

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

No. 35322-9-II

METROPOLITAN PROPERTY & CASUALTY CO., Appellant

v.

WILLIAM AND KARYL MARTIN, et al., Respondents

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. REPLY ARGUMENT

A. PLAINTIFF'S BURDEN OF PROVING REASONABLENESS WAS BYPASSED WHEN THE HEARING TOOK PLACE WITHOUT DISCOVERY OR EVIDENCE FROM METLIFE.

It was an abuse of discretion for the Superior Court to declare the "settlement" was reasonable without taking any evidence and before any discovery could be done by MetLife. It circumvented Plaintiff's burden to actually prove the settlement was, in fact, reasonable.

Rather unbelievably, Plaintiff/Respondents assert that MetLife had "ample opportunity"¹ to gather information, stating that a settlement should "not be deemed unreasonable simply because the plaintiff has not . . . done all the legwork required to formally establish every element of the claim."² To support this argument, Respondents rely on *Red Oak Condominium Owners Ass'n v. Sundquist Holdings, Inc.*³

From *Red Oak*, Respondents extract the quote "It should be no surprise to MOE that the parties settled quickly once a lawsuit was initiated."⁴ What Respondents fail to disclose, however, is that

¹ Respondents' Brief, p. 32.

² *Id.* at p. 22.

³ 128 Wn.App. 317, 116 P.3d 404 (2005).

⁴ Respondents' Brief, p. 32.

the language surrounding this quote reflects an entirely different context. The *Red Oak* Court stated:

MOE was not a stranger to this case. It was notified of the claims against Sundquist almost a year in advance of the hearing, defended Sundquist under a reservation of rights, agreed to the tolling of the statute of limitations, paid for an investigation into the claims, and was aware of ongoing settlement negotiations. It should have been no surprise to MOE that the parties settled quickly once a lawsuit was initiated. Further, the trial court permitted MOE to participate in the reasonableness hearing, but it chose not to.⁵

In *Red Oak*, MOE chose not to participate in the hearing; it was notified a year prior to the hearing; it agreed to tolling the statute of limitations; it paid for an investigation and was aware of ongoing settlement negotiations. It is unquestionable that MetLife did not have the advantages MOE had in the *Red Oak* case and this argument does not apply.

Here, Metropolitan had no opportunity to challenge the plaintiff's highly speculative assertion that the tank leaked while in Mrs. Johnson's possession. Further, Metropolitan had no opportunity to conduct written discovery or any depositions. The Plaintiff and Defendant reached a so-called "settlement" which the Defendant would never have to pay and went right to a

⁵ *Red Oak*, 128 Wn.App. at 326.

reasonableness hearing before anything could be done by Metropolitan to contest the claim. The trial court erred by accepting the agreement as a “settlement” and then declaring it “reasonable” before any discovery could be done and without taking any actual evidence.

B. CONTRARY TO RESPONDENTS’ UNSUPPORTED ASSERTIONS, BAD FAITH IS REQUIRED TO WARRANT A REASONABLENESS HEARING.

Respondents argue that “it does not follow” and there is “no logical reason” that there must be evidence of bad faith to warrant a reasonableness hearing.⁶ No authority is cited. Respondents also opine that requiring evidence of bad faith to warrant a reasonableness hearing and requiring proof of bad faith “would be ill advised” (sic).⁷ Again, no authority is cited other than the personal opinion of Respondents’ counsel.

Plaintiff’s argument ignores the fact that the only reason plaintiff asked for the reasonableness hearing was the hope that it would make the so-called “settlement” binding on MetLife. The law is clear that to bind Metropolitan to the “settlement”, plaintiff must prove (1) that MetLife was guilty of bad faith and (2) that the

⁶ Respondents’ Brief, p. 15-16.

⁷ *Id.* at p. 16.

“settlement” was “reasonable”.⁸ However, bad faith was never even alleged by plaintiff against MetLife and certainly no such evidence was presented. Thus, any determination that the settlement was “reasonable” was premature and there was no reason for the trial court to conduct such a hearing. Clearly it should not have been considered without discovery and the presentation of actual evidence.

C. A REASONABLENESS DETERMINATION IS ONLY WARRANTED WHEN CLEAR, ABSOLUTE, AND INDEFENSIBLE LIABILITY IS SHOWN.

Besides a finding of bad faith on the part of the insurer to justify the settlement between the parties, courts use the factors provided in *Chaussee v. Maryland Casualty Co.* to determine the reasonableness of a settlement agreement. Courts that have made a finding of reasonableness make a specific finding that the defendant’s liability is clear: In this case, it is highly questionable whether plaintiff would have prevailed at trial and evidence on this point was not allowed.

Here, the trial court received no evidence of the *Chaussee* factors and entered its finding without considering those factors. If

⁸ *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002); *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (*citing Glover*, 98 Wn.2d at 708).

they had been considered, it is clear that this settlement would not have been deemed “reasonable”.

1. THE MTCA SPECIFICALLY EXEMPTS A CONSUMER.

A review of Washington law concerning enforcement actions under the MTCA supports MetLife’s interpretation of this statute. Under existing case law, a consumer owner of a hazardous substance has never been held liable under the MTCA for a consumer product used by a consumer.

