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No. 35322-9-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY &
CASUALTY INSURANCE COMPANY,

Appellant Intervenor,

v.

LAURENCE M. JOHNSON, as Personal
Representative of the Estate of H.E. Sherry Johnson,

Respondent/Defendant,

and

WILLIAM and KARYL MARTIN,

Respondents/Plaintiffs.

RESPONDENTS' BRIEF

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INTRODUCTION AND STATEMENT OF ISSUES

Respondents William and Karyl Martin and Laurence M. Johnson present this brief jointly. They disagree with Metropolitan's statement of issues. The issue presented are:

1. Should the Court entertain Metropolitan's argument concerning RCW 4.22.060 when it was not raised below? (Answer: No.)
2. Was the reasonableness hearing procedurally proper, regardless of whether it was held pursuant to RCW 4.22.060? (Answer: Yes.)
3. Did the trial court abuse its discretion in determining the settlement was reasonable? (Answer: No.)
4. If the trial court is affirmed, are respondents entitled to their attorney fees pursuant to RCW 70.105D.080? (Answer: Yes.)

STATEMENT OF THE CASE

This is contribution action between past and present property owners, arising out of a leaking underground heating oil storage tank. If the action had proceeded to trial, the Martins would have presented the following evidence:

1. In 1996 the Martins purchased the home at 501 North Tacoma Avenue from Ms. H.E. Sherry Johnson, now deceased. (CP 61, ¶ 2.)

2. The home was originally built in 1910. Ms. Johnson was the second owner, having purchased the property in the 1950's. (CP 61, ¶ 3.)

3. At the time of the sale to the Martins the home was heated by an electric heat pump and an electric water boiler, having been converted from oil heat by Ms. Johnson during the 1970's. (CP 61, ¶ 4.)

4. Prior to the sale, Ms. Johnson was asked on at least two occasions whether there was an existing heating oil storage tank on the property, left over from the conversion. On both occasions Ms. Johnson disclaimed knowledge of any such tank. (CP 62, ¶ 5.)

5. In fact, the storage tank had not been removed, emptied, filled with sand, or otherwise properly decommissioned during the conversion. The tank was left in the ground, with heating oil still in it. The filler inlet had been covered with landscaping. (CP 62, ¶ 6.)

6. The Real Estate Purchase and Sale Agreement contained an inspection addendum. (CP 96.) The Martins had 10 days to inspect. (*Id.*, ¶ 2.) The addendum allowed Ms. Johnson to repair a condition discovered by the Martins. (*Id.*, ¶¶ 3-4.) If she failed to do so, the Martins could rescind the agreement. (*Id.*, ¶ 4.) The Martins hired an inspector, but he did not discover the hidden tank, and only reported that the home was serviced by an electric "Trane Executive Heat Pump" in

good working order. (CP 107, 137.) The Martins did not exercise their option to rescind, and went ahead with the sale. (CP 61, ¶ 2.)

7. In 2004 the Martins put the home up for sale and eventually entered into a Real Estate Purchase and Sale Agreement with the eventual buyer. (CP 62, ¶ 7.) The home is part of the Tacoma historical registry and the buyer did some research into its history. (*Id.*) In a truly serendipitous coincidence, he found a picture of the home in an old heating oil company advertisement. (*Id.*) Concerned that a fuel tank might be in the ground, he hired a contractor who located the old tank by taking soil samples and using a metal detector. (*Id.*) The buyer then required that the tank be removed prior to purchase. (*Id.*) The Martins complied. (*Id.*)

8. When the tank was uncovered, Ms. Martin personally observed it in the ground. (CP 62, ¶ 8.) There was a distinct odor of diesel fuel and the ground around and underneath the tank looked oily. (*Id.*) As the contractor continued to dig, he eventually hit groundwater. (*Id.*) The groundwater had a “rainbow” sheen of water with oil in it, and also smelled like diesel fuel. (*Id.*)

9. An environmental inspector took samples of the ground under the tank (9.5 feet below grade) and of the groundwater (13 feet below grade). (CP 31.) Chemical analysis showed that both samples

contained diesel heating oil in excess of the maximum allowed by state regulations. (CP 31-32.) Further chemical analysis showed that fuel had been leaking from the tank for at least 10 years, i.e., no later than 1994, two years before the 1996 sale from Ms. Johnson to the Martins. (CP 40.)

10. The discovery of the tank and of the contaminated condition of the soil caused emotional distress to the Martins because they had been living in a contaminated environment for almost 8 years. (CP 62, ¶ 9.)

11. The Martins incurred \$61,415.63 in actual expenses removing the leaking tank and cleaning the contaminated soil and groundwater. (CP 62, ¶ 10; CP 36-38.)

