

No. 68117-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA;  
STEADFAST INSURANCE COMPANY; and  
HEFFERNAN INSURANCE BROKERS, INC.

Appellants;

v.

THE ESPLANADE CONDOMINIUM ASSOCIATION,

Respondent.

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**REPLY BRIEF OF APPELLANT TRAVELERS PROPERTY  
CASUALTY COMPANY OF AMERICA**

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Thomas Lether, WSBA No. 18089  
Eric J. Neal, WSBA No. 31863  
Attorneys for Appellant  
Lether & Associates, PLLC  
3316 Fuhrman Avenue E., Suite 250  
Seattle, WA 98102  
206.467.5444  
[tlether@letherlaw.com](mailto:tlether@letherlaw.com)  
[eneal@letherlaw.com](mailto:eneal@letherlaw.com)

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## I. INTRODUCTION

The Superior Court held as a matter of law that the settlement agreement between Respondent Esplanade Condominium Association (“Esplanade”) and the named Defendants (“the Evans entities”)<sup>1</sup> was unreasonable as a matter of law. CP 3391-3394. In fact, the Superior Court specifically found that the settlement was not the result of arm’s-length negotiations because the settling parties, the Evans entities, did not have any interest in negotiating the amount of the settlement. Verbatim Report of Proceedings, December 10, 2010, RP 36-37. Despite this, Esplanade ignores the analysis set forth by the Washington Courts for determining the appropriate post-judgment interest rate and argues that this Court should rely on that unreasonable and collusive settlement agreement to determine whether the Superior Court erred in the interest award.

Esplanade also attempts to characterize its underlying claims against the Evans entities as being based on warranty and contract as opposed to tort. However, given the record in this matter, this Court must conclude that the underlying claims were, at best, “mixed” tort and non-

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<sup>1</sup> The Evans entities include AF Evans Company, which was the sole member of AFE Spinnaker, LLC, a single purpose LLC formed to be the condominium declarant for the subject property, and AF Evans Development, Inc., which provided the personnel for the conversion. Richard Bell, Jack Robertson, and Tory Laughlin-Taylor were officers and directors of those entities. The Evans entities were the defendants in the underlying lawsuit.

tort claims requiring a *Woo* analysis. *Woo v. Firemen's Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009). Once again, based on the record before this Court, the judgment eventually entered against the Evans entities is based *primarily* on the tort claims asserted against the Evans entities. Thus, the post-judgment interest rate for tort claims, as established by RCW 4.56.110(3) should have been applied.

The Superior Court erred when it applied the 12% interest rate to the judgment against the Evans entities and it further erred when it denied Travelers' motion for reconsideration based on its finding that the 12% rate set forth in the attachment to the unreasonable settlement was controlling. As a result, Travelers asks that the Court reverse the Superior Court's rulings and remand for entry of judgment with an appropriate post-judgment interest rate under RCW 4.56.110(3).

## II. ARGUMENT IN REPLY

### A. Esplanade's Argument that the 12% Interest Rate Is Contractual is Without Merit

Esplanade argues that a 12% post-judgment interest rate was appropriate in the judgment entered against the Evans entities because that rate was set forth in the attachments to the underlying settlement agreement. Esplanade relies solely on *Jackson v. Fenix Underground, Inc.*, 142 Wn.App. 141, 173 P.3d 977(2007), in support of this position.

However, Esplanade's reliance on *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007) is misplaced. In that case the interest rate was not only set forth in the settlement agreement itself, rather than attached appendices, but the Superior Court in that case specifically found that the settlement was reasonable. *Id.* at 144, 173 P.3d 977. That is not the situation presented to the Court herein where the Esplanade's settlement agreement was found to be unreasonable as a matter of law.

The Superior Court's reasoning in determining that the settlement was unreasonable as a matter of law is instructive:

As for the issue left before me, that is the reasonableness of the settlement reached, I find that the amount of the settlement was affected by the fact that the settling parties did not have any direct interest in the amount. In other words, it was not directly affected by the amount that would have been paid, and that it did not affect the nature of the negotiations of the amount. I find it an unreasonable amount.

Verbatim Report of Proceedings, December 10, 2010, RP 36-37.

The Superior Court found that there were no arm's-length negotiations as to the amount of the settlement because the Evans entities had no interest in negotiating a lower amount.

