

3741-5-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

WATER'S EDGE HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,

Plaintiff,

v.

WATER'S EDGE ASSOCIATES, a Washington general partnership;
PAUL A. NELSON and "JANE DOE" NELSON, and their marital
community; LARRY PRUITT and "JANE DOE" PRUITT, and their
marital community; BURKE M. RICE and "JANE DOE" RICE, and their
marital community; SALMON CREEK DEVELOPERS, INC., an Oregon
corporation; KEY PROPERTY SERVICE, INC., a Washington
corporation,

Defendants,

and

FARMERS INSURANCE EXCHANGE, a foreign corporation; MID-
CENTURY INSURANCE COMPANY, a foreign corporation; and
TRUCK INSURANCE EXCHANGE, a foreign corporation,

Intervenors.

~~ERRATA TO~~ APPELLANT'S BRIEF

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I. INTRODUCTION

This appeal arises from a condominium conversion case in which Plaintiff Water's Edge Homeowner Association ("Association") alleged over \$17 million in damages stemming from widespread hidden property damage throughout the condominium's common elements. Just three weeks prior to trial, with their insurers defending under a reservation of rights and having recently threatened to cut off their defense entirely, all Defendants¹ settled with the Association. At the time of settlement, Defendants' insurance-retained counsel did not have any expert reports to rebut the Association's consultants' opinions; in fact, Defendants had not disclosed a single defense expert and was facing a motion *in limine* to exclude any later identified experts. Under the terms of the settlement, the Association agreed to provide a release to all Defendants in exchange for entry of an \$8.75 million stipulated judgment with a covenant not to execute, along with an assignment of bad faith claims against the Defendants' insurers.

Following the settlement, the Settling Parties² moved the trial court to conduct a reasonableness hearing. Defendants' insurers (Truck Insurance Exchange, Mid-Century Insurance Company, and Farmers Insurance Exchange, hereinafter referred to as "Farmers") intervened in

¹ Defendants included the condominium's Declarants and separate property management company.

² The "Settling Parties" included the Association and all named Defendants, except for Salmon Creek Development, Inc., which had dissolved prior to commencement of the lawsuit. CP 741-42.

the action. With no factual evidence in the record to challenge the reasonableness of the settlement, and facing a bad faith lawsuit that Defendants had filed following receipt of Farmers' latest reservation of rights letter, the insurers asserted brazen allegations of collusion between the Settling Parties; specifically, the insurers claimed the parties' Seattle-based attorneys and Defendants' in-house and personal counsel engaged in a conspiracy to defraud the insurer and trial court.

In its written ruling, the trial court determined the reasonable amount of the \$8.75 million settlement was a mere \$400,000. In reaching its conclusion, the trial court failed to make an independent determination of the reasonableness of the settlement, and instead, substituted the opinion of the local, insurance-retained attorney who had appeared in front of the trial judge many times over multiple years. The trial court completely disregarded or misconstrued several of nine factors the Washington Supreme Court has dictated must be reviewed in determining the reasonableness of a settlement. Instead, the court focused on Farmers' accusations of collusion that were based solely on inference, innuendo and conjecture. Because the trial court's ruling misconstrued appropriate statutory and case authority and is unsupported by the factual record, this Court should vacate the trial court's Ruling on Reasonableness Hearing and find that the full \$8.75 million settlement figure was reasonable.

The court also ignored evidence creating an issue of material fact on summary judgment relating to the statute of limitations for warranty claims.

Finally, the court erred in dismissing the case post-reasonableness hearing rather than entering judgment.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering its:

- A. “Ruling on Reasonableness Hearing,” entered on January 28, 2008.
- B. “Ruling on Defendants’ Motion for Summary Judgment as to Causes of Action A and B,” entered September 8, 2006; and “Ruling on Plaintiff’s Motion for Reconsideration,” entered October 6, 2006.
- C. “Final Order Dismissing all Claims,” entered on March 7, 2008.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Under Assignment of Error A., whether the trial court committed reversible error relating to the reasonableness hearing when it:

1. Misconstrued the appropriate law in Washington regarding settlements that involve a stipulated judgment, covenant not to execute and assignment of claims;
2. Mistakenly found that the settlement agreement included an assignment of legal malpractice claims against Defendants’ attorneys;

3. Wrongly ruled that Plaintiff's attorney's contact with Defendants' in-house and personal counsel was improper and constituted "strong evidence of a motive, plan and scheme . . . to prejudice the interests of the Defendants' insurers";
4. Improperly deferred its independent evaluation of the settlement to that of insurance-retained counsel;
5. Failed to consider insurance-retained counsel's bias;
6. Wrongly found that the summary judgment motion filed by Defendants' counsel included an economic loss argument;
7. Failed to review three *Glover* factors,³ misconstrued several others and neglected substantial factual evidence which supported the \$8.75 million settlement amount; and
8. Incorrectly found indirect evidence of collusion in contradiction of Washington law and the factual record of the case.

Under Assignment of Error B., whether the trial court committed reversible error in dismissing on summary judgment the Association's warranty claims based on the statute of limitations when it:

1. Failed to find genuine issues of material fact existed regarding

³ In *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 658 P.2d 1230 (1983) *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), the Supreme Court articulated nine factors a trial court should consider when determining if a settlement is reasonable.

- Defendants'/Declarants' "addition to" or "completion of" common elements to the Water's Edge Condominium;
2. Wrongly ruled that windows, decks and patios were not common elements/limited common elements of the condominium;
 3. Mistakenly found that defective windows, decks and patios were not contributing to water damage at the condominium; and
 4. Incorrectly ruled that Defendants were not estopped from asserting a statute of limitations defense.

Under Assignment of Error C., whether the trial court's order dismissing all claims should be vacated when entry of judgment is the appropriate termination of the action.

IV. STATEMENT OF THE CASE

A. Statement of Relevant Facts

This appeal involves breach of warranty, breach of contract, failure to maintain condominium common elements, failure to disclose and update a condominium Public Offering Statement and breach of fiduciary duties under the Washington Condominium Act ("WCA") relating to the Water's Edge Condominium, a 138-unit, 20-building condominium complex located in Vancouver, Washington. CP 254-264.

Water's Edge Associates ("WEA") developed, constructed, owned and operated The Water's Edge Apartments from 1987 through conversion of the property to condominiums. CP 144-45. WEA utilized Key Property Services, Inc. ("KPS") to manage, maintain and repair the apartments. Sometime in 1994, WEA and KPS began maintenance on siding and exterior stairways at the complex. Defendants' files are replete with hundreds of pages of documents that reflect the worsening condition of the property as it aged over the years. CP 309-331.

In the late 1990s, it became apparent more rigorous work needed to be performed on the exteriors of the buildings.⁴ Commencing in 1999 and lasting through 2003, WEA and KPS engaged in a comprehensive repair and replacement program of siding, roofs and exterior stairways. CP 21-62. Though they worked on many buildings, WEA and KPS did not replace all of the Water's Edge siding, roofs or stairways. Instead, in 1999, just prior to commencement of the conversion process, WEA simply repainted the entire exterior of the condominium's 20 buildings.

Rather than complete the conversion process at one time, WEA converted units as each rental lease terminated and the individual units were sold. CP 144. This process became quite protracted and took over four years to complete, with control of the Association transitioning to the homeowners in 2004. CP 144. KPS continued as the Association's

⁴ The exterior cladding at Water's Edge consists of a combination of a fiber cement lap siding and a composite hardwood panel siding. CP 905.

management company during the entire four-year conversion period.
CP 144.

