IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Ct. No. 98434-4

(Court of Appeals No. 79490-6-I)

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

v.

ROBERT T. ULBRICHT, ET. AL,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

DAVIS WRIGHT TREMAINE LLP

Steven P. Caplow, WSBA #19843
Everett W. Jack, Jr., WSBA #47076
Attorneys for United States Fidelity
and Guaranty Company

920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150 Phone
(206) 757-7700 Fax
Email: stevencaplow@dwt.com
Email: everettjack@dwt.com

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Pursuant to RAP 13.4(b)(2)-(4), appellant United States Fidelity and Guaranty Company ("USF&G") respectfully requests discretionary review of an unprecedented decision holding that a trial court's assessment of the reasonableness of a covenant judgment award of actual damages in the underlying action may consider the costs and risks attendant to any future insurance coverage litigation.

As a matter of law, the costs and risks of collecting on a judgment cannot be awarded as actual damages in an underlying judgment. In a sworn declaration, even plaintiffs acknowledge that this is the "first time" a Washington Court has factored prospective judgment collection litigation costs to justify the reasonableness of a covenant judgment. Indeed, no court has ever permitted a party to base the judgment amount on the underlying case plus the future cost or risk of collection on the judgment itself. As this case illustrates, where the subsequent insurance coverage litigation provides for fee recovery not available in the underlying case, approving a settlement that covers future collection costs as actual damages in the underlying matter results in a massive double recovery.

I. IDENTITY OF PETITIONER

The party seeking review is appellant United States Fidelity and Guaranty Company.

II. STATEMENT OF DECISION

On February 10, 2020, Division I of the Court of Appeals issued its decision affirming the decision of the trial court. On March 20, 2020, the Court of Appeals denied USFG's motion for reconsideration and plaintiffs' motion for publication.

III. ISSUES PRESENTED FOR REVIEW

Whether it is proper for the trial court to contemplate the costs and risks involved in the future insurance coverage litigation when evaluating the reasonableness of the proposed covenant judgment.

IV. STATEMENT OF THE CASE

A. Parties and Claims

The plaintiff in this matter, Robert Ulbricht, was exposed to asbestos throughout his working life. CP 64, 67-68, 70-71. Following his November 2017 diagnosis of mesothelioma, he filed a claim with the Department of Veterans Affairs based on asbestos exposure during the years he served in the Air Force. CP 73, 306, 360-65. He and his wife also filed a complaint against 19 defendants alleging exposure to asbestos while working at a Texaco oil refinery in Anacortes, Washington. CP 1-5. Later amendments to the complaint added another defendant and his children as co-plaintiffs. CP 6-10. Among these defendants was PM Northwest, who was one of a number of contractors (including companies such as Bechtel), that occasionally worked at the Texaco site. CP 374 at 77:4-24, 1008-09 at 73:10-25, 77:4-9.

Ulbricht believed that despite the lack of evidence linking PM Northwest to his exposure to asbestos, through expert testimony, he could establish a link. Ulbricht also believed that because decades' old PM Northwest records had suffered water damage, he could establish liability based on spoliation of evidence. Further, he was confident that on discretionary review, the Court of Appeals would uphold the trial court's ruling barring recovery under the statute of repose. PM Northwest's counsel thought Ulbricht's causation expert was out on a limb, the spoliation argument meritless, and that based on his prior success in representing insulation contractors the statute of repose was a strong and valid defense.

B. Plaintiffs' "Ridiculous" $3.5 Million Settlement Demand

On July 9, 2018, plaintiffs sent PM Northwest a settlement demand for $3.5 million.[1] PM Northwest's counsel considered this demand so "high" and "ridiculous" he did not even recommend that PM Northwest make a counter-offer. CP 780; CP 782 at 90:21-24. In fact, PM Northwest's counsel testified that he did not even consider the $3.5 million a "real demand." CP 780 at 82:2-7. Counsel for PM Northwest, guided in his thinking based on decades of experience litigating asbestos cases to trial, many to defense verdicts, believed a reasonable settlement for this claim would not exceed $2 million. CP 782. Independent of the

[1] This far exceeds USF&G's alleged policy limits of $2.5 million, which have now been tendered to plaintiffs.

merits, PM Northwest's counsel testified that PM Northwest had limited assets and could not pay more than $1 million.[2] CP 484.

On July 18, 2018, Plaintiffs and PM Northwest participated in mediation, along with the other remaining defendants. CP 866. Between the July 18 mediation and the end of July, 2018, all of the defendants, other than PM Northwest, settled with or were dismissed from the case by Plaintiffs. CP 894-95. Twelve of the 20 defendants paid money to settle Plaintiffs' claims against them, and those twelve defendants paid a combined total of $1,523,000, an average of about $125,000 per defendant. CP 838 at 70:4-5, CP 895. The other eight defendants were dismissed without paying anything to Plaintiffs. Had the case gone to trial, PM Northwest would have been entitled to set-off for the $1.5 million plaintiffs had already received from the other settling defendants. CP 702-03.