Respondents contend that MetLife’s argument “ignores the fact that the storage tank and the heating oil were abandoned and not in consumer use at the time.”⁹ The authority Respondents rely on analyzes tenses and the “disjunctive” term “or”.¹⁰ Further, Respondents presume the legislature’s intent based on their opinion that “there is no other reasonable reading.”¹¹ Respondents argue that “all persons have environmental responsibility” and that there is not the “slightest inclination to exempt residential users”.¹² These arguments have no basis at all.

⁹ Respondents’ Brief, p. 23. (*Emphasis by Respondent*).

¹⁰ *Id.* at 24-25.

¹¹ *Id.* at 25.

¹² *Id.* at 26.

Consumer use of hazardous materials is outside the scope of the statute.¹³ Respondents' arguments regarding "abandonment" do not change this fact. Therefore, plaintiff's MTCA claim is entirely defensible, and possibly subject to summary judgment dismissal.

2. THE MTCA'S CONSUMER EXEMPTION ELIMINATES ANY BASIS FOR RECOVERY OF ATTORNEYS' FEES.

Without the MTCA claim, the plaintiff has no basis for recovery of attorneys' fees. Attorneys' fees were a significant component of the settlement between the parties, magnifying the unreasonableness of the agreement.

RAP 18.1(b) states that attorneys' fees can be requested if "applicable law grants to a party the right to recover reasonable attorney fees" The "applicable law" cited by Respondents is the MTCA, which does not apply here. Therefore, Respondents would not be entitled to attorneys' fees.

D. THE DEAD MAN'S STATUTE APPLIES SQUARELY TO THIS CASE.

The Dead Man's Statute applies to this case. The purpose of the Dead Man's Statute is to prevent interested parties from

¹³ RCW 70.105D.020(4); RCW 70.105 *et seq.*

giving self-serving testimony about conversations or transactions with the deceased.¹⁴ For instance, Respondents' contention that Mrs. Johnson "must have known" of the tank is speculative and self-serving.¹⁵ Mrs. Johnson is deceased. There is not a more clear-cut example of when this statute should apply.

Respondents cite to *Laue v. Estate of Elder*¹⁶ in arguing that the Appellant "misunderstands" the Dead Man's Statute.¹⁷ *Laue* supports MetLife's interpretation of the Dead Man's Statute in its entirety.

The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony about past conversations or transactions with a person who is now dead or incompetent.¹⁸

Consequently, pursuant to the Dead Man's Statute, parties of interest are prohibited from testifying regarding the transaction involving the deceased. Similarly, parties of interest are prohibited from testifying as to any statements made by the deceased.

¹⁴ *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn.App. 787, 150 P.3d 1163, 1166 (2007) (citing *McGugart v. Brumback*, 77 Wn.2d 441, 444-45, 463 P.2d 140 (1969); *Lasher v. Univ. of Wash.*, 91 Wn.App. 165, 169, 957 P.2d 229, review denied, 136 Wn.2d 1029, 972 P.2d 464 (1998)).

¹⁵ Respondents' Brief, p. 30.

¹⁶ 106 Wn.App. 699, 25 P.3d 1032 (2001).

¹⁷ Respondents' Brief, p. 30, Fn. 5.

¹⁸ *Laue*, 106 Wn.App. at 705-06 (citing *Lasher v. University of Washington*, 91 Wn.App. 165, 169, 957 P.2d 229, review denied, 136 Wash.2d 1029, 972 P.2d 464 (1998)). See also *Thor v. McDearmid*, 63 Wn.App. 193, 199, 817 P.2d 1380 (1991).

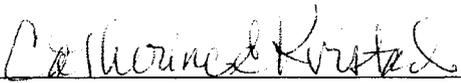
Therefore, the only admissible evidence related to Mrs. Johnson is the REPSA and Form 17.

II. **CONCLUSION**

For the foregoing reasons, MetLife Insurance Company requests the Court reverse the Court's August 11, 2006 Order Granting Motion to Determine Settlement Reasonable.

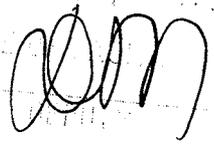
RESPECTFULLY SUBMITTED this 11th day of May, 2007.

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STATE OF WASHINGTON)
)
COUNTY OF KING) ss

Marie Aronsen, being first duly sworn on oath, deposes and states:

That on the 11th day of May, 2007, she caused to be sent via ABC Legal Messenger for delivery by 5:00 p.m., a copy of Reply Brief of Appellant to the below listed party of record in the above-captioned matter, as follows:

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FURTHER YOUR AFFIANT SAYETH NOT.


Marie Aronsen

See next page for notarial jurat.

SUBSCRIBED and SWORN to before me this 11th day of
May, 2007.



Sabrina M. Stevenson

SIGNATURE

Sabrina M. Stevenson

PRINT NAME

NOTARY PUBLIC in and for the
State of Washington,
residing at Scatter, WA
My commission expires 11-26-09