No. 86109-9

WIGGINS, J. (dissenting)—Farmers Insurance Exchange challenges the reasonableness hearing procedure in the covenant judgment between its insured, Best Plumbing Group LLC, and the party injured by Best Plumbing, James Bird. Because the stipulated damages, if they are reasonable, will become the presumptive measure of damages in a subsequent bad faith claim, Farmers argues that it has been deprived of the right to a jury determination of damages.

I cannot join the majority's holding that article I, section 21 of the Washington Constitution does not entitle an insurer to have that reasonableness determined by a jury in an action for the insurer's bad faith. Majority at 2. We have held that there is no right to have a jury determine reasonableness in the context of contribution among joint tortfeasors. An action for contribution is an equitable determination and the constitution does not guarantee jury trials in equity. But an action for insurance bad faith is a legal action to which our constitution unequivocally guarantees a right to trial by jury. I dissent from the majority's violation of this cherished right.

A. The Reason for Reasonableness Hearings

The reasonableness hearing was developed as part of the tort reform efforts of the 1970s and 1980s in Washington. Prior to 1973, the doctrine of contributory negligence barred an injured party from tort recovery if his or her own negligence contributed to the injury. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d

230, 236, 588 P.2d 1308 (1978), *superseded by statute on other grounds as stated in Kottler v. State*, 136 Wn.2d 437, 443, 963 P.2d 834 (1998). But if the injured person was not guilty of contributory negligence, any indivisible injury caused jointly by more than one tortfeasor created joint and several liability: each joint or concurrent tortfeasor was liable for the entire harm. *Id.* This joint and several liability meant that a fault free injured party could seek full recovery from one or all of multiple tortfeasors. *Id.* And if the injured person collected all of the damages from one of several tortfeasors, that hapless tortfeasor could not sue the other tortfeasors for contribution of their fair share of the damages. *Wenatchee Wenoka Growers Ass'n (Wenatchee) v. Krack Corp.*, 89 Wn.2d 847, 849-50, 576 P.2d 388 (1978).

In 1973, the legislature replaced common law contributory negligence with statutory comparative negligence. Laws of 1973, ch. 138, § 1; *Wenatchee*, 89 Wn.2d at 849. Under comparative negligence, an injured party's negligence is not a complete bar to recovery, but diminishes recovery in proportion to the percentage of negligence attributed to the injured party. *Seattle First*, 91 Wn.2d at 236. *Godfrey v. State*, 84 Wn.2d 959, 965, 530 P.2d 630 (1975). Joint and concurrent tortfeasors remained jointly and severally liable, *Seattle First*, 91 Wn.2d at 237, and contribution among tortfeasors remained unavailable, *Wenatchee*, 89 Wn.2d at 844.

In 1981, the legislature created the right of contribution among jointly and severally liable tortfeasors. Laws of 1981, ch. 27, §§ 11, 12. The right of contribution promotes equitable distribution of the responsibility to pay among these tortfeasors.

Wenatchee, 89 Wn.2d at 850. But the right of contribution also requires consideration of the effect of separate settlement with individual defendants. The legislature addressed this issue with the reasonableness hearing procedure. Laws of 1981, ch. 27, § 14.

The reasonableness hearing procedure both promoted settlements and protected the nonsettling defendants. Senate Journal, 47th Leg., Reg. Sess. at 636-37 (Wash. 1981). The procedures promoted settlements by releasing the individually settling defendant from any additional liability. Laws of 1981, ch. 27, § 14. The procedures protected nonsettling defendants from a greater-than-equitable share of liability by reducing the plaintiff's recovery by the amount of a reasonable settlement. *Id.* The reasonableness of the settlement would be determined by the courts in a reasonableness hearing. *Id.* The procedures also protected nonsettling defendants from collusion between plaintiffs and settling defendants by providing nonsettling defendants with notice of the terms of the settlement and an opportunity to be heard at the reasonableness hearing. *Id.*

In this equitable context of contribution among joint tortfeasors, the trial court made the reasonableness determination and the parties had no right to a jury for the reasonableness hearing. RCW 4.22.060(1); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990). In *Schmidt*, the plaintiffs settled with one defendant for $50,000, but after a reasonableness hearing under RCW 4.22.060, the trial court found that the reasonable settlement amount was $150,000. *Id.* at 156.

