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SEP 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

305449

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

MANUEL HIDALGO f/k/a MANUEL HIDALGO RODRIGUEZ,

Appellant,

v.

JEFFREY BARKER, individually, BARKER AND HOWARD, PS, INC.,
a Washington Corporation, and EDWARD STEVENSEN,

Defendants,

and

WESTPORT INSURANCE CORPORATION,

Respondent.

BRIEF OF RESPONDENT/ CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL2

III. STATEMENT OF THE CASE.....3

 A. D.E. and M.E.’s History of Alleged Sexual Abuse.3

 B. M.E.’s and D.E.’s Accusations Against Hidalgo.....6

 C. Hidalgo’s Criminal Trial.....8

 D. M.E.’s Recantation and Additional Evidence Generated After
 Hidalgo’s Trial.13

 E. Hidalgo’s Personal Restraint Petition.17

 F. Hidalgo’s Civil Suit.18

 G. Westport’s Involvement and Efforts to Settle.....19

 H. Hidalgo’s and Stevensen’s First Settlement and
 Reasonableness Petition.....20

 I. Post-Hearing Dispute Over the Content of a Proposed Order.24

 J. Hidalgo and Stevensen’s Second Settlement and
 Reasonableness Petition.....25

 K. The Trial Court’s Entry of Judgment, Including Prejudgment
 and Postjudgment Interest.....28

IV. ARGUMENT28

 A. The Trial Court Did Not Err When It Found the \$3.8 Million
 Settlement Unreasonable and Concluded that the Reasonable
 Settlement Amount Was \$688,875.28

 1. The Trial Court Appropriately Focused on the Merits of
 Hidalgo’s Claim and Its Finding that Hidalgo Was Not
 Likely to Prevail Was Supported By the Evidence.....30

 2. The Trial Court Was Not Required to Enter Written
 Findings, Comment on Every Piece of Evidence, or Detail
 Its Analysis of Every *Glover* Factor.39

3.	The Trial Court Did Not Abuse Its Discretion in Calculating the Reasonable Settlement Amount.....	42
B.	The Trial Court Did Not Err in Refusing to Reconsider Its Finding that the Reasonable Settlement Amount Was \$688,875.....	43
1.	The Trial Court Did Not Abuse Its Discretion When It Found No Grounds to Reconsider Its Decision.	43
2.	RCW 4.22.060 Did Not Mandate a Second Hearing.	45
C.	The Trial Court Erred By Including Interest in the Judgment.	46
1.	Hidalgo Was Not Entitled to Add Interest to the Amount the Court Found Would Be Reasonable.	46
2.	Even If Interest Was Appropriate, the Court Should Have Included Interest at the Statutory Tort Rate.....	48
V.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Bird v. Best Plumbing Group</i> , 161 Wn. App. 510, 260 P.3d 209 (2011), <i>review granted</i> , 172 Wn.2d 1010, 259 P.3d 1109 (2011).....	29, 30
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	41
<i>Chaussee v. Maryland Casualty Co.</i> , 60 Wn. App. 504, 803 P.2d 1339 (1991).....	29, 42
<i>Glover v. Tacoma General Hospital</i> , 98 Wn.2d 708, 658 P.2d 1230 (1983).....	22, 29
<i>Green v. City of Wenatchee</i> , 148 Wn. App. 351, 199 P.3d 1029 (2009).....	passim
<i>Halvorsen v. Ferguson</i> , 46 Wn. App. 708, 735 P.2d 675 (1986).....	31
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	31
<i>Howard v. Royal Specialty Underwriting, Inc.</i> , 121 Wn. App. 372, 89 P.3d 265 (2004).....	46
<i>In re Harold E.</i> , 92 Wn. App. 1027, 1998 WL 614703 (1998).....	16
<i>In re Leith's Estate</i> , 42 Wn.2d 223, 254 P.2d 490 (1953).....	44
<i>Jackson v. Fenix Underground, Inc.</i> , 142 Wn. App. 141, 173 P.3d 977 (2011).....	47, 48, 49
<i>Martin v. Johnson</i> , 141 Wn. App. 611, 170 P.3d 1198 (2007).....	30, 40
<i>Martin v. Northwest Washington Legal Services</i> , 43 Wn. App. 405, 717 P.2d 779 (1986).....	31

<i>Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Insurance Co.</i> , 137 Wn. App. 810, 156 P.3d 240 (2007)	29, 46, 47
<i>Mutual of Enumclaw Insurance Co. v. T&G Construction, Inc.</i> , 165 Wn.2d 255, 199 P.3d 376 (2008).....	30
<i>Oden Investment Co. v. City of Seattle</i> , 28 Wn. App. 161, 622 P.2d 882 (1981).....	45
<i>Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.</i> , 128 Wn. App. 317, 116 P.3d 404 (2005).....	45
<i>Roberson v. Perez</i> , 123 Wn. App. 320, 96 P.3d 420 (2004).....	14
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	6
<i>Sharbono v. Universal Underwriters Insurance Co.</i> , 139 Wn. App. 383, 161 P.3d 406 (2007).....	40
<i>State v. Rodriguez</i> , 86 Wash. App. 1011, 1997 WL 1110380 (1997).....	13
<i>State v. Wilkinson</i> , 12 Wn. App. 522, 530 P.2d 340 (1975).....	34
<i>Unigard Insurance Co. v. Mutual of Enumclaw Insurance Co.</i> , 160 Wn. App. 912, 250 P.3d 121 (2011).....	49
<i>Water's Edge Homeowners Ass'n v. Water's Edge Assocs.</i> , 152 Wn. App. 572, 216 P.3d 1110 (2009).....	40, 46, 47
<i>Werlinger v. Warner</i> , 126 Wn. App. 342, 109 P.3d 22 (2005).....	40
Statutes	
RCW 4.22.060	27, 43, 45, 46
RCW 4.56.110	49, 50

