about the kickback proposal. Berg responds that it sought to protect only privileged records that had nothing to do with the settlement negotiations and that RSUI obtained a stay of the proceedings that would have resolved the discovery dispute. Berg's response finds support in the fact that RSUI does not claim that Vision produced fewer than all of its settlement communications with Berg; the privilege log produced in federal court shows that none of the undisclosed documents concern communications with Aliment, who negotiated the settlement for Vision. Berg and Vision also point out that RSUI never objected to the deposition responses it now criticizes and that RSUI never requested clarification.

D. Lack of Serious Negotiations on Damages

RSUI's contention that the August e-mails show a lack of serious negotiations on damages again points to Berg's alleged failure to negotiate down rather than up. More specifically, RSUI contends that none of the August e-mail exchange was based on the actual damages Vision could obtain from Berg at trial. Vision's attorney argued below that RSUI was wrong in contending that the value of the extra contractual claims was not driven by the potential for $10 million in damages awards. He explained:

> Extra contractual rights against a liability insurer arise in contract and in tort when the liability insurer denies coverage and forces its insureds into a settlement position. And that settlement is driven exactly by, at least initially, the damages against them.
>
> So the argument that . . . somehow the extra contractual rights aren't connected to the value of the underlying claims, is just wrong.

RP at 30. As Aliment explained in his deposition, Berg felt that RSUI had abandoned it and exposed it to damages far in excess of the Admiral policy. Aliment also stated that his request of a $5.5 million judgment on August 28 was based on Vision's damages.

Moreover, the e-mails reflected only a portion of the settlement negotiations that involved several parties. The final agreement required 10 different signatures. As Mullin stated in a declaration, "if we were going to enter into a collusive and fraudulent settlement, it would have to involve an army of people." 2 CP at 649.

The negotiations did not cease with Vision's August 29 e-mail; the parties continued to dispute the wording of the settlement until September 9. Contrary to RSUI's assertions, this is not a case where the parties abruptly shifted from litigation to collaboration. *See Water's Edge*, 152 Wn. App. at 595 (trial court troubled by joint effort to create, in nonadversarial atmosphere, a resolution beneficial to both parties and highly prejudicial to the insurer). Nor is this a case where the settlement figure was set by one party and never negotiated. *See Spence-Parker v. Maryland Ins. Grp.*, 937 F. Supp. 551, 562 (E.D. Va. 1996) (parties' failure to inform trial court that settlement was not product of arm's-length negotiation amounted to material false representation). The record amply reflects the trial court's observation that the settlement was hotly contested.

E. Profit to the Insured/Harm to the Insurer

RSUI addresses this factor by again pointing to Berg's sharing proposal. But when the parties finally reached an agreement, Berg profited only to the extent that it settled with Vision.[4]

[4] Berg did receive $50,000 as compensation for damaged scaffolding.

RSUI also contends that the entire course of negotiation was intended to harm its interests. While it is no secret that Berg was unhappy with RSUI, the record supports that Berg's and Vision's negotiations were intended primarily to preserve Berg's financial solvency and to enable Vision to recover its damages.

RSUI also contends that the trial court abused its discretion in considering the CR 60(b) motion's timing as suspicious. RSUI points out that unlike motions to vacate under CR 60(b)(1)-(3), motions to vacate under CR 60(b)(4) and (11) are not governed by a one-year time limit. 4 K. Tegland, *supra*, at 559-60. During the hearing, the trial court asked RSUI to explain the timing of its motion, finding it interesting that the CR 60(b) motion was filed shortly before RSUI attempted to negotiate the federal lawsuit. But the trial court did not base its decision on RSUI's timing, and its inquiry does not demonstrate an abuse of discretion.

