

NO. 75470-0-I

Snohomish County Cause No. 15-2-03913-8

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Appellant,

v.

KATHLEEN LINK, and RUSSELL LINK; and YEN WALLY, and  
EDISON WALLY and JANE DOE WALLY,

Respondent.

FILED  
Nov 02, 2016  
Court of Appeals  
Division I  
State of Washington

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

In this case Respondents improperly leveraged a serious injury claim to induce a greater settlement of a minor injury claim by conditioning settlement of the serious claim to force an increased offer for the minor claim. American Family offered to pay policy limits to resolve the serious injury case within three weeks of the incident. Although the minor injury claim was not reasonably valued anywhere near policy limits, the Links refused to settle the more serious injury, for which policy limits were demanded, unless limits were also offered to settle the minor injury.

This appeal arises out of a car accident in which the driver, Kathleen Link, suffered very minor injuries, and her daughter, Vanessa Link, sustained serious injuries due to her having a disease which left her prone to bone fractures. Counsel for Kathleen and Vanessa made policy limits demands for both, but refused to settle Vanessa's claim unless limits were also offered for her mother. Ultimately Vanessa Link settled her claim for policy limits of \$25,000, and her parents obtained a stipulated judgment for \$1,000,000 and a covenant not to enforce against defendants Yen and Edison Wally. The Trial Court erred in finding the \$1,000,000 judgment to be reasonable.

The Trial Court's ruling in this case improperly allowed two parties to simultaneously pursue, and subsequently recover, monetary damages

based on injuries sustained by only one individual, Vanessa Link. Vanessa Link pursued and settled her injury claim, while at the same time, her parents Kathleen and Russell Link pursued Vanessa's claimed special damages through litigation. Kathleen and Russell Link obtained a stipulated judgment, based largely on pursuit of Vanessa's medical expenses. Specifically, the Trial Court found that a nearly \$1,000,000 judgment for Kathleen Link was reasonable based largely on her daughter's medical special damages after her daughter had settled. The Trial Court thus improperly allowed double recovery on a single injury.

Further, in determining that the judgment was reasonable, the Trial Court improperly included Kathleen Link's claim for consortium damages, when it ignored that Kathleen's claim did not survive Vanessa Link's settlement for policy limits.

This Court should find that the stipulated judgment was not reasonable as a matter of law. This Court should remand this action to allow for discovery into the underpinnings of the stipulated judgment, in addition to providing instruction regarding the proper allocation of damages, and the appropriate categories of damages to consider in determining reasonableness.

## **II. AMERICAN FAMILY'S ASSIGNMENTS OF ERROR**

Assignments of Error: (1) The trial court erred in determining the

stipulated judgment was reasonable by improperly including consortium damages and allowing for splitting of Vanessa Link's claim; and (2) The trial court erred in granting Plaintiff's Motion for Determination of Reasonableness without allowing for discovery regarding negotiations leading to the stipulated judgment.

Issues Pertaining to Assignments of Error:

1. Whether consortium claims based on a relationship with an injured non-party survive the settlement of the non-party's claim for policy limits.
2. Whether a parent and child may independently and simultaneously pursue and recover on the child's medical special damages based on the injury to the child.
3. Whether due process requires that an intervening insurer be permitted to conduct discovery regarding the basis of a stipulated judgment and covenant not to execute before the Court determines the settlement to be reasonable, thereby subjecting the insurer to presumptive damages established by a stipulated judgment.

**III. STATEMENT OF CASE**

This matter arises out of an August 6, 2014, two-vehicle collision. Kathleen Link was driving her vehicle at the time, and her daughter,

Vanessa, was a passenger. CP 153-156. American Family's insured, Yen Wally, collided with the Links' vehicle while attempting to make a left turn at an intersection. *Id.*

Unfortunately, Vanessa was highly susceptible to injury because she suffered from a rare condition called "Ollier's disease." CP 289. Due to this disease, even though the collision was minor, Vanessa sustained a left arm fracture. CP 322. Roughly one month after the accident, she underwent left arm amputation, resulting in roughly \$100,000 in medical expenses. CP 189. Kathleen Link sustained minor soft-tissue injuries, and incurred roughly \$2,000 in medical bills. CP 191.

The Wallys' automobile insurance with American Family carried bodily injury policy limits of \$25,000 per person, and \$50,000 per occurrence.

On August 26, 2014, twenty days after the collision occurred, and before the Links were represented by counsel, American Family offered policy limits of \$25,000 to settle claims arising from Vanessa Link's injuries. CP 247.

The Links then obtained representation, refused to accept the policy limit offer for Vanessa, and ultimately made acceptance of policy limits for Vanessa's claim contingent on paying policy limits for Kathleen's claim. CP 53-54. However, with regard to Kathleen's injuries, for whom claimed

special damages totaled only \$2,084, American Family did not view the value of her claim at the policy limits of \$25,000, or roughly twelve times her claimed special damages. CP 191.

On September 24, 2015, Links' counsel wrote American Family, specifically making acceptance of the limits demands of Kathleen and Vanessa contingent upon one another, stating:

Please consider this a policy limits demand for Vanessa Link and policy limits demand for Kathleen Link. The specifics of these demands are below:

**1. The policy limits demands are a package. You cannot agree to pay Vanessa's policy limits demand and not Kathleen's demand. You must accept both.** If you do not accept both it will be considered a rejection of both.