12. Faced with a claim by the Martins, Ms. Johnson tried to obtain coverage from her insurer, Metropolitan, but Met denied coverage. (CP 58.)

13. To recoup their expenses, the Martins hired their present counsel to pursue the present action on a 1/3rd contingent fee basis. (CP 63, ¶ 11.)

14. Before this action was filed, Ms. Johnson died. Her estate is in probate, Piece County Cause No. 05-4-01510-4. The Martins filed a timely creditor's claim. (CP 28, ¶ 8.)

15. Although Met denied coverage, it temporarily agreed to defend the Estate under a reservation of rights. (CP 44.) The sole basis for this agreement was that although Met disclaimed all liability for damage involving pollution or remediation costs, the Complaint includes a prayer for “[s]uch further relief as the Court deems just and proper.” (CP 3.) Met decided this prayer conceivably could include a claim for nonenvironmental damage, and agreed to defend on that basis. (CP 47.)

16. The Martins have, in fact, no claim for damage not related to the entry of pollutants into land and groundwater.¹ Thus, despite providing a defense under a reservation of rights, Met has clearly and unequivocally stated it would not pay one penny of any judgment that conceivably might be entered.

As a result of all the above, the Martins and the Estate negotiated a proposed settlement. The key terms were:

- The Estate stipulated to judgment for \$81,928.63, which is the Martins’ actual clean-up expenses, plus attorney fees as provided by the Model Toxic Control Act. (CP 19.)
- The Martins waived their claim for general damages. (CP 19.)

¹ Even if they had a claim separate from the tank leak, they did not file a probate claim for it and the probate nonclaim statute thus would bar it.

- The Estate assigned to the Martins all claims the Estate has against Met. (CP 19.)
- In return, the Martins covenanted not to execute against the Estate's assets, other than the Met policy. (CP 20.)
- The settlement was contingent on the Court approving it as reasonable. (CP 20.)
- If the Court did not find the settlement amount to be reasonable, but found that a lower amount would be, the Martins had the option, at their sole discretion, to settle for that lower amount. (CP 21.)

The Martins and the Estate executed the settlement agreement on May 11 and 14, 2006. (CP 24-25.) On May 18, 2006, Met's counsel signed a declaratory complaint, which was filed on May 26, 2006 as Pierce County Cause No. 06-2-08353-4. (CP 49, 51.) The declaratory action seeks a declaration of "no coverage." Thus, when the Martins and the Estate settled, Met already was seeking to terminate the defense provided under a reservation of rights. It does not appear that Met's action was a response to the settlement. Rather, it appears that the Martins and the Johnson Estate happened to settle at the time that Met was drafting the declaratory complaint.

The Martins noted a reasonableness hearing. (CP 5.) The Martins and the Estate stipulated to Met's request to intervene, and Met filed an

extensive opposition. (CP 68.) After oral argument, the trial court ruled that the settlement was reasonable and entered an Order to that effect. (CP 138.) Shortly thereafter, the Court entered an agreed judgment in the Martins' favor, in the settlement amount. (CP 147.²) Met filed this timely appeal.

ARGUMENT

A. The Reasonableness Hearing Was Procedurally Proper

1. The Argument Concerning RCW 4.22.060 Was Not Raised Below

Much of Met's brief is devoted to the argument that because there was only one defendant, RCW 4.22.060 did not require a reasonableness hearing. Since the hearing was not held pursuant to chapter 4.22, the argument is hard to understand. In any event, Met made no such argument below. (CP 68-88.) "Generally, this court does not consider an issue that was not raised at the trial court." *Harris v. State, Dept. of Labor and Industries*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993); see *Richmond v. Thompson*, 130 Wn.2d 368, 375, 922 P.2d 1343 (1996). Since the argument was not made below, it need not be addressed here.

² At the time of this brief, the Respondents filed a supplemental designation of clerk's papers, identifying the final judgment. Respondents assume the judgment will be designated CP 147-48.

2. Ample Precedent Supported Holding the Hearing

The question of whether a reasonableness hearing is properly held in the liability action between the plaintiff and a defendant/insured has been resolved against Met:

The presumptive measure of the insured's damages in a bad faith action is the settlement amount, so long as the amount is reasonable and not the product of fraud or collusion. *Besel v. Viking Ins. Co. of Wis.*, 146 Wash.2d 730, 49 P.3d 887 (2002). Here, an injured plaintiff entered into a settlement, which included a covenant not to execute, with the defendant, who assigned its rights against its insurer to the plaintiff. The trial court determined that the settlement was reasonable. The insurer seeks reversal of the trial court's reasonableness determination, arguing that the personal injury action was not the proper forum for this determination. We affirm the finding of reasonableness because (1) the personal injury action was a proper forum for the reasonableness determination, (2) the insurer had adequate notice, (3) the insurer had a meaningful opportunity to be heard, and (4) the settlement amount was reasonable.