Regulations

Allan D. Windt, 1 Insurance Claims & Disputes 5th § 5:1
(Westlaw, database updated March 2012)..... 43

Karl B. Tegland, et al., 15A Washington Practice: Handbook on
Civil Procedure § 65.1 (2011-12 ed.) 44

I. INTRODUCTION

Plaintiff, Manuel Hidalgo (“Hidalgo”), and defendant Edward Stevensen (“Stevensen”) entered into a settlement in which Stevensen agreed to the entry of a \$3.8 million judgment against him. Hidalgo petitioned for a finding that the settlement was reasonable, and Westport Insurance Corporation (“Westport”) intervened. After a hearing on the merits, the trial court found that the settlement was unreasonable and determined that the reasonable settlement amount was \$688,875.

Over a year later, Hidalgo and Stevensen entered into a second settlement, this time for \$2.9 million, and Hidalgo again petitioned the court for a finding of reasonableness. Westport moved to strike the petition, arguing that the court had already decided that \$688,875 was the reasonable settlement amount. The court granted Westport’s motion and refused to reconsider its prior decision.

Hidalgo then proposed a judgment in the amount of \$688,875, plus prejudgment and postjudgment interest at the statutory catch-all rate of 12%. Westport objected to the inclusion of interest and further contended that, even if interest was appropriate, it should be computed at the applicable tort rate, rather than the catch-all rate. The court overruled Westport’s objections and entered the proposed judgment.

Hidalgo has appealed, arguing that the trial court erred in denying his first reasonableness petition and in refusing to reconsider its decision in connection with his second reasonableness petition. The court did not err, however, in either respect. First, ample evidence supported the trial court's decision that the first settlement was unreasonable and that the reasonable settlement amount was \$688,875. Second, Hidalgo cited no basis upon which to justify reconsideration of the court's decision concerning the reasonable settlement amount, and he was not entitled to a "second bite at the apple" by entering into a new settlement agreement.

The trial court nevertheless did err when it included interest in the judgment. By doing so, the court improperly entered a judgment that exceeded the amount it previously determined would be reasonable. At the very least, the court should have computed interest at the applicable tort rate, rather than the catch-all rate, because the judgment was based on Stevensen's tort liability. Westport, therefore, cross-appeals the trial court's inclusion of interest in the judgment.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

The trial court erred when it entered a judgment that included interest in addition to the amount it determined would be reasonable. The issue is whether Hidalgo was entitled to the entry of a judgment binding

Westport that exceeded the amount the court found would be reasonable by including interest on that amount.

In the alternative, even if the inclusion of interest was appropriate, the court erred in computing interest at the statutory catch-all rate, rather than the applicable tort rate. The issue is whether the statutory tort interest rate or the catch-all rate applies to an agreed judgment entered pursuant to the settlement of a tort claim, where the settlement was neither reasonable nor specified the rate at which interest would accrue.

III. STATEMENT OF THE CASE

A. D.E. and M.E.'s History of Alleged Sexual Abuse.

This case arises out of a long history of sexual abuse allegedly suffered by two children, D.E. and M.E. State authorities first investigated sexual abuse involving the children in 1992, after D.E., then seven years old, exhibited signs of abuse. CP 641-42. D.E. disclosed that she had been molested by Abel Lopez, a 27-year-old man who lived with D.E.'s half-sister. CP 648-52. Also, Dr. Douglas Isert, a specialist in examining children for suspected sexual abuse, examined D.E. and observed abnormalities that led him to conclude that she had been sexually abused. CP 2293-95. Lopez was subsequently convicted, and D.E. has maintained that she was molested by Lopez. CP 648-49, 2121, 4031.

State authorities were again called to investigate sexual abuse involving the children the next year after D.E.'s brother, Ro.E., told a therapist that their father, Harold, had battered him in the genitals. CP 758, 1855. Also, D.E.'s therapist reported ongoing concerns that D.E. showed "symptoms of a child who continue[d] to experience abuse in the family home." CP 1854. D.E., Ro.E., and Ro.E.'s twin brother, S.E., subsequently disclosed episodes of abuse. CP 759-63. As a result, Harold agreed to have no contact with the children. CP 1846-47. Therapists treating the children also recommended that Harold undergo a sexual offender evaluation, citing "disclosures of sexual abuse made by [Ro.E.] and the pervasive family characteristics that are suggestive of an incest family." CP 1860.