...

**If the demands are not accepted we will file a lawsuit in Snohomish County Superior Court and submit the cases to Mandatory Arbitration where we will seek a total \$100,000 (\$50,000 for Vanessa and \$50,000 for Kathleen).** This will certainly result in an excess judgment against your insured, especially if a de novo is filed. Please inform your insureds that this is their only chance to resolve this case without an excess judgment being entered against them.

CP 53-54 (emphasis added).

When the claims of Vanessa and Kathleen Link did not settle, Respondents Kathleen and Russell Link brought the instant lawsuit on May 13, 2015. CP 369-374. Vanessa Link was not a named party. CP 65.

However, "courtesy copies" of the summons and complaint

provided to American Family on October 2, 2014, listed as parties Kathleen Link, an individual, and Kathleen Link as “parent and natural guardian for the minor Vanessa Link” thus indicating that Vanessa’s claims were part of the lawsuit. CP 52, 59. Russell Link was not a named party in the courtesy copy provided to American Family. *Id.* However, the lawsuit that was actually filed listed only Kathleen and Russell Link (and their marital community) as Plaintiffs; Vanessa was not a party to the lawsuit in any capacity. CP 65.

Following initial discovery in the underlying matter, the Links filed a motion for summary judgment on December 29, 2015, attempting to establish that Vanessa’s amputation was 100 percent causally related to the August 6, 2014, collision. CP 308-315. The Wallys then filed their opposition to the motion on January 19, 2016, and provided expert testimony that Vanessa’s amputation of her left arm had been long-contemplated by her treating physicians and was inevitable. CP 248-262. In fact, in 2012, Vanessa’s treating physician Dr. Joan D. Miles, noted “There has also been discussion in the past about left upper extremity amputation but she ultimately decided to postpone that.” CP 250. The Wallys argued: “In this case, there is substantial evidence that Vanessa Link's left arm amputation (1) was inevitable, and (2) was caused, at least in part, by Ollier's syndrome and Maffucci syndrome.” CP 251. American

Family was aware of the arguments and defenses that were being presented in opposition to summary judgment on behalf of its insureds.

Roughly one week later, and before the hearing on Plaintiff's motion for summary judgment, the Wallys agreed to a \$1,000,000 judgment to be taken against them in exchange for a covenant not to execute. A "Stipulated Judgment, Covenant Not to Execute, and Settlement Agreement" was signed by the parties on January 27, 2015. CP 173-181. Vanessa Link is not a party to this agreement. CP 173, 181.

On February 18, 2016, Vanessa Link executed a release of her claims for policy limits of \$25,000, less a \$1,500 deferred payment.<sup>1</sup> CP 71-73. Language was added to the release claiming it does not apply to Vanessa's medical expenses:

It is specifically agreed that **the foregoing settlement amounts do not include, nor do they contemplate, payment for medical expenses** that were incurred by Vanessa Link. Vanessa Link was a minor at the time of this accident and Vanessa's parents are seeking reimbursement for those expenses under RCW 4.24.010 in Snohomish County Cause No. 15-2-03913-8.

CP 71 (emphasis added).

Respondents filed their motion for determination of reasonableness on April 8, 2016. CP 130. Counsel for American Family received notice of the reasonableness hearing only two days before, on April 6, 2016.

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<sup>1</sup> This amount will be paid to Vanessa provided Yen Wally's passenger does not bring a claim within the statute of limitations. CP 71-73.

American Family timely moved to intervene and challenged the reasonableness of the stipulated judgment. CP 264-276.

At the time American Family intervened, neither American Family nor its counsel possessed materials regarding the negotiation leading to the \$1,000,000 stipulated judgment, and sought to conduct discovery on the issue (counsel still does not possess such materials as discovery was declined). *Id.* American Family was granted leave to intervene on April 20, 2016. CP 103-104. The Trial Court denied American Family's request to continue the reasonableness hearing in order to allow it to conduct discovery into issues regarding the stipulated judgment. *Id.*

Further, during the April 20, 2016, reasonableness hearing, the Trial Court noted that the idea of pursuing claims of consortium and medical expenses pursuant to RCW 4.24.010 in this context was novel, at least outside the context of a wrongful death claim. CP 79.

After the reasonableness hearing the Trial Court entered an order holding that the \$1,000,000 judgment was reasonable—finding Russell Link's damages to be \$6,600, and Kathleen Link's damages to be \$993,400. CP 112. The paramount finding with regard to the determination of reasonableness is the Court's ruling that "a jury would award general damages to plaintiffs between \$100,000 (on a good day for Defendants) to north of \$2 million (on a good day for Plaintiffs)." CP 111. This was

based on special damages of approximately \$300,000-\$400,000 for Vanessa Link's injuries. CP 92.

The Court made no finding as to injury to or destruction of the parent-child relationship, but rather found that general damages could be up to \$2 million. CP 106-113. The Court instead noted Vanessa's potential damages:

Vanessa only has one arm and still has phantom arm pain. Before this accident, Vanessa had the freedom to get in and out of her chair under her own power. Now she needs assistance from her parents with-nearly all day-to-day activities.