C. Parties' $4.5 Million Covenant Judgment

On Thursday, July 26, 2018, roughly a week after the failed mediation, Plaintiffs' counsel, Matthew Bergman ("Bergman"), reached out to PM Northwest's counsel, David Shaw ("Shaw") to see if PM Northwest had any interest in discussing settlement before trial and Bergman's upcoming vacation. CP 796. Five days later, on Wednesday,

[2] *See Aspen Grove Owners Ass'n v. Park Promenade Apartments, LLC*, 842 F. Supp. 2d 1298, 1303 (W.D. Wash. 2012) (agreement to a covenant judgment in an amount that the defendant would have no ability to pay is a "strong indication of unreasonableness").

August 1, 2018, Shaw responded, and Bergman and Shaw met for drinks later that afternoon at Fadó, a bar in downtown Seattle. CP 798-99. At that point, the parties were no longer negotiating.[3] CP 700. Bergman set the new settlement amount at $4.5 million with a covenant not to execute, and PM Northwest's counsel promptly agreed without consulting his client, or even "discuss[ing] the actual number." CP 792 at 117:22-23. PM Northwest's counsel explained, without any obligation to pay, the amount simply was no longer a relevant consideration to his client. CP 792-93 at 117:20-118:1 ("He was getting ought [sic], and that's all he cared about.").

In papers submitted to the trial court for approval of the covenant judgment, plaintiffs explained why—even though the earlier $3.5 million proposal to PM Northwest had been rejected as "ridiculous"—Bergman increased the settlement amount to an even higher sum:

> When the prospect of resolution through covenant judgment arose, Mr. Bergman made clear that Plaintiffs would be assuming a significant risk by 'trading one litigation for the other' against PM Northwest's insurers. Thus, Mr. Bergman demanded $4.5 million for the covenant judgment to ameliorate that risk and fairly compensate Plaintiffs' for their loss.

[3] The parties' exchange here was in no way exceptional, and is exactly why the Courts are obligated to conduct a reasonableness hearing with regard to covenant judgment settlements. *Merriman v. Bernd*, No. 13-2-00504-1 (Yakima Sup. Ct. May 2, 2004), CP 939-62 (courts recognize that by its very nature, there is no incentive for a defendant "negotiating" a covenant judgment to limit the monetary judgment).

CP 503.

In Conclusion of Law 23, the trial court agreed with plaintiffs that the risks and costs of potential future insurance coverage litigation "justifies a larger covenant judgment amount than would be reasonable" to otherwise settle the underlying case. CP 1199. The trial court agreement that the amount that "would be reasonable" to settle the underlying case should be increased for covenant judgments sets a new standard because by their very their nature, covenant judgments involve a subsequent claim for insurance coverage.[4] In short, the Court improperly created a new criterion to evaluate whether the settlement amount underlying the covenant judgment was reasonable—the extent that the covenant judgment will involve future litigation costs.

On appeal, the court of appeals affirmed, ruling it is "proper for the trial [court] to contemplate the risks and costs involved [in the 'future bad faith litigation'] when evaluating the reasonableness of the proposed covenant judgment." Op. at 10. Even plaintiffs acknowledge that this is the "first time that the 'risks of continued litigation' factor encompasses the risks of future litigation faced by plaintiff." Hayes Decl. ¶ 5; see also Pl. Mot. to Pub. at 4.

[4] In addition to the legal defects addressed by this petition, as a factual matter, the premise is dubious. PM Northwest could not pay a judgment in excess of $1 million. CP 484. Plaintiffs have already received $2.5 million from USF&G (plus $1.5 million from other defendants). Pursuing a coverage action against USF&G actually reduces collection risk.

D. Post-Opinion, Plaintiffs Demand Upfront Payment of the Entire Judgment, including the Risk/Cost of Future Coverage Litigation

At every stage of this case, plaintiffs insisted that including the costs of future insurance coverage litigation in arriving at the approved settlement amount of the underlying case would not result in a double recovery. Yet, two days after the Court of Appeal's Opinion issued, plaintiffs sent USF&G an Insurance Fair Conduct Act (IFCA) notice demanding payment of the entire $4.5 million consent judgment, plus 5.25% interest.[5] Plaintiffs further warned USF&G that unless it immediately paid the consent judgment in full (which includes the future cost of pursuing the insurance coverage litigation) USF&G would be subject to all remedies provided for in the statute (which includes the costs to pursue the insurance coverage litigation). Ex. 1 to USF&G Mot. for Recons. The notice belies plaintiffs' assurances in obtaining approval of the covenant judgment amount, and that the future insurance recovery action would not award the litigation costs for the insurance recovery action twice.

[5] This situation placed USF&G in an untenable situation: it must either pay the full amount and provide the plaintiff a windfall that includes recovery of litigation costs that were never incurred, or contest coverage and make the additur to the actual damages a self-fulfilling prophesy. Accordingly, as required by Washington law, USF&G has initiated a declaratory judgment action, but offered to stay such action pending the appeal.