D.E., Ro.E., and S.E. were placed in foster care while their older siblings, Ri.E. and M.E., remained in the family home. CP 828. D.E. was initially placed in the home of Bob Devereaux, but Devereaux asked that she be removed for misbehavior. CP 3864-66. D.E.'s caseworker then sought to place D.E. in the home of Robert and Luci Perez, who had previously cared for difficult children. CP 3866. Robert was also a Wenatchee Police Department ("WPD") detective. CP 3866. The Perezes agreed, and D.E. was placed in their home in March 1994. CP 3867.

While living with the Perezes, D.E. "made significant improvements both in her academic achievements and in her behavior."

CP 830. The Perezes bought D.E. new clothing, hired a personal tutor, took her on vacations, and encouraged her to participate in extracurricular activities. CP 4065-66. Her “grooming improved 100 percent,” her “self-esteem was elevated,” and she went to school consistently. CP 3868. She also felt very comfortable, loving, and secure with the Perezes. CP 3869.

After living with the Perezes for about six months, D.E. disclosed to Robert Perez that her parents had sexually abused her. CP 845-46, 4180-85. At the time, Perez was the sole WPD detective assigned to investigate crimes against persons, so he undertook to investigate the matter. CP 2148-49. Perez also reported D.E.’s disclosure to Child Protective Services (“CPS”), which assigned caseworker Laurie Alexander to investigate. CP 846, 4225-26.

Perez and Alexander interviewed M.E., who was still living in her parents’ home, and M.E. confirmed that sexual abuse had occurred. CP 4232-36. Also, M.E. was examined by Dr. Mark Shipman, a physician with specialized training in child sexual abuse, who observed physical evidence of abuse. CP 2400-05. Accordingly, the children’s parents were arrested, and their mother, Idella, admitted that she and her husband had sexually abused their children. CP 847-51. Harold and Idella were subsequently convicted of child rape and molestation. CP 875-91.

A few months later, in January 1995, D.E. told Perez that she, her siblings, and other children had been sexually abused by a number of adults at her family home and at Devereaux's home. CP 918-21. Perez reported D.E.'s disclosure to CPS, and he and CPS caseworker Kate Carrow interviewed M.E., who made similar disclosures. CP 922. M.E. also disclosed sexual abuse to her caseworker, Cindy Andrews. CP 931. D.E.'s and M.E.'s disclosures led the State to bring child sexual abuse charges against numerous individuals in the much publicized "Wenatchee sex ring." *Roberson v. Perez*, 156 Wn.2d 33, 36, 123 P.3d 844 (2005).

B. M.E.'s and D.E.'s Accusations Against Hidalgo.

On April 13, 1995, M.E. was being interviewed by a defense attorney in one of the "sex ring" cases when she disclosed that Hidalgo had also abused her. CP 1868, 3971. Significantly, Perez was not present when M.E. accused Hidalgo, nor was he assigned to investigate her accusation. CP 2157, 3970. Rather, WPD Sergeant Mike Magnotti was assigned to investigate, and M.E. confirmed to Magnotti that Hidalgo had abused her. CP 1868-71.

Hidalgo was charged with four counts of child rape and molestation involving M.E. CP 1875. Hidalgo was indigent, so the law firm of Barker & Howard, which served as Chelan County's contract public defender, was appointed to represent him. CP 1863-66. Stevensen,

an attorney employed by Barker & Howard, entered his appearance for Hidalgo on May 1, 1995. CP 1879, 4382-83.

The court initially set a trial date of June 26, 1995, but later rescheduled the trial to July 25, 1995. CP 4383-84. In the meantime, Stevensen served the State with discovery requests and interviewed at least 10 potential witnesses, including the State's disclosed witnesses. CP 1879, 1899-1902, 1904, 3297-98. He also met with Hidalgo on several occasions to discuss the case, but Hidalgo was uncommunicative and refused to help Stevensen prepare for trial. CP 4383-84.

When Stevensen interviewed D.E., she stated that Hidalgo had also abused her. CP 3986. As a result, the State informed Stevensen that it would charge Hidalgo with additional counts of child rape and molestation involving D.E. CP 4385.

By that time, several individuals had admitted or been convicted of sexually abusing D.E. and M.E. As previously discussed, Abel Lopez was convicted of abusing D.E. in 1992, and Harold and Idella were convicted of abusing their children in early 1995. Additionally, at least six others had been convicted of sexually abusing one or both girls. CP 2389-90.

Stevensen had no reliable evidence that anyone investigating D.E.'s or M.E.'s allegations had coerced false statements from anyone. CP 3313. Accordingly, Stevensen developed a defense theory that

acknowledged the girls' prior abuse, but argued that, in an irrational response to it, they lashed out and accused virtually every adult that they knew, including Hidalgo. CP 3313, 3988. Stevensen thus focused on discrediting only a small part of the girls' story of rampant sexual abuse – namely, their belated identification of Hidalgo as one of their abusers – rather than trying to prove a vast and complex conspiracy amongst the State officials to fabricate evidence of widespread abuse. CP 3313-14.

Stevensen nevertheless advised Hidalgo to seek a continuance to allow him to investigate further. CP 4385. Hidalgo refused and demanded an immediate trial. CP 4385. Thus, the court set Hidalgo's trial for August 1, 1995. CP 4385. The day before trial, the State added two counts of child rape and molestation involving D.E. CP 1953-54. Stevensen immediately moved for a continuance, citing the fact that the State had not made R.E. (the eldest sibling, who denied the occurrence of sexual abuse) available for an interview. The court, however, denied the motion. CP 1956.