KPS employee and onsite manager Gil Mulder handled much of the day-to-day maintenance, repair and renovation of Water's Edge. CP 1121. Around the time the complex was being converted, the condition of the chimney chases, roofs and siding had deteriorated to such a severe degree that Mr. Mulder believed the entire condominium needed to be re-sided and re-roofed. CP 267-70, 352-56. He expressed these concerns directly to Paul Nelson, a general partner in WEA and sole owner of KPS, in a strikingly prescient series of conversations and written communication. CP 417-33. Representative citations from these communications include:

- This is a major replacement task. Some of the areas are more visibly affected than others. However many of these sheets [of siding] that need to be replaced don't look too bad but have significant water penetration issues. Many of these have popped nail heads and moisture has been invading the walls off and on for some time. By this I mean that some of these have undergone a sealing repair prior to paint, but deterioration has weakened the material around the nails creating further problems.⁵
- There are many areas where there will be significant replacement required over the next few years unless we intervene with a stop gap measure that may cure the problem.⁶
- THE BIG QUESTION??? Should we bite the bullet on this [siding] issue and repair all that we can this summer thus clearing the "playing field" of any serious siding issues for

⁵ CP 353-54.

⁶ *Id.*

the nest [sic] few years? Or do we want to spread this out over two or three years layering the costs incurred over many months and many more unit sales? By doing the latter we increase the potential for greater rot damage.⁷

- At the time of construction a moisture barrier was not installed under the siding. This makes the replacement of faulty siding even more important.⁸
- I realize that at times I sound like a “broken record” regarding siding issues. It’s just that when siding no longer sheds water or holds out moisture, the infrastructure is at risk and repairs are so very expensive. This entire project really needs a complete re-siding.⁹

In deposition, Mr. Mulder testified that in some locations WEA knowingly concealed dry rot in underlying framing components. CP 148-49.

During the four-year period of Declarant control of the Association, WEA failed to properly follow the WCA and its own governing documents¹⁰ by: (a) failing to appoint more than a single homeowner board member; (b) not allowing the single board member to participate in any board meetings; (c) only scheduling a single homeowner association meeting in four years; (d) failing to present any association budget for review or ratification by the homeowners; and (e) failing to provide necessary documents to the homeowners once control of the association passed to the homeowners. CP 143-48. Also, as Declarant of the conversion condominium, WEA failed to disclose in the Public Offering Statement the true condition of the property to potential buyers,

⁷ *Id.*

⁸ CP 354.

⁹ CP 356.

¹⁰ The governing documents include the Declaration of Covenants, Conditions and Restrictions (“CC&Rs”), which created the Water’s Edge Condominium.

as required under RCW 64.34.405, .410, and .415. *Id.*; CP 1203. Thus, the volunteer, layperson board of directors started out at a significant disadvantage to manage the Association, lacking the vital information WEA and KPS possessed regarding the deficient condition of the multi-million dollar property. CP 146-47.

Following transition of control from WEA to the homeowners and in response to systemic water intrusion complaints from multiple homeowners, the Association hired two consultants to conduct an intrusive investigation of the condominium exterior. In 2005 and 2006, these experts made more than 35 openings in the exterior of 11 separate buildings and concluded there was extensive and pervasive rot, decay and damage to siding, stairways, roofs and underlying sheathing and framing components. CP 309-345, 984-1012, 109-125. The structural integrity of building components was in question, with the chimney chases an “extreme safety concern with collapse appearing imminent at some locations.” CP 314. Not only was water intrusion damage pervasive throughout the site, but the Association’s experts found compelling evidence that WEA’s ill-advised attempts to renovate the siding and chimney chases during the period of Declarant control had actually exacerbated the damage. CP 312-313, 333-334.

The Association’s general contractor expert, Charter Construction, Inc., determined the cost estimate of reasonable repairs at Water’s Edge amounted to \$9,950,386.00. CP 993-1012. Three separate, independent expert consultants hired by the Association determined that the scope of

repair was appropriate and necessary and supported Charter's \$9.95 million cost estimate. CP 309-345, 984-992. Defendants retained construction expert Mark Lawless.¹¹ But counsel appointed by Farmers to represent the Defendant (Bruce White) never asked Mr. Lawless to prepare a report to refute Charter's estimate. CP 684.

B. Circumstances of Settlement

Commencing in mid-2006, the Association's counsel began requesting that the parties schedule mediation. CP 1635-1636. Defense counsel responded that Farmers may not be interested in mediating, and definitely would not be ready to mediate that summer. CP 1635-1636. After repeated requests and delays, with the Association's attorney contacting Defendants' in-house counsel and personal attorney, Robert Hughes, to spur action, Farmers finally agreed to a January 16, 2007 mediation, just one month prior to trial. CP 1635-1636.

On November 14, 2006, eight weeks prior to mediation and three months from trial, Farmers sent Defendants a 28-page revised reservation of rights letter stating explicitly that it did not feel it owed a duty to indemnify Defendants, that it might terminate defense of the claim outright, and that it might sue Defendants in order to obtain reimbursement of defense costs incurred to date. CP 700-27. In response, Defendants WEA and KPS immediately sought the advice of independent

¹¹ Although Farmers had hired Mr. Lawless, at time of settlement—just three weeks from trial—Defendants' counsel had not yet disclosed Mr. Lawless as a testifying witness and was unsure if he would be used in the case at all. CP 617.

insurance coverage counsel.¹² CP 1632-33. Two weeks later, WEA and KPS filed a bad faith lawsuit against Farmers claiming, *inter alia*, that the insurer failed to properly retain separate counsel for the Defendants and failed to adequately prepare the case for trial. CP 1326-31.

At mediation less than a month later, the Association's settlement demand was \$17,645,203.00.¹³ Farmers countered with an offer of \$175,000 and refused to negotiate any higher. CP 1639. Following the failed mediation, the parties continued to negotiate through in-house and personal counsel for Defendants, along with assistance from the mediator. CP 1636-1637, 1655-56, 1665, 1667. Following continued arm's length negotiations, three weeks from trial, the parties finally arrived at a settlement agreement on or about January 25, 2007.

Under the settlement agreement, Defendants agreed to stipulate to a judgment in the amount of \$8.75 million, down from over \$17 million, in exchange for the Association's execution of a covenant not to execute on the judgment except as to an assignment of claims against Farmers. CP 741-753. Additionally, the individual Defendants agreed to make a partial payment of \$215,000 from their personal assets. CP 741-753.

¹² Coverage counsel had been referred to Defendants' in-house and personal counsel by the Association's attorney months earlier in an effort to spur Farmers into action on the file. CP 1743-47.

¹³ The demand included \$9,950,386 for hard construction costs, \$156,083 for investigation and emergency repairs, \$24,000 in architectural design, permitting and window testing costs, \$199,000 for an owners' representative to coordinate with the owners during the 60-week repair process; \$54,000 in homeowner relocation, \$1,380,000 for Consumer Protection Act ("CPA") violations (\$10,000 statutory maximum per unit) and attorneys' fees as allowed under the WCA and CPA. CP 684.

Finally, Defendants retained rights to assert claims of legal malpractice against their attorneys to recoup their \$215,000 cash payment. CP 741-753.

C. The Reasonableness Hearing

The parties moved the trial court to conduct a reasonableness hearing and Farmers intervened. After several procedural motions, the court set a briefing schedule that included page limits and a one-day hearing based entirely on a written record without live testimony. CP 1586. The parties submitted three large binders encompassing over 1,100 pages of documents, exclusive of the briefing submitted by Farmers. *See Clerk's Papers*. Farmers' briefing included accusations that the parties had colluded to improperly inflate the settlement amount.¹⁴

In its Ruling on Reasonableness Hearing ("Reasonableness Ruling"), the trial court rejected the validity of the settlement, inferred evidence of collusion between the parties and stated that its "inexact conclusion is that \$400,000.00 would be a reasonable settlement." CP 1774. Following its ruling, the trial court refused to enter judgment in any amount against Defendants, and instead, signed an order of dismissal of all claims; thus, terminating the action.