V. ARGUMENT

The parties know that to the extent the covenant judgment is collectible, it will be against an insurance company and for that reason the settlement of the underlying claim must be reasonable as it will establish the presumptive value of the *underlying claim* for purposes of the future coverage action. Plaintiffs' IFCA notice demonstrates the legal error of lumping together as "actual damages" (i) the defendants' cost of achieving a reasonable settlement in the underlying case, with (ii) the plaintiffs' ability to recover attorney fees as a prevailing party in any future insurance coverage action. As a matter of due process and judicial administration, courts do not pre-adjudicate matters and award as reasonable sums that are at issue in a future case. Particularly when Washington common law and statute requires the judge assigned to future insurance coverage action to consider an award of these same costs.

A. Future Risk/Costs Are Not Actual Damages

A party cannot recover as "actual damages" the potential additional cost/risk of collection on a judgment. This is particularly true for a covenant judgment. The entire purpose of the reasonableness finding in this context is to make sure that the covenant judgment amount fairly values the underlying case—because this amount becomes the presumptive "damages" for which insurance coverage will be sought in the later insurance coverage action. *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). As a matter of law, "the term 'actual damages,' as used in IFCA and the CPA, does not include

attorneys' fees or other litigation costs." *Schreib v. Am. Family Mut. Ins. Co.*, 129 F. Supp. 3d 1129, 1141 (W.D. Wash. 2015). But even outside the IFCA context, no court allows a party to recover as actual damages included within a judgment, the potential additional cost/risk of collecting on the judgment.

B. The Award of Future Collection Costs as Actual Damages Is Unprecedented

As the Ulbricht plaintiffs belatedly concede, the award of future insurance coverage fees/costs as part of defendant's damages is unprecedented and contrary to existing law. Hayes Decl. ¶ 5. Without exception, cases that address the fifth Glover factor ("risk and expense of continued litigation") do so exclusively with reference to the continuation of the underlying case, not a future collection action or future insurance coverage action. Indeed, in the seminal *Chaussee* decision, the Court of Appeals ruled that a settlement within the range of jury verdicts was ***unreasonable*** because this "determination did not take into consideration the risk and cost of proceeding to trial [i.e., in the underlying case] . . . which may serve to ***reduce*** the amount of a settlement." *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 513, 514, 803 P.2d 1339 (1991) (citing *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983) (emphasis added). *Chaussee* applies this factor to evaluate the costs of the underlying case (not the future coverage case), and to reduce (not increase) the amount of a reasonable settlement.

The Court of Appeals Opinion suggests that trial courts need the ability to consider the cost of future insurance coverage litigation in order to be consistent with *Werlinger v. Warner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005), where the court considered a bankruptcy proceeding that pre-dated the underlying lawsuit. Op. at 10-11. Of course, the *Werlinger* Court was reviewing the sixth Glover factor (the defendant's "ability to pay") based on the bankruptcy of the defendant that predated the underlying case, not the fifth Glover factor ("risk and expense of continued litigation") based on future insurance coverage litigation. In *Werlinger*, before the underlying plaintiff filed suit, the defendant had already secured a discharge in bankruptcy. 126 Wn. App. at 345. The plaintiff and defendant in the underlying suit then agreed to a $5 million covenant judgment. *Id*. This Court ruled that although plaintiff otherwise had "a very strong case," the reasonable settlement value of the case was $25,000 because "[b]y virtue of the bankruptcy discharge, [defendant] had a complete defense to personal liability [in the underlying case]." *Id*. at 351. In *Werlinger*, the Court of Appeals flatly rejected the argument that the covenant judgment should be based on recovery in a future coverage action. As even plaintiffs now acknowledge, *Werlinger* is consistent with every prior decision in the State of Washington that evaluates the Glover factors exclusively with reference to the merits of underlying case as presented by the parties at the time, not based upon any future insurance coverage litigation.

C. The Award Improperly Awards the Same Damages Twice

As demonstrated by the IFCA notice, should it fail to make this payment within 20 days, USF&G will be subject to the "remedies provided for in the statute, which include recovery of the actual damages sustained, together with the costs of the [insurance coverage] action, including reasonable attorneys' fees and certain litigation costs." USF&G Mot. for Recons. Ex. 1. In short, USF&G may be required to pay plaintiffs for costs of a coverage action (1) as part of the covenant judgment; and (2) again as part of awardable costs and disbursements under *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). No Washington decision has gone so far as to award the same litigation expenses twice—once as damages and again as awardable attorney's fees—yet that would be the result if the costs of future insurance coverage litigation can be considered in approving the covenant judgment amount.

D. Alternative, the Case Should be Remanded

As explained above, consistent with existing law, the preferred approach is for the trial court to establish the settlement value of the underlying case, and the new court to determine damages, if any, associated with any potential future coverage litigation. This both accords with Washington law on actual damages and avoids a double recovery. However, at a minimum, even if this Court upholds the trial court's determination that a covenant judgment should include a higher amount to

address future insurance coverage litigation, this case should be remanded to the trial to allocate the covenant judgment amount between the settlement of the underlying case, and the future coverage litigation cost awarded. *See Mayer v. City of Seattle*, 102 Wn. App. 66, 80, 10 P.3d 408 (2000) (abuse of discretion not to segregate out attorneys' fees between claims).