After a jury trial against the remaining defendants, the trial court reduced the total damage award by the $150,000 reasonableness figure. Because the $150,000 reasonableness figure was determined by the trial court, not the jury, the Schmidts argued on appeal that RCW 4.22.060 deprived them of their constitutional right to a jury trial. *Id.* at 159. We held that that the jury trial right does not extend to procedures in equity, like the reasonableness determination under RCW 4.22.060. *Id.* at 161.

In 1986, the legislature rendered reasonableness determinations largely unnecessary when it significantly limited joint and several liability, providing that the trier of fact, the jury (or the judge in cases tried without a jury) would determine the percentage of fault attributable to every entity responsible for the injured party's damages.[1] Laws of 1986, ch. 305, § 401. The jury now assigns fault to each person or entity who caused the harm to the plaintiff, and if the jury finds that the injured party was partly at fault, the court enters judgment against each nonsettling defendant according to that defendant's proportionate share of the fault. RCW 4.22.070. If the injured party is fault-free, the court enters judgment jointly and severally against all nonsettling defendants for the total of their respective proportionate shares of fault. *Id.* As a result, the reasonable value of a prior settlement is no longer deducted from the ultimate judgment because the proportionate share of damages assigned to the settling

[1] The reasonableness determination under RCW 4.22.060 retains its original relevance in terms of contribution between joint tortfeasors under the exceptions listed in RCW 4.22.070(3), where true joint and several liability applies. These exceptions apply only in very specific causes of action: (a) hazardous wastes or substances or solid waste disposal sites; (b) tortious interference with contracts or business relations; and (c) manufacture or marketing of fungible products in generic form. RCW 4.22.070(3)(a)-(b). None of these is relevant here.

defendant is no longer included in the judgment. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294-95, 840 P.2d 860 (1992).

B. Reasonableness Hearings and Covenant Judgments

Although the 1986 tort reforms rendered reasonableness hearings largely irrelevant for contribution among joint tortfeasors, we have applied reasonableness determinations to covenant judgments. As explained by the majority, a covenant judgment results when an insured defendant settles with the injured plaintiff and assigns its bad claim against the insurer in return for the plaintiff's covenant not to execute against the insured. *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002).

In an insurance bad faith action, an insurer who acts in bad faith can be liable for the entire amount of a judgment entered against its insured even though that judgment exceeds policy limits. *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 627-28, 245 P.2d 470 (1952). Even if no judgment is entered, we have held that an insured can recover based on settlement of a claim that the insurer refused in bad faith to settle, as long as the claim was settled in good faith and the settlement was reasonable. *Id.* at 628. We have explained under *Evans*, that the insured may recover the full amount of a reasonable settlement even if that amount exceeds policy limits. *Murray v. Aetna Cas. & Sur. Co.*, 61 Wn.2d 618, 620-21, 379 P.2d 731 (1963).

The Court of Appeals adapted the statutory reasonableness determination to evaluating covenant judgment settlements in *Chaussee v. Maryland Casualty Co.*, 60

Wn. App. 504, 509-10, 803 P.2d 1339, 812 P.2d 487 (1991). Before *Chaussee*, no Washington court had defined what constitutes a reasonable settlement in the insurance bad faith setting. *Id.* at 510. The *Chaussee* court adopted the factors set out by this court in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), for a reasonableness hearing under RCW 4.22.060.[2] These factors would protect the insurer from fraud and collusion between the insured defendant and injured plaintiff in the covenant judgment context just as they protected nonsettling, joint-tortfeasor defendants in the contribution context. *Id.* And just as in the contribution context, the reasonableness determination in the covenant judgment context would be made by the court. *Id.*

We expanded on the *Chaussee* court's adoption of the reasonableness factors from the contribution context in *Besel* and its progeny. *Besel*, 146 Wn.2d 730; *see, e.g.*, *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007). We not only endorsed the RCW 4.22.060 reasonableness hearing as the vehicle for judicial determination of reasonableness in the covenant judgment context, we went a step further: we held that the amount of the settlement between injured plaintiff and insured defendant, judicially determined to have been reasonable, was the presumptive measure of damages in the subsequent bad faith action. *Besel*,

[2] The reasonableness factors adopted in *Chaussee* are (1) the 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. 60 Wn. App. at 512.

146 Wn.2d at 738-39. This presumption may be rebutted only by a showing of fraud or collusion. *See, e.g.*, *Mut. of Enumclaw*, 161 Wn.2d at 925. Aside from the inherent difficulty in proving fraud or collusion, fraud and collusion are already included in the factors the trial court considers in making the reasonableness determination. *Besel*, 146 Wn.2d at 738.