In summary, we conclude that the trial court did not abuse its discretion in denying RSUI's motion to vacate under CR 60(b)(4). Pursuant to RSUI's invitation, the trial court appropriately considered the impact of the August 2008 e-mails on its reasonableness determination and concluded that they were not material to that determination. The court also concluded that Vision and Berg did nothing improper in September 2008 by failing to disclose the e-mails to RSUI or the court. In reaching this conclusion, the trial court necessarily relied on the Vision and Berg attorneys' explanations of how the August and September negotiations unfolded. As officers of the court, the attorneys were ethically required to be completely candid with the court in explaining these negotiations. Moreover, the record supports that the claimed inflated settlement was actually the addition of the value of the extra contractual damages for which RSUI

could be liable. Because the record provides no clear and convincing evidence of misconduct in the pre-settlement negotiations or post-settlement conduct, the trial court did not abuse its discretion in denying relief under CR 60(b)(4).

III. Relief Under CR 60(b)(11)

RSUI claims that the trial court abused its discretion in failing to determine whether it was entitled to relief under CR 60(b)(11), which allows a court to vacate for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(11) applies only to extraordinary circumstances not otherwise covered by the rule. *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003). Such circumstances should relate to irregularities extraneous to the court's action or questions concerning the regularity of the court's proceedings. *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).

RSUI argues that CR 60(b)(11) is properly invoked when a party's failure to respond to an opponent's request for information prevents the opponent from fully presenting its position. As support, it cites *Suburban Janitorial Services*, 72 Wn. App. 302, where the trial court vacated a default judgment after discovering that appellant's attorney had failed to respond to inquiries about the status of the lawsuit. Division One affirmed, holding that even if the failure to respond was not misrepresentation under CR 60(b)(4), it was a persuasive "other reason" that justified relief under CR 60(b)(11). *Suburban Janitorial Servs.*, 72 Wn. App. at 311. The facts here, however, did not involve extraordinary circumstances not otherwise addressed under CR 60(b)(4), and the trial court did not abuse its discretion in failing to separately discuss the potential for relief under CR 60(b)(11).

## IV. CR 11 Sanctions

### A. Standard of Review

CR 11 permits a trial court to impose sanctions upon finding that a claim was filed for an improper purpose or that it is not grounded in law or fact and the attorney or party failed to conduct a reasonable inquiry into the law or facts. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994); *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 191, 244 P.3d 447 (2010). We review a trial court's imposition of CR 11 sanctions for abuse of discretion. *Biggs*, 124 Wn.2d at 197.

### B. Findings of Fact

The trial court entered seven findings of fact and conclusions of law to support its CR 11 sanctions. RSUI formally assigns error to findings 2, 3, 5, and 7, but it also challenges finding 1 in the body of its brief. *See* RAP 10.3(g) (separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number). We review findings of fact for substantial evidence. *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The challenged findings follow:

> 1. On April 8, 2010, "RSUI's CR 60(b) Motion for Relief from Reasonableness Order" was filed in Court. The motion sought relief under CR 60(b)(4) Relief from Judgment or Order for "fraud, misrepresentation, or other misconduct of an adverse party." In the pleadings, RSUI alleged that [Berg] and [Vision] using "improper means" entered into a settlement figure and obtained a reasonableness finding from this court." . . . Repeatedly, RSUI referred to Berg and Vision's "collusion and kickback scheme."
> 2. On April 8, 2010, David Linehan signed and filed a declaration asserting that he had personal knowledge that the documents showed "collusion in their negotiation of the settlement."
> 3. These specific phrases "improper means" and "collusion" and "kickback scheme" were baseless and without merit in that they were not "well grounded in fact" and not based on an actual inquiry that was reasonable under the

> circumstances.
> . . .
> 5. The timing of the pleadings is suspicious. The depositions for the federal lawsuit were taken of some of the principals, including: Jerry Edmonds on August 19, 2009, Randy Aliment [on] August 19, 2009; Peter Petrich on August 12, 2009, and Daniel Mullin on August 18, 2009. The one year time limitation for a motion to consider new evidence did not run until September 15, 2009. RSUI had a full month after these depositions to file a motion before this trial department without the necessity of accusing opposing counsel of fraud and misrepresentation. They chose not to do so.
> . . .
> 7. On April 13, 2010, Mr. Helgren telephoned Mr. Aliment and inquired about settlement of the federal litigation. During the call, Mr. Aliment expressed his concern about the CR 60(b) motion and the accusations therein. Two days later an amended CR 60(b) motion was filed, but the previous pleadings were not retracted or withdrawn.