Esplanade's claim that the parties agreed to the interest rate is disingenuous. There is no evidence in the record before this Court

indicating any negotiations relating to the interest rate. Rather, Esplanade rests on the signatures to the agreement as the sole support for its claim that the 12% rate was negotiated. These are the signatures to the same agreement that Superior Court found to be unreasonable, because it was not properly negotiated at arm's length since the defendants had no direct interest in the amount.

Similarly, the Evans entities also had no interest in negotiating an appropriate post-judgment interest rate based on the realities of the claims asserted against them by Esplanade.

Esplanade argues that the rule in *Jackson* should apply here because the Superior Court established a new reasonable settlement amount after finding the settlement that Esplanade actually attempted to secure was deemed unreasonable as a matter of law. This argument is specious at best. The fact that the Superior Court in this matter was forced to reduce the reasonable settlement value of the case to a figure nearly half that which Esplanade was pursuing, distinguishes this case from *Jackson* where the Superior Court accepted the settlement between the parties. Moreover, this argument ignores the Superior Court's finding that the settlement agreement did not reflect a true negotiated agreement because the Evans entities had no financial interest in such negotiations.

Esplanade relies on *Meadow Valley Owners Assn v. Meadow Valley, LLC*, 137 Wn. App. 810, 156 P.3d 240 (2007), in support of its argument that the interest rate set forth in the proposed stipulated judgments attached to the original unreasonable settlement agreement, was unaltered when the Superior Court reduced the amount of the settlement agreement upon its finding of unreasonableness. However, the *Meadow Valley* case does not support this argument.

*Meadow Valley* stands for the rather unremarkable proposition that under RCW 4.22.060, the trial court's determination that a settlement is unreasonable does not render the settlement void. The *Meadow Valley* Court was not presented with any issues relating to the applicability of a purported agreed interest rate in the context of an unreasonable settlement. Moreover, since *Meadow Valley*, the Washington Courts have clarified that once a settlement is deemed unreasonable, the settlement itself remains in effect, but a new agreement must be negotiated. *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009).

Here, there is no evidence that the 12% interest rate was ever negotiated. Again, Esplanade relies solely on the original settlement agreement. The Trial Court's acceptance of this argument was error.

Finally, Esplanade argues that Travelers cannot challenge the interest component of the judgment entered against the Evans entities, because it did not challenge the interest component in the context of the reasonableness hearing. However, RCW 4.22.060 establishes that reasonableness hearings are to establish the reasonableness of the amount of a settlement.

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.

RCW 4.22.060(1) (emphasis added).

Travelers challenged the reasonableness of the amount of the settlement between Esplanade and the Evans entities and it prevailed in that challenge. Travelers then, upon the presentation of the final judgment, appropriately objected to the proposed post-judgment interest rate. There was no waiver.

Moreover, this waiver argument was never raised by Esplanade in its briefing on Travelers' objection to the interest component of the proposed judgment. CP 3578-3580. Rather, it is argued here for the first time that Travelers should have challenged the interest rate in the context of the reasonableness hearing. This argument, which is contrary to the statute, is without merit and should be rejected by this Court.

Esplanade has presented no legal authority for the proposition that the interest term in a settlement, deemed unreasonable as a matter of law, is controlling under RCW 4.56.110. Its attempts to justify the 12% interest rate as being an agreed contractual term are entirely without merit and are contrary to the record. As a result, this Court should reverse the Superior Court's award of 12% post-judgment interest.

**B. Under *Woo*, The Appropriate Interest Rate for the Subject Judgment Was the Tort Rate**

Esplanade's brief does not even mention this Court's decision in *Woo*, much less provide any analysis in support of its arguments that the 12% interest rate was appropriate for its warranty claims in the underlying action. However, because *Jackson* is inapplicable to the interest component in the instant action, this Court's decision in *Woo v. Firemen's Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009) is controlling.