The importance of segregating between actual damages in the underlying case and future cost of the coverage litigation is illustrated by the fact that the future insurance coverage case portion of the covenant judgment potentially represents up to 78% of the total $4.5 million covenant judgment:

Underlying Settlement Value	**Future Coverage Case ($)**	**Future Coverage Case (%)**
$1 million [ability to pay]	$3.5 million	78%
$2 million [reasonable settlement based on facts of this case]	2.5 million	56%
$3.5 million ["ridiculous" demand]	$1 million	22%

VI. CONCLUSION

USF&G respectfully requests discretionary review of the Court of Appeal's decision ruling that it was proper for the trial court to contemplate the risks and costs involved in the future coverage litigation

to evaluate the reasonableness of the proposed covenant judgment awarding actual damages for the underlying action.

RESPECTFULLY SUBMITTED this 17th day of April, 2020.

Davis Wright Tremaine LLP
Attorneys for Petitioner United States Fidelity and Guaranty Company

By /*s Steven P. Caplow*
Steven P. Caplow, WSBA #19843
Everett W. Jack, Jr., WSBA #47076

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APPENDIX TO
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Steven P. Caplow, WSBA #19843
Everett W. Jack, Jr., WSBA #47076
Attorneys for United States Fidelity
and Guaranty Company

920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150 Phone
(206) 757-7700 Fax
Email: stevencaplow@dwt.com
Email: everettjack@dwt.com

APPENDICES

Respectfully submitted this 17th day of April, 2020.

Davis Wright Tremaine LLP
Attorneys for Respondent

By: *s/ Steven P. Caplow*
Steven P. Caplow, WSBA #32491
Everett W. Jack, Jr., WSBA #47076

APPENDIX A

FILED
2/10/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; ELLIOTT COMPANY, d/b/a ELLIOTT TURBOMACHINERY COMPANY; FRASER'S BOILER SERVICE, INC.; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), INC.; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; IMO INDUSTRIES, INC., individually and as successor-in-interest to DE LAV AL TURBINE, INC., and ADEL WIGGENS; INGERSOLL-RAND COMPANY; ITT CORPORATION, as successor-in-interest to FOSTER VALVES; MET ALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PM NORTHWEST, INC.; SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; SEQUOIA VENTURES, INC., formally known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.;	)	No. 79490-6-I (Consolidated with No. 79590-2-I) DIVISION ONE UNPUBLISHED OPINION

SULZER PUMPS (US), INC., formally known as SULZER BINGHAM PUMPS, INC.;
UNION CARBIDE CORPORATION;
WARREN PUMPS, LLC, individually and as successor in interest to QUIMBY PUMP COMPANY;
ZURN INDUSTRIES, LLC, as successor in interest to ERIC CITY IRON WORKS,

Appellant,

v.

ROBERT PAUL ULBRICHT and KAREN ULBRICHT, husband and wife; HEIDI L. ULBRICHT, ROBERT S. ULBRICHT,

Respondent.

FILED: February 10, 2020

HAZELRIGG-HERNANDEZ, J. — Intervenor United States Fidelity & Guarantee (USF&G) appeals a superior court's determination of reasonableness of a $4.5 million covenant judgment in favor of Robert and Karen Ulbricht and their dependent adult children (collectively, Ulbrichts). The covenant judgment was reached by counsel for the Ulbrichts and the sole remaining defendant in the suit, PM Northwest, days before trial was to commence and as PM Northwest was still left with uncertainty as to their insurers' position on defending them. The insurers for PM Northwest, USF&G and National Union Fire Insurance Company, intervened in the proceedings on reasonableness with the agreement of the parties. USF&G avers the court improperly considered previous asbestos verdict information and assigns error to a number of the findings of fact. We affirm the superior court's determination of reasonableness.

FACTS

In January 2018, Robert Ulbricht and his wife, Karen,[1] filed suit against 20 defendants, including PM Northwest, seeking damages for bodily injury from exposure to asbestos. The record indicates that Robert came into contact with asbestos through activities involving various contractors between 1973 and 1999 when he worked at the Texaco Oil Refinery (the plant) in Anacortes, Washington. In April 2018, the Ulbrichts amended their complaint a second time to include their two dependent adult children as plaintiffs. Due to Robert's mesothelioma diagnosis, the case was given an expedited trial date of August 6, 2018.

PM Northwest was a maintenance contractor at the plant; it did not manufacture asbestos or bring asbestos insulation onto the site. The duration of PM Northwest's work at the plant was disputed. PM Northwest asserted several defenses to the Ulbrichts' claims, including one based on the statute of repose which was denied on summary judgment. Prior to the summary judgment motion, the trial court struck 17 of PM Northwest's affirmative defenses, including employer negligence and superseding cause.

Attorneys for both the Ulbrichts and PM Northwest were deposed in preparation for the reasonableness hearing. Counsel for PM Northwest has defended asbestos cases since 2001. He estimated that 80 percent of all his cases ended in defense "victor[ies]." PM Northwest's counsel also recognized PM Northwest as a "major player" in the case. The attorney identified three key defenses for his client: 1) a lack of causal link, 2) comparative negligence on

[1] Because all of the plaintiffs share the same last name, we use their first names for clarity. We intend no disrespect.