CP 111.

Finally, the Court found that:

American Family had the opportunity to resolve plaintiffs' claims before litigation on more than one occasion. When it had enough information to do so they refused to do so. American Family participated in the reasonableness hearing and has had notice of the covenant judgment since the late January of 2016. The Court notes the Wallys have resolved Vanessa Links' claims and are therefore protected from liability from Vanessa's claims. In open Court the parties agreed the settlement is allocations \$6,600 to Mr. Link and the balance to Ms. Link. (Kathleen).

CP 112.

Following the Trial Court's denial of American Family's ability to conduct discovery, and determination of reasonableness, American Family moved for reconsideration on these issues. CP 74-85. The Trial Court denied American Family's Motion for Reconsideration on June 13, 2016,

and American Family appealed. CP 29-30; CP 2-3.

#### **IV. STANDARD OF REVIEW**

Questions of law are reviewed de novo. *Laffranchi v. Lim*, 146 Wn. App. 376, 382, 190 P.3d 97 (2008). Additionally, though findings of reasonableness are generally factual determinations, “[w]hen the record consists entirely of written material, an appellate court stands in the same position as the trial court and reviews the record de novo.” *Hous. Auth. v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005).

The Trial Court’s conclusions regarding the categories of damages which can be considered in determining whether the stipulated judgment was reasonable are subject to de novo review. Further, because the entire record here consists of written materials, this Court should review the entirety of the Trial Court’s ruling de novo.

#### **V. LEGAL AUTHORITY AND ARGUMENT**

The Trial Court’s ruling in this case allowed the Links to execute a plan in which they attempted to force tender of policy limits (and more) on a very small damage claim by intertwining Kathleen Link’s damages with those of her daughter. The Trial Court impermissibly allowed for recovery of Kathleen’s loss of consortium damages when those claims were extinguished with the settlement of Vanessa’s claims. The determination of reasonableness also creates a scenario in which both a parent and child

can simultaneously pursue and recover on the child's claim, opening the door for double recovery for the same injury.

Additionally, American Family was deprived of due process when it was prevented from conducting discovery and fully investigating the underpinnings of a stipulated judgment before being subject to presumptive damages of \$1,000,000. The Trial Court erred when it refused to allow American Family to conduct discovery to determine what negotiation took place to reach an agreement for \$1,000,000 for Kathleen and Russell Link's claims in light of the fact that, apparently, Vanessa was concurrently settling her claims for \$25,000.

The Court should also permit discovery due to potential bad faith in obtaining the stipulated judgment. This case was presented to American Family as two separate claims, with settlement of Vanessa Link's higher value claim improperly made contingent on settlement of her mother's much smaller claim for policy limits. Kathleen and Vanessa then simultaneously pursued claims based on Vanessa's injury. Vanessa settled her claim for policy limits, and her parents were allowed to obtain a \$1,000,000 stipulated judgment based on her injuries and medical expenses.

**A. The Court Erred in Finding the Stipulated Judgment to be Reasonable**

Washington courts have recognized the dangers inherent in consent judgments coupled with a covenant not to execute and an assignment of

rights against an insurer. *See, e.g., Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002) (“We are aware that an insured’s incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount. Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer’s liability for settlement amounts is all the more important.”); *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991) (“These courts have reasoned that an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement. We share this concern about consent judgments coupled with a covenant not to execute.”). Due to this specter of collusive or fraudulent settlements, the courts have adopted the following facts a trial court must consider in determining whether a settlement is reasonable:

1. The releasing person’s damages;
2. the merits of the releasing person’s liability theory;
3. the merits of the released person’s defense theory;
4. the released person’s relative faults;
5. the risks and expenses of continued litigation;
6. the released person’s ability to pay;
7. any evidence of bad faith, collusion, or fraud;
8. the extent of the releasing person’s investigation and preparation of the case; and
9. the interest of the parties not being released.

*Chaussee*, 60 Wn. App. at 511-12 (citing *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983)).

Here, the trial court erred in (1) Overstating Kathleen Link's damages by improperly including consortium damages and Vanessa's medical special damages (*Chaussee* factors 1-3); (2) Refusing to allow discovery into the issues of bad faith or collusion (*Chaussee* factor 7); and (3) Preventing American Family, a party not being released, from conducting a full evaluation regarding reasonableness before the Court found the judgment to be reasonable (*Chaussee* factor 9).

Further, while determinations of reasonableness are generally factual determinations to be upheld if supported by substantial evidence, the legal determination to include Vanessa's medical bills and consortium claims in assessing the value of Kathleen Link's claims is a legal issue subject to de novo review.

**1. The \$1,000,000 judgment amount is not reasonable because consortium damages and medical costs were improperly included.**

Neither consortium damages, nor Vanessa Link's medical special damages, were properly considered as part of Kathleen's recoverable damages for determining reasonableness. Vanessa's settlement limits Kathleen's damages to those arising out of her own injury, which was minimal. Further, as discussed below, the prohibition on claim splitting prohibits Kathleen Link from pursuing her daughter's medical specials while her daughter pursued, and settled, her own claim. Without

consideration of consortium damages and Vanessa Link's medical special damages, a judgment in favor of her parents for \$1,000,000 is per se unreasonable in this case.