Howard v. Royal Specialty Underwriting, Inc., 121 Wn. App. 372, 374-75, 89 P.3d 265 (2004) (underline added); see *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765-66, 58 P.3d 276 (2002).

The above cases involve alleged bad faith. The reasonableness hearing also is relevant if, as a contractual matter, the insurer has incorrectly denied coverage. An insurer that denies coverage will be bound by a reasonable settlement if, in fact, there is coverage for the allegations in the underlying action. See *Public Utility Dist. No. 1 of*

Klickitat County v. International Ins. Co., 124 Wn.2d 789, 794, 881 P.2d 1020 (1994) (reasonableness determined under Federal Rule of Civil Procedure 23(e)(1)(C), governing class action settlements).

Ample precedent exists for holding a reasonableness hearing in the liability action when a coverage dispute exists between the insured and the liability insurer. See *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 735, 49 P.3d 887 (2002); *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 320-21, 116 P.3d 404 (2005); *Werlinger v. Warner*, 126 Wn. App. 342, 344, 109 P.3d 22 (2005); *Howard*, 121 Wn. App. at 375; accord *PUD No. 1, supra*, 124 Wn.2d at 794. If the insurer wishes to contest reasonableness, its remedy is to intervene, as Met did here. See, e.g., *Howard*, 121 Wn. App. at 376-77; *Red Oaks*, 128 Wn. App. at 320-21.

3. **RCW 4.22.060 Did Not Preempt the Field and Bar the Use of Reasonableness Hearings in Other Cases**

Ignoring the above precedent, Met sets up a straw man. First, Met contends the hearing was held pursuant to RCW 4.22.060, which applies to settlements between joint tortfeasors. Met then contends that because there was only one defendant, the Estate, there were no joint tortfeasors and no need for a reasonableness hearing pursuant to RCW 4.22.060.

Actually, there *were* joint “tortfeasors” in the sense that the Martins and the Estate were jointly liable to the State of Washington for contamination at the property. The problem is not that there were no joint tortfeasors and thus no action for contribution, but that the present action is a contribution action, albeit one brought pursuant to RCW 70.105D.080, rather than chapter 4.22 RCW.

Regardless, it is hard to understand what the consequence of Met’s argument is supposed to be. The reasonableness hearing in this action was neither designed nor intended to implement the contribution rights between joint tortfeasors which were created by Chapter 4.22. Rather, the hearing was a common law device created to determine whether a liability insurer will be bound by a reasonable settlement entered into by its insured. *See Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991) (leading case).

While Metropolitan never articulates its logic, apparently Met is arguing the only reasonableness hearings that can exist under Washington law are hearings directly authorized by RCW 4.22.060, so if that statute does not apply, then the hearing is void. Met seems to believe that when the legislature enacted RCW 4.22.060, it intended to occupy the field and preempt all reasonableness hearings in all areas of the law. Thus, if a particular settlement does not qualify for a reasonableness hearing

pursuant to RCW 4.22.060, there is nowhere to go, as the legislature has not given the courts any room to fashion their own procedures.

Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent, see cf. *Roberts v. Dudley*, 140 Wash.2d 58, 71-73, 72 n. 11, 993 P.2d 901 (2000), and “it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent.” *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wash.2d 154, 161, 351 P.2d 525 (1960).

In re Parentage of L.B., 155 Wn.2d 679, 695 n.11, 122 P.3d 161 (2005).

Preemption requires a showing that (1) the legislature either expressly or by necessary implication stated its intention to preempt the field, or (2) that the challenged rule is in such direct conflict with the statute that the two cannot be reconciled. *Accord Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 805, 123 P.3d 88 (2005) (stating formula with respect to preemption of local statutes).

RCW 4.22.060 does not preempt the field of reasonableness hearings. RCW 4.22.060 was meant to apply to contribution rights created by that chapter. There is no express legislative indication, and no intellectually plausible reason to believe, that in enacting a reasonableness procedure for contribution actions between joint tortfeasors, the legislature intended to *eliminate* the use of reasonableness hearings in other situations.

The case which created the reasonableness hearing procedure in insurance actions applied case law developed under RCW 4.22.060 by *analogy*, recognizing the statute did not directly apply:

In the context of the contribution provisions of the tort reform act, RCW 4.22 et seq., the Supreme Court has adopted factors a trial court should consider in determining whether a settlement is reasonable. *Glover v. Tacoma Gen. Hosp.*, 98 Wash.2d 708, 717, 658 P.2d 1230 (1983). Pursuant to RCW 4.22.060 a reasonableness hearing is held to determine the effect of an equitable distribution of payment among joint tortfeasors according to their liability.

....