V. ARGUMENT

A. The Trial Court Erred In Multiple Respects When it Found Only \$400,000 of the \$8,750,000 Stipulated Settlement to be Reasonable.

¹⁴ A fuller description of Farmers' accusations is included in Section V.A(7), *infra*.

1. The Standard of Review Regarding the Reasonableness Ruling.

In conducting the reasonableness hearing, a trial court ordinarily is called upon to: (i) decide questions of fact, which should be reviewed on the basis of substantial evidence, *see Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 158, 795 P.2d 1143 (1990); (ii) decide questions of law, which should be reviewed *de novo*, *see Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); and (iii) weigh the relative importance of each *Glover* factor, which should be reviewed for abuse of discretion, *see Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005).

In this appeal, there are no disputed issues of fact involving the reasonableness hearing; the Association assigns error to the trial court's misapplication of law to the facts. More specifically, the Association alleges that the trial judge failed to consider each of the nine *Glover* factors and interpreted the facts to find "evidence of" collusion between the parties. As such, all of the errors involve questions of law, which shall be reviewed *de novo*. *Dep't of Ecology*, 146 Wn.2d at 9.

The Association also assigns error to the trial court's determinations involving the limited number of *Glover* factors it did consider. Ordinarily, an appellate court will not disturb a trial court's

factual determinations when they are supported by substantial evidence. *Schmidt*, 115 Wn.2d at 158. However, when the underlying facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is *de novo*. *Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 49, 2 P.3d 968 (2000); *see also Deatherage v. State Examining Bd. Of Psychology*, 134 Wn.2d 131, 135, 948 P.2d 828 (1997). Here, the material facts are not disputed; it is the legal effect of those facts that is questioned. Therefore, this Court should review the trial court's application of those facts *de novo*.

Lastly, an appellate court is charged with determining whether the trial court properly balanced each of the *Glover* factors as a matter of law. *Adams v. Johnston*, 71 Wn. App. 599, 605, 860 P.2d 423 (1993). Reasonableness hearings frequently involve live testimony. *See, e.g., Villas at Harbour Pointe Owners Ass'n v. T & G Const., Inc*, 137 Wn. App. 751, 154 P.3d 950 (2007), *rev. denied*, 163 Wn.2d 1020 (2008). In such cases, a trial court's overall determination of reasonableness is reviewed for an abuse of discretion. *Werlinger*, 126 Wn. App. at 349. Here, however, the reasonableness hearing was conducted solely upon documentary evidence; the trial court did not hear any live testimony. Decisions based on declarations, affidavits, and written documents are reviewed *de novo*. *In re Estate of Nelson*, 85 Wn.2d 602, 605-06, 537

P.2d 765 (1975) (where the trial court did not have an opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony, appellate review of factual findings and legal conclusions is *de novo*).

Thus, because there are no disputed material facts and since the trial court conducted the reasonableness hearing solely upon a written record, the appropriate standard of review for the trial court's determination of each *Glover* factor—including evidence of fraud or collusion—should be *de novo*. In this case, after conducting a *de novo* review of each *Glover* factor, this Court should find that the trial court's determination of \$400,000 as the reasonable amount of settlement was manifestly unreasonable and based on untenable grounds. Accordingly, this Court should vacate the trial court's Reasonableness Ruling, and based on the factual record, hold that the \$8.75 million settlement amount was reasonable.

2. The Court's Personal Distaste for Stipulated Judgments With an Assignment of Claims Impermissibly Affected Its Ruling.

In Washington, once a settlement involving a stipulated judgment is agreed upon, the parties may move the trial court to conduct a hearing to determine if the settlement is reasonable. *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991). The court then conducts a two-part analysis. First, the trial court reviews each of the nine

Glover/Chaussee factors and determines if the settlement was reasonable. Then, the burden shifts to the insurer to show that the settlement was the product of fraud or collusion. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739, 49 P.3d 887 (2002). In the instant case, the trial court reversed the steps. The court bypassed review of the *Glover/Chaussee* factors and initially addressed the issue of collusion raised by Farmers. In interpreting the court's written ruling, it is apparent the trial court was swayed by Farmers' hyperbole and put off by coverage counsels' allegations of possible legal malpractice claims against local attorney Bruce White. In response, the court rejected all evidence submitted by the Settling Parties, and instead, deferred all discretion to Mr. White.

The trial court also improperly rejected well-established Washington law by viewing the parties' settlement agreement as suspect on its face. The court stated, "[T]he use of such settlements with covenants not to execute has the potential to become a 'cottage industry' within the practice of law, undermining the respect owed to the honorable profession." CP 1759. The court went on to state that Washington courts view this type of settlement as "a necessary evil," despite the fact settlement devices that utilize stipulated judgments with an assignment of claims have been readily approved by the Supreme Court and several appellate courts, none of which have ever described the procedure as "evil" or disfavored. See *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002); *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992); *Red Oaks Condo. Owners Ass'n v.*

Sundquist Holdings, Inc., 128 Wn. App. 317, 116 P.3d 404 (2005);
Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 803 P.2d 1339
(1991).¹⁵

The court's substitution of personal opinion for settled tenets of Washington law at this most fundamental level constitutes *prima facie* evidence of reversible error that should be corrected by this Court. Moreover, the court's apparent personal distaste for the process clearly colored its ultimate ruling in an impermissible way. When making its ultimate finding of reasonableness, the court stated:

Under *Chaussee*, supra, and *Villas at Harbour Pointe Homeowner's Association v. Mutual of Enumclaw Insurance Company*, 137 Wn. App. 751 (2007), the reasonableness hearing court is instructed to make a factual finding as to what a reasonable settlement would be. ***As stated above, this is an exercise fraught with uncertainty, due to this court's rejection of the validity of the settlement.***

CP 1774 (emphasis added).

Rather than follow the law as established in *Glover*, *Besel*, *Chaussee* and their progeny by making a factual determination of the reasonable amount of settlement, the trial court failed to fulfill its duty, by

¹⁵ See also Chris Wood, Assignment of Rights and Covenants not to Execute in Insurance Litigation, 75 Tex. L. Rev. 1373, 1384 (1997) ("The assignment-covenant not to execute may also play a valuable role in encouraging settlements. With the ability to assign its rights against the carrier in return for capping its own liability, the insured has greater leverage in reaching a settlement with the plaintiff. This resolution is more efficient than litigation between the plaintiff and insured that serves only to preserve the insured's cause of action against the carrier. By allowing litigation between the plaintiff and the carrier to immediately proceed, the arrangement avoids wasting the limited resources of litigants and courts and may result in a quicker resolution of the issues in a case.") (footnote omitted).

allowing its misunderstanding of the process and personal distaste of the stipulated judgment to cloud its decision. Such conduct constitutes obvious error that should be remedied by this Court overturning the Reasonableness Ruling.

3. The Court's Findings Regarding the Settlement Agreement Were Factually Inaccurate.

The trial court also misconstrued the settlement agreement. The court believed the agreement included an assignment of a legal malpractice claim, and cited two cases, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994), and *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003), for the proposition that appellate courts “have looked askance at such devices.” CP 1761. The court further found that the parties’ interests were aligned by a “kick back” provision in the settlement agreement that furthered the relationship between Plaintiff and Defendants as a “joint venture.” CP 1764. The court was demonstrably wrong in both instances.

First, as stated in the preceding section, Washington courts do not look “askance” at settlements that incorporate a stipulated judgment and assignment of claims.¹⁶ Rather, the courts require a reasonableness hearing be conducted under the *Glover/Chaussee* factors if the parties intend for the judgment to have any preclusive effect in a subsequent bad faith action. This is precisely what the Settling Parties did here. This

¹⁶ *Zuniga* is a Texas court of appeals opinion with absolutely no relevance to the instant action, as Texas courts view stipulated judgments with covenants not to execute in an entirely different light than do Washington courts.

procedure is not a “necessary evil,” it is an efficient use of litigants’ resources and judicial economy.