CP at 13,371-72.

RSUI initially challenges findings 1 and 3 and their assertions that the phrases "improper means," "collusion," and "kickback scheme" were not well grounded in fact. This challenge implicates finding 3 only; finding 1 simply quotes RSUI's motion. RSUI maintains that *Water's Edge* used the phrase "kickback" under similar circumstances. In *Water's Edge*, 152 Wn. App. at 595, the insureds' right to recover their settlement contribution if the plaintiffs prevailed in the bad faith case was an agreement to "kick back" some of the proceeds. Although RSUI added a pejorative spin by describing the kickback proposal as a "scheme," its use of the term "kick back" was arguably accurate. We agree with the trial court, however, that the phrases "improper means" and "collusion" are not well grounded in fact.

RSUI also challenges the statement in finding 2 that Linehan "signed and filed a declaration asserting that he had personal knowledge that the documents showed 'collusion in their negotiation of the settlement.'" CP at 13,371. RSUI argues that the collusion to which

Linehan referred was the failure to disclose the 2008 e-mails to the trial court, but his declaration expressly describes the e-mails as "showing collusion in their negotiation of the settlement." 2 CP at 23. The record supports this finding.

RSUI disputes the statement in finding 3 that its CR 60(b) motion was not based on actual inquiry that was reasonable under the circumstances. RSUI again complains of its inability to obtain all relevant documents from Mullin in federal court and to the vague and equivocal deposition testimony that Mullin and Aliment offered when asked about Berg's sharing proposal. As we stated earlier, RSUI had a full opportunity to question Mullin and Aliment during their depositions, and Berg disclosed all of its settlement negotiations with Vision. Furthermore, RSUI requested the stay that has delayed resolution of the discovery dispute. The record supports finding 3.

RSUI also complains of the trial court's reference to its motion's "suspicious timing" in finding 5, despite the court's refusal to conclude that the CR 60(b) motion was filed for an improper purpose. The trial court concluded that, although the motion might have been filed for an improper purpose, i.e., to influence Vision to settle the case, it could not make that determination without further investigation. Consequently, the reference to RSUI's "suspicious timing" is irrelevant.

Finally, RSUI challenges finding 7 and the trial court's statement that after RSUI filed an amended CR 60(b) motion, the previous motion was not retracted or withdrawn. RSUI contends that when it filed its amended motion, the original motion was effectively withdrawn. As support, it cites *Herr v. Herr*, 35 Wn.2d 164, 166, 211 P.2d 710 (1949), which holds that an amendment

to a complaint that is complete in itself and does not refer to or adopt the prior pleading supersedes the prior pleading, whereupon the original pleading ceases to be part of the record. Berg and Vision respond that a motion is not a pleading and that the rule in *Herr* does not apply to a CR 60(b) motion. They also point out that the amended motion did little to soften the original motion's accusations of wrongdoing and that the supporting Linehan declaration, which accused the parties of colluding during settlement negotiations, remained unaltered. Even as amended, the trial court concluded that "[t]he allegations were serious and would constitute serious professional misconduct and likely result in discipline." CP at 13,372. As the trial court found, the amended motion did not effectively withdraw the original motion.

The trial court's findings support its conclusion that RSUI's CR 60(b) motion was baseless and advanced without an inquiry that was reasonable under the circumstances. The trial court did not abuse its discretion in imposing CR 11 sanctions.