C. Hidalgo's Criminal Trial.

Hidalgo's trial began on August 1, 1995. In his opening statement, Stevensen laid out his theory by acknowledging that D.E. and M.E. had been abused by others and that those individuals had gone to jail for their crimes. CP 2130, 2137. Stevensen explained, however, that, at some point,

the girls simply began accusing almost every adult that they knew of abusing them, defying credibility. CP 2138-40.

Stevensen also advised the jury that the girls had serious psychiatric problems and had undergone extensive treatment. CP 2136. Yet, Stevensen explained, throughout all that time, the girls never mentioned Hidalgo. CP 2142. Stevensen also explained that, after the girls accused Hidalgo, the State recruited admitted child molesters Gary Filbeck, Sharlann Filbeck, and Sadie Hughes to testify against him. CP 2141. Stevensen pointed out that the Filbecks made a deal with the State to testify against Hidalgo, and Hughes recanted her accusation. CP 2142. Finally, Stevensen explained that Hidalgo was not in the area for most of the time the girls claimed he had abused them. CP 2128, 2135, 2142.

The State then called numerous witnesses to testify against Hidalgo, including D.E. and M.E., Detectives Perez and Magnotti, CPS caseworker Kate Carrow, Drs. Isert and Shipman, and Gary Filbeck.¹ CP 2144-2414. Using drawings as demonstrative evidence, D.E. and M.E. described how Hidalgo allegedly abused them. CP 2238-2242, 2303-04. Perez testified concerning the chronology of events leading to D.E.'s placement in his care and her disclosures of sexual abuse involving others. CP 2146-2157. Magnotti and Carrow testified concerning their

¹ The State did not call Scharlann Filbeck or Sadie Hughes.

investigations into M.E.'s disclosures against Hidalgo. CP 2196-2212. Drs. Isert and Shipman testified concerning their evaluations of D.E. and M.E. CP 2291-95, 2400-10. Finally, Filbeck testified that he had observed Hidalgo sexually abuse D.E. CP 2341.

Stevensen cross-examined the witnesses consistent with his defense theory. For example, Stevensen attacked D.E.'s and M.E.'s credibility in various respects. From D.E., he elicited incredible accusations of sexual abuse against 34 separate individuals occurring in more than 16 different locations. CP 2312-15. Likewise, from M.E., he elicited accusations of abuse involving 24 different people. CP 2244-51. Stevensen also elicited testimony from the girls that did not match their own testimony or the testimony of others.² CP 2263-78, 2325. Stevensen also elicited admissions concerning the girls' memory and behavioral problems, and he highlighted the fact that, notwithstanding years of counseling, neither one disclosed the rampant sexual abuse they were allegedly experiencing. CP 2252-57, 2278-79, 2316-2319, 2330-31.

² For example, on direct, D.E. testified that no abuse occurred in a shed that was located in the back of her house. CP 2304. On cross, however, D.E. claimed that she was abused in the shed. CP 2325. Also, M.E. testified that Hidalgo had last abused her in 1995, which Stevensen pointed out was impossible since M.E. had been removed from her home in 1994 following her parents' arrests. CP 2267, 2550-51. Similarly, D.E. testified on cross that she was molested by Hidalgo while she was in third grade, which Stevensen pointed out was also impossible, since Hidalgo was out of the state that year. CP 2325, 2545.

Cross-examining Perez, Stevensen questioned him on the emotional bonds that form between parents and their children, making the point that his ability to assess the veracity of the girls' disclosures was compromised by his relationship with them. CP 2162-66, 2186-87. Stevensen then established that, when Perez interviewed Ri.E. and S.E., they denied any abuse had occurred. CP 2169-73. Stevensen also discussed the timeline of the girls' disclosures, emphasizing the fact that over a period of several months, the girls made accusations against a large number of individuals, but never mentioned Hidalgo. CP 2173-81.

Stevensen cross-examined Carrow on her lack of experience handling cases of such magnitude. CP 2377. He also established the children's history of behavioral and psychiatric problems. CP 2378-81.

With regard to the State's medical evidence, Stevensen objected to Drs. Isert's and Shipman's testimony on grounds of relevance and unfair prejudice. Stevensen pointed out that Dr. Isert had examined D.E. in 1992, before Hidalgo had even met the family. CP 2281-86. Stevensen further pointed out that neither physician could identify who had molested the girls. CP 2282, 2395-96. Nevertheless, the court overruled Stevensen's objections. Thus, on cross-examination, Stevensen elicited testimony concerning the date when Dr. Isert examined D.E. and the fact that neither of them could identify the girls' abusers. CP 2296, 2413.

Finally, with regard to Filbeck, Stevensen elicited an admission that Filbeck had lied on several different occasions regarding the girls' alleged abuse. CP 2354-62. Filbeck also admitted that he had previously been convicted of raping an 11-year-old girl. CP 2359-60.

Notably, while the State was presenting its case, Hidalgo presented Stevensen with a letter from an attorney, Tyler Firkins, offering to represent Hidalgo upon payment of a \$10,000 retainer.³ CP 2387, 4386. Hidalgo indicated that he wanted Firkins to represent him, so Stevensen requested a continuance and leave for Firkins to substitute as Hidalgo's counsel. CP 2387, 4386. The court denied the motion after determining that Firkins was not in the courtroom, commenting that Stevensen was "doing a good job with [Hidalgo's] defense and if [Firkins] wanted to be a part of this case he had better have been here today." CP 2387-88.