We believe the factors identified by the Supreme Court in *Glover* would logically apply to a determination that a settlement was reasonable in the context of a failure to settle claim. We see little difference between a determination of reasonableness in the context of the contribution statute and the present claim. In both settings similar concerns exist regarding the impact of a settlement on other parties and the risk of fraud or collusion. Because the *Glover* factors address these concerns and will likely result in a fair resolution, we hold that these factors should be weighed in determining a reasonable settlement in an action for bad faith. A court, using the *Glover* factors, can suitably determine whether a consent judgment is reasonable.

Chaussee, 60 Wn. App. at 511-12.

Further guidance is found in *PUD No. 1*, 124 Wn.2d 789. In that case, the insurer denied coverage and was held bound to a reasonable settlement entered into by the insured. *Id.* at 809. The liability case was

a class action in which the trial court had found the settlement to be reasonable. *Id.* at 794. The reasonableness procedure in the class action would have been the one created by Federal Rule of Civil Procedure 23(e)(1)(C), not RCW 4.22.060.

Admittedly, the cases have created some ambiguity when citing RCW 4.22.060 in the insurance settlement context. Most recently, Division One upheld a trial court's authority to conduct such a reasonableness hearing. *See Villas at Harbour Pointe Owners Ass'n ex rel. Construction Associates, Inc. v. Mutual of Enumclaw Ins. Co.*, No. 56144-8-I, 2007 WL 960025 (April 2, 2007). In that construction defect case, a settlement was reached with all parties except a single subcontractor.³ Slip. op. at 1. That subcontractor later entered into a covenant settlement with the plaintiff.

Because only the subcontractor remained as a defendant, RCW 4.22.060 would not have mandated a reasonableness hearing as to the settlement the subcontractor later entered into (there would only be, as Met notes, a single defendant in the litigation). The trial court nonetheless held a reasonableness hearing and found the settlement to be

³ After stating that all parties settled at a mediation except the siding subcontractor (slip op. at 1), the decision states in a footnote that another subcontractor did not settle at the mediation (slip op. at 4 n.7). It is unclear as to whether this second subcontractor was a party at the time of the reasonableness hearing.

reasonable, over the objection of the subcontractor's insurer, who had intervened.

The insurer appealed, contending, *inter alia*, that the trial court lacked authority to conduct a reasonableness hearing. Division One disagreed and affirmed. Slip. op. at 2. In the course of doing so, the Court discussed RCW 4.22.060 (slip op. at 6), but never stated this statute was the direct authority for holding the hearing. Rather, the hearing was treated as a creature of case law, not statute:

In *Chaussee v. Maryland Casualty Co.*, 60 Wash.App. 504, 803 P.2d 1339 (1991), this court adopted the *Glover* factors to evaluate the reasonableness of a settlement between an insured and the claimant for a stipulated judgment and an assignment of coverage and bad faith rights in exchange for a covenant not to execute and dismissal. Because of similar concerns regarding the impact of a settlement on other parties and the risk of fraud or collusion, we concluded the *Glover* factors should apply to a covenant judgment settlement agreement between an insured and the claimant. *Chaussee*, 60 Wash.App. at 512, 803 P.2d 1339.

In *Besel*, the Washington Supreme Court approved of the procedure adopted in *Chaussee* and of conducting a reasonableness determination in the underlying action prior to a coverage or a bad faith action.

Slip. op. at 6-7.

Finally, it is worth noting that despite Met's "only one defendant" argument, the Washington Supreme Court case adopting the reasonableness procedure with respect to covenant judgments involved an

underlying lawsuit in which there was only one defendant. *Besel*, 146 Wn.2d 730 (single-car accident; passenger sued driver).

In the final analysis, when the issue is whether the insurer is bound by a reasonable settlement, the source for holding the reasonableness hearing should not matter. It may be that the liability action is one involving joint tortfeasors in which an RCW 4.22.060 reasonableness hearing is held. It might be a federal class action. *PUD No. 1, supra*. Or, it might be a common-law procedure such as the one developed in *Chaussee* and implemented in numerous cases thereafter. Metropolitan's complaint that RCW 4.22.060 does not apply gets it nowhere, and does not provide a reason for reversing the trial court's judgment.

4. **There Is No Requirement that an Insurer's Bad Faith Be Established as a Prerequisite to a Reasonableness Hearing**

Met argues the reasonableness hearing should not have been held, as there was no evidence that Met acted in bad faith. Met's argument is premature and puts the cart before the horse. While one consequence of the reasonableness hearing is that a reasonable settlement establishes the presumed level of damages if the insurer is liable for bad faith, *Besel, supra*, it does not follow that insurer bad faith must be established as part of the reasonableness hearing.

