A Nonsettling Defendant’s Perspective On Reasonableness Hearings Under Washington’s 1981 Tort Reform Act

INTRODUCTION

The 1981 Product Liability and Tort Reform Act requires that when parties enter into a settlement agreement, a hearing must be held on the issue of the reasonableness of the amount of the settlement. Although the major purpose of the reasonableness hearing is to prevent the nonsettling defendant from having to pay more than her share of damages, current practices may be defeating this purpose. The following hypothetical illustrates problems that nonsettling defendants may encounter when faced with reasonableness hearings.

Attorney Smith represents one of two defendants in a personal injury/wrongful death action. She has been working with the codefendant’s attorney to develop the expert evidence that she believes will exonerate their clients. The defense attorneys agree that even if their clients are not exonerated, liability should be spread evenly between them as their pockets are about equally deep and there is no evidence implicating one significantly more than the other. Plaintiff has demanded two million dollars and has rejected Smith’s client’s $500,000.00 settlement offer.

A day or two before trial, Smith learns that the other defendant has settled for $250,000.00, and that the hearing on

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1. Act of April 17, 1981, 1981 WASH. LAWS, ch. 27 (codified at WASH. REV. CODE § 4.22.060(1)).

EFFECT OF SETTLEMENT AGREEMENT. (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days’ written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.
the reasonableness of the settlement will be held that very afternoon. Not having been involved in a reasonableness hearing before, Smith drops her trial preparation to do some quick research. On the plane to the hearing, she reviews the three cases,2 law review article,3 and statutes4 found, but finds few clues about what the reasonableness hearing will be like. One of the cases,5 however, lists factors that the superior court judge should consider when ruling on the reasonableness of a settlement.

At the hearing, the plaintiff’s attorney presents evidence of jury awards and settlements showing that $250,000.00 is a ball park figure in this type of case. Smith points out that while $250,000.00 is a ball park figure, it is 50 percent lower than her client’s offer, and the plaintiff has offered no proof of why it was reasonable to accept the lower offer in the face of a higher one. Nevertheless, the judge, without articulating her reasons, issues a ruling stating, “I have examined all the factors set out by the court in Glover v. Tacoma General Hospital6 and find that the settlement in this case is reasonable.” At trial, the plaintiff, supported throughout by the settling defendant, obtains a jury verdict of ten million dollars.

Attorney Smith and other attorneys representing nonsettling defendants at reasonableness hearings face several important questions that must be answered if they are to protect their client’s interests. These questions include what kind of evidence is appropriate for the hearing, whether findings and conclusions are necessary, what notice is adequate, what remedies are available if a settlement is collusive, and what effect the reasonableness hearing will have on the nonsettling defendant’s subsequent trial. Unfortunately, these questions are not answered by the statute.

The legislature left significant gaps in the statute by not setting out a definition of reasonableness or delineating proce-


3. Harris, Washington’s Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement, 20 Gonz. L. Rev. 69 (1985) [hereinafter Harris]. Upon analysis, this article seems to favor settling parties, especially plaintiffs, in that the author’s conclusions consistently support plaintiff’s interests at the cost of those of nonsettling defendants.


5. Glover, 98 Wash. 2d at 717, 658 P.2d at 1236.

dURES for the hearings. And because reasonableness hearings are a relatively recent addition to settlement procedures in Washington, the discussion in judicial opinions that will eventually fill the gaps is so far incomplete. As a result, many issues raised by reasonableness hearings have not been fully aired, or even identified. The attorney who has no experience with reasonableness hearings must grope her way along in very dim light—a distinct disadvantage when the attorney may be called upon to attack a settlement’s reasonableness on just a few hours’ notice.

The legislative history of the reasonableness hearing statute shows that fairness concerns inspired the creation of reasonableness hearings:

There is a legitimate concern that claimants will enter into “sweetheart” releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was entered into. Furthermore, it requires parties desiring to enter into such releases to give five days’ notice to all other parties of the terms of the release.

Because the reasonableness hearing exists as a filter to block collusive settlements ("sweetheart releases"), the hearing must, by its form, provide meaningful exploration of collusion issues. However, as the hypothetical illustrates, “meaningful exploration” is not necessarily a practical reality.

The materials written about reasonableness hearings evoke the image of a conversation between settling parties and nonsettling defendants, with the legislature, courts, and commentators speaking for different sides. Much of this material amplifies the voice of the settling parties and, by contrast, reduces the nonsettling defendants’ voice to a whisper. This Comment amplifies the nonsettling defendants’ voice; for as we will see, the nonsettling defendant has much to lose at a reasonableness hearing. While the hearing was in large part created for her benefit to minimize her losses, existing practices may be subverting the hearing’s purpose.

This Comment addresses the questions that the nonset-

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8. See infra text accompanying notes 107-11.
9. FINAL REPORT, supra note 7, at 636.
tling defendant's attorney must answer. Section I sets out the function of reasonableness hearings in light of the policies the hearings are intended to further—avoiding collusion between settling defendants and plaintiffs and equitably apportioning the financial burden among tortfeasors. Section II examines the form of reasonableness hearings, including what evidence should be presented, what standards must be met, and the need for reviewable findings and conclusions. Section III analyzes, in terms of constitutional due process, the notice required by the statute. Section IV considers what remedy should follow a finding that a settlement is collusive. Section V examines the relationship between the reasonableness hearing and the nonsettling defendant's subsequent trial.

I. THE FUNCTION OF THE REASONABLENESS HEARING

To understand the reasonableness hearing's function, we must look at the hearing in the context of the 1981 Product Liability and Tort Reform Act. This Act established a right of contribution among joint tortfeasors and so reversed Washington's common law rule. The legislature established the right of contribution to promote judicial economy and fairness to defendants. However, the Act cuts off the right of contribution between settling and nonsettling defendants when

10. Act of April 17, 1981, 1981 WASH. LAWS ch. 27 (codified at WASH. REV. CODE § 4.22.060(1)).

11. A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. WASH. REV. CODE § 4.22.040(1) (1987).

12. Final Report, supra note 7, at 635. Before the enactment of the 1981 Product Liability and Tort Reform Act, the Washington Supreme Court analyzed Washington's common law rule against contribution in Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 576 P.2d 388 (1978). The court noted that the policies behind the doctrines of comparative negligence and contribution were different, even though both promoted fairness in tort liability. The court held that the statutory adoption of comparative negligence did not necessitate the court's acceptance of contribution, and affirmed the common law rule against contribution. Id. at 850, 576 P.2d at 389.

13. The Committee believes that with the creation of the right to contribution a party defendant will be able to join another party who may be liable for contribution in the original action under current Civil Rule 14, relating to third party practice. This means that a defendant will not be bound by the plaintiff's choice of defendants. It is in the interests of judicial economy to have all of the liability issues determined in one action. The judge will naturally continue to have authority to require separate trials as to issues or parties where justice requires. Final Report, supra note 7, at 636.
the settlement fails to release the nonsettling defendants.\textsuperscript{14} When the nonsettling defendants are not released by the settlement, they receive a credit offsetting any future judgment against them in the case.\textsuperscript{15} This pro tanto credit is set at an amount equal to the settlement amount, or if the settlement amount is found to be unreasonably low, the credit is set at an amount determined by the court to be reasonable.\textsuperscript{16}

The legislature adopted the pro tanto credit rule to encourage settlements.\textsuperscript{17} The rule encourages settlements in two ways. First, the rule encourages defendants to settle by creating immunity from further litigation for the settling defendant. Second, the rule encourages plaintiffs to settle by creating certainty for the releaser about the amount of credit against a future judgment.\textsuperscript{18}

In addition to encouraging settlements, the pro tanto credit rule has the positive effect of apportioning the financial burden, to a limited extent, among codefendants. However,

\begin{enumerate}
\item \textsuperscript{14} Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement. WASH. REV. CODE § 4.22.040(2) (1987).
\item \textsuperscript{15} Note that a ruling on the reasonableness of the settlement is required to establish the amount of contribution when a settling defendant obtains the release of a nonsettling defendant. In this case, logic dictates that the nonsettling defendant would be interested in a finding that the settlement was unreasonably high.
\item \textsuperscript{16} Apparently, settling defendants rarely obtain the release of nonsettling defendants. This rarity would explain why the Senate Select Committee Report and Senator Talmadge's article both omit comments about this aspect of a reasonableness hearing. See \textit{Final Report, supra} note 7; Talmadge, \textit{Washington's Products Liability Act}, 5 U. PUGET SOUND L. REV. 1 (1981). Because the section 4.22.040(2) case seems to be rare and did not seem to concern the proponents of the Act, I will not discuss it further.
\item \textsuperscript{17} A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable. WASH. REV. CODE § 4.22.060(2) (1987); see also \textit{Final Report, supra} note 7, at 636.
\item \textsuperscript{18} See \textit{supra} note 15; see also Harris, \textit{supra} note 3, at 117.
\end{enumerate}
the credit may also have undesirable effects: it may cause the settling or nonsettling defendant to assume a disproportionately large share of the plaintiff’s compensation, and it may encourage partial settlements at the expense of full.\textsuperscript{19}