These considerations render the presumption of reasonableness practically irrebuttable. As a result, the insurer like Farmers, who was not a party to the settlement and whose conduct did not cause the injuries on which the settlement is based, is bound by an irrebuttable presumption of damages based on a trial court's reasonableness determination. This type of irrebuttable presumption of damages effectively takes the determination of damages in a bad faith claim out of the hands of the jury. And determining the amount of damages is an important constitutional role for the jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 646, 771 P.2d 711, 780 P.2d 260 (1989).

C. The Constitutional Right to a Jury Determination of Damages

We have not previously considered whether an insurer has a right to a jury determination of the reasonableness of a covenant judgment, neither in *Besel* nor its progeny. Our focus in *Besel* was whether damages in the bad faith action after a covenant judgment could exceed policy limits and whether a victim's covenant not to execute on the judgment against the insured defendant precluded a finding of harm in a subsequent bad faith claim against the insurer. 146 Wn.2d at 735-36. Nor were we

asked in later cases to address the constitutionality of this use of the reasonableness determination.[3]

In *Schmidt*, we considered the constitutionality of the reasonableness determination under RCW 4.22.060, which, as discussed above, is an equitable determination of the right to contribution among joint tortfeasors.[4] By contrast, when the reasonableness determination is applied to a covenant judgment, it becomes an all but irrebuttable measure of damages in an insurance bad faith action.

Turning then to the Washington Constitution, article I, section 21 provides that "[t]he right of trial by jury shall remain inviolate." This provision is the sole protection of the right to a jury trial in a civil case in Washington. *See Sofie*, 112 Wn.2d at 644 (noting that the Seventh Amendment to the United States Constitution does not apply to the states).

We have held unequivocally that article I, section 21 protects the jury's role of determining damages when we examined another aspect of the 1986 tort reform legislation: a cap on noneconomic damages. *Id*. at 648. In *Sofie*, plaintiffs argued that RCW 4.56.250 violated their constitutional right to jury trial by requiring that the jury's

[3] *See Mut. of Enumclaw*, 161 Wn.2d 903 (defining the duty of good faith where an insurer defends its insured under a reservation of rights; holding that the same criteria for reasonableness of the covenant judgment and presumptive measure of damages apply in a subsequent bad faith action); *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) (holding that affirmative defenses rejected in the underlying liability case could not be relitigated in a subsequent coverage action).

[4] Although *Schmidt* was decided in 1990, the underlying lawsuit was brought in 1985. 115 Wn.2d at 155-56. The 1986 tort reform amendments applied to actions filed on or after August 1, 1986. Laws of 1986, ch. 305, § 910. Thus, *Schmidt* was decided under the 1981 rules for joint and severable liability.

determination of noneconomic damages of $1,345,883.00 be reduced to $316,377.45. *Sofie*, 112 Wn.2d at 638, 640. In interpreting article I, section 21, we looked to the right as it existed at the time of the constitution's adoption in 1889 to determine both the scope of the right and the causes of action to which it applies. *Id.* at 645. We found clear evidence that the jury's fact-finding function included the determination of damages. *Id.* at 645-46 (citing, e.g., *Baker v. Prewitt*, 3 Wash. Terr. 595, 19 P. 149 (1888); *Dacres v. Oregon Ry. & Nav. Co.*, 1 Wash. 525, 20 P. 601 (1889)). This evidence led us to conclude that article I, section 21 guarantees that the jury determines damages. *Id.* at 646.

In evaluating the causes of action to which this right applies, we rejected the argument that the right to jury trial protected only those theories of recovery that were accepted in 1889. *Id.* at 648-49. Such an analysis, being frozen in time, would make little sense because it would diminish the right to a jury over time. *Id.* Rather, a more flexible historical approach better achieves the intent of the framers. *Id.* at 649. Ultimately, we were guided by the plain language of article I, section 21: "The right of trial by jury shall remain inviolate." *Id.* at 656. We held:

> Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties. In Washington, those guaranties include allowing the jury to determine the amount of damages in a civil case.

Id.

This sweeping language compels the conclusion that the right to jury

determination of damages that we recognized in *Sofie* applies in this case as well. The nearly irrebuttable presumptive measure of damages removes the damages determination from the jury's hands as surely as did the damages cap in *Sofie*. And the insurance bad faith claim is as firmly rooted in the common law of tort as were the Sofies' personal injury claims. *See Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992) ("An action for bad faith handling of an insurance claim sounds in tort"). *Cf. Burnham v. Commercial Cas. Ins. Co.*, 10 Wn.2d 624, 627, 117 P.2d 644 (1941) (holding that harm is an element of an action for insurer's negligent handling of the defense of a claim) (citing *Sterios v. S. Sur. Co.*, 122 Wash. 36, 209 P. 1107 (1922) (upholding a jury verdict in a claim that the insurer negligently failed to defend its insured)). There is no more justification to deny Farmers its constitutional right to have a jury determine damages than there was to deny the Sofies that right.