Second, the settlement agreement shows neither assignment of a legal malpractice claim, nor any “kick back” provision. Rather, Defendants reserved their rights to pursue their own malpractice claims against their attorneys and to recover the \$215,000 cash payment made as part of the overall settlement of all claims, including their malpractice claims. CP 741-769. Everything but the malpractice claims were assigned in accordance with the prohibition on assignment of malpractice claims cited in *Zuniga* and *Kommavongsa, supra*. Thus, there was no “joint venture” in any capacity. Both of the trial court’s findings were factually wrong and provide grounds for reversal by this Court.

4. The Court Committed Error When it Deferred its Independent Evaluation of the Settlement to that of Insurance-Retained Counsel.

The court committed reversible error when it abdicated its duty of independent analysis in favor of Farmers-retained counsel Bruce White’s opinion. The court unabashedly stated in its ruling that it provided “great weight to Mr. White’s analysis of the case,” “guidance must be had in the most reliable opinions of counsel available . . . Mr. White again comes to the forefront,” and “[the court] must resort to the expertise of Mr. White.” CP 1765.¹⁷ Ultimately, the court appeared to base its entire selection of the

¹⁷ In fact, the court referred to attorney Bruce White by name 30 times in the 18-page Reasonableness Ruling. *See* CP 1757-74.

reasonableness amount based not on the evidence, but on the *opinion* of counsel.

Again, *I must resort to the expertise of Mr. White*, who *opined* that a worst case scenario of \$500,000.00, as the starting point. Given all the applicable Glover factors, and considering the many unanswered questions in this litigation, and eliminating the factor of collusion, my inexact conclusion is that \$400,000.00 would be a reasonable settlement.

CP 1774 (emphasis added).

In *ACLU v. Blaine Sch. Dist.*, 95 Wn. App. 106, 975 P.2d 536 (1999), the trial court addressed a petition for attorneys' fees following trial. Rather than make an independent determination of the reasonableness of the hours claimed or the fee charged, the court simply awarded an amount suggested by defendant's counsel. *Id.* at 119-20 ("The School District has conceded that \$11,000 is a reasonable fee. While I think even that is somewhat high, I'm going to award \$11,000 in attorney's fees.") (citing *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), *rev. denied*, 134 Wn.2d 1027, 958 P.2d 313 (1998) (trial court's awarding of double the fees incurred at arbitration for trial, without conducting an independent lodestar determination, was unsupportable.)).

Just as the trial court did in *ACLU*, the court here repeatedly relied upon Mr. White's *opinions* regarding the reasonableness of the settlement instead of conducting its own independent review of the evidence. Because the trial court renounced its duty to review the evidence and

independently determine the reasonableness of the settlement, this Court should overturn the trial court's ruling, and based on its own analysis of the documentary record, find that the \$8.75 million settlement was reasonable.

5. Contrary to the Trial Court's Finding, Farmers-Retained Counsel Had a Motive to Undervalue the Case.

In substituting the Farmers-retained attorney's opinion for its own determination, the trial court erroneously stated that Mr. White had no incentive to undervalue the case. CP 1765. However, in reaching this conclusion, the court ignored that Mr. White was unprepared for trial and had ample incentive to undervalue the case and reduce his possible exposure in a future malpractice action (brought by the Defendants, not the Association). At the time of settlement, trial was in three weeks and Mr. White had:

- Failed to disclose any expert witnesses to rebut the Association's properly disclosed following experts:
 - Architect;
 - Structural engineer;
 - Forensic waterproofing consultant;
 - Condominium adverse consequences consultant;
 - Microbiology and wood sciences professor;
 - Forensic CPA; and
 - General contractor cost estimator.

CP 561-618.

- Failed to disclose any expert reports to counter a plethora

of Association's experts' reports and was facing a Motion *in limine* to Exclude As-Yet Unidentified Experts. CP 613, 617-18, 888.

- Failed to produce any evidence to counter the Association's experts' \$9.95M cost estimate of repair. CP 684.
- Failed to file an ER 904 Notice in preparation of trial (in comparison, the Association had filed a 51-page, 522-document ER 904 Notice). CP 888.
- Failed to supplement discovery responses. CP 888.
- Refused to mediate the case until one month before trial. CP 681.
- Failed to file any motion that included an argument based on the economic loss doctrine. (The court mistakenly thought Defendants' second motion for summary judgment included an economic loss argument, but it did not. The motion included a defense based upon *Kelsey Lane, infra.*) CP 888.
- Received a reservation of rights letter in which Defendants' insurer was claiming it would not pay any post-trial judgment and might sue the Defendants to recover defense costs. CP 726, 1632.

Instead of preparing for trial,¹⁸ Mr. White placed all his figurative eggs in a defense based upon *Kelsey Lane Homeowners Association v. Kelsey Lane Co., Inc.*, 125 Wn. App. 227, 103 P.3d 1256 (2005), even though this defense was inapplicable on its face. The *Kelsey Lane* court held that a plaintiff could not establish a claim for *fraudulent concealment* of construction defects against a developer/builder based only on evidence

¹⁸ For example, one of the very first actions the newly-retained defense counsel substituting for Mr. White did was develop a extensive "to-do" list to prepare the case for trial. CP 1302.

that the general contractor “may have had” constructive knowledge of the defects. As shown in the Association’s Opposition to Defendants’ Motion for Partial Summary Judgment (with eight declarations attached thereto), CP 265-89, application of the defense in this case was misguided, as the Association was not alleging constructive knowledge of *construction defects*, it was alleging Defendants had *actual* knowledge of hidden *property damage* which they failed to disclose. Furthermore, the *Kelsey Lane* defense would not have applied to the breach of contract claims against KPS, a defendant who shared joint and several liability for the Association’s claims.

6. The Trial Court Erred by Disregarding Some *Glover* Factors and Misconstruing Others.

Under *Glover*, the Washington Supreme Court articulated nine factors that a trial court should consider when determining if 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 interests of the parties not being released. *Glover*, 98 Wn.2d at 717-18.¹⁹

¹⁹ No one factor should control and the trial court must necessarily have discretion to weigh each case individually. *Id.* at 718.

Here, the trial court disregarded this charge. The court completely ignored the evidence in support of some factors and gave others too much, or too little, weight. The court also confused consideration of the Association's monetary damages with consideration of the value of the settlement based on potential legal defenses; in other words, the court conflated "released party's damages" with the additional *Glover* factors of "plaintiff's liability" and "defendants' defense theories."

a. *The Court Failed to Properly Weigh Glover Factor No. 1: Evidence of the Released Party's Damages.*

The trial court erred in several instances in reviewing this *Glover* factor. First, rather than review evidence in the record of the Association's damages, the court delegated its discretion to Mr. White. There was no admissible evidence before the trial court rebutting the Association's \$9,950,386 repair estimate. Instead of analyzing the evidence, the court unaccountably deferred to Mr. White and adopted his unfounded, conclusory and self-serving opinion that "Charter's cost estimate . . . would carry little weight." CP 1766.²⁰ The court went so far as to surrender all discretion and defer completely to Mr. White:

I give great weight to Mr. White's analysis, and conclude that, if this was an arm's length negotiation between parties, with the Defendants actually having to spend their own money to pay damages, the Defendants would not have evaluated Plaintiffs' damages at anything near \$8,750,000. I accept Mr. White's estimate of exposure not

²⁰ The court either ignored or dismissed without comment the Association's challenge to Lawless's inadmissible hearsay attack on Charter. CP 1701-42.

exceeding \$500,000 as a reasonable evaluation on a worst case scenario.²¹

Second, the court incorrectly stated that Defendant Paul Nelson's declaration gave no basis for Defendants' desire not to have expert Mark Lawless testify on their behalf, when a clear reading of the declaration proves otherwise.²²

Third, the court failed to cite, or comment upon in any manner, the multiple declarations, photos and further evidence submitted by the Association's experts and lay witnesses that supported Charter's \$9,950,386 repair estimate.²³ The court improperly disregarded relevant, admissible evidence in favor of unsubstantiated and inadmissible opinion of a conflicted attorney. *See ACLU*, 95 Wn. App. at 119-120 (trial court erred by disregarding expert testimony and accepting testimony from conflicted opposing expert without analyzing conflict). Accordingly, this court should find such conduct constitutes reversible error.