In the eyes of the nonsettling defendant, the biggest problem with a pro tanto credit approach to partial settlements is the possibility that a collusive agreement between the settling parties will result in a disproportionately low settlement and a correspondingly low credit against the judgment.\textsuperscript{20} When a partial settlement releases the settling defendant from contribution, the plaintiff may

release one tortfeasor from his fair share of liability and mulct another instead, from motives of sympathy or spite, or because it might be easier to collect from one than from the other . . . . [T]he release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released . . . . In most three-party cases, two parties join hands against the third . . . . \textsuperscript{21}

These concerns about collusive settlements shaped the 1939 Uniform Contribution Among Tortfeasors Act’s treatment of partial settlements.\textsuperscript{22} This Uniform Act and its progeny were historical references for Washington’s 1981 Product Liability and Tort Reform Act.\textsuperscript{23} Under section 5 of the 1939 Uniform Act, the release of “any tortfeasor [did] not release him from liability for contribution unless it expressly provided for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person’s recoverable damages.”\textsuperscript{24}

Under section 4 of the Uniform Act, a plaintiff could have the certainty of a pro tanto credit; however, if the plaintiff chose the pro tanto credit rather than the pro rata share in sec-

\begin{itemize}
  \item \textsuperscript{19} Id. at 90.
  \item \textsuperscript{20} Id.; UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4 comment, 12 U.L.A. 98 (1955).
  \item \textsuperscript{21} 12 U.L.A. at 99.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} FINAL REPORT, supra note 7, at 628.
  \item \textsuperscript{24} Id. A pro rata share, another device for apportioning damages, equals the total judgment divided by the total number of joint and several tortfeasors. See Harris, supra note 3, at 77-78. The pro rata share discouraged collusive settlements. However, because the pro rata share could not be determined until after trial, plaintiffs had no idea before trial of how much they were giving up by settling, and were reluctant to settle at all.
\end{itemize}
tion 5, the settling defendant would not be released from contribution. This section discouraged defendants from settling because "[n]o defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party."25

The 1955 revision of the 1939 Act placed a higher priority on encouraging settlements and a lower priority on avoiding collusive settlements.26 It attempted to solve the collusive settlement problem by imposing a good faith requirement.27 The Washington legislature incorporated the idea of a good faith requirement into the reasonableness requirement of section 4.22.060 of the Revised Code of Washington.28

Seen in the light of this historical context, the reasonableness hearing serves the function of evaluating the good faith, or noncollusiveness, of a partial settlement.29 This view is validated by the Washington State Senate Judiciary Committee's report on reasonableness hearing procedures. In this report, the committee, following the lead of the supreme court,30 rec-

25. 12 U.L.A. at 99; Harris, supra note 2, at 80-81.
26. 12 U.L.A. at 100 ("It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.").
27. 12 U.L.A. at 99 ("The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive . . . "); see also Harris, supra note 3, at 87 n.55.
28. See Pickett, 43 Wash. App. at 334, 717 P.2d at 282 ("[T]he good or bad faith of a settlement is a question of fact to be determined by the trial court [during the reasonableness hearing] based on the evidence presented by the parties."); see also Final Report, supra note 7, at 636-37.
29. A finding of reasonableness by the court is intended to prevent "sweetheart deals" with favored parties. If the settlement amount is found to be unreasonable, the final award is to be reduced by an amount determined by the court to be reasonable. This process protects the nonsettling tortfeasors from incurring financial costs which exceed their proportionate share of liability.

SENATE JUDICIARY COMM., 48th LEG., 1ST REG. SESS., PROCEDURES FOR CONDUCTING REASONABLENESS HEARINGS UNDER PRODUCT LIABILITY AND TORT REFORM ACT OF 1981 2 (1983) [hereinafter COMMITTEE REPORT].

For a discussion of the good faith requirement, see Harris, supra note 3, at 92-93. In California where the good faith requirement was law, the requirement was broader than was necessary to prevent collusion, and the subjectivity of the requirement invited abuse and caused judicial consternation. Tech-Bilt, Inc. v. Woodward-Clyde & Assoc's., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). A requirement of reasonableness seems to limit the scope of inquiry: if a settlement is economically reasonable it may pass muster in Washington. For more on the standards for reasonableness, see infra text accompanying notes 44-52.
30. Glover, 98 Wash. 2d at 716 n.2, 658 P.2d at 1235.
ommended that the first consideration of a court conducting a reasonableness hearing should be whether or not the settlement is "fraudulent or collusive."\footnote{Committee Report, supra note 29, at 5.}

Reasonableness hearings thus have two functions: (1) avoiding collusion, and (2) equitably apportioning the financial burden among tortfeasors. The collusion-avoidance function requires a hearing on the reasonableness of a settlement at the time it is entered into, with five days' notice to the parties.\footnote{There is a legitimate concern that claimants will enter into "sweetheart" releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was entered into. Furthermore, it requires parties desiring to enter into such releases to give five days' notice to all other parties of the terms of the release. Final Report, supra note 7, at 636-37.} The equitable-apportionment function requires the court to determine a reasonable amount for reducing any later damages awarded\footnote{Washington Rev. Code § 422.060(2) (1987) provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.} or for establishing the amount of the settling defendant's right to contribution.\footnote{Washington Rev. Code § 422.040(2) (1987) provides:

Contribution is available to a person who enters into a settlement with a claimant only (a) if the liability of the person against whom contribution is sought has been extinguished by the settlement and (b) to the extent that the amount paid in settlement was reasonable at the time of the settlement.} If we look at collusive settlements as creating a disproportionate financial burden among defendants, then the collusion-avoidance function of reasonableness hearings also serves the equitable-apportionment function.

II. THE FORM OF THE REASONABLENESS HEARING

The form of a reasonableness hearing includes, for the purposes of this Comment, the standards for judgment that affect the content of evidence, the form of evidence allowed, and the form of judgment; in other words, the need for formal findings and conclusions. Miscellaneous matters such as the burden of proof and notice requirements are also included.
The standards and procedures for determining reasonableness are deliberately minimal. On the matter of standards, the legislature has stated:

The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors including the provable liability of the released parties and the liability limits of the released party's insurance.35

While standards for evaluating reasonableness were left to the courts, a recent amendment to section 4.22.060(1) places the burden of proof of reasonableness on the party requesting the settlement.36 Before this amendment was passed, Seattle attorney Thomas Harris noted in a lengthy law review article that the policies of encouraging settlements and promoting full recovery by plaintiffs dominate all aspects of the 1981 Product Liability and Tort Reform Act, including the reasonableness hearing requirement.37 Based on this premise, he argued that the burden of persuasion should be on the nonsettling party; in other words, the nonsettling party must affirmatively prove unreasonableness.38 However, absent statutory language that the "burden of proof" means anything less than the burden of going forward and the burden of persuasion, the 1987 burden of proof amendment must be read as placing fairness to defendants ahead of encouraging settlements in the policy hierarchy, at least where reasonableness hearings are concerned.

The only legislative guidelines for the form of reasonableness hearings exist in section 4.22.060(1) of the Revised Code of Washington. The statute calls for five days' written notice to all nonsettling parties of intent to settle, although the notice requirement may be altered to accommodate "eve of trial" settlements.39 A copy of the settlement must be included in the notice. There must be a hearing "on the issue of the reasonableness of the amount to be paid with all parties afforded an

35. Final Report, supra note 7, at 636.
36. 1987 WASH. LAWS ch. 212 § 1901(1).
37. Harris, supra note 3, at 167.
38. Id. at 118-20; see infra note 66 and accompanying text.
opportunity to present evidence." There are no further legislative guidelines. However, the courts have slowly begun to take up the legislative slack.

A. Standards for Reasonableness Hearings

The first case to address standards for reasonableness, Glover v. Tacoma General Hospital, involved multiple defendants in a medical malpractice suit. All the defendants except the Hospital reached a joint settlement with the plaintiff, who had sued on behalf of her comatose sister. The settlement figure was $575,000.00, leaving the Hospital potentially exposed to a $2.5 million verdict with only $575,000.00 as a pro tanto credit.

In an effort to gain a higher credit, the Hospital appealed the reasonableness ruling. The Hospital argued that to be reasonable, the settlement must reflect the defendants' relative liability. The plaintiff replied that good faith is the only real test of reasonableness. The court found both positions to be too extreme and adopted a balancing test proposed by an amicus brief. The factors of the balancing test are as follows:

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 fault;
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.

The court held that no one of these factors should control, but that the trial judge "must have discretion to weigh each case individually."