First, and most importantly, the utility of a reasonableness hearing is not solely contingent on whether the insurer can eventually be shown to have acted in bad faith. An insurer that denies coverage will be bound by a reasonable settlement if, in fact, there is coverage for the allegations in the underlying action. *See PUD No. 1*, 124 Wn.2d at 809. What is the difference between the *Besel* line of cases and *PUD No. 1*? In *Besel* and similar cases, there was no coverage as a contractual matter, but the insurer nevertheless was bound by the covenant judgment because it acted in bad faith. In *PUD No. 1*, the contract provided coverage, so the insurer was bound by the reasonable settlement even though the insurer did not act in bad faith. In sum, if the settlement is reasonable, then an insurer will be bound by it (1) if there is coverage, or (2) even if there is no coverage, if the insurer defended or refused to defend in bad faith.

Because a determination of reasonableness can be relevant even if the insurer did not act in bad faith, there is no logical reason for requiring insurer bad faith to be demonstrated as a prerequisite to holding a reasonableness hearing.

There are other sound reasons why requiring proof of bad faith would be ill advised. Such a requirement would be procedurally illogical, as bad faith by the insurer normally would not be relevant to issues in the liability action and would not be part of discovery in that action.

A settling plaintiff cannot be expected to come forward with proof of something it has no right to obtain proof of.

Such a requirement would favor insurance companies over plaintiffs and insureds. The insurer could use an alleged lack of evidence of bad faith as a roadblock to establishing the reasonableness of a settlement, while at the same time resisting discovery into bad faith on the ground the issue is irrelevant to the liability action. That way, an insurer acting in bad faith would be able to prevent its insured from protecting itself by entering into a reasonable settlement with a plaintiff.

The flip side of this coin leads to an equally unpalatable result. If Met requires its insureds to establish bad faith as part of a reasonable liability settlement, such a requirement could force insureds to reveal, to the plaintiff, information that otherwise would be protected as work product. *See generally Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999). For example, the settling insured might have to reveal communications with the insurance carrier, consulting experts, and retained insurance defense counsel. Indeed, if the parties were required to establish bad faith as a prerequisite to holding the reasonableness hearing, a settling defendant might not have any choice but to divulge that information. If the settlement negotiations fell apart, or if the settlement was not approved, the work product would be out of the bag,

and the defendant would be back to defending the liability action, but the damage would be done.⁴ As an insurer issuing liability policies and defending insureds, Met should be careful about what it asks for.

B. The Trial Court Did Not Abuse Its Discretion in Determining the Settlement To Be Reasonable

1. The Ruling Is Reviewed for Abuse of Discretion

As Met concedes (Appellant's Brief at 5), the trial court's ruling is reviewed for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005); *Howard v. Royal Specialty Underwriting*, 121 Wn. App. 372, 380, 89 P.3d 265 (2004). "A trial court abuses its discretion only if the discretion exercised is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons." *Wright v. Terrell*, 135 Wn. App. 722, 741 n.18, 145 P.3d 1230 (2006) (citation omitted). Met's arguments fall far short of meeting this difficult standard.

2. There Is No Requirement that Liability Be Indisputable and, in Any Event, the Estate Was Strictly Liable

Met argues that settlements are found reasonable only when a defendant's liability is "absolute." (Appellant's brief at 8.) No case has

⁴ The present settlement includes a provision that if it is not approved as reasonable, the settlement is void.

so stated, but Met claims the proposition is demonstrated by “review of the case law[.]” (*Id.* at 9.)

The assertion is curious, as in one of the cases discussed by Met, the trial court stated a jury might find one of the nonsettling defendants to be 20 to 40 percent at fault, i.e., that the settling party had a substantial defense based on the negligence of another. *Howard*, 121 Wn. App. at 383. This hardly qualifies as “absolute” liability on the part of the settling party.

Regardless, here the Estate *was* “absolutely” liable because the standard for liability in an environmental coverage case is strict liability.

The Model Toxic Controls Act provides in pertinent part:

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

RCW 70.105D.040(2). The Washington Court has described has the Act this way:

The MTCA imposes joint and several liability for all natural resource damage and remediation costs. RCW 70.105D.040(2). Liability under both CERCLA and the MTCA extends broadly to current owners and operators of a facility, persons who owned or operated a facility at the time hazardous substances were disposed or released, and any other person who caused the disposal or release of the

hazardous substance at any facility. *See* 42 U.S.C. § 9607(a); RCW 70.105D.040(1).

Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 661, 15 P.3d 115 (2000).

Because MTCA imposes strict liability, the only issue at trial would have been the relative contributions to be made between two strictly liable parties: the Martins and Ms. Johnson's estate.

3. **The Damages Awarded Are Legally Supportable and Within the Range of the Evidence**

Met starts its argument by misrepresenting the size of the settlement in relation to the Estate's potential liability, suggesting the Estate confessed to 100% of all that the Martins could have recovered if the case was tried. This is untrue. The Martins made substantial concessions:

1. They waived their right to general damages.
2. They waived their right to statutory costs.
3. They waived their right to collect on the judgment from any source other than an insurance policy.