Robert's part, and 3) assertion of error as to trial court's decision on the statute of repose. Counsel acknowledged that the chance of prevailing on the first two defenses was "not very good." The defense also recognized the difficulty that PM Northwest had with credibility challenges if the case proceeded to trial, given the expected testimony of four former PM Northwest employees discrediting the company president's denial of working with insulation at the plant. Counsel knew that a "formidable witness" who was an expert in asbestos was expected to testify for the plaintiffs. Perhaps most critically, he was also aware of the likelihood that his client would have to declare bankruptcy if an adverse verdict was entered.

Counsel for the Ulbricht family has represented plaintiffs in asbestos litigation since 1994, taking approximately 20 cases to verdict. The attorney's firm handles approximately 30 asbestos cases a year. The attorneys for PM Northwest and the Ulbrichts tried numerous asbestos cases against each other over the years. The Ulbrichts' attorney was aware of the mounting obstacles that PM Northwest was facing as trial approached.

In March 2018, PM Northwest notified one of its insurers, United States Fidelity & Guaranty Company (USF&G) of the Ulbrichts' claim. USF&G refused to defend or indemnify under the policy and would take no further action until PM Northwest located and produced a copy of the applicable policies. On July 10, 2018, PM Northwest obtained the policy information, but not the formal policy documents, and contacted Travelers and AIG Insurance seeking to open claims under these policy numbers. Shortly after, PM Northwest provided the insurers with the demand letter from Plaintiffs. Defense counsel tendered the claim to

Travelers and AIG, through a risk management company, during the mediation on July 18, 2018, but the insurers still refused to take any action. At that time, PM Northwest advised the insurers that trial was set to begin on August 6, 2018. The Ulbrichts sent PM Northwest a $3.5 million settlement demand, which PM Northwest's counsel described as "ridiculous" and "too high" for a settlement. No counter offer was made.

During the mediation on July 18, 2018, the assigned mediator, a retired judge experienced in asbestos litigation, suggested to defense counsel that PM Northwest consider a covenant judgment given that they had yet to receive authority to extend an offer since no insurance company had agreed to defend or indemnify. Between this July 18th mediation and an August 1st meeting of counsel, much had worsened as to PM Northwest's prospects at trial. PM Northwest's president testified in a deposition that they never worked with asbestos, in direct contrast to the testimony of former employees. PM Northwest's industrial hygiene expert witness testified that she agreed PM Northwest's conduct at the plant violated safety regulations, and the Ulbrichts had brought a spoliation motion. Both sides were actively preparing for trial. The Ulbrichts' attorney expected a verdict above $6 million based on recent asbestos verdicts in Washington and Oregon. After offset of the aggregate settlements already obtained, a verdict would likely result in a judgment of $4.5 to $5.5 million against PM Northwest. Defense counsel similarly estimated the likely outcome of a trial and advised PM Northwest that a potential adverse verdict could range from $1 to $6 million.

Counsel for both sides decided to meet two days before trial to explore settlement possibilities one last time. At the meeting, defense counsel revealed that the insurers had thus far declined to provide defense or indemnity. Both parties' attorneys then began to explore resolution through covenant judgment. Plaintiffs' counsel identified the risk of such a resolution for his clients due to "trading one litigation for the other." Given the recent developments since the last mediation and the contingent nature of such a resolution, Plaintiffs' counsel increased the demand by $1 million from their previous settlement offer to a total of $4.5 million. Defense counsel did not see another alternative to protect his client and also considered the recent verdicts in Washington State. Defense counsel felt $4.5 million was "within the range of possible verdicts" and advised his clients to agree to the covenant judgment in that amount, with an assignment of all rights to pursue a coverage action against its insurers.

Following entry of the resolution, both parties stipulated to intervention by PM Northwest's insurers to challenge the reasonableness of the amount of the covenant judgment.[2] A reasonableness hearing occurred on November 29, 2018 with video testimony by Robert and live testimony from Karen. The parties provided both written and oral argument. The superior court entered its findings of fact and conclusions of law on December 26, 2018 and determined the covenant judgment was reasonable. USF&G timely appeals the superior court's ruling on the reasonableness of the covenant judgment.

[2] The second insurer, National Union Fire Insurance Company, also intervened in the litigation as to reasonableness with USF&G and initially joined in their appeal of that ruling. However, National Union voluntarily dismissed their appeal during the pendency of the matter before this court.

ANALYSIS

I. Reviewing a Reasonableness Determination

We review a superior court's determination of reasonableness for abuse of discretion. Water's Edge Homeowners Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 584, 216 P.3d 1110 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Boguch v. Landover Corp., 153 Wn. App 595, 619, 224 P.3d 795 (2009).