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42. Id. at 710, 658 P.2d at 1232.
43. Id. at 711, 658 P.2d at 1232.
44. Id. at 711, 716-17, 658 P.2d at 1232, 1235-36.
45. Id. at 717, 658 P.2d at 1236.
46. Id.
47. Id.
48. Id. at 718, 658 P.2d at 1236. The Senate Judiciary Committee endorsed the Glover factors in its report. COMMITTEE REPORT, supra note 29, at 6. The factors
The court found three of its balancing test factors in the record made by the trial judge: "risks of litigation, the lack of bad faith and the interests of Tacoma General Hospital."\(^\text{49}\) While the way in which the trial judge used these factors was not clear from the record, the supreme court found substantial evidence to support the finding of reasonableness. This evidence included testimony both about the high risk of plaintiffs losing at trial and about the substantial amount of settlement, which was 23 percent of the damages sought.\(^\text{50}\)

In a later case challenging a reasonableness hearing, the nonsettling defendant argued that the trial court had erred by failing to balance all of the *Glover* factors.\(^\text{51}\) The court of appeals affirmed the trial court's ruling, but did not address the petitioner's argument. The court of appeals cited *Glover* for the principle that "the trial court should not allow any one factor to control. Rather, the court should use its discretion and weigh each case individually."\(^\text{52}\) Even though the *Glover* court did not say that fewer than all the factors may be used to support a finding that a settlement amount is reasonable, the *Glover* court in fact used fewer than all its factors to analyze and affirm the trial court's decision. That is, the court's actions, not its words, support the proposition that fewer than all the factors may be used.

Because the burden of proof of reasonableness is now squarely, by statute, on the head of those seeking the ruling of reasonableness (the settling parties), and because the courts have shown a willingness to decide the matter using fewer than all of the *Glover* factors, the settling parties may offer proof of fewer than all of the factors at the reasonableness hearing. A nonsettling defendant seeking to bring the remaining factors into the discussion would have to introduce proof of them herself.

We can see how this might work in our hypothetical:

Assume Attorney Smith has had enough time to prepare for the reasonableness hearing and has discovered that in order to show that the settlement amount is reasonable the plaintiff will offer proof only of what other attorneys think the

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\(^{49}\) *Glover*, 98 Wash. 2d at 718, 658 P.2d at 1236.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) *Pickett*, 43 Wash. App. at 333, 717 P.2d at 281.

\(^{53}\) Id. at 333, 717 P.2d at 281 (citing *Glover*, 98 Wash. 2d at 718, 658 P.2d at 1236).
case is worth. In addition to offering proof from other attorneys that the case is worth more, Smith could show the following: (1) that the available evidence suggests that the plaintiff’s theory of liability is as strong against the settling defendant as it is against the nonsettling defendant (“merits of the releasing person’s liability theory,” “merits of released person’s defense theory,” and “interests of the parties not being released”);53 (2) that there is no evidence implicating one defendant more than another (“released person’s relative faults”);54 (3) that with the settlement so close to trial, and discovery complete, the plaintiff has already made a considerable investment in the case, should have a definite figure for the amount of damages sought, and should expect a settlement that is realistic in terms of the damages and amount of time, effort, and money invested (“the extent of the releasing person’s investigation and preparation of the case”);55 (4) that both defendants are equally solvent and equally accessible for payment (“released person’s ability to pay,” “interests of parties not being released”);56 and (5) that a settlement with one defendant, in these circumstances, for half the other defendant’s settlement offer is not only unreasonable, but evidence of “bad faith, collusion, or fraud.”57

Arguably, going forward with evidence of this type is much like assuming the burden of persuasion of nonreasonableness after the proponent has offered proof of reasonableness. However, under the burden of proof amendment, the proponent of reasonableness now must make some offer of proof; the rule suggested by Harris created, in effect, a rebuttable presumption of reasonableness to the proponent’s advantage.

Finally, two comments that may affect a nonsettling defendant’s decision about evidence strategies at a reasonableness hearing. First, attorneys for nonsettling defendants are in an awkward position at reasonableness hearings. At this point, the client’s interest is to have the highest amount possible set as a reasonable settlement because with the pro tanto credit, the higher the amount set as a reasonable settlement, the less the nonsettling defendant will pay after judgment. However,

53. Glover, 98 Wash. 2d at 717, 658 P.2d at 1236.
54. Id.
55. Id.
56. Id.
57. Id.
to argue for a high settlement amount at a reasonableness hearing undermines the nonsettling defendant's trial and settlement negotiation strategy, which is to convince all concerned that the case is worth as little as possible. To establish credibility and secure the most favorable procedures, nonsettling defendants would do well to consider carefully their opinions about a case's worth and avoid assertions of worth that seem extreme in either direction.

Second, in the hypothetical, Smith's position is sympathetic because of her client's high settlement offer. However, where a nonsettling defendant has refused to negotiate or has made offers considerably lower than those of the settling defendant, the nonsettling defendant will not be seen in such a sympathetic light unless the other factors can be balanced in her favor.

B. Evidence

We have discussed the general content of evidence that must be offered by parties to a reasonableness hearing. The obvious next question is, what form does this evidence take?

Apparently the forms of proof vary from court to court. This was a source of concern to the Senate Judiciary Committee, which found mini-trials used in some jurisdictions, affidavit evidence in others, and in still others reasonableness orders issued on agreement without a hearing.58

In its report, the Senate Judiciary Committee recom-

58. Individuals involved in a tort action who decide to enter into a settlement agreement ought to have a reasonable expectation of being treated the same regardless of the county in which the trial is held. A fundamental concept of law is that all persons should be treated equally. However, at the present time litigants are being treated differently, depending on the county where the action is brought.

... While in many cases, reasonableness orders are entered on agreement of the parties, some courts are actually conducting mini-trials on the issue of reasonableness and requiring in-court testimony. Other courts are handling the reasonableness hearings through affidavits. This situation creates tremendous procedural problems for attorneys and litigants since often times the parties are not assigned a judge until the day of the hearing.

... The lack of uniformity in conducting reasonableness hearings is creating confusion and uncertainty for judges, attorneys and litigants. The public policy of the state is to encourage settlement agreements and avoid unnecessary court delay and congestion. The lack of uniformity in conducting reasonableness hearings is frustrating the public policy of the state.

COMMITTEE REPORT, supra note 29, at 4-5.
mended that evidence at reasonableness hearings be presented by affidavit "unless the court specifically determines that testimony is required in the interest of fairness to all the parties in the action." The committee's recommendation for affidavit evidence when there are no complications calls to mind CR 56, the civil rule regarding summary judgment. Indeed, CR 56 appears to be a good model for most reasonableness hearing procedures. Under CR 56, a party may move for summary judgment with or without supporting affidavits. The party opposing the motion has an opportunity to present opposing affidavits, and where there are no disputed issues of material fact based on the preliminary affidavits, a ruling is made on the applicable law. CR 56 permits depositions and interrogatories to supplement affidavits and allows for continuance where an opposing party shows insufficient time to prepare

59. Id. at 6.
60. (a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(c) MOTION AND PROCEEDINGS. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of the hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

WASH. R. CIV. P. 56(a), (c).
61. Id.
62. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

WASH. R. CIV. P. 56(e).
63. (e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

WASH. R. CIV. P. 56 (e)
adequate proof.64

CR 56(e) gives the party opposing the motion the burden to go forward with contradictory evidence if the moving party supports the motion with proof.65 Practically, this requirement applies even with the new burden of proof amendment for reasonableness hearings.66 This amendment affects the analogy between summary judgments and reasonableness hearings on the issue of proof by making the proponent's offer of proof mandatory.67

Reasonableness hearings may also present some problems under the evidence rules. These problems will arise when the nonsettling party seeks to discover any terms that may not be disclosed in the written settlement agreement and that may be potentially harmful to her case. For instance, perplexed by plaintiff's refusal of her client's higher offer, Attorney Smith may suspect that the settling defendant has agreed to help the plaintiff win his case against Smith's client. This help could take the form of disclosing weaknesses in Smith's client's case—the kind of weaknesses defense attorneys know exist but which they pray plaintiff's attorney will never discover.68

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64. (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

WASH. R. CIV. P. 56(f).

65. See supra note 62. The Washington Court of Appeals noted in Pickett before the passage of the burden of proof amendment:

We see a similarity between a reasonableness hearing and a motion for summary judgment where the moving party has the initial burden of proof. Once the moving party proves by uncontroverted facts that no genuine issue of material fact exists, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue for trial.

Pickett, 43 Wash. App. at 333 n.2, 717 P.2d at 281 n.2. See also id. at 332, 717 P.2d at 281 ("It is incumbent upon a party having a significant interest in seeing that the settlement is found to be unreasonable to present some evidence to controvert the settling parties' evidence.").

66. See supra notes 36-38 and accompanying text; see also supra text accompanying notes 57-58.

67. Id.

68. Note that serious ethical questions may arise when the attorneys for codefendants work together in preparing a defense. Arguably the cooperation could be construed as dual representation, triggering RPC 1.7(a).

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each-client consents in writing after consultation and a
To ascertain if there are undisclosed settlement terms, Smith attempts to depose the attorneys for the settling parties. The attorneys reply that that information is privileged. May the settling parties legitimately claim that settlement terms, undisclosed in the settlement agreement, are privileged? A closer examination of the settlement process and of the attorney-client privilege indicates that they may not.