²¹ CP 1767.

²² "During the course of litigation, KPS was adamant that we not use Mark Lawless as our expert witness in the lawsuit. . . . It was my belief that Mr. Lawless was going to sink KPS if called to testify given that he had expressed several times his opinion that the complex was poorly built and was in substantial need of repair." CP 1632.

²³ The parties submitted five declarations from expert construction consultants and architects, with attached exhibits and photos, and scores of pages of deposition transcripts from fact witnesses that described the abhorrent condition of the property and supported the Association's claims for damages. CP 109-125, 227-31, 290-345, 969-1012, 1128-37, and 1160-1206. The trial court failed to even comment on any of this evidence.

b. *The Court Improperly Merged Glover Factor No. 2: The Merits of the Releasing Person's Liability Theory, With Factor No. 3: The Merits of the Released Person's Defense Theory.*

The trial court improperly blended the second and third *Glover* factors of “the merits of the releasing person’s liability theory” and “the merits of the released person’s defense theory” that should have remained wholly separate. In doing so, the court focused almost exclusively on an economic loss doctrine defense. This focus was flawed for two reasons. First, the defense was never raised in any summary judgment motion prepared by Mr. White; the defense was never properly before the court. Second, assuming, *arguendo*, that the defense had been raised as to some claims against WEA, it would not have applied to the Association’s breach of contract claims against KPS.²⁴

Next, the court stated “that an objectively reasonable settlement process would have placed more emphasis on the strength of the defense case, and less emphasis on the best case scenario or the Plaintiff’s case.” CP 1769. Despite the court’s statement, the settlement process followed an objective, reasoned path. The Association’s total settlement demand exceeded \$17 million. The eventual settlement sum was approximately half that, or \$8.75 million, nowhere near Plaintiff’s “best case scenario.”²⁵

²⁴ KPS was jointly and severally liable for all of the Association’s damages. CP 691-92.

²⁵ Attorney Stephen Todd was retained by Farmers to represent KPS approximately one week prior to mediation. CP 1215. Indeed, Mr. Todd’s testimony shows that the ultimate settlement amount was a hard fought number, and was far *lower* than he had expected:

I believe after I saw the actual stipulated judgment number I had a conversation with Rick Beal, and I told him I was surprised he got Barker Martin down that far, and the reason I say that is because very

The strengths of the defense were emphasized—but not overemphasized—because at time of settlement, *three weeks from trial*, Defendants had no expert witnesses, no expert reports, no ER 904 documents, were facing a motion for partial summary judgment with no opposition brief filed and an insurance company that was refusing indemnity and threatening to pull its defense and sue Defendants for its defense costs.

Finally, the trial court completely ignored the existence of the Association's remaining claims: breach of contract against KPS; breach of fiduciary duties against all Defendants; omission and misrepresentation in the Public Offering Statement against WEA; violation of the Consumer Protection Act against WEA and KPS; and other Washington Condominium Act claims against WEA.²⁶

Defendants were facing an unrebutted eight-digit damages figure going into the mediation on January 16, 2007. If this amount were to get to the jury, Defendants had no experts to counter; a sympathetic jury easily could have awarded the Association this full amount. As attorney Steve Todd stated in his deposition, this lack of an expert to rebut the Association's damages figure was a major concern:

We would have been in trial on February 20 as prepared as we could be. That would [have] been a Herculean task. We didn't have the kinds of experts

often in stipulated judgments the number is the maximum the plaintiff can wish for on a good day, so 10 million plus 5 million attorneys' fees plus the cost of investigation plus expert fees, and I fully expected from my experience that the number would be higher, not because that's the value of the case. It's just the nature of the beast. CP 1608.

²⁶ See Association's Motion for Partial Summary Judgment. CP 478-91.

on board that I would have wanted for things like
diminution-of-market value²⁷

The assessment of Defendants' risk by Mr. Todd is one of the most telling pieces of evidence before this Court. Mr. Todd explained that while he thought he could beat \$8.75 million had the case gone to trial, it would not have been unreasonable in the least bit for the Defendants to settle for that amount, even if the settlement was funded with Defendants' own money:

I would tell these people if it was their money that they were going to agree to pay, we can probably beat 8.75. I would be disappointed if we couldn't beat 8.75, but you have exposure greater than 8.75, so if you have got the assets and are willing to pay 8.75, that may in the long run be a better resolution than going to trial and hearing what a jury thinks about the case.

Q. I'm asking whether that dollar figure [\$8.7 million] in your view was a reasonable value for the settlement of this case.

A. As I think I've said before, **it was clearly within the exposure if the case went to trial.** I would not recommend to those individual clients if there was not a stipulated judgment . . . that they agree to pay 8.75 million out of their own pocket, but that wasn't a necessary decision for them to make, because they had an asset that apparently had significant value to the homeowners' association which they could deal with, and so **was a settlement at a cost that they were willing to pay plus an assignment reasonable for them? It was.**²⁸

Mr. Todd's final paragraph in his January 12, 2007 evaluation letter to Farmers and Defendants contain perhaps the most insightful and

²⁷ CP 1623.

²⁸ CP 1229 (emphasis added).

objective observations of the case, and directly support the reasonableness of the parties' settlement:

If the Plaintiff is allowed to introduce a \$10 million estimated cost of repair, we fully expect a verdict to be in the millions of dollars. . . . A runaway jury, however, could award the entire \$10 million claim.²⁹

The trial court committed reversible error in failing to consider the strength of plaintiff's case independent of the defense's case.

c. *The Court Ignored Consideration of Glover Factor No. 4: Defendants' Relative Faults.*

The court failed to perform any analysis of the Defendants' relative fault as required by *Glover*. This error was magnified because KPS and WEA were separate entities, yet faced joint and several liability for the Association's claims. In the improbable event WEA were to prevail against the Association's claims, the Association maintained incontrovertible breach of contract claims against KPS. In essence, both WEA and KPS were equally at fault for the Association's damages, yet the trial court completely ignored any liability on behalf of KPS.

d. *The Court Misinterpreted Glover Factor No. 9: The Interests of Any Third Parties Not Being Released.*

In reviewing the ninth *Glover* factor, the court focused on Farmers' interests and somehow concluded that Farmers was not fully involved in the case and that "the insurers were at a disadvantage." CP 1772. In reality, Farmers had every opportunity to participate; it was far from a

²⁹ CP 1273-74.

“stranger to the case.” See *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379-80, 89 P.3d 265 (2004). Farmers provided counsel for Defendants, hired an expert and had access to all case files. The court’s statement that Mr. White’s “exclusion from the settlement negotiations further removed the insurers from any meaningful participation in the resolution of the matter,” is contradicted by the record, as shown below. What the court failed to understand, however, was that inclusion of Farmer’s-retained counsel in coverage discussions would have been highly improper as a violation of *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Under *Tank*, insurance appointed counsel has a duty to the insured which cannot be subordinated to the insurer’s interests. Therefore, insurance appointed counsel are prohibited under *Tank* from allowing coverage issues to affect its representation of the insured. Farmers’ own attorney was present and fully participated in the mediation. CP 1211-12. Defendants’ coverage counsel communicated directly to Farmers’ counsel regarding the ongoing settlement negotiations with the Association. CP 682, 695-98. ***Farmers was even invited to participate in the settlement negotiations and was offered the opportunity to accept coverage and take complete control over defense of the claims, but refused to do so*** and continued to rely upon its reservation of rights. *Id.* There is no evidence to support the court’s finding that the “interests of the insurers were systematically neglected, ignored and grossly violated by this settlement.” CP 1773.