"When an insurer refuses to settle a claim, the insured may negotiate a settlement on its own and then seek reimbursement from the insurer." Chausee v. Maryland Cas. Co., 60 Wn. App. 504, 509-10, 803 P.2d 1339 (1991). An insurer is only liable for the amount of a settlement that is reasonable and made in good faith. Evans v. Cont'l Cas. Co., 40 Wn.2d 614, 628, 245 P.2d 470 (1952). In Chausee, this court adopted the factors from Glover v. Tacoma General Hospital, to apply to the reasonableness of covenant judgments. Chausee, 60 Wn. App. at 512; Glover, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983). RCW 4.22.060 provides the opportunity for a party to request a reasonableness hearing and places the burden on the party requesting settlement to prove the reasonableness of such. Application of the Chausee factors focuses on weighing them based on the facts of the case at issue.

When a trial court evaluates a covenant judgment for reasonableness the factors applied are:

> [T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses

> of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Chausee, 60 Wn. App at 512 (citing Glover, 98 Wn.2d at 717) (alterations in original). Perhaps most critically for our examination, courts have consistently held that "[n]o one factor controls and the trial court has the discretion to weigh each case individually." Id.; See also Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 739, 49 P.3d 887 (2002).

II. Consideration of Previous Verdicts

USF&G argues that the superior court improperly considered "a purely hypothetical settlement amount based on the range of verdicts," instead of the amounts that had been discussed at the prior mediation and were all rejected. This was not improper. A reasonableness hearing examines the amount of the proposed covenant judgment by applying the Chausee factors, not necessarily the amounts previously discussed. See, e.g., Chausee, 60 Wn. App. at 510; Hidalgo v. Barker, 176 Wn. App. 527, 537, 309 P.3d 687 (2013). In the current case, the parties were in quite different positions when they arrived at the covenant judgment days before trial than they were during the court-ordered mediation session.

In Sharbono v. Universal Underwriters Insurance Co., both the plaintiff and defendant submitted jury verdict research at the reasonableness hearing. 139 Wn. App. 383, 404, 161 P.3d 406 (2007). The defendants argued on appeal that the research submitted by the plaintiff included verdicts that were unrepresentative for

the case. Id. Division Two of this court held that the court properly relied on the research, which included past jury verdicts, when evaluating the reasonableness of the covenant judgment. Id. In the current case, the court's consideration of recent verdicts provided by both counsel for PM Northwest and the Ulbrichts operated as a basic framework from which to evaluate reasonableness and was not an abuse of discretion. This situation is analogous to Sharbono, except that instead of critiquing the specific past verdicts that were reviewed at the hearing, USF&G challenges the court's ability to look to previous verdicts at all. This argument by USF&G is unsupported by the case law. The court's consideration of past asbestos verdicts in applying the Chausee factors did not constitute abuse of discretion.

III. Plaintiffs' Risk and Expense of Pursuing a Bad Faith Claim

USF&G next argues that the court erred by considering the risk of continued litigation for the Ulbrichts in the overall reasonableness determination. Washington courts recognize that covenant judgments are distinct from settlements. "[T]he amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable." Besel, 146 Wn.2d at 738. A covenant judgment is distinct from a cash settlement, in that it does not release a tortfeasor from liability and is only an agreement to seek recovery from a specific asset. Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 765, 287 P.3d 551 (2012). "The insurer still must be found liable in the bad

faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion." Id.

The trial court did not abuse its discretion by considering the future bad faith litigation that would be necessary to enforce the covenant judgment. It is proper for the trial to contemplate the risks and costs involved when evaluating the reasonableness of the proposed covenant judgment. This is what the Chausee factor "risks of continued litigation" encompasses for a court to consider and weigh. At oral argument, USF&G advanced the notion that this factor does not include possible future suits and only refers to the risk of continuing the current suit; we are not persuaded.

As the Ulbrichts point out, the covenant judgment was within the possible verdicts contemplated by both parties. USF&G focuses on conclusion of law 23, where the superior court recognized "[w]hile covenant judgments and settlements overlap in many ways, they are nevertheless separate and distinct agreements that cannot be referred to interchangeably." The court went on to discuss the risks of continued litigation to PM Northwest in the current suit and the risk that the Ulbrichts "may recover nothing from PM Northwest's insurers" in a future bad faith suit. This sort of reasoning is exactly what the Chausee factor "risks of continued litigation" is designed to capture. The superior court made a total of six conclusions of law under this factor of risks and expenses of continued litigation and considered the reasonableness of the resolution holistically.

Further, if the court could not consider litigation beyond the current suit, as USF&G argues, then courts would be unable to consider outside bankruptcy

proceedings as they did in Werlinger v. Warner. 126 Wn. App. 342, 350-51 109 P.3d 22 (2005). The contemplation of the risks associated with a covenant judgment that were considered by the attorneys for both PM Northwest and the Ulbrichts during their meeting before the start of trial reinforces the conclusion that it was something the court should and did consider in terms of how the final covenant judgment was reached. USF&G argues that PM Northwest's motivation for pursuing this covenant judgment is to escape exposure. This is the very nature of a covenant judgment and likely the most common reason that they are pursued, which is why a court has the authority to review a proposed covenant judgment for reasonableness. The court did not abuse its discretion by considering the risks inherent in future suit against the insurers in the context of a reasonableness determination.