Because of these concessions, the judgment amount is well within the range of what the evidence would have supported at trial.

Point number 3 is important because the Martins did not settle for cash. All they received in settlement was a lawsuit (Met's declaratory

action). It would be unfair for an insurer to deny its duty to indemnify and then demand that its insured's settlement with the plaintiff be evaluated as if the settlement was reached on a cash basis. By denying a duty to indemnify, the insurer has created a cognizable litigation risk that it will pay nothing. If the plaintiff removes that risk from the insured and shoulders it, the negotiated price will reflect the presence of that risk.

Met also complains that the judgment was inflated because it includes attorney fees "where no attorney fees would be awarded by law." (Appellant's brief at 11.) The claim is perplexing. The applicable statute states in part:

[A] person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. . . . The prevailing party in such an action shall recover its reasonable attorneys' fees and costs

RCW 70.105D.080.

Because the attorney fee provision uses the word "shall," an award of fees is mandatory. *City of Seattle v. Washington State Dept. of Transp.*, 107 Wn. App. 236, 240, 26 P.3d 1000 (2001). There was ample legal basis for attorney fees to be included in the judgment.

4. **Because It Was Necessary To Eliminate Contamination in Excess of Regulatory Standards, the Remediation Was the Substantial Equivalent of a DOE Remediation**

Before proceeding further, the Martins respectfully remind the Court that the present appeal is from an Order determining a settlement to be reasonable. The object of the hearing was not to hold the Martins to their proof at trial, or to enter summary judgment against the Estate. One of the purposes of a settlement, after all, is to avoid the cost of preparing for such trials and motions. A settlement should not be deemed unreasonable simply because the plaintiff has not, at the stage of litigation when settlement is reached, done all the legwork required to formally establish every element of the claim.

The preceding observation is important because one of Met's arguments is that according to RCW 70.105D.080, the Martins' MTCA claim is "limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department supervised remedial action." While the Martins did not offer formal proof on the "substantial equivalence" issue, such as through an expert or a DOE employee making a specific statement to that effect, the Martins offered enough proof so that, for purposes of a reasonableness hearing, a trial judge exercising reasonable discretion could conclude the Martins probably would prevail on this issue at trial.

Specifically, the Martins have shown (1) the amount of heating oil in the soil and groundwater vastly exceeded the DOE's regulatory levels, and (2) the remediation consisted of work necessary to return the property to regulatory compliance. (CP 27, 31.)

In *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006), similar evidence was deemed sufficient to affirm *summary judgment* in favor of the current landowner and against a former landowner, despite arguments about whether the remediation was substantially equivalent to a DOE-supervised remedial action. *Id.* at 118-23. The present case, involving only the question of whether the trial court abused its discretion in approving a settlement as reasonable, is much more easily affirmed.

5. **The "Consumer Use" Exception Does Not Apply to an Abandoned Oil Tank**

Met next suggests that under RCW 70.105D.020(4), heating oil is a "consumer product in consumer use" and thus is exempt from the MTCA. Met's argument ignores the fact that the storage tank and the heating oil in it were abandoned and not in consumer use at the time. (CP 62, ¶ 7.) A statute's tense—past, present, or future—is an important guide to determining legislative intent. *See, e.g., Staats v. Brown*, 139 Wn.2d 757, 767-68, 991 P.2d 615 (2000). By using the present tense in

the “consumer” exception, the legislature showed that it did not intend to exempt *abandoned* oil tanks from the MTCA.

The argument also ignores the disjunctive nature of the statutory definition, which states:

(4) "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

RCW 70.105D.020(4) (emphasis added).

The crucial term “or,” is disjunctive. *See In re Discipline of Blauvelt*, 115 Wn.2d 735, 743, 801 P.2d 235 (1990). A heating oil storage tank thus is a “facility” subject to the MTCA if it qualifies under subsection (a) or subsection (b). Subsection (a) applies to “any . . . structure, installation . . . storage container[.]” Unlike subsection (b), subsection (a) has no exception for “a consumer product in consumer use.” The heating oil storage tank thus qualifies as a “facility” under section (a), and section (b) is irrelevant.

This conclusion can be viewed another way. If the consumer product exception was meant to apply to both subsections, then

subsection identifiers (a) and (b) could be eliminated without changing the statute's meaning. It could read:

(4) "Facility" means ~~(a)~~ any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, ~~or~~ aircraft, or ~~(b)~~ any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

The legislature used subsections to distinguish between the items in (a) and (b), and to create a consumer product exception for the latter, not the former. There is no other reasonable reading.