Put simply, once Vanessa Link settled her claims, her mother could only recover on her own personal injury damages, making the \$1,000,000 stipulated judgment patently unreasonable. Thus, the Trial Court erred in its analysis of *Chausse* factors 1-3 when it overstated the value of Kathleen Link's damages through inclusion of categories of damages that could not support her recovery.

**2. The Trial Court Erred in Considering Consortium Damages in the Determining the Judgment for Kathleen and Russell Link was Reasonable.**

Damages to a parent for the bodily injury suffered by a child are indirect and arise as a consequence of the harm suffered by the child, not as an independent injury. *West American Ins. Co. v. Buchanan*, 11 Wn. App. 823, 525 P.2d 831, (1974). Though Kathleen's consortium claim is an independent cause of action, it arises out of Vanessa's bodily injury claim and is extinguished with her settlement. *See, Greene v. Young*, 113 Wn. App. 746, 754, 54 P.3d 734 (2002) ("Allstate correctly points out that Mitchell's loss of consortium claim is derivative of Cheryl's claim, and is therefore extinguished by the payment to Cheryl").

Damages for loss of consortium are consequential damages of the

injured spouse or child, and are necessarily dependent on the injury of that spouse or child: “It has long been settled in this state that, absent different policy provisions, insurance indemnity for a claim for loss of consortium is restricted to the same single person limit of the policy available to indemnify for the spouse's injuries that occasioned the claim.” *Grange Ins. Asso v. Morgavi*, 51 Wn. App. 375, 376, 753 P.2d 999 (1988); *see also*, *Thompson v. Grange Ins. Asso*, 34 Wn. App. 151, 161-162, 660 P.2d 307 (1983) (“We next observe the widely held rule that damages for loss of consortium are consequential, rather than direct, damages. They necessarily are dependent upon a bodily injury to the spouse who can no longer perform the spousal functions; it does not arise out of a bodily injury to the spouse suffering the loss.”); *see also*, *West Am. Ins. Co. v. Buchanan*, 11 Wn. App. 823, 525 P.2d 831 (1974) (claim for grief, mental anguish, and suffering held to be for consequential damages, rather than for bodily injuries which would trigger the upper limit for UMC).

Consortium claims fall within the bodily injury limit of the injured party, do not give rise to an additional injury claim, and are thus extinguished with payment of limits to the injured party. In *Grange Ins. Asso v. Morgavi*, William Morgavi had a claim for loss of consortium due to a tortious injury to his wife. 51 Wn. App. at 376. The insurer tendered policy limits to Ms. Morgavi, and the trial court held that Mr. Morgavi was

then entitled to an additional per person policy limit. *Id.* The Court of appeals reversed, holding that the consortium claim arising out of the injury to Ms. Morgavi was subject to the same per-person policy limit as her injury claim. *Id.* Therefore, when she was paid policy limits, there was no additional entitlement to benefits for Mr. Morgavi's consortium claim. *Id.* See also, *Zoda v. Mut. of Enumclaw Ins. Co.*, 38 Wn. App. 98, 100, 684 P.2d 91 (1984) (it seems clear that Mr. Zoda's claim for loss of consortium must fail because Mrs. Zoda exhausted her single person limit of \$100,000.); *Miller v. Public Employees Mut. Ins. Co.*, 58 Wn. App. 870, 873, 795 P.2d 703 (1990) (same); and *State Farm Mut. Auto. Ins. Co. v. Pan*, 2011 U.S. Dist. LEXIS 120243, \*13, 2011 WL 4944976 (W.D. Wash. Oct. 17, 2011) (favorably citing *Morgavi* and applying same reasoning to anti-stacking provisions).

Similarly, here, once Vanessa Link settled her bodily injury claim for policy limits, her mother was not entitled to recover any additional payment for general damages based on lack of consortium. Thus, it was improper for the Court to consider consortium damages in determining the reasonableness of the \$1,000,000 judgment following Vanessa's settlement. Vanessa's settlement limits Kathleen's damages to those arising out of her own minimal bodily injury, which resulted in just over \$2,000 in special damages. If Kathleen Link cannot recover for consortium claims, a

\$1,000,000 is per se unreasonable.

This Court should therefore overturn the Trial Court's reasonableness determination based upon this error alone.

**3. Policy and Case Law Prohibit Claim Splitting by Kathleen and Vanessa Link.**

Counsel for Kathleen and Vanessa Link attempted to split Vanessa Link's claim by adding language to the release agreement for Vanessa Link's settlement purportedly foregoing her medical special damages and reserving those damages for her mother. CP 71. Thus, Vanessa Link settled part of her claim for policy limits, and her mother also pursued the medical special damages portion of her daughter's claim. These medical special damages were then improperly considered in finding that the \$1,000,000 stipulated judgment was reasonable. CP 17-18.