The attorney-client privilege is governed by statute. Further, the privilege applies only to confidential communications between attorney and client. The privilege is lost when those communications involve a third party with whom there is no attorney-client relationship. Settlement negotiations necessarily include at least two sets of attorneys and clients, each set third parties to the other set. Thus, any terms agreed upon during settlement negotiations cannot be considered confidential communications between the attorney and client, and are not protected by the attorney-client privilege.

Settlement terms are required by law to be disclosed to

full disclosure of the material facts (following authorization from the other client to make such a disclosure).

WASH. RULES OF PROFESSIONAL CONDUCT, Rule 1.7(a) (1987).

While disclosure and written consent to the cooperative representation may be time consuming and awkward, it is ultimately in the defendants' interest that cooperation by their attorneys constitutes dual representation. Once the attorneys are seen as representing both clients, the nonsettling defendant may have at least some minimal protection later on if the plaintiff tries to trade a release for defense confidences or secrets. This protection comes from RPC 1.9.

A lawyer who has formerly represented a client in a matter shall not thereafter:

. . . .

(b) Use confidences or secrets relating to the representation to the disadvan-
tage of the former client . . . .

WASH. RULES OF PROFESSIONAL CONDUCT, Rule 1.9 (1987).

Applying this analysis to the reasonableness hearing context, we can see that once there has been dual (cooperative) representation, the settling defendants' attorney risks discipline if she reveals to the plaintiff any confidences or secrets of the nonsettling defendant.

69. WASH. REV. CODE § 5.60.060(2) (1987) provides: "An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment."

70. See supra note 69; see also State ex rel. Sowers v. Olwell, 64 Wash. 2d 828, 394 P.2d 681 (1964); K. TEGLAND, 5 WASH. PRAC. EVIDENCE § 171, 372.

71. Sowers, 64 Wash. 2d at 832, 394 P.2d at 683-84.

72. While not privileged, and therefore discoverable, the admissibility of settlement terms at trial is limited by WASH. R. EVID. 408. See infra notes 160-68 and accompanying text.
nonsettling defendants and to the court. Because settlement terms must, by law, be shared with other than the settling parties, the law would be undermined if the attorney-client privilege was used to protect some terms from discovery merely because they were not disclosed in the formal settlement agreement.

C. Findings and Conclusions

Although summary judgment procedures provide a good model for reasonableness hearing procedures, one aspect of CR 56 should not apply to reasonableness hearings: an exemption from formal findings of fact and conclusions of law. To aid appellate review and prevent judges from "rubber-stamping" settlement agreements, judges must articulate for the record the factors supporting a determination of reasonableness. Additionally, their determination of reasonableness should be fully reviewable as a question of law.

In Glover, the court said that to aid appellate review, trial judges "should enunciate those factors which lead them to conclude that a settlement is reasonable." This sounds like a requirement for at least an articulation of those factors on the record, if not a requirement of formal findings of fact and con-

73. Wash. Rev. Code § 4.22.060(1) (1987) requires that a copy of the proposed settlement be sent "to all other parties and the court." The disclosure of settlement terms must be required under the reasonableness hearing statute to facilitate the inquiry into the reasonableness of the settlement and to protect nonsettling defendants from collusion.

74. Some attorneys may feel that even affidavit or deposition testimony would be improper testimony under RPC 3.7: "A lawyer shall not act as advocate at trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness." However, RPC 3.7(c) would be usable at a reasonableness hearing; the above rule applies except where "the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate." Wash. Rules of Professional Conduct, Rule 3.7 (1987). See also Wash. Rules of Professional Conduct, Rule 1.6 (1987) (lawyer may reveal information relating to representation of client if disclosure is impliedly authorized in order to carry out representation).

75. (1) Generally. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law.

(5) When Unnecessary. Findings of fact and conclusions of law are not necessary:

(B) Decision on Motions. On decisions of motions under Rules 12 or 56 . . . .

Wash. R. Civ. P. 52(a)(1),(5)(B) (emphasis added).

76. Glover, 98 Wash. 2d at 718, 658 P.2d at 1236.
clusions of law. A clear statement of the trial judge's reasoning is necessary to show an appellate court that the trial judge did use discretion and to provide a key to further articulation of a reasonable settlement standard.

Harris recommends that Glover should not be read as requiring the entry of formal findings of fact. He cites "analogous judicial decisions, Wash. R. Civ. Proc. 52, and a closer review of Glover" as the basis of this conclusory recommendation, without referring to the specific statements on which his analysis was based. Thus Harris provides a perfect example of why detailed findings are necessary.

Harris argues further that "there is no reason for making the final order for reasonableness hearings any more formal than those required for summary judgment decisions." Because summary judgment decisions specifically do not require formal findings and conclusions, Harris argues that rulings on reasonableness should not require formal findings and conclusions. Not only is this reasoning circular, it ignores the nature of summary judgment motions.

A summary judgment motion may be granted only when there are no genuine issues of material fact, making judicial fact-finding unnecessary. At a reasonableness hearing, however, there may be genuine issues of material fact, such as the existence of collusive settlement terms, or the amount the case is worth. The Glover factors all require factual determinations that must precede the balancing and legal determination of reasonableness. All of the facts underlying the Glover factors are open to contest. Formal findings of fact should be required to help trial court judges resist any temptation to rubber-stamp settlement agreements, and to aid in the appellate review of determinations of reasonableness.

77. Id.
79. Id.
80. Harris, supra note 3, at 150-51.
81. Id. at 151.
82. Id.
83. WASH. R. CIV. P. 52(a)(5)(B); see supra note 75.
84. WASH. R. CIV. P. 56(b); Wilson v. Steinbach, 98 Wash. 2d 434, 656 P.2d 1030 (1982).
85. See Morris v. McNicol, 83 Wash. 2d 491, 519 P.2d 7 (1974) (a material fact is one on which the outcome of the litigation depends).
86. Glover, 98 Wash. 2d at 718, 658 P.2d at 1236 ("[W]e note that the finding of reasonableness necessarily involves factual determinations.").
The problem of findings and conclusions at a reasonableness hearing is analogous to the problem of findings and conclusions required of a decision to admit prior conviction evidence to impeach the credibility of a criminal defendant under ER 609. Like the creation of contribution rights under the Product Liability and Tort Reform Act of 1981, ER 609 was a major departure from the common law rule that automatically allowed the admission of prior conviction evidence.  

ER 609 allows the use of prior conviction evidence only in limited circumstances. After the adoption of ER 609, trial court judges apparently paid mere lip service to its requirements and let in prior conviction evidence in spite of the rule. Finally, in State v. Jones, the Washington Supreme Court insisted that the balancing test for admitting prior conviction evidence must be used responsibly and must be articulated on the record to aid appellate review.

Like ER 609, contribution rights were a significant departure from the common law in Washington. In joint and several liability cases under the common law, contribution was disallowed. This rule was justified by the policy that joint tortfeasors, as wrongdoers, should not have access to the courts. With this rule and policy so recently a part of Washington law, there is a danger that trial court judges may show a bias against joint tortfeasors by rubber-stamping settlement agreements, thereby denying the nonsettling party the more


88. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

WASH. R. EVID. 609 (a).


90. Jones, 101 Wash. 2d at 122, 677 P.2d at 137.


92. FINAL REPORT, supra note 7, at 628.
equitable apportionment of a higher "reasonable" release or a remedy appropriate for collusion.

Because this major policy change regarding joint tortfeasors in Washington is so new, and because it demands more of a judge's time, some trial courts may try to avoid more than a cursory look at a settlement during a reasonableness hearing. To encourage all trial courts to take a serious look at the arguments about the reasonableness, or alternatively, the collusiveness of a settlement, we must take seriously the court's dictum in Glover about enunciating the factors that support a judgment of reasonableness.93 A formal and responsible analysis of fact and factor should be performed on the record. The requirement of formal findings and conclusions in support of a reasonableness ruling would be a step towards responsible trial court consideration of both the settlement agreement and the arguments of the nonsettling parties.94

A further step in this direction would be to treat the balancing of the factors, and thus the ultimate decision on reasonableness, as a question of law fully reviewable by an appellate court.95 Harris reaches a contrary conclusion, stating, "The proper rule is that any tort decision regarding reasonableness, even when made in a non-jury setting, should be sustained as long as there is substantial evidence supporting the decision."96 The cases cited in support of this statement uphold findings on negligence—whether or not a person acted reasonably. Harris asserts that "[r]easonableness hearing determinations are directly analogous to fully litigated, non-jury tort cases in which the court determines whether a person acted reasonably."97

These determinations are analogous in the sense that both are "objective" determinations. However, there is a conspicuous difference between a ruling on the reasonableness of a per-

93. Glover, 98 Wash. 2d at 718, 658 P.2d at 1236.
95. This is consistent with the use of summary judgment practice and procedure as a model for reasonableness hearings. See supra notes 60-67 and accompanying text. In reviewing a summary judgment, the appellate court engages in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wash. 2d 434, 437, 656 P.2d 1030, 1031 (1982).
96. Harris, supra note 3, at 149.
97. Id. at 149 n.281.
son's acts in the context of negligence and a ruling on the reasonableness of a settlement. In the context of negligence, the court must decide whether certain behavior fell short of what a reasonably prudent person in similar circumstances would do. The standard of reference is fairly broad and is based on ordinary, day-to-day experience. The ruling on the reasonableness of a settlement under Glover is quite different. Rather than drawing on common cultural experiences to define reasonableness, the Glover factors focus on a much narrower legal context. Such factors as the merits of the legal theories of the settling parties, the risks of continued litigation, and the extent of discovery must be judged from experience in the legal system.