IV. The Superior Court's Findings and Conclusions

USF&G further argues that a number of the superior court's findings were not supported by substantial evidence. We disagree. A reasonableness hearing necessarily involves factual findings which will not be disturbed as long as substantial evidence supports them. Water's Edge, 152 Wn. App. at 584. Our review is limited to whether substantial evidence supports the findings, and if so, whether the findings support the conclusions of law from the trial court. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise." Id. The burden is on

the challenging party to show that the finding of fact is not supported by the record. Id.

"Washington courts have found a trial court's reasonableness determination to be valid even when the trial court fails to list any of the Chausee factors and instead simply mentions that the parties addressed the factors in their briefs and the trial court considered the briefs." Water's Edge, 152 Wn. at 585. Even more dispositive, "[n]o one factor controls and the trial court has discretion to weigh each case individually." Chausee, 60 Wn. App. at 512. USF&G only assigns error to conclusions under four of the nine Chausee factors. Additionally, the four conclusions identified by USF&G in its assignments of error on appeal are not the only conclusions under those corresponding factors. Even if we disregarded all four conclusions as urged by USF&G, the reasonableness ruling could still be independently affirmed on the basis of any number of the unchallenged findings and conclusions.

In looking to the two findings challenged on appeal, finding 8 has five factual components, each of which is supported by substantial evidence and occurred in the three weeks between the mediation and the attorneys' meeting days prior to trial. First, the record before this court makes it clear that "all remaining defendant's settled." Second, "PM Northwest's CR 30(b)(6) representative reaffirmed testimony from a decade ago that the company had no involvement with asbestos materials in stark contrast to the testimony of Mr. Ulbricht and PM Northwest's own employees." This is supported by the July 24, 2018 deposition of PM Northwest's representative, Richard Huntley Jr. Third, "PM Northwest's sole

expert testified that the company violated OSHA regulations in its handling of asbestos materials, causing Plaintiffs to subpoena the expert in their case in chief." This is anchored in the deposition of the Ulbrichts' counsel regarding the expert's testimony and by the witness list provided in preparation of trial.

Fourth, "[p]laintiffs filed a spoliation motion based on evidence that work records had been destroyed after the company had become aware of its asbestos liabilities." This motion was included in the record. The fifth component is "PM Northwest had repeated communications with representatives of intervenors USF&G and National Union apprising them of the fast approaching trial date, neither insurer agreed to furnish defense of indemnity prior to trial." This also is supported by copies of email communications with the insurers and depositions of counsel which make clear that this was the crux of the reasoning behind PM Northwest's counsel determination that it was necessary to explore a covenant judgment.

Finding 11 addresses the procedural posture and history of the case and is supported, in part, by the simple fact of a covenant judgment coming before the court on a reasonableness hearing. This finding states:

> Based on PM Northwest's perilous litigation posture and, in the absence of indemnity coverage, inability to satisfy a multi-million verdict in this case, the parties discussed resolution through covenant judgment. Plaintiffs' counsel proposed that PM Northwest enter into a $4.5 million stipulated judgment together with a covenant by Plaintiffs not to execute said judgment against Defendant's assets and limit their recovery to any insurance coverage available to PM Northwest to satisfy the judgment. PM Northwest's counsel agreed to discuss the proposed settlement with his client.

In the record there are emails and depositions that support the assertion that the Ulbricht's' counsel proposed that PM Northwest enter into a $4.5 million judgment. PM Northwest's counsel admitted that as trial approached he felt their chances of winning were getting worse, that his client would be unable to satisfy the possible judgment against it, and that this compelled him to discuss the possibility of a covenant judgment. The record supports the portion of finding stating that there was an "absence of indemnity coverage." The fact that PM Northwest's counsel admitted he would discuss the proposal with his clients is supported by the signed agreement itself. Each of the component parts of the two challenged findings are well supported by the record; therefore, substantial evidence exists to support them.

The superior court properly utilized the factors laid out in Chausee and the conclusions of law entered by the court logically flow from the unchallenged facts that were found in the case. The conclusions show the trial court's work in evaluating each of the factors under Chausee. We have upheld trial courts' weighing of the factors even without such a clear record. See Martin v. Johnson, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007). Here, USF&G's assignment of error to conclusions of law found by the court are without merit. Further, as noted above, USF&G does not assign error to even half of the conclusions under the four corresponding Chausee factors. Again, as precedent is clear that no one factor controls, the court's reasonableness determination could be affirmed even if we disregarded those findings and conclusions challenged by USF&G. However, we find that the superior court's findings and conclusions in their entirety were proper

as they were supported by substantial evidence in the record, and the conclusions of law properly followed.