Recovery of medical special damages by a parent for the injury to a child pursuant to RCW 4.24.010 is only permissible when the child is not pursuing her own claims. "Filing two separate lawsuits based on the same event--claim splitting--is precluded in Washington." *Landry v. Luscher*, 95 Wn. App. 779, 780, 976 P.2d 1274, (1999). Washington courts consistently recognize "the general rule that if an action is brought for part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim." *Landry*, 95 Wn. App. at 782. The public policy favoring prevention of claim splitting applies to a party

seeking to recover from an insurer based on various theories of recovery.

*Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn.

App. 222, 228, 308 P.3d 681 (2013).

Elementary considerations of the undesirability of claim splitting and of fairness to the defendant tortfeasor militate against such an outcome. “The doctrine of claim preclusion prohibits claim splitting as a matter of policy, primarily in order to conserve judicial resources and to ensure repose for parties who have already responded adequately to the plaintiff’s claims.”

*Mahler v. Szucs*, 135 Wn.2d 398, 415, 957 P.2d 632 (1998) (citing *Babcock*

*v. State*, 112 Wn.2d 83, 93, 768 P.2d 481 (1989)).

Even obtaining a judgment in a property damage claim from an auto collision will preclude later pursuit of a bodily injury claim arising out of the same collision. *Landry*, 95 Wn. App. at 785-86. In *Landry*, Kenneth and Katherine Landry obtained a judgment against Kristen and Marjorie Luscher in small claims court for damage to their automobile, following an accident. *Landry v. Luscher*, 95 Wn. App. at 781. The Landrys later sued in superior court for personal injuries arising out of the same accident. *Id.* The superior court dismissed the second suit due to the prohibition on claims splitting, and this dismissal was upheld on appeal. *Id.*

Here, just as the Landry’s could not bring a claim for injury arising out of the same accident giving rise to a prior suit for the property damage, Kathleen Link is thus precluded from seeking damages arising out of

Vanessa's bodily injury claim after she resolved her claim. Vanessa's settlement of a portion of her claim arising out of the accident in question precludes her mother's ability to seek special damages arising from Vanessa's bodily injury. This case presents the unusual scenario in which Vanessa Link attempted to separate the various components of her damages arising from her bodily injury in order to allow her parents to pursue other aspects, namely her medical special damages. CP 71. The prohibition on claim splitting prohibits Vanessa and Kathleen from separately seeking damages based on Vanessa's injury.

Just as Vanessa would be precluded from settling her own general damages claim in order to later pursue a claim for medical specials arising out of the same injury, her mother may not pursue Vanessa's medical specials following Vanessa's settlement. Therefore, even though RCW 4.24.010<sup>2</sup> creates a cause of action for a parent to pursue medical costs which arise out of a child's injury, the child's settlement of her injury claim necessarily precludes her parent from pursuing damages arising out of that

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<sup>2</sup> RCW 42.24.010 provides:

A mother or father ... may maintain or join as a party an action as plaintiff for the injury or death of the child.

...

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

injury. Thus, the Trial Court improperly included Vanessa Link's medical special damages when determining that her mother's stipulated judgment against the Wallys was reasonable. Without the inclusion of Vanessa's medical special damages, the judgment for Kathleen Link of nearly \$1,000,000, when she sustained only roughly \$2,000 in her own special damages, is not reasonable and warrants reversal of the reasonableness determination.

Here, the Trial Court improperly allowed both Vanessa and her parents to pursue claims and to recover based on her injuries based on the language of the RCW 4.24.010 allowing for a parent to recover for "injury" to the child. However, neither logic nor case law support the notion that a child can sustain an injury and pursue her claims simultaneously with her parent. Vanessa and her mother both presented claims to American Family following the collision at issue. Vanessa independently pursued and settled her claim. The Trial Court then found that her mother was reasonably entitled to nearly \$1,000,000 in damages based largely on Vanessa's medical special damages. Counsel is aware of no case which allowed a parent to recover for the medical expenses incurred by their child when the child was also pursuing her own claim.

Therefore, the Trial Court erred when it considered Vanessa Link's medical special damages in determining that the stipulated judgment of her

parents was reasonable. Washington case law does not, and should not, permit the splitting of Vanessa's personal injury claim thereby allowing her parents to recover for her special damages while she simultaneously pursued and settled her claim. This Court should overturn the Trial Court's ruling based on consideration of Vanessa's special damages in valuing her parents' claims.

**4. Finding that Kathleen and Russell Link's Damages Differ by Nearly \$1,000,000 Is Per Se Unreasonable.**

There can be no reasonable conclusion that one parent in this scenario suffered damages of roughly \$6,000 and the other nearly \$1,000,000.<sup>3</sup> Russell Link's damages were found to be only \$6,600 of the \$1,000,000 judgment in the April 20, 2016, Order finding the stipulated judgment to be reasonable. CP 94, 112.

Kathleen and Russell Link are similarly situated Plaintiffs who have nearly identical claims, aside from Kathleen's minimal injury claim which arose by virtue of her being in the collision. The Trial Court's ruling cannot be supported on its face because it found that Kathleen Link was entitled to nearly \$1,000,000 in damages, and Russell Link was entitled to a mere \$6,600. CP 94, 112. It is absolutely illogical for each parents' damages to vary so widely, and such a disparity in damages is not supported by the

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<sup>3</sup> Further, as discussed above, any consortium claim of Russell Link would also be extinguished upon Vanessa's settlement, and the doctrine of claim splitting would also prohibit him from pursuing Vanessa's special damages.

record. Even assuming that Kathleen Link's damages include medical expenses of her daughter, this still cannot support a several hundred thousand dollar disparity between the damages findings for Kathleen and Russell. Kathleen's special damages were roughly \$2,000, whereas Russell suffered none, or \$2,000 less than Kathleen's. Thus, there is can be no reasonable basis to hold that the two parents' general damages differ by several hundred thousand dollars.