Thus, the trial court committed reversible error by misconstruing this *Glover* factor.

e. The Court Completely Failed to Consider Glover Factor No. 8: The Releasing Party's Investigation and Preparation of the Case.

The court's disregard of this important *Glover* factor is another example of the court's failure to follow the law and properly conduct a reasonableness determination under RCW 4.22.060 and *Chaussee*.³⁰ The Association had conducted a thorough and comprehensive investigation of its claims and was well prepared for trial. Conversely, Defendants had not conducted any independent investigation of the condominium, had not disclosed any expert witnesses and were not prepared for trial. CP 576-78, 611-18. In fact, at the time of settlement—just three weeks from trial—Defendants had filed a motion to continue trial because they were so ill prepared to proceed. The court's omission of these vital facts is further evidence of its resignation in conducting a thorough and appropriate reasonableness determination.

7. The Trial Court Impermissibly Based its Reasonableness Determination on Unsupported Allegations of Collusion

While the trial court ultimately claimed it did not consider any evidence of collusion in making its findings on reasonableness,³¹ at least

³⁰ *But see Besel*, 146 Wn.2d at 740, n.2.

³¹ “Again, I must resort to the expertise of Mr. White, who opined that a worst case scenario of \$500,000.00, as the starting point. Given all the applicable *Glover* factors, and considering the many unanswered questions in this litigation, *and eliminating the*

8-10 pages of its 18-page ruling were devoted to the specter of collusion. Moreover, Farmers' entire focus was on the alleged collusion.

Under the *Glover* factors, improper collusion refers to a concerted effort of both plaintiff and defendant to defraud the insurance company. Impermissible collusion is determined by looking at agreements and interactions between a *plaintiff* and a *defendant*, not by examining the internal machinations *within* a defense team. *Continental Cas. Co. v. Westerfield*, 961 F. Supp. 1502, 1506 (D.N.M. 1997) (citation omitted) (relied upon by Farmers) ("collusion occurs when *plaintiff* and *insured* enter into a 'questionable collaboration' . . . to impose an uncompromised full balance of judgment upon the insurer."). Neither Farmers nor the trial court dispute the requirement set forth in *Continental Casualty*. Instead, Farmers attempted to create evidence of collusion where there was none. Farmers' argument hangs from a single, thin thread—that Association's counsel, Mr. Zimmeroff, set in motion a multi-party, multi-stage, multi-attorney collusive conspiracy by contacting Defendants' in-house and personal counsel, Robert Hughes, to discuss insurance coverage issues, in general, and the possibility of a settlement, in particular.³² CP 1650.

factor of collusion, my inexact conclusion is that \$400,000.00 would be a reasonable settlement." CP 1774 (emphasis added).

³² The purported triggering email does not refer to stipulated judgments at all. CP 1650. In fact, the email contemplates a settlement funded by the insurance company, and under such a premise, the insurer would have to agree to such a settlement. Thus, if anything, this email is evidence disproving a scheme to defraud Farmers because the outcome contemplated by Mr. Zimmeroff included participation (and payment) by the insurer.

Farmers' contention fails at the outset. There was nothing improper, unethical, or collusive about Mr. Zimberoff's contacting Mr. Hughes to discuss insurance coverage issues. The trial court's implication³³ that the contact was improper is insupportable. In fact, Mr. Hughes was the only person Mr. Zimberoff could properly contact on the issue of coverage; Mr. Zimberoff could not contact the Defendants directly under applicable ethical rules. Nor could he contact Mr. White because Mr. White was appointed insurance defense counsel who, under *Tank v. State Farm*, could not discuss such issues. See THOMAS V. HARRIS, WASHINGTON INSURANCE LAW §17.4 (2d ed. 2006).

Farmers insisted that Mr. Zimberoff's contact with Mr. Hughes was in violation of RPC 4.2 restricting contact of an attorney with a represented party because, Farmers argued, Mr. Hughes was not counsel "in this matter." The trial court adopted this argument, finding that:

The fact that contact was made through Mr. Hughes, an attorney who was not representing the Defendants in this matter, is immaterial, and no different than if contact had been made directly to the Defendants, or through the Defendants' spouses, accountants, or any other intermediaries.

Not only is this finding in derivation of applicable law, it is completely unsupported by the record because Farmers' *own documents show that Farmers considered Mr. Hughes to be co-counsel in this matter.*

³³ The trial court quotes RPC 4.2, and then fails to undertake any analysis of the rule. This action is troubling because the court creates an inference that a violation has occurred, but does not set forth any analysis upon which Mr. Zimberoff could refute.

Farmers' reservation of rights letter to all insured Defendants was addressed to Mr. Robert Hughes, Attorney at Law, and contained the following statement in its penultimate paragraphs:

You are free to continue to associate in the defense of Key Properties Services, Inc., Water's Edge Associates, Paul A. Nelson, Larry Pruitt, Burke N. Rice, and Salmon Creek Developers at their sole expense if that is their desire. . . . Throughout the pendency of this litigation, Mid-Century, Truck and Farmer's will continue to work cooperatively with you in the investigation, defense and evaluation of the underlying claims."

CP 727 (emphasis added). Farmers also acknowledged Mr. Hughes' status as co-counsel in its Memorandum in Opposition to Reasonableness Determination when it wrote:

Attorney Robert Hughes, personal counsel for all defendants, continued to jointly represent defendants throughout this case. . . ."

CP 1553 (emphasis added). Farmers' argument is incredibly disingenuous, as there is no rule restricting the ability of opposing counsel to contact co-counsel in a matter.

In addition to being disingenuous, Farmers' argument is incorrect, as is the trial court's Reasonableness Ruling. As a starting point, Mr. Hughes is not equivalent to the Defendants' "spouses, accountants, or any other intermediaries." CP 1762. Mr. Hughes is an attorney licensed in the state of Washington with twenty years' experience. His status as in-house

or personal counsel instead of insurance-retained defense counsel does not change his status as an attorney. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 854 (1981). The duties required of Mr. Hughes and the protections afforded him are the same as those required and afforded outside counsel – and they are far different than the duties imposed on lay persons:

Like retained counsel, however, in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel. The problem and importance of avoiding inadvertent disclosure is the same for both.

U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed Cir. 1984).

a. Mr. White Himself Testified Attorney Hughes Represented Defendants on “This Matter.”

Because Mr. White was appointed insurance-defense counsel in this matter, he could not discuss insurance coverage matters. At his deposition in response to a question regarding whether he had advised the Defendants regarding pursuing a stipulated judgment, Mr. White confirmed that he could not advise the defendants with respect to their relationship with the insurer:

Q. Prior to November of 2006 in the filing of the lawsuit against Farmers by Water's Edge Associates and Key Property Services, did you ever advise your clients whether or not to pursue

a stipulated judgment in an assignment of rights against Farmers? And by clients, I mean your assigned Farmers clients. . . .

A. I think I advised them in our private conversation . . . that I understood Farmers was defending under a reservation of rights and they had to take that into account. I strongly encouraged them to confer with independent counsel about what to do in that regard and what they needed to do to protect themselves. **So was it discussed? Yes. Did I ever tell them here's what you ought to do, negotiate a stipulated judgment, no I didn't do that. I didn't think it was appropriate to do that.**

Q. Why not?

A. **Because they had personal counsel that were representing their interest in their regard. To me that was very evident from day one.**

Q. So you, at all times before and after your knowledge of the filing of the lawsuit against Farmers by Water's Edge Associates and Key Property Services, deemed it was inappropriate for you to advise the clients or to participate in a stipulated judgment and an assignment of rights against Farmers; correct?