Not only is "reasonableness" at a reasonableness hearing unlike reasonableness in the context of negligence, the contest over reasonableness at reasonableness hearings will probably wax hottest over legal conclusions rather than facts—that is, whether or not, given the state of the case, a particular settlement is reasonable as a matter of law.

Conclusions of law are fully reviewable with minimal deference to the trial court's decision. Because the legal question dominates a reasonableness hearing, the trial court's answer should not be treated deferentially: the trial court is in

98. Glover, 98 Wash. 2d at 717-18, 658 P.2d at 1236.

Findings of fact, unlike conclusions of law, are treated deferentially, with review limited to whether they are supported by substantial evidence. Peeples v. Port of Bellingham, 93 Wash. 2d 766, 771, 613 P.2d 1128, 1132 (1980), rev'd on other grounds, Chaplin v. Sanders, 100 Wash. 2d 853, 676 P.2d 431 (1984); Maehren v. Seattle, 92 Wash. 2d 480, 486, 599 P.2d 1255, 1260 (1979), cert. denied, 452 U.S. 938 (1981). The greater deference to findings of fact is based on the theory that there is a conflict in the testimony and that the trial court, having the witnesses before it, is in a better position to arrive at the truth than is the appellate court. For this reason, the rule has no application in a case where there is no substantial dispute as to the facts and no question as to the credibility of witnesses or the weight to be given to their testimony, but where the sole question on appeal concerns the proper conclusions to be drawn from practically undisputed evidence, in such situation [sic], this court has the duty of determining for itself the right and proper conclusions to be drawn from the evidence in this case. Peeples, 93 Wash. 2d at 772, 613 P.2d at 1132 (quoting Shultes v. Halpin, 33 Wash. 2d 294, 306, 205 P.2d 1201, 1207 (1949)).

100. Harris admits the relative unimportance of demeanor evidence and the lesser degree of fact finding at a reasonableness hearing:

The trial court is not performing the same refined dollars-and-cents task that is performed by the trier of fact in a trial on the merits. For that reason,
no better position to answer the legal question than is the appellate court.\textsuperscript{101}

In addition to practical reasons for nondeferential review of a trial court's pre-trial ruling on the reasonableness of a settlement, policy reasons dictate nondeferential review. Well-defined standards for reasonableness are crucial to all parties. The greater the clarity of the standard by which reasonableness is judged, the more likely that the settling parties' agreement will fall within that standard and in the long run reduce litigation. In addition to encouraging responsible analysis, nondeferential review will hasten the definition of reasonableness by creating opportunities for appellate decisions that authoritatively balance the *Glover* factors.

III. **Notice**

The following notice requirements are set out in the reasonableness hearing statute:

A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement.\textsuperscript{102}

Because the pro tanto credit in the amount of a reasonable settlement is a statutory property right that a nonsettling

\textsuperscript{101} While the appellate court should be as able as the trial court to rule on the reasonableness of pre-trial settlements in most instances, a trial judge may be in a better position to evaluate the reasonableness of a settlement reached during a trial over which she presides. See Harris, *supra* note 3, at 601. This was the situation in Zamora v. Mobil Oil, 104 Wash. 2d 211, 704 P.2d 591 (1985). Where "settlement . . . [is] reached well into a hotly contested jury trial and the reasonableness hearing [is] conducted before the same trial judge—a judge who [is] intimately acquainted with all aspects of the case and who holds that the settlement [is] a reasonable one," there is good reason to defer to the trial court. *Zamora*, 104 Wash. 2d at 223, 704 P.2d at 598 (emphasis added). In this situation, the trial court's experience with courtroom dynamics—including jury reactions, which cannot appear in the written record—puts the trial court in a better situation than the appellate court to evaluate the reasonableness of the settlement. Jury reactions are relevant to the question of which party is likely to win. If the jury does not seem to be persuaded by the plaintiff's case, a lower settlement may be appropriate. Only in the limited situation of a mid-trial settlement, ruled on by the judge presiding over the trial, is there reason to give the trial court's decision deferential review.

\textsuperscript{102} WASH. REV. CODE § 4.22.060(1) (1987).
defendant may invoke at a reasonableness hearing, the requirements for notice of that hearing are subject to the demands of constitutional due process. The United States Supreme Court has long held that due process requires, at a minimum, "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." The standards by which sufficiency of notice must be judged appear in Mullane as well as in many Washington cases:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . .

In other words, the purpose of notice statutes is to apprise potentially affected parties of the nature and character of an action in a manner sufficient to allow them to intelligently prepare for the hearing.

Two aspects of the notice requirements under section 4.22.060(1) of the Revised Code of Washington may offend constitutional due process: (a) the provision for a shorter than five days' notice period to accommodate eve-of-trial settlements, and (b) the requirement that the notice contain only a copy of the settlement agreement.

103. A due process property interest may arise if "there are such rules or mutually explicit understandings that support [an individual's] claim of entitlement to the benefit and that he may invoke at a hearing." Ritter v. Board of Comm'rs, 96 Wash. 2d 503, 509, 637 P.2d 940, 944 (1981) (quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972)); Danielson v. City of Seattle, 108 Wash. 2d 788, 796, 742 P.2d 717, 721 (1987). "While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Danielson, 108 Wash. 2d at 795, 742 P.2d at 721 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1984)).


A. Time of Notice

An expedited hearing, while providing both a convenience for the settling parties and the encouragement to settle, may actually interfere with the nonsettling party's ability to effectively challenge reasonableness. With less than five days' notice, there may not be sufficient time for research and discovery. Harris argues that the minimal notice of an expedited hearing should not adversely affect a nonsettling party: "With trial just a few days away, the parties should have all but completed their necessary discovery and preparation." This argument ignores two important facts. First, while discovery related to the merits of the case may be substantially complete, additional discovery may be necessary of both the terms of settlement and the facts behind the Glover factors. In addition, this additional discovery could yield clues about the collusiveness of the settlement. Second, the focus of a reasonableness hearing is different from the focus of the trial. A shift of focus, with attendant legal research and materials preparation, takes time. This is especially true if the summary judgment model is used, requiring affidavits, depositions, or other evidence.

Not only do research and materials preparation take time, but the nonsettling defendant will still have the burden of last-minute trial preparation. Under the statute as written, the trial judge could, in her discretion, order a reasonableness hearing with only a few hours' notice to the nonsettling defendant. Such a short notice period has great potential for prejudice to the nonsettling defendant. Indeed, even Harris admits that "[m]eaningful discovery of the opposing party's testimony and evidence cannot be accomplished in [less than five days]."

The sufficiency of time of notice of a reasonableness hearing was challenged in Zamora v. Mobil Oil. In Zamora, the claim against one of the codefendants was dismissed on summary judgment, but reinstated on appeal. Trial against the

107. Harris, supra note 3, at 131.
108. See supra notes 62-63 and accompanying text.
111. Harris, supra note 3, at 128.
112. 104 Wash. 2d 211, 704 P.2d 591 (1985).
113. Id. at 213, 704 P.2d at 593.
other codefendants began before reinstatement.\textsuperscript{114} Several days into trial, all the remaining codefendants settled, a reasonableness hearing was held, and the settlement was found reasonable.\textsuperscript{115} The dismissed defendant, Cal Gas, did not attend the reasonableness hearing, but sought to challenge the finding of reasonableness after being reinstated with the pro tanto credit frozen at the settlement amount.\textsuperscript{116} The nonsettling defendant attacked the reasonableness finding by challenging the sufficiency of notice of the proceeding at which the finding was made:

[S]ince Cal Gas had neither formal notice of, nor opportunity to participate in, the reasonableness hearing, that hearing should not impair Cal Gas' right of contribution.\textsuperscript{117}

After finding that Cal Gas was indeed a party to whom notice was due,\textsuperscript{118} the court found that Cal Gas had waived its right to five days' written notice.\textsuperscript{119} Several facts influenced the court's finding of a waiver. Apparently, Cal Gas had notice of the reasonableness hearing the morning of the hearing,\textsuperscript{120} but chose not to attend because at that time Cal Gas was not a party to the lawsuit.\textsuperscript{121} More importantly, however, settlement was reached well into a hotly contested jury trial and the reasonableness hearing was conducted before the same trial judge — a judge who was intimately acquainted with all aspects of the case and who held that the settlement was a reasonable one . . . . [T]here is nothing whatsoever in the situation . . . which suggests that the settlement was a "sweetheart deal" to the prejudice of the nonsettling [defendant].\textsuperscript{122}