C. The Sanctions Awarded

A violation of CR 11 is complete upon the filing of the offending paper; an amendment of the paper does not expunge the violation. *Biggs*, 124 Wn.2d at 199-200. Any corrective action should be used, however, to mitigate the amount of the sanction imposed. *Biggs*, 124 Wn.2d at 200. RSUI argues that any sanction imposed for the original motion must be limited to the seven days before the amended motion was filed, with any other sanction based on the amended motion and the Linehan declaration. RSUI also argues that the fees awarded were excessive because Vision and Berg failed to identify what fees were incurred in responding specifically to the allegedly improper allegations and because the trial court failed to limit a sanction to those fees.

*See Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 177, 68 P.3d 1093 (2003) (after determining that sanctions are appropriate, trial court must limit attorney fees to the amount reasonably expended in response to the sanctionable claims).

RSUI's reliance on *Biggs* presumes that the amended motion cured the ills of the original motion, a presumption the record does not support. As the trial court concluded, "The accused attorneys were compelled to vigorously defend against [RSUI's] allegations." CP at 13,372. Vision and Berg filed lengthy memoranda detailing the time and effort expended in responding to RSUI's CR 60(b) motions. The trial court awarded approximately one third of the fees requested and supported its award with this conclusion of law:

> 7. RSUI shall pay the following in attorneys fees which are reasonably attributable to the specific sanctionable filings:
>
> Berg's fees: There was a need for Berg to file a separate brief because two of Berg's attorneys were being personally accused of misconduct; they had the right and the duty to respond separately from Vision One. However, a lodestar analysis is not appropriate. A reasonable amount of fees for all attorneys representing Berg is 100 hours at $185/hour or $18,500.
>
> Vision One's fees: The Court finds 150 hours as being a reasonable amount of hours to spend defending against the allegations of misconduct. There is evidence in the billings of numerous conferences[,] discussions and excessive times spent on some of the pleadings, i.e. RAP 7.2(e) briefing.
>
> An hourly rate of $295 is reasonable. Therefore $44,250 is reasonable.

CP at 13,372. The trial court retains broad discretion to tailor an appropriate sanction under CR 11. *Miller v. Badgley*, 51 Wn. App. 285, 303, 753 P.2d 530 (1988). Here, the trial court limited attorney fees to amounts reasonably expended in responding to RSUI's CR 60(b) motions, and its sanction awards do not demonstrate an abuse of discretion.

## V. Attorney Fees on Appeal

Berg requests fees on appeal under RAP 18.1 and 18.9. RAP 18.9 is the appellate equivalent of CR 11 and provides for sanctions if there is evidence that the appellant used the rules of appellate procedure for delay or to file a frivolous appeal. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384-85, 46 P.3d 789 (2002). An appeal is frivolous if it is so devoid of merit that there is no reasonable possibility of reversal. *In re Marriage of Meredith*, 148 Wn. App. 887, 906, 201 P.3d 1056, *review denied*, 167 Wn.2d 1002 (2009). RSUI's appeal is not so devoid of merit as to warrant fees under RAP 18.9.

A party is entitled to attorney fees on appeal under RAP 18.1 if a contract, statute, or recognized ground in equity permits recovery of attorney fees at trial and the party is the substantially prevailing party on appeal. *Eller*, 159 Wn. App. at 194-95. In *Eller*, 159 Wn. App. at 194-95, CR 11 constituted a "recognized ground in equity" and authorized an award of attorney fees to a party that responded to a frivolous cross-appeal. Because RSUI's appeal is not frivolous, Berg is not entitled to fees under RAP 18.1.

This analysis also prevents Vision from receiving fees under RAP 18.1 for defending the CR 11 sanctions on appeal. Vision makes the additional argument that it is entitled to fees under RAP 18.1 for defending the CR 60(b) order as part of its coverage-related litigation. *See Estate of Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 508, 844 P.2d 403 (1993) (insured's assignee entitled to attorney fees on appeal if it prevails in coverage action). The action below was not coverage related, however, and Vision is not entitled to relief on this basis.

We affirm each of the challenged rulings and deny Berg and Vision attorney fees on

appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.