Given the foregoing, the Trial Court did not have a factual or legal basis for finding that an award of general damages of roughly \$1,000,000 to Kathleen Link was reasonable, while also holding that \$6,600 in damages for Russell Link was reasonable. The Trial Court therefore erred in finding that the stipulated judgment was reasonable based on these figures.

**5. The Trial Court Erred Concluding there Was No Evidence of Bad Faith While Also Refusing to Allow Discovery into the Matter.**

The Trial Court erred in finding there was no evidence of bad faith without allowing discovery on the issue. *See* CP 88-108 (Orders on determination of reasonableness, allowing intervention, and denying discovery). One of the factors the Court must consider in determining reasonableness is whether there is "any evidence of bad faith, collusion, or fraud." *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991).

While American Family initially performed its evaluation for purposes of allocating damages to the separate claims, Kathleen's claim for consortium was subsumed in the limits demand for policy limits as to Vanessa. See *Thompson v. Grange Ins. Asso*, 34 Wn. App. 151, 161-162, 660 P.2d 307 (1983) (consortium claim arises out of injured individuals bodily injury); see also, *West Am. Ins. Co. v. Buchanan*, 11 Wn. App. 823, 525 P.2d 831 (1974) (claim for grief, mental anguish, and suffering held to be for consequential damages, rather than for bodily injuries which would trigger the upper limit for UMC)

There was absolutely no indication that Vanessa would not be pursuing her own claims when American Family was evaluating her and her mother's claims in response to the limits demand. American Family offered limits to Vanessa within three weeks of the accident. Respondents' counsel thereafter made limits demands for both Vanessa and Kathleen Link, Vanessa having special damages which far exceeded those of her mother's roughly \$2,000 medical specials. Kathleen Link had very low medical special damages, and her claims independent of Vanessa's were reasonably evaluated at well under \$25,000. Indeed, initial copies of the summons and complaint indicated that the parties were Kathleen Link, and Kathleen link as the representative of her minor daughter Vanessa. However, apparently realizing that Kathleen and Vanessa Link would not be able to

simultaneously pursue Vanessa's medical special damages, thereafter, the complaint filed removed Vanessa as a party.

Further, Counsel for Kathleen Link misled American Family with regard to her intended course of action:

If the demands are not accepted we will file a lawsuit in Snohomish County Superior Court and submit the cases to Mandatory Arbitration where we will seek a total \$100,000 (\$50,000 for Vanessa and \$50,000 for Kathleen). This will certainly result in an excess judgment against your insured, especially if a de novo is filed. Please inform your insureds that this is their only chance to resolve this case without an excess judgment being entered against them.

There is absolutely no indication in this correspondence the Kathleen Link had any intention of pursuing her daughter's claims pursuant to RCW 4.24.010.

Then, once litigation commenced, Respondents attempted to pursue Vanessa's medical special damages via her mother as well as pursue a consortium claim while Vanessa simultaneously settled her claims, which extinguishes her parents' consortium claims. Determining how a \$1,000,000 settlement arose in this context is crucial in determining whether there was bad faith in obtaining the settlement and warrants discovery.

Thus, Kathleen Link induced American Family to believe she was pursuing her claims herself, and Vanessa Link was pursuing her claims independently of her mother. Then, Respondents altered course and decided

to pursue Vanessa's claims through her mother, settled with Vanessa for \$25,000, and sought to obtain a stipulated judgment for Vanessa's claims via her Plaintiff mother, when Vanessa had not brought suit herself. This bait and switch tactic, regarding Respondents' intended course of action, is at minimum suggestive of bad faith.

Therefore, the Court erred in finding lack of collusion without allowing any discovery into the matter.

**6. The Trial Court Erred in Holding that American Family's Interests were Adequately Represented.**

American Family was deprived of due process when it was prevented from investigating the underpinnings of the stipulated judgment. The Trial Court did not adequately account for American Family's interest in the determination of reasonableness, nor did it accurately reflect American Family's role in the underlying action. Therefore, the Trial Court erred in its determination that *Chausse* Factor nine, the interest of the parties not being released, supported a finding of reasonableness. *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991).

As occurred here, an insurer's "exclusion from the settlement negotiations" prevents "any meaningful participation in the settlement." *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 592, 216 P.3d 1110, (2009). Courts have held that the due process as to

an insurer in the context of a stipulated judgment and covenant not to execute “is satisfied by notice and an opportunity to intervene in the underlying action.” *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 287 P.3d 551 (2012) citing *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 251, 961 P.2d 350 (1998). However, due process through intervention requires substantive intervention which will include the opportunity to conduct discovery.