Waiver of notice was also found in \textit{Pickett v. Stephens-Nelson},\textsuperscript{123} where the nonsettling defendant challenged the sufficiency of notice (less than five days). As in \textit{Zamora}, overwhelming evidence showed that the settlement was noncollusive and reasonable. Absent collusion, the nonsettling

\textsuperscript{114} See id. at 223, 704 P.2d at 598.
\textsuperscript{115} Id. at 213-14, 704 P.2d at 593.
\textsuperscript{116} See id. at 218-23, 704 P.2d at 595-98.
\textsuperscript{117} Id. at 220 n.22, 704 P.2d at 597 n.22 (citing Appellant's Opening Brief at 16, \textit{Zamora} (No. 51193-4)).
\textsuperscript{118} Id. at 221-22, 704 P.2d at 597-98.
\textsuperscript{119} Id. at 223, 704 P.2d at 598.
\textsuperscript{120} Cal Gas did not challenge the brevity of notice.
\textsuperscript{121} Id. at 222-23, 704 P.2d at 598.
\textsuperscript{122} Id. at 223, 704 P.2d at 598.
\textsuperscript{123} 43 Wash. App. 326, 717 P.2d 277 (1986).
defendant's actual notice of more than five days, combined with his failure to object or to ask for additional time, was held to be a waiver not prejudicial to the nonsettling defendant.\textsuperscript{124}

The court in \textit{Pickett} reasoned that waiver of notice may readily be found in a reasonableness hearing unless the inadequate notice proved prejudicial to the defendant. The possibility of collusion suggests enough potential prejudice for notice requirements to be taken very seriously. Because the Senate committee found that the primary function of reasonableness hearings is collusion-avoidance, more stringent notice requirements when collusion is posited are justified.\textsuperscript{125}

Stricter notice requirements for posited collusion accords with supreme court dicta on the flexibility of due process: "The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them."\textsuperscript{126} Because reasonableness hearings exist to block collusive settlements, greater procedural safeguards should be available to a nonsettling defendant when she has a good faith belief that the settlement is collusive. These greater safeguards will effectuate the policy behind reasonableness hearings by creating an opportunity for meaningful exploration of the collusion issue.

\textbf{B. Notice Documents}

The nonsettling defendant's opportunity to prepare meaningful reasonableness hearing arguments is also severely limited if only the settlement agreement is included with the notice. A copy of the settling parties' arguments for reasonableness or their proposed findings and conclusions or both should also be included. Without notice of the settling parties' arguments for reasonableness, the nonsettling party may have difficulty structuring effective arguments against it.

This rationale is supported by \textit{Seidler v. Hansen}, a case cited in \textit{Zamora}. The \textit{Zamora} court refers to \textit{Seidler} in reaching its conclusion that the five days' notice requirement may be waived absent prejudice to the defendant. The court applied by analogy the principles of the five days' notice requirements of presentation for findings of fact (CR 52(c))\textsuperscript{127} and presenta-

\begin{footnotesize}
\textsuperscript{124} \textit{Id.} at 329-30, 717 P.2d at 279.
\textsuperscript{125} \textit{Final Report}, supra note 7, at 636.
\textsuperscript{126} \textit{Olympic Forest Prod.}, 82 Wash. 2d at 423, 511 P.2d at 1005.
\textsuperscript{127} Unless an emergency is shown to exist, or a party has failed to appear to a hearing or trial, the court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and
\end{footnotesize}
tion for judgments (CR 54(f)(2)),\textsuperscript{128} set out in \textit{Seidler}.\textsuperscript{129} Continuing the analogy, \textit{Seidler} also indicates what documents must be included for sufficient notice under CR 52 and CR 54.

In \textit{Seidler}, the plaintiff complained of defendant's failure to include a copy of proposed findings and conclusions under CR 54(f)(2).\textsuperscript{130} The court found CR 52(c) the more apt rule, but agreed that

\begin{quote}
[n]otice of presentation would be of small value to a defeated party without also having notice of the contents of the proposed findings of fact and conclusions of law, in order to have time to evaluate them and prepare argument against their adoption. Any other construction of the rule would be unreasonable and we must conclude that the 5-day notice requirement applies both to notice of submission and to service on the adverse party of copies of the proposed findings of fact and conclusions of law.\textsuperscript{131}
\end{quote}

According to the \textit{Zamora} court, the principles of notice under CR 52(c) and CR 54(f)(2) apply to notice under section 4.22.060(1) of the Revised Code of Washington.\textsuperscript{132} The effect of this holding is that notice of a reasonableness hearing, in order to be sufficient, must include not only a copy of the settlement agreement, but also a copy of either a document in which the party asserting reasonableness presents the arguments supporting reasonableness or the proposed findings and conclusions, or any document that will inform the nonsettling party of the proponent's perspective. This would enable the nonset-

\textsuperscript{128} No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment . . . .

\textsuperscript{129} Id. at 919, 547 P.2d at 920.

\textsuperscript{130} Id. at 919, 547 P.2d at 920.

\textsuperscript{131} Id. at 919, 547 P.2d at 920.

\textsuperscript{132} The 5-day written notice to parties requirement of the statute, [WASH. REV. CODE] 4.22.060(1) (1987), is much the same as the requirement for a 5-day notice of presentation for findings of fact (CR 52(c)) and the 5-day notice of presentation for judgments (CR 54(f)(2)). Under these latter two rules, 5 days' notice is required unless a party in some manner waives such notice or the trial court for cause shown shortens the time—providing that, in either event, no prejudice ensues. By analogy, we hold that these same principles should be applicable to the situation before us.

\textit{Zamora}, 104 Wash. 2d at 222, 704 P.2d at 598.
tling party to "intelligently prepare for the hearing" and to be afforded an opportunity to present objections.\textsuperscript{133}

\textbf{C. Procedural Protections v. Eve-of-Trial Settlements}

In addition to asserting that nonsettling defendants do not need procedural protections in expedited eve-of-trial settlements because they will already have completed discovery, Harris argues that "postponing the reasonableness hearing until during or after the trial was expressly rejected in \textit{Glover}."\textsuperscript{135} The dictum to which Harris refers arose in the context of the \textit{Glover} court's rejection of the nonsettling defendant's argument that relative liability should be the determinant of reasonableness.\textsuperscript{136} The court considered the possibility of postponing the reasonableness determination pending the resolution of the relative liability issue at trial.\textsuperscript{137} The court pointed out that this solution would deprive plaintiffs of certainty at the start of trial about the amount by which any later judgment would be offset.\textsuperscript{138}

Plaintiffs would be deprived of certainty if they accepted a partial eve-of-trial settlement, whether the reasonableness determination depended on the outcome of the trial or on a hearing continued into the trial time to benefit the nonsettling defendant. However, the plaintiff has the ultimate say on settlements—it is the plaintiff who accepts a defendant's offer. While procedural protections for a nonsettling defendant may discourage plaintiffs from accepting an eve-of-trial settlement, there is no reason why these procedures should discourage settlements before or after the eve of trial. Perhaps a plaintiff threatened by the uncertainty of a partial eve-of-trial settlement would be encouraged to seek \textit{full} settlement on the eve of trial. Procedural protections for defendants in eve-of-trial settlements may discourage partial settlements on the eve of trial, and thus may run counter to the policy of encouraging settlements. However, this small loss is more than balanced by the gain of a meaningful reasonableness hearing and respect for due process.

\textsuperscript{133} See also \textit{Nisqually}, 103 Wash. 2d at 727, 696 P.2d at 1226; \textit{Barrie}, 84 Wash. 2d at 585, 527 P.2d at 1380.

\textsuperscript{134} See \textit{Mullane}, 339 U.S. at 314; \textit{Barrie}, 84 Wash. 2d at 585, 527 P.2d at 1381.

\textsuperscript{135} Harris, \textit{supra} note 3, at 128.

\textsuperscript{136} \textit{Glover}, 98 Wash. 2d at 717, 658 P.2d at 1236.

\textsuperscript{137} \textit{Id}.

\textsuperscript{138} \textit{Id}.
Appellate courts are sensitive to the tension that exists between encouraging settlement and avoiding collusion when a reasonableness hearing is challenged on procedural grounds. Probably correctly, they favor the policy of encouraging settlement by showing a reluctance to overturn a finding of reasonableness on procedural grounds absent an allegation of collusion. The reverse side of this coin is that where good faith allegations of collusion exist, the courts would violate legislative intent by finding a waiver of procedural rights. At the trial court level, a motion for reconsideration of a reasonableness finding should be allowed under CR 59(a)(1) where procedural deficiencies exist, and where there is evidence of collusion that may not have been thoroughly presented at the initial hearing because of those procedural deficiencies.\textsuperscript{139}

IV. REMEDIES FOR COLLUSION

The Senate Judiciary Committee recommended that a threshold ruling on collusion be made at a reasonableness hearing.\textsuperscript{140} While a threshold ruling on collusion may be logical since reasonableness hearings purportedly exist to avoid collusion, a ruling on collusion is not yet mandated by law. Section 4.22.060(1) of the Revised Code of Washington requires only a finding that the settlement amount is reasonable. In *Glover*, the court acknowledged that a trial court may find collusion if the non-settling defendant presents evidence of collusion.\textsuperscript{141} When such a determination is made, however, the question arises as to what remedy a non-settling defendant should seek.