Met's skill at selective quotation also can be seen in its reference to the declaration of policy in RCW 70.105D.010(2). Met suggests a reference to "many farmers and small business owners" means only large, commercial facilities are within the MTCA's scope. In context, the reference states:

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

....

(3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides

landowners. RCW 70.105D.040(1)(a)-(b). If the Martins had found the problem prior to purchase, Ms. Johnson would have found herself in exactly the situation the Martins found themselves in several years later: holding title to contaminated property that they, as property owners, were legally obligated to decontaminate. Thus, if the Martins had done what Met says they should have done, and discovered the contamination while Ms. Johnson still owned the property, Ms. Johnson would have paid 100% of the remediation cost (and Met would have had to indemnify her if the policy covered her liability to the state).

In fact, the inspection addendum gave Ms. Johnson the right to repair the condition at her own expense if she wanted the Martins to continue with the sale. (CP 96, ¶¶ 3-4.) No matter how one looks at it, if the Martins had discharged their so-called “duty” to inspect and discover, Ms. Johnson would have been stuck with the bill.

From this point of view, Met’s comparative fault argument is completely speculative. The most that could be apportioned to the Martins for their “fault” of failing to discover the situation prior to their purchase of the property would be the inflation-adjusted additional cost of cleaning up the property in 2004 rather than 1996. There was no evidence that there was any such difference or that such a difference is

and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

RCW 70.105D.010 (underline added).

The above declaration of policy shows that all persons have environmental responsibility and shows not the slightest inclination to exempt residential users from environmental responsibility when they operate a "facility."

6. **Met's Contributory Fault Argument Fails: If the Martins Had Discovered the Problem at the Time of Their Purchase, Ms. Johnson Would Have Been Required To Pay for 100% of the Remediation Costs**

Met spends considerable time arguing that that because Ms. Johnson checked "don't know" on the Form 17, the Martins had a "duty" (Met's word) to perform an expert inspection and discover the problem. Essentially, this is an argument for comparative fault. One problem with the argument is that proximate cause is missing.

One must remember that the present suit is for contribution for the Martins' discharge of a duty owned by both parties to the state, not for enforcement of an independent duty owed between private property owners. The MTCA imposes liability on both past and present

substantial. Certainly Met's argument is not so strong that the trial court abused its discretion by declaring the settlement reasonable.

7. **The Inspection Addendum Was Not a Release**

The Real Estate Purchase and Sale Agreement did not, as Met suggests, allocate "duties" between the parties, nor did it function as an exculpatory clause discharging Ms. Johnson from liability for contribution. "Exculpatory clauses are strictly construed under Washington law and are enforceable only if their language is sufficiently clear." *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339-40, 35 P.3d 383 (2001); see *Vodapest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996). The Real Estate Purchase and Sale Agreement contains no exculpatory language, and it certainly does not state the parties were allocating to the Martins any liability Ms. Johnson might have to the state for a MTCA violation.

This is because addendum was not a release, but an option. The addendum simply allows a prospective purchaser, a layperson without the expertise to determine a home's condition, to hire an expert to evaluate the residence and to back out of the sale if the evaluation is negative. The addendum does not release the seller from liability for conditions not found by the expert.

Even if one assumes the Martins had some sort of “duty” to inspect, at best Met’s argument goes to the parties’ relative culpability. The Martins had the home inspected, but the inspector only noted that the house was serviced by a “Trane Executive Heat Pump” and a steam boiler. (CP 107, 137.) The heat pump and the boiler were electric. (CP 61, ¶ 4.) The inspector’s failure to discover the oil storage tank is not remarkable, because the tank was underground and the filler nozzle had been buried under landscaping. (CP 62 ¶ 6.) The tank was found only under unusual circumstances, when the purchaser from the Martins discovered, in the Tacoma Historical Registry, an old heating oil advertisement featuring the house. (CP 62, ¶ 7.) The tank then had to be located with exploratory digging and a metal detector. (*Id.*)

If this case had been tried, Ms. Johnson could have argued contributory fault by the Martins. A court or jury might or might not have accepted the argument. The Martins recognized this risk and thus settled for an amount within the range of the evidence, an amount contingent on their successfully pursuing insurance coverage from Met. The trial court did not abuse its discretion in deciding this course of action was reasonable.

8. **The Other Glover Factors Do Not Show an Abuse of Discretion**

a. **The Released Person's Relative Faults**

Met argues that because of the dead man's statute, the Martins could not prove Ms. Johnson had knowledge of the tank or that it leaked. Met then argues that the only evidence of her knowledge would be her "don't know" responses to questions on the disclosure form.⁵

Met misunderstands the statute and what the Martins contended below. The Martins contended that Ms. Johnson must have known of the tank, as she was the one who converted from oil to electric heat. The conversion to electric heat was not a "transaction" with the Martins, so the statute would not apply. *See Estate of Lennon v. Lennon*, 108 Wn. App. 167, 174-75, 29 P.3d 1258 (2001).