MS. EK: Object to form.

THE WITNESS: I never took that position at all. No. I think I probably said, look, you guys need to do what you need to do to protect yourself. I'm here to defend the case and tell you what I think about it, but **when it comes to disputes between you and Farmers, you'll have to confer with your own attorneys in that regard.**

CP 1751-52 (emphasis added). Because Mr. White could not represent the Defendants with regard to a stipulated judgment, or any other insurance coverage matter, there was no legal or practical reason he should have been consulted prior to Mr. Zimmeroff contacting Mr. Hughes.

b. *Applicable Case Law Confirms That Counsel's Contacting Mr. Hughes Was Proper.*

In *La Jolla Cove Motel and Hotel Apts., Inc. v. Superior Court*, 121 Cal.App.4th 773, 17 Cal.Rptr.3d 467 (2004), the California Court of Appeals determined that no ethical violation had occurred under a situation similar to the matter before this Court. In *La Jolla Cove*, plaintiffs were a minority stockholder and a former president of a closely held corporation who filed an action to dissolve the corporation. *Id.* at 777. Plaintiffs' counsel obtained declarations from several directors of the corporation who had been appointed by a former president – after gaining the consent of the directors' counsel, but without the knowledge or consent of the corporation's counsel. *Id.* The corporation moved to disqualify plaintiffs' counsel alleging violation of California's Ethics Rule 2-100, which is essentially identical to RPC 4.2. *Id.* at 783 (quoting both rules).

The *La Jolla Cove* court framed the issue as “whether an attorney may contact a director for an opposing corporation when that director's separate counsel gives the attorney permission, but the corporation's counsel has not.” *Id.* at 783. The court analyzed the issue both under California Ethics Rule 2-100, and ABA Model Rule of Professional Conduct 4.2, which is functionally identical to Washington RPC 4.2. To decide the issue, the court referred to Comment 7 to the ABA Model Rule 4.2, which states:

If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule [4.2].”

Id. The court found Comment 7 convincing and ruled that because plaintiffs’ counsel had obtained the permission of the directors’ separate counsel, no ethical violation had occurred. *Id.* at 784.

The *La Jolla Cove* holding and logic applies to the current situation. Initially, Comment 7 to the ABA Model Rule 4.2 is directly on point. Mr. Hughes was personal counsel for all defendants, and he was entitled to act in a representative capacity for purposes of Rule 4.2. Moreover, due to conflict issues arising under *Tank*, Mr. White admitted that he did not, and could not, advise the Defendants with respect to insurance coverage issues, in general, and a stipulated judgment in particular. In such circumstances, Mr. Zimberoff was fully justified in contacting Mr. Hughes – Defendants’ in-house and personal counsel – directly to discuss insurance coverage issues. Mr. Zimberoff’s actions were entirely appropriate and within all ethical norms.

c. The Trial Court Erred When it Relied Upon Innuendo and Inferences of Collusion.

The court committed egregious error by holding there was indirect evidence of collusion, when the record reflects no direct evidence or reasonable inference of such conduct. Instead, the court accepted the opinions of a single attorney and substituted those opinions for its own.

The only reasonable way to find collusion in this case would be to accept the hypothesis that counsel for the Association and Defendants had a plan or scheme to intentionally defraud Farmers and the trial court; though, the exact plan is never expressly stated by Farmers because there is no factual evidence of such. At best, Farmers alleges that a sinister scheme was hatched by Mr. Beal and Mr. Zimmeroff at some point prior to the initial email correspondence between them, even though the attorneys swore under oath (Mr. Beal via declaration and deposition and Mr. Zimmeroff via declaration) that no such communication or plan existed. Furthermore, this alleged conspiracy would have had to include at least six separate attorneys from four independent law firms: Daniel Zimmeroff and Angela Bagby representing the Association; Richard Beal and Zach McIsaac representing KPS; Greg Harper, representing WEA; and Robert Hughes, representing Defendants.³⁴ Much of the settlement negotiations were conducted through mediator Chris Soelling; thus, Farmers' parade of horrors and alleged conspiracy among the four law firms may have had to reach the professional mediator, as well. CP 1655-56. If Farmers' allegations of collusion are accepted, then each of these attorneys—with cumulative 100-plus years of licensed practice—risked destroying their professional reputations and livelihoods for this single case.³⁵

³⁴ Attorney Hughes was an addressee on several emails and correspondence as part of the eventual settlement between the parties. CP 1337, 1655-56. He also participated in settlement negotiations in some capacity as in-house counsel and personal counsel for Defendants. CP 1320.

³⁵ As the court held in *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 749 N.E.2d 368 (2001), an accusation that opposing counsel has violated RPC 4.2 and has acted deceptively and

In reality, the record reflects that the opposite occurred. There was no reasonable evidence of collusion in the record because no plan or scheme existed. If there had been any collusive conduct between the Settling Parties or their attorneys, why would the parties have voluntarily subjected their settlement agreement and all communication between themselves to judicial review by moving the court to conduct a reasonableness hearing when the settlement agreement did not require it? The trial court's determination of evidence of collusion "postulated from circumstantial evidence and reasonable inference" was comprised solely of speculation and conjecture that falls radically short of the required burden of proof required to overcome the plethora of evidence submitted by the Settling Parties. *See Besel*, 146 Wn.2d at 740 (burden of proof is on the insurer to show settlement is the product of fraud or collusion). "[Washington courts] cannot infer bad faith, collusion, or fraud merely based on innuendo and speculation alone." *Martin v. Johnson*, 141 Wn. App. 611, 622-23, 170 P.3d 1198 (2007). *See also Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969) ("[F]raud will not be presumed and must be proven by evidence that is clear, cogent, and convincing."). Accordingly, this Court should overturn the trial court's ruling and hold that Farmers did not meet its burden in proving collusive

fraudulently is a momentous one that could lead to disbarment and should be made only with competent, clear and convincing evidence supporting the charge. *Id.* at 673-74. These are serious charges that should not be alleged based merely upon conjecture and speculation. *Kim*, 749 N.E.2d at 668, 670.

conduct. The \$8.75 million settlement was reasonable.

B. The Trial Court's Summary Judgment Rulings Should be Reversed Because Genuine Issues of Material Fact Existed.

1. The Standard of Review for Summary Judgment.

An appellate court reviews summary judgment decisions *de novo*, viewing the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Anderson v. State Farm Mutual Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). Here, the trial court committed reversible error by granting summary judgment where genuine issues of material fact existed regarding: (1) the date common elements were completed; and (2) the date common elements were added to the condominium. Alternatively, the trial court erred in holding that the Declarants were not equitably estopped from alleging a statute of limitation defense when they failed to properly transfer control to the Association.

2. There Was a Dispute of Fact as to the Date of Accrual of the Warranty Claims.

A cause of action for breach of the express and implied warranties of the WCA must be commenced within four years after accrual.³⁶ When

³⁶ A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2)(b) of this section shall not expire prior to one year after

the cause of action relates to common elements, as here, the cause of action accrues in accordance with RCW 64.34.452(2)(b):

Subject to subsection (3) of this section, a cause of action for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

.....

(b) As to each common element, *at the latest of* (i) the date the first unit in the condominium was conveyed to a bona fide purchaser, (ii) the date the common element was completed, or (iii) the date the common element was added to the condominium.

RCW 64.34.452(2)(b) (emphasis added). The Association did not contest that the first unit was conveyed on August 24, 2000, or that under RCW 64.34.452(2)(b)(i) relating to the date of first sale claims for breach of the express and implied warranties of the WCA would be time-barred because the lawsuit was commenced in July 2005. But the trial court erred in failing to consider subsections (ii) and (iii) of the statute.