If evidence of collusion is presented at a reasonableness hearing and the court makes no finding about collusion but instead approves the settlement, then arguably reconsideration should be granted under CR 59(a)(1),\textsuperscript{142} which allows for reconsideration when there has been a procedural error. This

\textsuperscript{139} See infra notes 142-43 and accompanying text.
\textsuperscript{140} COMMITTEE REPORT, supra note 29, at 5.
\textsuperscript{141} *Glover*, 98 Wash. 2d at 716 n.2, 658 P.2d at 1235 n.2 (if the non-settling defendant presents evidence of collusion, the judge may refuse to approve the settlement pursuant to her inherent authority).
\textsuperscript{142} (a) GROUNDS FOR NEW TRIAL OR RECONSIDERATION. The verdict or other decision may be vacated and a new trial granted to all or any of the parties and on all or part of the issues when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any one of the following causes materially affecting the substantial rights of such parties:

1. Irregularity in the proceedings of the court, jury or adverse party, or
result is dictated by the collusion-avoidance function for which reasonableness hearings were formed.

The supreme court, in both cases in which it considered reasonableness rulings, mentioned lack of bad faith or collusion as a reason to not reverse a finding of reasonableness.\textsuperscript{143} It follows that evidence of collusion, either ignored by the court in the initial hearing, or surfacing subsequently, justifies reconsideration and possibly reversal of the reasonableness ruling.

Evidence of collusive settlement emerging after the reasonableness hearing is relevant for two related reasons: (1) evidence of collusion will probably be hidden and difficult to discover, and (2) collusive settlement terms may be withheld from the reasonableness hearing, but later become apparent at trial.

Once collusion is established, there is the problem of an appropriate remedy. Three possible remedies suggest themselves. The trial judge could (1) fail to approve the settlement, so making it void; (2) accept the settlement, but not extinguish the nonsettling defendant’s right to contribution from the settling defendant; or (3) accept the settlement, but fix a reasonable figure for a noncollusive settlement to be used as a pro tanto credit.

The first remedy, failure to approve the settlement, is advocated by the \textit{Glover} court.\textsuperscript{144} Once the possibility exists that a settlement may not be approved and may therefore not bind the parties, an element of certainty will be removed from

\textsuperscript{143} Zamora, 104 Wash. 2d at 223, 704 P.2d at 598; \textit{Glover}, 98 Wash. 2d at 718, 658 P.2d at 1236.

\textsuperscript{144} See \textit{Glover}, 98 Wash. 2d at 716 n.2, 658 P.2d at 1235 n.2.
settlements. If we accept the argument that the carrot of certainty entices settlements, then removing that carrot will discourage settlements, or at least not encourage them. To discourage settlements by limiting certainty seems to be at odds with legislative policy.  

The *Glover* court and the Judiciary Committee apparently based their suggested remedy on the assumption that the collusion ruling will be made at a reasonableness hearing prior to the nonsettling defendant's trial. If instead the collusion ruling occurs during or after the trial of the nonsettling defendant, then if the settlement is not approved it must be renegotiated or the case must be tried over against the settling defendant.

This remedy punishes all the parties. The plaintiff and settling defendant lose certainty and gain the expense of renegotiation or trial. The nonsettling defendant will lose the certainty of an early pro tanto credit. If the settlement cannot be renegotiated, she may also have to incur the expense of a trial on the issue of contribution because the right of contribution will again exist between the defendants. Comparative fault governs the right of contribution under section 4.22.040(1) of the Revised Code of Washington. So unless the settlement is voided in time to simultaneously bring all defendants to trial, the defendant who first goes to trial must participate in the subsequent trial of the other defendant, or bring a separate contribution action so that the matter of comparative fault is fairly tried. The courts, as well as the parties, may lose under this remedy. Their loss will be the burden of avoidable litigation.

The second remedy, letting the settlement bind the parties to it without extinguishing the nonsettling defendant's right to contribution, is suggested by Harris, analogizing to CR 56(g). Under CR 56(g), an affidavit is always subject to scrutiny for good faith.  

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145. *See supra* notes 10-18 and accompanying text.


147. *See Harris, supra* note 3, at 185 for a proposed court rule addressing this point, modeled after CR 56(g).

148. *(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused*
hearings, a finding of bad faith or collusion in the settlement, or in the affidavits supporting reasonableness, would require the party acting collusively or in bad faith to reimburse the other party for any expenses it incurred because of the bad faith or collusion.\textsuperscript{149} If this suggested rule were read as maintaining the nonsettling defendant's right to contribution,\textsuperscript{150} the bad faith plaintiff would get his full recovery, while the bad faith defendant would lose the certainty of his settlement. All defendants would have to incur the costs of a trial to determine comparative fault. However, if this rule were read as requiring contribution by all settling parties, then depending on when in the course of payment of the judgment the ruling occurred, the plaintiff might be liable to the nonsettling party for either partial reimbursement or for a credit against his portion of the judgment.

This second remedy, while it punishes all the bad faith parties, is awkward because the comparative fault issue would still need to be tried, and the plaintiff's share of the nonsettling defendant's costs would need to be fixed as well. If the collusion affects the nonsettling defendant's trial, the nonsettling defendant may not have to pay any judgment at all because improper disclosures to the plaintiff may forever foreclose the possibility of a fair trial.

The third remedy is the simplest. It lets the settlement bind the parties as prescribed by section 4.22.060(3) of the Revised Code of Washington but lets the court fix the amount of the pro tanto credit based on a reasonable, noncollusive settlement or, if occurring after trial, based on the judgment. Under this remedy, the collusive defendant keeps the certainty of his settlement while the plaintiff is punished with less than a full recovery, assuming a verdict disproportionately higher than the settlement. While this remedy creates uncertainty for plaintiffs, and thus could discourage them from settling, a plaintiff has full control over an accepted settlement. The plaintiff could avoid any uncertainties by scrupulously avoiding even the appearance of collusion.

The tension between avoiding collusion and encouraging

\textsuperscript{149} Harris, supra note 3, at 185.

\textsuperscript{150} In other words, the amount of the judgment in excess of comparative fault equals expense incurred as a result of collusion.
settlement is very real. By allowing a remedy against collusion, but by setting a high standard of proof for collusion,151 a proper balance might be struck. The remedy chosen should not discourage settlement because courts, with an interest in settlements, would be reluctant to use it.

V. THE RELATIONSHIP BETWEEN A REASONABLENESS HEARING AND THE NONSETTLING DEFENDANT’S SUBSEQUENT TRIAL

Important questions about the reasonableness hearing arise in the context of the nonsettling defendant’s subsequent trial. These questions concern the admissibility of the reasonableness proceedings and ruling as evidence in that trial. They arise because plaintiff’s interest in presenting the amount of damages may change between the reasonableness hearing and trial.

At the reasonableness hearing, the plaintiff will probably claim damages on the low side to make the amount of settlement look reasonable. At trial, on the other hand, the plaintiff will have an incentive to claim higher damages to maximize recovery, and may obtain a judgment that appears excessive when compared to the reasonableness hearing figures. When settlement occurs early in the lawsuit and discovery is incomplete, a later increase in the amount of damages sought may be acceptable because evidence discovered during preparation for trial may show a personal injury plaintiff’s damages to be greater than originally represented.152

While an increase in the damage figure at trial may be justified for a personal injury plaintiff who settles early with less than all of the defendants, the plaintiff who accepts a settlement on the eve of trial may be motivated only by greed. By the eve of trial, the plaintiff should have a firm idea of her damages. Absent an abrupt change in the law, the only reason to change the damage figure would be to gamble for a higher recovery. This gamble is at the nonsettling defendant’s expense.


152. The Glover factor relating to extent of preparation addresses these circumstances. Glover, 98 Wash. 2d at 717, 658 P.2d at 1237.
A settlement is found reasonable partly because of its relationship to the amount of damages sought.\footnote{153} If the plaintiff uses a lower damage figure at the reasonableness hearing, a nonsettling defendant is deprived of the opportunity to argue that the settlement amount is too low as a percentage of the damages claimed.

The problem of shifting damage figures arises because of the intangible nature of compensatory damages\footnote{154} and because state law forbids specifying the amount of damages sought.\footnote{155} Rather, the statute requires "a prayer for damages as shall be determined."\footnote{156} However, the statute also requires plaintiffs to provide defendants with statements of damages sought within 15 days of a formal request by defendants.\footnote{157}

Defendants must be able to rely on the amount of damages that plaintiff claims to seek. That figure guides the defendants' strategy in litigation and settlement negotiations as well as in arguments about the reasonableness of a codefendant's settlement.