After the State rested its case, Hidalgo called three witnesses in Hidalgo's defense: Ri.E. (the eldest sibling), Donna Hidalgo (Hidalgo's wife), and Robert Roberson (a frequent visitor in the children's home). All three testified that they had never observed Hidalgo abuse any of the children. CP 2441-42, 2469, 2494. Indeed, Roberson testified that, although he visited the children's home just about every day, he had never even met Hidalgo. CP 2487-94. Also, Donna Hidalgo testified concerning

³ Firkins currently represents Hidalgo in this action.

all of the different places she and Hidalgo had lived, making the point that Hidalgo was not even in the area for most of the time he was allegedly abusing the girls. CP 2452-67.

The attorneys then made their closing arguments. Stevensen summarized the evidence and forcefully argued that reasonable doubt existed concerning the charges against Hidalgo. CP 2537-62. After deliberating six hours, the jury was unable to reach a verdict on five of the six counts alleged, including all four counts involving M.E., and the State dismissed those charges. CP 2568-71, 2582-84, CP 4387. The jury did, however, find Hidalgo guilty on one count of molesting D.E. CP 2585. Hidalgo was sentenced to 68 months in prison, CP 2591, and his conviction was affirmed. *State v. Rodriguez*, 86 Wash. App. 1011, 1997 WL 1110380 (1997). Stevensen performed no further work on the case after the trial ended; Hidalgo's sentencing and appeal were handled by others. CP 4387.

D. M.E.'s Recantation and Additional Evidence Generated After Hidalgo's Trial.

About a year after Hidalgo's trial ended, on June 3, 1996, M.E. gave a videotaped interview to a television reporter in which she recanted her prior allegations of sexual abuse and said that Perez had pressured her into accusing the individuals, including Hidalgo, who were charged with

molesting her. CP 2604. Based on M.E.'s recantation, Harold and Idella filed personal restraint petitions, and this Court directed Judge Wallis W. Friel to hold a reference hearing on the petitions. CP 669. Also, Robert Roberson and others filed lawsuits against the State authorities, including Perez, accusing them of misconduct. *Roberson v. Perez*, 123 Wn. App. 320, 325, 96 P.3d 420 (2004).

M.E. and D.E. testified in Harold and Idella's reference hearing and related civil proceedings. First, M.E. repudiated her recantation, testifying that Roberson had threatened to kill her if she did not recant her accusations. CP 2721-73. She also testified that Perez never forced her to accuse anyone and that she had, in fact, been molested by the individuals she had accused, including Hidalgo. CP 2664-69, 2680, 2795-96.

D.E. likewise testified that Perez never threatened her and that she disclosed the sexual abuse to him because she came to trust him. CP 4518-19. D.E. also confirmed that she had been raped by Hidalgo. CP 4531. In fact, when D.E. heard about her sister's 1996 videotaped recantation, she told her caseworker, Connie Saracino, "But Connie, but Connie, it really did happen." CP 3881. D.E. also wrote the Perezes to tell them that she was "sorry about [her] sister" because she knew "how much [the Perezes] care[d] about her." CP 3584. Indeed, as late as 2000, after D.E. had been

out of the Perezes' home for four years, she wrote letters telling them that she "love[d]" them and that they had "help[ed] [her] a lot." CP 3582.

Additional medical evidence regarding the girls also came to light. First, the parties learned that, on August 3, 1995 (the final day of Hidalgo's criminal trial), the girls were examined by Dr. Philip Milnes, a pediatrician trained in examining child sexual abuse victims. CP 3006-08. Dr. Milnes observed signs that M.E. was not sexually active, which he found "surpris[ing]" given the nature of her allegations. CP 3011-15. Nevertheless, he acknowledged that his observations were not necessarily inconsistent with Dr. Shipman's conclusions because the trauma that Dr. Shipman observed could have healed by the time he examined M.E. CP 2896-97. Also, in contrast to M.E., Dr. Milnes observed strong evidence that D.E., then age 11, was sexually active. CP 3032-33, 3044. In fact, Dr. Milnes testified that D.E. exhibited signs of repeated sexual activity consistent with her allegations of abuse. CP 3033, 3048, 3051.

Additionally, Dr. Joyce Adams evaluated Dr. Shipman's colposcopic slides from his examination of M.E. and opined, contrary to Dr. Shipman, that M.E. exhibited normal and non-specific findings. CP 1181. Nevertheless, Dr. Adams testified that she was not disclaiming the existence of abuse, explaining that "the majority of children with legally confirmed sexual abuse will have normal or nonspecific genital findings."

CP 3105, 3115-18, 3138. Dr. Adams also stated that the history of child abuse described by the child is the “most important aspect to an exam of a child suspected of being abused sexually,” and that “the frequent finding of normal anal genital examination must always be reported as being consistent with a history of molestation, as given by the child.” CP 3110-11. Dr. Adams also testified that it was not uncommon for children to deny or delay disclosing abuse and that, even after a child discloses abuse, the child may recant if he or she comes to regret the disclosure due to the emotional reactions of others, the involvement of State authorities, and separation from family members. CP 3126-27, 3134-36, 3144.