With respect to both subsection (ii) (the date of completion of the common elements) and subsection (iii) (the date of the addition of common elements), the Association produced evidence that because this was a conversion condominium, common elements of the condominium were completed after the date of the first sale, thus extending the statute of limitations. Documentary evidence from the project files and deposition testimony in this case demonstrated that Declarants did not complete common elements of siding, roofing and exterior stairways until 2003. CP

termination of the period of declarant control, if any, under RCW 64.34.308(4). RCW 64.34.452(1).

150-62, 175-84. The Association also produced evidence that Declarants added or authorized additions to common elements involving exterior windows, decks and patios through 2003. *Id.* The additions to common elements are evidenced by deposition testimony of the Defendants involved in the conversion process and documentary evidence from the project file. CP 17-18, 24-108.

3. The Structures Completed in 2003 and Added to the Condominium after the First Sale are Common Elements.

Defendants acknowledged that the windows, decks and patios constitute “common elements” under RCW 64.34.020(6). CP 14. Moreover, the Water’s Edge Declaration and the WCA both provide that the windows, decks and patios throughout the project are Common Elements/Limited Common Elements.³⁷ Thus, the court erred when it found that “the additions were not common elements, but rather were specific improvements to individual units.”³⁸ In its summary judgment ruling, the trial court appeared to acknowledge the proffered facts, but failed to apply the relevant subsections of the statute when it stated, “[t]o the extent that Plaintiff is claiming that addition of windows, patios and decks extends the statute of limitations as to other structures, I decline to accept that theory.”³⁹ This is a simple error of law which led to the court granting summary judgment.

³⁷ See CP 197-98.

³⁸ CP 173.

³⁹ CP 173.

The court should have considered the accrual of the warranty claims to have occurred in 2003 since RCW 64.34.452(1) states that the “later of” the sale, completion or addition of common elements is when the cause of action accrues. At an absolute minimum, genuine issues of material fact existed as to the breadth, scope and extent the completion or addition of common elements.

4. Defendants Should Have Been Equitably Estopped From Asserting a Statute of Limitations Defense.

Notwithstanding the fact that the Association’s breach of warranty claims under the WCA were not time-barred, Defendants should have been equitably estopped from asserting such an affirmative defense. Declarant WEA failed to follow the very Declaration it created. It likewise failed to comply with the requirements of RCW 64.34.312 when transitioning the Association from Declarant to homeowner control.

Equitable estoppel is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has “fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitations has expired.” *Del Guzzi Constr. Co., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986). The elements to be proved are: (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. *Id.*

On April 27, 2002, one of the condominium's first unit purchasers, George Plummer, expressed to WEA his concerns regarding the condition of the Water's Edge property. CP 126-42, 358, 360, 362 and 364. WEA responded by assuring Mr. Plummer that the partnership "was meeting to investigate several options regarding capital item needs at Water's Edge" and the "projected costs based on useful life should be covered by the current reserve monthly payments." *Id.*; *see also* CP 414-15. Mr. Plummer and the other Water's Edge homeowners relied upon Defendants' statements and believed WEA and KPS were preserving the value of the condominium and would ensure sufficient assets to conduct any needed repairs. Yet, when Declarants transferred control of the Association to the homeowners, the Association's operating and reserve accounts were short by approximately \$102,000. CP 457-59.

Moreover, Declarants failed to place an additional homeowner on the Board after 25% of the units were sold and failed to transfer control of the Association to the homeowners after 75% of the units were sold. When Declarants finally relinquished control—almost four years after the first sale and virtually on the eve of the expiration of the statute of limitations—they failed to provide the homeowner Board with necessary documents required under the WCA. CP 143-49. Declarants did not conduct any board meetings with the first homeowner board member in attendance. *Id.* No Board meeting minutes were ever drafted, as none were provided to the Association at turnover. *Id.* Declarants also failed to conduct an independent audit of the Associations financial records, in

clear contravention of RCW 64.34.312(2). *Id.* Lastly, by repairing and replacing substantial portions of the condominium's common elements, Declarants' represented to the homeowners that defects and property damage had been repaired. It was not until the homeowners took control of the Association that they found the opposite to be true. At that point, the Association was straddled with a multi-million dollar repair bill. Under these facts, equitable estoppel should have barred Defendants from asserting a statute of limitations defense. Because genuine issues of material fact existed, and the Association detrimentally relied upon the representations of Defendants, summary judgment was not appropriate and should be overturned by this Court.

C. **The Trial Court Should Have Entered Final Judgment Instead of an Order of Dismissal.**

When an insured enters into a settlement agreement with a stipulated judgment, the insurer is presumptively liable to the extent the amount is reasonable.⁴⁰ Here, following the trial court's publication of its Reasonableness Ruling, the Settling Parties jointly moved the court for an entry of final judgment. Farmers opposed the motion and claimed a judgment did not need to be entered, even though the settlement agreement required entry of a stipulated judgment. Although the Settling Parties sought the Judgment Sum of \$8.75 million (as required under the settlement agreement), the parties deferred to the court for its

⁴⁰ See *Besel*, 146 Wn.2d at, 738.

determination of the judgment amount.⁴¹ With this in mind, the parties deferred to the trial court for its determination of the amount to be listed in the final judgment. CP 1868-90.

Rather than entering a judgment in the amount of \$400,000, the trial court erroneously entered an order dismissing all claims. CP 1894-95. Under CR 54 and CR 58, the appropriate termination of this case was through entry of a final judgment, not an order of dismissal of the Association's claims. If the trial judge disapproved of the amount of the judgment requested, he should have entered judgment in an alternative amount. At a minimum, the trial court could have denied the motion for entry of judgment. The dismissal of the Association's claims was in error and should be vacated.

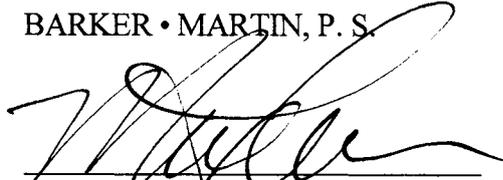
VI. CONCLUSION

The trial court substituted defense counsel's opinions for its own, disregarded evidence and failed to review all of the *Glover* factors when it based its finding of evidence of collusion on mere speculation, postulation and inference. The trial court improperly ignored genuine issues of material fact regarding the Association's warranty claims under the Washington Condominium Act. This Court should therefore vacate the trial court's rulings and, based on the relevant, admissible evidence in the record, hold that the Settling Parties' \$8.75 million settlement was reasonable and direct the court to enter judgment in that amount.

⁴¹ The parties were fully aware that the court ruled the reasonable amount of settlement was \$400,000 and not \$8.75 million; however, to preserve their appeal rights, they could not voluntarily agree to enter judgment in the amount of \$400,000.

Respectfully submitted this 30th day of June, 2008.

BARKER • MARTIN, P. S.

A handwritten signature in black ink, appearing to read 'D. Merchant', written over a horizontal line.

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Attorneys for Appellant Water's Edge
Homeowners Association

37415-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WATER'S EDGE HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation,

Plaintiff/Appellant,

v.

WATER'S EDGE ASSOCIATES, a Washington general partnership;
PAUL A. NELSON and "JANE DOE" NELSON, and their marital
community; LARRY PRUITT and "JANE DOE" PRUITT, and their
marital community; BURKE M. RICE and "JANE DOE" RICE, and their
marital community; SALMON CREEK DEVELOPERS, INC., an Oregon
corporation; KEY PROPERTY SERVICE, INC., a Washington
corporation,

Defendants,

and

FARMERS INSURANCE EXCHANGE, a foreign corporation;
MID-CENTURY INSURANCE COMPANY, a foreign corporation; and
TRUCK INSURANCE EXCHANGE, a foreign corporation,

Intervenors/Respondents.

CERTIFICATE OF SERVICE

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