Nonsettling defendants may be protected from shifting damage figures and the purposes of reasonableness hearings may be furthered by the remedy of equitable estoppel.\footnote{158} The elements for equitable estoppel are:

(1) an admission, statement or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.\footnote{159}

Where a plaintiff claims to seek damages in a lower amount for purposes of a reasonableness hearing, especially on

\footnotesize{\begin{itemize}
  \item[153.] Id; see supra text accompanying note 47.
  \item[154.] Barr v. Interbay Citizens Bank, 96 Wash. 2d 692, 700, 635 P.2d 441, 444-45 (1981) (compensatory damages are intended to compensate for tangible injuries, such as property damage, and for such intangible injuries as pain and suffering or loss of reputation); Baxter v. Greyhound Corp., 65 Wash. 2d 421, 438, 397 P.2d 857, 868 (1964); Walker v. McNeil, 17 Wash. 582, 593-94, 50 P. 518, 521-22 (1897).
  \item[156.] Id.
  \item[157.] Id.
  \item[158.] The doctrine of equitable estoppel rests on the principle that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Emrich v. Connell, 105 Wash. 2d 551, 559, 716 P.2d 863, 868 (1986) (quoting Wilson v. Westinghouse Elec. Corp., 85 Wash. 2d 78, 81, 530 P.2d 298, 300 (1975)).
  \item[159.] Emrich, 105 Wash. 2d at 559, 716 P.2d at 868.
\end{itemize}}
the eve of trial, and then at trial seeks a higher amount, all three elements for estoppel are present. Element (1) is present when the plaintiff’s damage claim ("statement") at the reasonableness hearing, and presumably during settlement negotiations, is inconsistent with the claim at trial. Element (2) is present when the nonsettling defendant relies on the plaintiff’s damage claim to structure settlement offers and to argue against the reasonableness of any settlement with a codefendant. The court also relies on the plaintiff’s statement in making the reasonableness ruling. Element (3) is present when a settlement is found to be reasonable based on the lower amount, and the defendant is deprived of the possibility of a higher pro tanto credit. The court is harmed because it is used by the plaintiff for ignoble ends and thereby loses a measure of dignity and credibility. When there is no good faith reason for the plaintiff to assert a claim for damages at trial that is significantly higher than the amount proved at a reasonableness hearing, the plaintiff should be estopped from asserting that claim. The estoppel remedy could be implemented through a court rule that prohibited the assertion of significantly higher damages absent good cause, or through a jury instruction placing a ceiling on damages.

However, any attempt to claim that the plaintiff is estopped from asking for a higher damage award would have to take into account ER 408, which excludes evidence of settlement to prove the amount of a claim. ER 408 is based on the assumption that evidence of settlement or offers of compromise is not relevant to the issues of liability or damages. Its purpose is to protect a defendant whose offer of settlement is rejected from having that offer used at trial as an admission of

160. COMPROMISE AND OFFERS TO COMPROMISE. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

WASH. R. EVID. 408 (emphasis added).

161. K. TEGLAND, 5 WASH. PRAC. EVIDENCE § 134 (2d ed. 1982).
liability or of the amount of damages due the plaintiff.\footnote{Id. at 331 (comment WASH. R. EVID. 408).} However, the rule also protects the plaintiff from use of such evidence to prove "the invalidity of the claim."\footnote{WASH. R. EVID. 408.} Neither of these purposes of ER 408 is violated by using evidence of assertions made at reasonableness hearings to establish a ceiling for damages at the nonsettling defendant's subsequent trial. However, there are several conceptual frameworks for estopping a plaintiff from inflating her suggested damage amount that avoid using reasonableness hearing assertions as evidence. Each framework relies on jury instructions to effectuate the estoppel.

The first framework is based on the fact that equitable remedies are granted by the judge, not by the jury.\footnote{In re Estate of Shaughnessy, 97 Wash. 2d 652, 657, 648 P.2d 427, 430 (1982).} Therefore, a defendant could move for estoppel, and the motion would be argued only to the judge. The arguments would be made out of the presence of the jury, and if the motion was denied, neither party would have been prejudiced by the admission of evidence of the settlement figure or by the amount of damages claimed as a basis for the reasonableness of the settlement figure. On the other hand, if the judge decided that the plaintiff should be estopped from seeking a higher damage award, the arguments and evidence supporting this motion\footnote{This evidence would include the fact of the plaintiff's settlement with the codefendant as well as the amount of settlement, both of which are inadmissible under ER 408. Grisby v. Seattle, 12 Wash. App. 453, 458, 529 P.2d 1167, 1171 (1975) (in personal injury action, revelation that plaintiff had settled with a codefendant was error). The scope of ER 408 is broad enough to extend beyond the parties at trial. See K. TEGLAND, 5 WASH. PRAC. EVIDENCE § 134 (2d ed. 1982).} would still not be revealed to the jury. The estoppel would be implemented by incorporating the amount or range of damages claimed at the reasonableness hearing into jury instructions as a ceiling on any jury award.

Summary judgment procedure also provides a second framework for estoppel that would be consistent with the policy underlying ER 408. Under CR 56(d), the court may grant partial summary judgment, specifying in its order the facts not in dispute, "including the extent to which the amount of damages or other relief is not in controversy."\footnote{WASH. R. CIV. P. 56(d).} The rule provides that any such facts not in dispute at the summary judgment proceeding "shall be deemed established" for the purpose of

\[\text{\textsuperscript{162}}\text{Id. at 331 (comment WASH. R. EVID. 408).} \]

\[\text{\textsuperscript{163}}\text{WASH. R. EVID. 408.} \]

\[\text{\textsuperscript{164}}\text{In re Estate of Shaughnessy, 97 Wash. 2d 652, 657, 648 P.2d 427, 430 (1982).} \]

\[\text{\textsuperscript{165}}\text{This evidence would include the fact of the plaintiff's settlement with the codefendant as well as the amount of settlement, both of which are inadmissible under ER 408. Grisby v. Seattle, 12 Wash. App. 453, 458, 529 P.2d 1167, 1171 (1975) (in personal injury action, revelation that plaintiff had settled with a codefendant was error). The scope of ER 408 is broad enough to extend beyond the parties at trial. See K. TEGLAND, 5 WASH. PRAC. EVIDENCE § 134 (2d ed. 1982).} \]

\[\text{\textsuperscript{166}}\text{WASH. R. CIV. P. 56(d).} \]
any upcoming trial.\textsuperscript{167}

If a determination of reasonableness is equated with a partial summary judgment\textsuperscript{168} then the maximum damage figure asserted by the plaintiff at a reasonableness hearing could be considered a fact "deemed established" for trial as a ceiling on any damage award. This would give the plaintiff no flexibility in adjusting a damage claim upward at trial. However, it may be unreasonable to expect the plaintiff to conclusively establish her damages, or range of damages, before attempting to settle with any defendants, in order to avoid being held to a low damage figure at trial. On the other hand, this expectation might force plaintiffs to err on the side of projecting a higher total damage figure at the reasonableness hearing, thus counteracting any tendency to minimize damages in order to push the settlement through.

Naturally, a plaintiff who settles long before trial should be entitled to a reconsideration of the ceiling on damages if she can present evidence of higher damages that could not have been discovered with reasonable diligence before the reasonableness hearing.

The rebuttable presumption supplies a third framework for estoppel: the maximum damages asserted at the reasonableness hearing become a presumptively correct ceiling. At trial, in addition to proving the fact and amount of damages, the plaintiff must prove that figures higher than those asserted at the reasonableness hearing are justified on the basis of evidence that could not have been discovered with reasonable diligence before the reasonableness hearing. The closer to the time of trial a settlement and reasonableness hearing occur, the more difficult it will be for a plaintiff to show new evidence justifying higher damages.

The second and third frameworks are substantially similar. While they may provide satisfying conceptualizations for attorneys and judges, it may be difficult to develop understandable jury instructions to implement them. On the other hand, the first framework would produce an elegantly simple instruction: "The jury may not award damages greater than $\ldots\ldots\ldots\ldots$"

\textsuperscript{167} Id.

\textsuperscript{168} A determination of reasonableness of a settlement is similar to a partial summary judgment as to the settling defendant.
CONCLUSION

Reasonableness hearings exist primarily to benefit nonsettling defendants. Procedures developed for the hearings should effectuate this purpose. To that end, nonsettling defendants must have adequate temporal and documentary notice of reasonableness hearings in order to discover and prepare evidence challenging the settling parties' assertion of reasonableness. Trial courts should consider the factors for reasonableness set out by the supreme court, and should articulate the bases for their judgments so that coherent standards of reasonableness may be developed through appellate review. Trial courts should also be prepared to protect the nonsettling defendant's interests by providing remedies against collusive settlements and by prohibiting the assertion of a damage claim at trial that is unjustifiably higher than the amount asserted at the reasonableness hearing.

Luanne Coachman