In *Woo*, this Court held that the lower tort rate as set forth in RCW 4.56.110 applies where the judgment entered against the defendant is founded on the "tortious conduct of individuals". See *Woo*, 150 Wn. App. at 161. So long as the judgment is founded on the tortious conduct, the tort rate should apply. *Id.* Moreover, where a judgment is based on "mixed" claims involving contract and tort type claims, the Court looks to

whether the claims, regardless of how characterized, are “founded on” or “having a basis in” tortious conduct. Where the predominant claims have a basis in tort, the tort rate will apply. *Id.*

In this matter, a simple review of the plain language of Esplanade’s Complaint confirms that its claims were based on the allegedly tortious conduct of the Evans entities. CP 1-28. Esplanade goes to great lengths in its briefing to argue that it was continuing to pursue claims against the Evans entities for recovery under the Washington Condominium Act warranties. However, those arguments do not address the *Woo* analysis in any way and do not alter the fact that the basis for any such warranty claims is the allegedly tortious conduct of the Evans entities.

The entire factual and evidentiary basis for Esplanade’s claims against Travelers’ insureds was that Spinnaker and AF Evans misrepresented and fraudulently concealed the condition of the property in the pre-sale materials. Esplanade’s causes of action for fraudulent concealment, breach of fiduciary duty, and other causes of action based on the Public Offering Statement were grounded in tort.

Furthermore, Esplanade actually admitted in pleadings presented to the Superior Court that all of its claims, including the warranty claims, had a basis in the tortious conduct of the Evans entities.

tort claims at issue here [include] fraudulent concealment, CPA violations, and violations of specific statutory duties (here WCA duties to prepare an accurate POS (RCW 64.34.405) and to act as fiduciaries of the unit purchasers (RCW 64.34.308)”.

CP 712. *See also*, CP 1022 and CP 710-713.

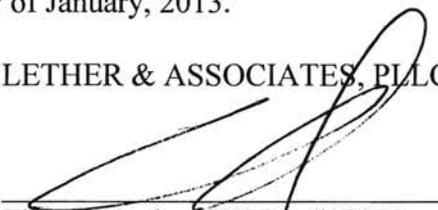
As a result, the appropriate post-judgment interest rate for the Judgment entered against the Evans entities was the tort rate asset forth in RCW 4.56.110(3). The Superior Court erred when it relied on the attachments to the unreasonable settlement as establishing a contract interest rate and it further erred in awarding a 12% interest rate where the claims of Esplanade were based on the tortious conduct of the Evans entities.

### III. CONCLUSION

Based on the foregoing, Travelers asks that this Court reverse the rulings of the Superior Court as they pertain to the post-judgment interest component of the Final Judgment.

DATED this 17<sup>th</sup> day of January, 2013.

LEATHER & ASSOCIATES, PLLC

  
Thomas Lether, WSBA #18089  
Eric J. Neal, WSBA #31863  
Attorneys for Appellant Travelers Property  
Casualty Company of America

## CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

Steven Goldstein  
BETTS PATTERSON & MINES  
701 Pike St, Ste. 1400  
Seattle, WA 98101  
206-292-9988  
sgoldstein@bpmlaw.com,  
lgreen@bpmlaw.com

Peter O. Glaessner  
Bruce P. Loper  
LOMBARDI LOPER & CONANT,  
LLP  
1999 Harrison Street, 26th Floor  
Oakland, CA 94612  
510-433-2600  
pog@llcllp.com  
bloper@llcllp.com  
*Attorneys for Third-Party  
Defendant Heffernan Insurance  
Brokers*

Leonard D Flanagan  
Justin D Sudweeks  
Daniel S Houser  
STEIN FLANAGAN SUDWEEKS  
& HOUSER  
901 Fifth Ave, Ste. 3000  
Seattle, WA 98164  
206-388-0660  
Leonard@condodefacts.com,  
justin@condodefacts.com,  
dhouser@condodefacts.com,  
mlucente@condodefacts.com,  
mariah@condodefacts.com  
*Attorneys for Defendants AF Evans  
Company, et al.*

Steven Soha  
Geoffrey C Bedell  
SOHA & LANG, PS  
1325 Fourth Ave, Ste. 2000  
Seattle, WA 98101  
206-624-1800  
courtnotices@sohalang.com,  
low@sohalang.com,  
soha@sohalang.com,  
bedell@sohalang.com,  
thomas@sohalang.com  
*Attorneys for Third Party  
Defendant Steadfast Insurance  
Company*

**[X] Via Email**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11<sup>th</sup> day of January, 2013, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "Lindsay Hartt", is written over a horizontal line. The signature is stylized and cursive.

Lindsay Hartt, Legal Assistant