For reasons unknown, neither Dr. Milnes’s testimony concerning D.E., nor Dr. Adams’s testimony regarding the reluctance of child victims to disclose abuse or their tendency to later recant such disclosures was presented to Judge Friel. Also, while D.E. and M.E. both testified that they had been abused, Judge Friel discounted their testimony in favor of M.E.’s prior recantation. CR 670, 688-90, 716-20. Judge Friel also found that Perez and others had used improper interview techniques when questioning the children. CR 670. Following Judge Friel’s decision, this Court granted Harold and Idella’s personal restraint petition. *In re Harold E.*, 92 Wn. App. 1027, 1998 WL 614703 (1998).

E. Hidalgo's Personal Restraint Petition.

After Judge Friel issued his opinion, Hidalgo filed his own personal restraint petition. CP 4583. This Court referred Hidalgo's petition to Judge Friel for a reference hearing on two issues: (1) "whether the state improperly influenced the testimony of [M.E.] and [D.E.]," and (2) "[i]f the court [found] improper influence by the State, then...whether the evidence [was] newly discovered." CP 3236. The Court explained that "[n]ewly discovered evidence" meant evidence that "could not have been discovered before trial by the exercise of due diligence." CP 3236.

Judge Friel concluded that the State had improperly influenced M.E.'s and D.E.'s testimony at Hidalgo's trial. CP 3240. Judge Friel also concluded that "[a] substantial and crucial portion of the evidence...was newly discovered," including: (1) M.E.'s recantation; (2) Ri.E.'s testimony elicited at Harold and Idella's reference hearing; (3) Dr. Milnes's opinions after examining M.E. on August 3, 1995; (4) Dr. Adams's opinions concerning Dr. Shipman's 1994 examination of M.E.; and (5) other evidence of improper and coercive methods the State used to investigate the girls' accusations. CP 3242, 3248-52. This Court adopted Judge Friel's conclusions, reversed Hidalgo's conviction, and remanded the case for a new trial. CP 3262. The State, however, declined to retry the case and dismissed the remaining charge. CP 3337.

F. Hidalgo's Civil Suit.

On January 4, 2001, Hidalgo sued numerous defendants in federal district court, seeking to recover damages for his alleged wrongful prosecution and incarceration. CP 3267. Specifically, Hidalgo sued three classes of defendants: (1) the City of Wenatchee, the WPD, and various city officials, including Detective Perez (the "Wenatchee defendants"); (2) Chelan County; and (3) Barker & Howard, Jeffrey Barker, Keith Howard, and Stevensen (the "Barker & Howard defendants"). CP 3269-71.

Hidalgo settled his claims against Chelan County for \$100,000. CP 4409. The other defendants moved for summary judgment. On August 22, 2003, the district court granted the Barker & Howard defendants' motion on Hidalgo's federal claims, but declined to rule on his state law claims, instead dismissing them for lack of jurisdiction. CP 3598. The court also entered summary judgment in favor of the Wenatchee defendants, except Perez. CP 3612, 3619-20. Hidalgo later tried his claims against Perez, but the jury returned a verdict in Perez's favor. CP 4379-80.

In the meantime, on September 22, 2003, Hidalgo re-filed his lawsuit against the Barker & Howard defendants in state court. CP 3625. In his complaint, Hidalgo claimed legal malpractice, negligent infliction of emotional distress, and violation of the Consumer Protection Act ("CPA"). CP 3627. The court later entered summary judgment in Stevensen's favor

on Hidalgo's emotional distress and CPA claims, but denied summary judgment on Hidalgo's malpractice claim. CP 509-14, 539-42.

G. Westport's Involvement and Efforts to Settle.

At the time Hidalgo initially filed his civil suit in federal court, the Barker & Howard defendants were insured under a liability policy that the firm had purchased from Westport. Significantly, the firm purchased only \$500,000 in coverage, including defense costs. Thus, the amount available to pay claims declined as defense costs were paid. CP 1784.

In addition to Hidalgo's lawsuit, several other lawsuits were filed against Barker & Howard attorneys based on the firm's representation of other criminal defendants charged with child sexual abuse. Specifically, Barker & Howard attorneys were also sued by Henry Cunningham, Ralph Gausvik, and Doris Green, who made similar claims of malpractice against the firm's attorneys. All four lawsuits, including related defense costs, were subject to the same \$500,000 aggregate policy limit. CP 1784.

Westport retained attorney Joel Wright of Lee Smart, P.S., Inc. to represent the Barker & Howard defendants in each of the lawsuits. CP 4536. Early on, Westport contacted the plaintiffs' attorneys to invite them to participate in a joint mediation to resolve all claims within the policy limit. CP 3292. The plaintiffs, however, refused to jointly mediate their claims, and Westport subsequently made aggressive efforts to settle by

suggesting that the plaintiffs make a global settlement demand, again inviting the plaintiffs to joint mediation, and making global policy limit offers to the plaintiffs. CP 4537-38, 4542-44.