As discussed in *Water's Edge*, an insurance company's interests are not protected by counsel it funds to defend its insureds because “insurance-appointed counsel has a duty to the insured that cannot be subordinated to the insurer's interests.” *Water's Edge Homeowners Ass'n*, 152 Wn. App. at 593; see also, *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Though American Family was funding the defense of its insureds, the Wallys, there is no evidence that American Family participated in the negotiation of the stipulated judgment in any meaningful way that would have protected its interests. The Trial Court held that American Family was adequately protected simply because it had an opportunity to settle the matter, and because it was made aware of the proposed stipulated judgment. CP 112.

The Trial Court erred when it put substantial weight in the fact that “the settlement agreement was executed by the very attorney that American

Family was paying to defend this case” in finding that American Family was sufficiently involved in the matter to protect its interest and in finding that there was no evidence of bad faith, collusion, or fraud. CP 112. The Trial Court’s finding ignored the fact that even when a defense attorney is paid by an insurance company, the attorney’s duty is to the insured, not to the insurance company. *Tank v. State Farm*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Though American Family funded the defense, there is nothing in the record indicating American Family was in any way involved in the process leading to the stipulated judgment.

In *Water's Edge Homeowners Ass'n*, the Court found that the trial court did not err in finding Farmers Insurance was disadvantaged by a stipulated judgment negotiated by counsel Farmers Insurance had hired to defend its insured. As argued by Farmers in *Water's Edge*, when an insurer assigns defense counsel, that counsel's only client is the defendant. *Water's Edge Homeowners Ass'n*, 152 Wn. App. at 592. Further, there was evidence in the record that counsel that had been hired by Farmer’s was “did not feel comfortable ... reporting defense strategy to Farmers.” *Water's Edge Homeowners Ass'n*, 152 Wn. App. at 592. The trial court in *Water's Edge* also indicated that the way that the case shifted abruptly from litigation to collaboration, after the parties had filed motions for summary judgment, was highly suspect and troublesome. *Id.* at 572.

The Court in *Water's Edge* identified a number of facts indicating possible collusion or bad faith, all of which were based on communications between third party defense counsel funded by Farmers, and the Plaintiffs. The court summarized that there was a “joint effort to create, in a non-adversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor.” *Water's Edge Homeowners Ass'n*, 152 Wn. App. at 595 (2009). The only reason the Court could even review these facts is because Farmers had uncovered them after having the opportunity to conduct discovery. *Water's Edge Homeowners Ass'n*, 152 Wn. App. at 582 (2009).

Similar to events leading to the stipulated judgment in *Water's Edge*, this case shifted abruptly from litigation to collaboration in agreeing to a stipulated judgment, and this occurred while a summary judgment motion was pending. Defendants Wally filed their opposition to the Link's motion for summary judgment on January 19, 2016, and then agreed to a \$1,000,000 stipulated judgment only one week later. CP 248-262 (January 19, 2016, response to motion for summary judgment); CP 173-181 (January 27, 2016, stipulated judgment).

However, in contrast to *Water's Edge* where discovery was permitted and the Court found the stipulated judgment was not reasonable, here American Family was prevented from conducting discovery, and thus

could not present evidence of facts leading to the stipulated judgment. American Family received notice of the reasonableness hearing on April 6, 2016, and though made aware of the stipulated judgment beforehand, there was no evidence that American Family had any substantive involvement in negotiations leading to the agreement entered into by its insured. American Family does not possess materials regarding the negotiation leading to the \$1,000,000 stipulated judgment, and believes there to be additional materials not in American Family's file leading to the stipulation. If there are no additional materials, it then appears that there may not have been any real negotiation leading to the stipulated judgment. American Family must be permitted to investigate these issues through discovery.

Nonetheless, here the trial court erroneously found that American Family was permitted to adequately protect its interests because it refused to allow for discovery and simply granted the Links' motion for determination of reasonableness without allowing any discovery into the underpinnings of the agreement.

**B. The Trial Court Erred in Refusing to Continue the Reasonableness Hearing to American Family to Conduct Discovery.**

As discussed above, due process required that American Family be permitted to investigate the circumstances of the stipulated judgment with Kathleen and Russell Link and the settlement agreement of Vanessa Link in

this case. American Family still does not possess all information pertaining to negotiations leading to Defendants' agreement to settle Vanessa's claims. Regardless, Kathleen's claims unrelated to her bodily injury were extinguished with Vanessa's February 18, 2016, settlement of her claims for bodily injury. After this settlement, Kathleen's claims for consortium disappeared with Vanessa's settlement and could not be properly considered in the determination of reasonableness.

The negotiations, or lack thereof, leading to the stipulated judgment will be telling in determining whether bad faith existed in arriving at the million dollar settlement agreement. Again, where the interest of the plaintiff and the insured are aligned, "one cannot be confident that the litigation accurately established the value of the claim." *NW Prosthetic v. Centennial Ins.*, 100 Wn. App. 546, 547, 997 P.2d 972 (2000). This is especially true here, where consortium claims which were being extinguished with settlement of Vanessa's claims must have been considered in order to support a \$1,000,000 settlement figure, and where the parties' interests were aligned in agreeing to a judgment.