The trial court's determination of reasonableness is affirmed.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; ELLIOTT COMPANY, d/b/a ELLIOTT TURBOMACHINERY COMPANY; FRASER'S BOILER SERVICE, INC.; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), INC.; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; IMO INDUSTRIES, INC., individually and as successor-in-interest to DE LAV AL TURBINE, INC., and ADEL WIGGENS; INGERSOLL-RAND COMPANY; ITT CORPORATION, as successor-in-interest to FOSTER VALVES; MET ALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PM NORTHWEST, INC.; SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; SEQUOIA VENTURES, INC., formally known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.;	)	No. 79490-6-I (Consolidated with No. 79590-2-I) DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

)

SULZER PUMPS (US), INC., formally known as SULZER BINGHAM PUMPS, INC.; UNION CARBIDE CORPORATION; WARREN PUMPS, LLC, individually and as successor in interest to QUIMBY PUMP COMPANY; ZURN INDUSTRIES, LLC, as successor in interest to ERIC CITY IRON WORKS,	)
Appellant,	)
v.	)
ROBERT PAUL ULBRICHT and KAREN ULBRICHT, husband and wife; HEIDI L. ULBRICHT, ROBERT S. ULBRICHT,	)
Respondent.	)

The appellant, United States Fidelity & Guaranty Company, filed a motion for reconsideration of the opinion filed on February 10, 2020. The respondent filed a response to the motion. The majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:

Judge

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; ELLIOTT COMPANY, d/b/a ELLIOTT TURBOMACHINERY COMPANY; FRASER'S BOILER SERVICE, INC.; GENERAL ELECTRIC COMPANY; GOULDS PUMPS (IPG), INC.; HONEYWELL INTERNATIONAL INC., successor-in-interest to ALLIED SIGNAL, INC., successor-in-interest to BENDIX CORPORATION; IMO INDUSTRIES, INC., individually and as successor-in-interest to DE LAV AL TURBINE, INC., and ADEL WIGGENS; INGERSOLL-RAND COMPANY; ITT CORPORATION, as successor-in-interest to FOSTER VALVES; MET ALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PM NORTHWEST, INC.; SABERHAGEN HOLDINGS, INC., as successor to TACOMA ASBESTOS COMPANY and THE BROWER COMPANY; SEQUOIA VENTURES, INC., formally known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.;	)	No. 79490-6-I (Consolidated with No. 79590-2-I) DIVISION ONE ORDER DENYING MOTION TO PUBLISH

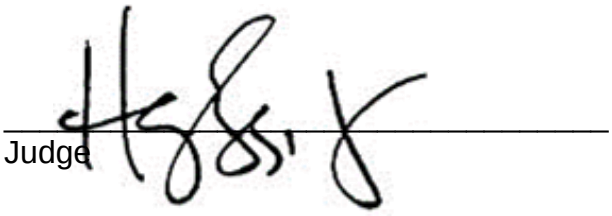
)

SULZER PUMPS (US), INC., formally known as SULZER BINGHAM PUMPS, INC.; UNION CARBIDE CORPORATION; WARREN PUMPS, LLC, individually and as successor in interest to QUIMBY PUMP COMPANY; ZURN INDUSTRIES, LLC, as successor in interest to ERIC CITY IRON WORKS,	)
Appellant,	)
v.	)
ROBERT PAUL ULBRICHT and KAREN ULBRICHT, husband and wife; HEIDI L. ULBRICHT, ROBERT S. ULBRICHT,	)
Respondent.	)

The respondent, Karen Ulbricht, filed a motion to publish the court's opinion filed on February 10, 2020. The appellant filed a response to the motion. The majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion to publish the opinion is denied.

For the Court:



Judge

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Ct. No. _____

(Court of Appeals No. 79490-6-I)

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

v.

ROBERT T. ULBRICHT, ET. AL,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2020, I caused a copy of the foregoing documents to be served on the following attorneys of record via the Court's e-serve application:

1. Petition for Discretionary Review;
2. Appendices; and
3. this Certificate of Service.

David A. Shaw
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101
dshaw@williamskastner.com

Matthew Bergman
Vanessa Firnhaber Oslund
Justin Olson
Glen S. Draper
Bergman Draper Oslund, PLLC
821 2nd Avenue, Suite 2100
Seattle, WA 98104
matt@bergmanlegal.com
vanessa@bergmanlegal.com
justin@bergmanlegal.com
glenn@bergmanlegal.com

Richard Dykstra
Lincoln D. Sieler
Alexander E. Ackel
Friedman | Rubin, PLLP
1109 1st Avenue, Suite 501
Seattle, WA 98101
rdykstra@friedmanrubin.com
lsieler@friedmanrubin.com
aackel@friedmanrubin.com

Carl E. Forsberg
Stephanie Andersen
Forsberg & Umlauf, P.S.
901 5th Avenue, Suite 1400
Seattle, WA 98165
cforsberg@foum.law
sandersen@foum.law

I declare under penalty of perjury under the laws of the state of

Washington that the foregoing is true and correct.

Executed this 17th day of April in Seattle, Washington.

By: *s/ Steven P. Caplow*
Steven P.Caplow, WSBA 19843

DAVIS WRIGHT TREMAINE LLP

April 17, 2020 - 12:36 PM

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- dbulis@williamskastner.com
- dshaw@williamskastner.com
- everettjack@dwt.com
- glenn@bergmanlegal.com
- justin@bergmanlegal.com
- lsieler@friedmanrubin.com
- matt@bergmanlegal.com
- nancybrownstein@dwt.com
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- sandersen@foum.law
- service@bergmanlegal.com
- vanessa@bergmanlegal.com

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Address:
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SEATTLE, WA, 98104-1610
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