The plaintiffs refused to enter a global settlement for the policy limit. CP 4539-40. Instead, Westport was only able to settle Gausvik's claims for \$35,000 and Cunningham's claims against one firm attorney for \$18,000. CP 4539-40. Hidalgo and Green refused to settle any of their claims, and Cunningham refused to settle his claims against other Barker & Howard attorneys. Hidalgo's last settlement demand to Stevensen was \$75,000, in August 2003. CP 4546. Stevensen instructed Westport to reject it. CP 4548. Hence, Westport was required to continue defending the Barker & Howard defendants against Hidalgo's, Green's, and Cunningham's claims. In March 2005, Westport fulfilled its contractual obligation to pay \$500,000 on behalf of the Barker & Howard defendants, and Wright withdrew from the lawsuits. CP 4550.

H. Hidalgo's and Stevensen's First Settlement and Reasonableness Petition.

On May 16, 2007, Hidalgo and Stevensen entered into a settlement agreement in which Stevensen agreed to the entry of a \$3.8 million judgment against him, plus prejudgment interest from the date of the agreement until the judgment was entered and postjudgment interest

thereafter. CP 4403. Stevensen also agreed to assign his rights under the policy to Hidalgo. CP 4403-04. In exchange, Hidalgo agreed not to execute the judgment against Stevensen, personally, but instead to seek to recover the judgment amount exclusively from Westport. CP 4404. Finally, Hidalgo and Stevensen agreed that their settlement was conditional upon a finding that it was reasonable. CP 4403.

More than a year later, on July 21, 2008, Hidalgo filed a petition asking the court to find that the settlement was reasonable. CP 555-89. In the alternative, Hidalgo stated that, if the court found that the settlement was unreasonable, it would be required to determine what amount would be reasonable. CP 561. Westport intervened and filed a brief in opposition to Hidalgo's petition, arguing that the settlement was unreasonable and that the court should find that a settlement figure in the range of \$75,000 (the amount Hidalgo had previously demanded to settle his claims) would be reasonable. CP 1742-43, 1745-1808, 4557-60. Collectively, the parties submitted over 100 pages of briefing and almost 4,000 pages of exhibits to the court in connection with Hidalgo's petition. CP 555-1101, CP 1745-1808, 1835-4552, 4583-4647, 4719-5268.

On February 2, 2009, the court held a hearing on Hidalgo's petition. At the beginning of the hearing, the court stated that it had read the parties' briefs and reviewed the exhibits. CP 5931. The parties then

presented extensive oral arguments. CP 5934-6013. After the parties concluded, the court explained the manner in which it evaluated the evidence as follows: First, the court stated that it had reviewed the exhibits in chronological order to “get a picture of Mr. Stevensen’s representation of Mr. Hidalgo as it happened in time and try to distinguish between what was known then or capable of being known then and what only came later.” CP 6015. Second, the court explained that it evaluated the parties’ evidence under the factors set forth in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), to determine whether the settlement was reasonable. CP 6015.

In that regard, the court stated that, while it had considered all of the *Glover* factors, its evaluation ultimately “came down to a heavy emphasis on the merits of Mr. Hidalgo’s liability theory and the merits of the defense theory.” CP 6015. On that point, the court found that Hidalgo’s chances of prevailing were “not very good,” which the court assessed to be between 10% and 20%. CP 6017. In reaching that conclusion, the court found most significant “the role played by newly discovered evidence as opposed to what reasonable diligence or due diligence on Mr. Stevensen’s part would have revealed in August of ’95.” CP 6018. Secondly, the court cited “the somewhat theoretical nature of the plaintiff’s theory applied only to D.E. as opposed to as it would apply

to D.E. and M.E.” CP 6018. Finally, the court cited the fact that, by the time of Hidalgo’s criminal trial, several other individuals had already been convicted of abusing D.E. and M.E., thus making the “kind of enterprise that [Hidalgo] now urge[s] should have been followed at the time of trial an extremely difficult proposition.” CP 6018-19.

Nevertheless, the court acknowledged that, if Hidalgo prevailed, he would have recovered damages in the range of \$2 million to \$6.6 million, based primarily on the length of Hidalgo’s incarceration and the range of damages awarded in other cases. CP 6017. Thus, to calculate the reasonable settlement amount, the court multiplied the midpoint between those two figures by Hidalgo’s chances of success. CP 6017-18. The court then adopted the midpoint of the resulting amounts, or \$688,875, as the reasonable settlement amount. CP 6018. Accordingly, the court concluded that the settlement was unreasonable and that the reasonable settlement amount would be \$688,875. CP 6017-18.

Significantly, after the court announced its decision, Hidalgo’s counsel acknowledged the thoroughness of the court’s analysis, stating, “Even though I’m not happy with the ultimate conclusion the [c]ourt reached, it’s hard to find fault with everything you’ve done.” CP 6021.

I. Post-Hearing Dispute Over the Content of a Proposed Order.

On February 6, 2009, Westport's counsel tendered a proposed order to Hidalgo's counsel reflecting the court's decision. CP 5851-53. A week later, Hidalgo's counsel asserted that the court's decision "did not seem clear enough" and that he would insist on the inclusion of findings in the written order. CP 5855. On February 18, 2009, Hidalgo's counsel notified Westport's counsel that he had received the transcript of the hearing and would propose findings by February 23, 2009. CP 5856.