The stipulated judgment was entered into when the parties' interests were aligned and was far in excess of prior damages discussions of the parties. On September 24, 2014, Respondents' counsel wrote American Family, making acceptance of the limits demands of Kathleen and Vanessa

contingent upon one another, stating:

Please consider this a policy limits demand for Vanessa Link and policy limits demand for Kathleen Link. The specifics of these demands are below:

1. **The policy limits demands are a package. You cannot agree to pay Vanessa's policy limits demand and not Kathleen's demand. You must accept both.** If you do not accept both it will be considered a rejection of both.

...

If the demands are not accepted we will file a lawsuit in Snohomish County Superior Court and submit the cases to Mandatory Arbitration where we will seek a total \$100,000 (\$50,000 for Vanessa and \$50,000 for Kathleen). This will certainly result in an excess judgment against your insured, especially if a de novo is filed. Please inform your insureds that this is their only chance to resolve this case without an excess judgment being entered against them.

CP 53-54.

Then, when the parties to this action (Plaintiffs Kathleen and Russell Link and Defendants Wally) were negotiating a stipulated judgment, it appears that Vanessa Link was concurrently settling her claims, while represented by the same counsel as her parents. Vanessa settled her claim sometime in early 2016, and signed a release of all claims, purporting to aside from medical expenses, on February 18, 2016. On January 27, 2016, Kathleen and Russell Link entered into a stipulated judgment with the Wallys. What claims remained viable when, and who possessed what claims at what time, is unclear. Thus, in assessing the reasonableness of Kathleen Link's settlement, negotiations regarding her

claim as well as her daughter's must be produced and analyzed.

American Family learned of the stipulated judgment, and the Wallys' counsel worked to defer entry of the judgment to allow for a mediation. When the mediation did not take place as originally scheduled, Kathleen and Russell Link filed a motion for determination of reasonableness of the stipulated judgment. American Family challenged the reasonableness of the judgment in response to the Link's motion.

But, because it was not allowed to conduct discovery, American Family was deprived of meaningful recourse to challenge the judgment amount prior to the hearing on reasonableness. The agreement was reached by parties whose interests were wholly aligned. Thus, though American Family provided defense for the Wallys, it was not directly involved in the stipulated judgment until Respondents sought to have the judgment approved by the Court. The Court should therefore allow American Family to engage in discovery, and it erred in refusing to allow American Family to do so.

**C. Public Policy Does Not Support the Stipulated Judgment.**

Again, when a settlement includes a covenant not to execute, "[t]he insured may be persuaded to settle for an inflated amount in exchange for immunity from personal liability." *Red Oaks Condo. v. Sundquist Holdings*, 128 Wn. App. 317, 322, 116 P.3d 404 (2005). Washington courts have recognized the dangers inherent in consent judgments coupled with a

covenant not to execute and an assignment of rights against an insurer. *See, e.g., Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002) (“We are aware that an insured’s incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount. Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer’s liability for settlement amounts is all the more important.”); *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991) (“These courts have reasoned that an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement. We share this concern about consent judgments coupled with a covenant not to execute.”).

This entire case was set up to coerce American Family to overvalue Kathleen Link’s claim by intermixing it with her daughter Vanessa’s claim. Demands made throughout this case mislead American Family about what counsel was pursuing, and may have actually created a conflict between Vanessa and Kathleen Link. Again, Kathleen Link and Vanessa Link initially presented their claims to American Family and each demanded policy limits, but counsel improperly made settlement of Vanessa’s claim contingent upon offering policy limits to her mother. The complaint initially provided to American Family even named Kathleen Link and

Kathleen Link as the parent and guardian of Vanessa Link, thus giving the impression that Vanessa Link was litigating her own claims. However, the action actually filed listed Kathleen and Russell Link as Plaintiffs.

Vanessa settled her claims out of court on February 18, 2016. CP 73. When this settlement was negotiated is unknown. However, the stipulated judgment was signed a mere three weeks earlier, on January 27, 2016. CP 181.

The history of this matter thus reveals initial settlement negotiations which involved claims of Vanessa and Kathleen link which were very different, yet made contingent upon one another. American Family almost immediately offered to settle Vanessa's claims, but its offer was rejected as contingent on also offering policy limits for Kathleen Link's claims. A lawsuit was initiated, with courtesy copies provided to American Family naming different parties than the filed lawsuit named. Respondents later entered into a large stipulated judgment, while Vanessa's claims were settling for the amount initially offered by American Family. This gamesmanship to set up an insurer for very large potential liability by parties whose interests are fully aligned should not be how these stipulated judgment agreements function and should not be promoted by the Courts.

## **VI. CONCLUSION**

Based on the foregoing, this Court should overturn the lower

Court's finding that the stipulated judgment was not reasonable as a matter of law, because it improperly included consortium damages and allowed for double recovery on Vanessa Link's injury. Further, the record cannot support the extreme disparity in the damages allocations among Kathleen and Russell Link.

On remand the Court should allow for discovery into the underpinnings of the stipulated judgment, in addition to providing instruction regarding the proper allocation of damages, and the appropriate categories of damages to consider in determining reasonableness.

DATED this 2<sup>nd</sup> day of November, 2016.

Respectfully Submitted,

**COLE | WATHEN | LEID | HALL, P.C.**



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