Regardless, *scienter* is not a prerequisite to recovering contribution under MTCA, as responsibility is apportioned by weighing the overall equities of the case. *Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148 (1997) ("The MTCA specifically grants discretion to the trial court to base recovery on such equitable factors as it considers appropriate"). And because the standard

⁵ The dead man's statute does not bar documentary evidence although it may limit testimony about the documents. *Laue v. Estate of Elder*, 106 Wn. App. 699, 25 P.3d 1032 (2001).

is strict liability, MTCA actions frequently will involve “innocent” persons who wind up with a bill for environmental cleanup.

Essentially, Met argues that a person who lived on the property for 45 years and created a hidden condition by converting to electric heat and abandoning the tank should be declared to have been without knowledge and fault-free, but a couple who had a 10-day inspection window should be faulted for failing to find the hidden condition, even though they hired an inspector. This argument is underwhelming, and does not demonstrate that the trial court abused its discretion in finding the settlement to be reasonable.

b. **Risks and Expenses of Continued Litigation and the Released Person’s Ability To Pay**

Met argues the Estate did not have to pay for a defense attorney. This ignores the fact that the Estate had to pay for personal counsel, because Met categorically denied any duty to pay for any judgment that might be entered in this case. At the time of the settlement, Met was preparing a declaratory action seeking to terminate the defense. Met also ignores the fact that by assigning any coverage claim to the Martins, the Estate avoided the expense of continuing to defend against Met’s declaratory judgment suit.

c. Evidence of Fraud, Collusion, or Bad Faith

Met complains that the settlement took place before there was substantial discovery. A similar argument has previously been rejected. *See Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 326, 116 P.3d 404 (2005) (“It should have been no surprise to MOE that the parties settled quickly once a lawsuit was initiated”). Met ignores the fact that it denied coverage over a year prior to the Martin’s suit.⁶ There had been ample opportunity for Met to gather facts if it had any inclination to do so.

d. The Interests of the Parties Not Being Released

If, as Met claims, there is no coverage for the contamination and Met did not act in bad faith, then it pays nothing and the settlement does not affect its interest. If Met wrongfully denied coverage or acted in bad faith, then its interest should not trump the interest of its insured and should not prevent the insured from entering into a reasonable settlement.

C. Respondents Are Entitled to Their Attorney Fees

In compliance with RAP 18.1(b), the Martins and the Estate request their attorney fees incurred in responding to Met’s appeal.

The present suit was brought pursuant to the MTCA. (CP 3.) The

⁶ The Martins’ Complaint was filed December 14, 2005. (CP 1.) Met first denied coverage on December 2, 2004. (CP 54.)

settlement waives the Martins' claims for general damages and awards only actual remediation costs and attorney fees, which are expenses specifically allowed by the MTCA. RCW 70.105D.080. Judgment was entered for these MTCA-allowed amounts. (CP 147-48.)

While Met was not an original party to this lawsuit, it has intervened and is attempting to overturn a judgment entered pursuant to the MTCA. The attorney fee provision in RCW 70.105D.080 uses the word "shall," and an award of fees is mandatory. *City of Seattle*, 107 Wn. App. at 240. Attorney fees thus are mandated if the judgment is affirmed.

CONCLUSION

Order Granting Motion To Determine Settlement Reasonable should be affirmed and the Respondents should be awarded their attorney fees pursuant to RAP 18.1(b).

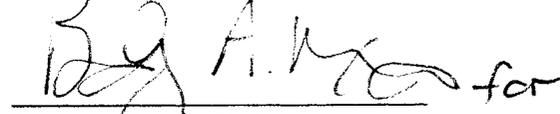
DATED this 11th day of April, 2007.

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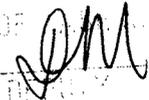
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COURT OF APPEALS
DIVISION TWO

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STATE OF WASHINGTON
BY 

NO. 35322-9-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

METROPOLITAN PROPERTY
& CASUALTY INSURANCE
COMPANY,

Appellant Intervenor,

v.

LAURENCE M. JOHNSON, as
Personal Representative of the
Estate of H.E. Sherry Johnson,

Respondent/Defendant,

and

WILLIAM and KARYL MARTIN,

Respondents/Plaintiffs.

CERTIFICATE OF SERVICE
OF RESPONDENTS' BRIEF

The undersigned hereby certifies that on Wednesday, April 11,
2007, he caused true and complete copies of

1. Respondents' Brief;
2. this Certificate of Service of Respondents' Brief

to be served by having the same deposited in the United States mails,
postage prepaid, addressed to the following counsel of record in this case:

CERTIFICATE OF SERVICE - 1

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