The majority argues that a judge's reasonableness determination "measures the harm suffered by the insured and eliminates any need for a factual determination of damages in the later bad faith claim." Majority at 18 n.1. Dissecting this argument, the majority reasons: a judge determines "harm" in equity, the equitable determination becomes the measure of damages, and the parties are no longer entitled to a jury trial on damages. Consider the ramifications of this breathtaking argument. The legislature could simply provide for an equitable proceeding in which the sole issue would be the amount of damages suffered by a party, and which would collaterally estop the parties from seeking a jury trial on damages. This would be no different from the majority's

decision that a judge's reasonableness determination under a statute promulgated by the legislature deprives the parties of the right to jury trial.[5]

The right to jury trial cannot be truncated by such a procedural pretext. The jury trial is the rootstock of our liberties, a fundamental right for which the peers of England stood firm at Runnymede against King John, without which the original states refused to ratify the constitution until the bill of rights was added, and which article I section 21 requires must remain "inviolate."

The majority's reasoning is also contrary to *Sofie*, in which we distinguished the unconstitutional cap on noneconomic damages from the mandatory arbitration procedure, which requires that damages in smaller cases must be determined initially by an arbitrator. We noted that "the availability of a jury trial de novo to redetermine the arbitrator's conclusions preserved the right protected by article 1, section 21." *Sofie*, 112 Wn.2d at 652. If the majority's interpretation were correct, the constitution would not require a trial de novo by jury; the arbitrator's conclusion would authoritatively determine the damages.

The majority seeks to avoid the application of *Sofie* by relying on our holding in *Nielson v. Spanaway General Medical Clinic*, 135 Wn.2d 255, 956 P.2d 312 (1998). *See* majority at 16-17. This reliance is misplaced. In *Nielson*, we held that the trial court's application of collateral estoppel to the issue of damages did not violate the

[5] Actually, this case is worse than the hypothetical statute described in the text because here it was this court that decided to apply the reasonableness determination to a bad faith action and now deprives Farmers of a jury trial. I decline to join this violation of article I, section 21, deferring to the constitutional requirement to preserve the right to a jury trial "inviolate."

Nielsons' right to a jury trial. *Id.* at 268-69. The Nielsons brought two separate medical malpractice actions: one against the United States, as owner and operator of Madigan Hospital, in federal court and the other against a private clinic and physician in state court. *Id.* at 259. The federal case was tried first—without a jury, as required by 28 U.S.C. § 2402—and the federal court found total damages of just over $3 million. *Id.* at 259-60. We held that the Nielsons were collaterally estopped from relitigating the issue of damages. *Id.* at 268-69. The application of collateral estoppel to the issue of damages did not violate article I, section 21 because there was no factual issue remaining on the subject of damages for a jury to determine. *Id.* at 269.

Nielson does not control this case because the Nielsons chose to litigate their claim in federal court, in which they had no right to a jury trial, and were collaterally estopped by the federal court decision. Here, by contrast, Farmers had no choice but to intervene in the reasonableness determination in order to protect itself, and most importantly, demanded a jury trial, which the trial court denied. Clerk's Papers at 107-23, 384-95. *Nielson* is the result of the anomaly that the federal constitution does not allow a jury trial in the very same circumstances in which the Washington constitution requires a jury trial. Once the federal court decided the Nielsons' damages, no issue of damages remained for a Washington jury to determine. As we held in *Nielson*, "[a]lthough the factual issue of damages is a jury question in Washington, there must be an issue of fact to resolve in order for that right to arise." 135 Wn.2d at 269.

To state the matter another way, the Nielsons had no right to a jury trial in the

initial proceeding—the federal trial—and were bound by the result in the subsequent Washington state court action. But Farmers has the right to a jury trial on damages under state law and is not precluded by a federal determination of the identical issue. *Nielson* is inapposite.

For the foregoing reasons, I would hold that the judicially created application of the reasonableness hearing to decide the reasonableness of a covenant judgment violates the right to jury determination of damages, a right that article I, section 21 dictates "shall remain inviolate."

I respectfully dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice James M. Johnson