Hidalgo's counsel, however, never proposed any findings. Over the next several months, Westport's counsel repeatedly inquired concerning the status of the order. CP 5857, 5859. On June 25, 2009, Hidalgo's counsel responded by explaining that he had been busy with other cases and that he would block off time in the next week to address the issue. CP 5860. In the meantime, he suggested that Westport's attorneys consider preparing findings. CP 5860.

In response, Westport's counsel advised Hidalgo's counsel that Westport did not believe written findings were necessary and that it would be sufficient for the written order to include the transcript of the court's oral ruling. CP 5862. Hidalgo's counsel replied by reasserting his belief that the written order should include findings, and he promised to "get back" to Westport's counsel on the issue. CP 5865. He also expressed

Hidalgo's intent "to file a motion for reconsideration" of the court's ruling. CP 5865. Hidalgo's counsel, however, never provided Westport's counsel with any further input, and no proposed order was presented to the court. CP 5848.

J. Hidalgo and Stevensen's Second Settlement and Reasonableness Petition.

More than a year after the trial court's decision, on May 7, 2010, Hidalgo and Stevensen entered into a "new" settlement agreement. CP 5350-53. This time, Stevensen agreed to the entry of a judgment against him in the amount of \$2.9 million "or such amount as is found reasonable by the...court," plus prejudgment interest from the date of the agreement until entry of the judgment and postjudgment interest thereafter. CP 5350. Again, Hidalgo promised not to execute the judgment against Stevensen, and Stevensen assigned his rights against Westport to Hidalgo. CP 5350-51. Unlike the first settlement, however, the "new" settlement was not conditional upon a finding that it was reasonable. CP 5350.

Hidalgo subsequently filed a petition asking the court to find that the "new" settlement amount of \$2.9 million was reasonable. CP 5291-92. Also, because the \$2.9 million settlement amount exceeded the amount the court previously determined to be the reasonable settlement amount,

Hidalgo sought “reconsideration of the [c]ourt’s verbal ruling regarding reasonableness.” CP 5292.

In support of his petition, Hidalgo relied upon the material submitted in connection with the prior reasonableness hearing, CP 5292, plus “new” declarations from the following five witnesses: (1) David Mandt, an insurance consultant who opined that the reasonable settlement value of Hidalgo’s claim was between \$5.125 million and \$8.15 million, CP 5302; (2) Dennis Smith, an attorney who opined that the reasonable settlement value of Hidalgo’s claim was between \$2.5 and \$3.5 million, CP 5321; (3) John Strait, a law professor who opined that the trial court’s assessment of Hidalgo’s claims did “not reflect the proper evaluation of likely success,” CP 5310; (4) Lawrence Daly, a private investigator involved in the underlying criminal cases who claimed to have shared the results of his investigation with Jeffrey Barker prior to Hidalgo’s trial, CP 5342-43; and (5) Edward Stevensen, who attempted to reconcile conflicting statements in a declaration he submitted in connection with Hidalgo’s first reasonableness petition with a declaration he had previously submitted in connection with a motion for summary judgment. CP 5345-48. Compare CP 4382-98 with CP 4689-94.

Westport moved to strike Hidalgo’s petition because Hidalgo did not identify any grounds that justified reconsideration of the court’s

reasonableness determination. CP 5354-63. In response, Hidalgo contended that, in connection with his first reasonableness petition, his attorneys did him and the court a “disservice” by “relying on the [c]ourt’s experience” (which he claimed was inadequate) and that they “should have supplied the [c]ourt with more and better material and expert analysis.” CP 5462. Hidalgo further argued that, “[t]his time,” he provided “significant expert analysis and explanation why the liability in the civil malpractice case against Mr. Stevensen was strong, how the dynamics of this claim would have worked with a civil jury, and why the damage[s] were also potentially larger than the Court recognized.” CP 5462. Finally, Hidalgo argued that RCW 4.22.060 required the trial court to hold a new hearing to determine whether his new settlement was reasonable, rather than relying on its prior reasonableness determination. CP 5482.

The trial court granted Westport’s motion, finding “no grounds justifying reconsideration” of its prior determination. CP 6139. In reaching its conclusion, the court reviewed all of the “new” declarations submitted by Hidalgo and found that they were “beyond the pale of newly discovered evidence or...evidence that could not have been presented to the [c]ourt at the time of the reasonableness determination.” CP 6139. The court also rejected Hidalgo’s argument that it was required to hold a new

reasonableness hearing. CP 6140. The court thus entered an order granting Westport's motion and denying Hidalgo's petition. CP 6132.

K. The Trial Court's Entry of Judgment, Including Prejudgment and Postjudgment Interest.

Subsequently, Hidalgo tendered a judgment to the court in the amount the court previously determined would be reasonable, \$688,875, plus prejudgment interest in the amount of \$134,755.27 and postjudgment interest at the statutory catch-all rate of 12%. CP 6024-25. Westport objected on the grounds that, by including interest, the judgment exceeded the amount the court previously found would be reasonable. CP 5891-97. Westport also objected to the inclusion of interest at the catch-all rate, rather than the applicable tort rate. CP 5898-99. The court, however, overruled Westport's objections and entered the judgment. CP 6024-26.

IV. ARGUMENT

A. The Trial Court Did Not Err When It Found the \$3.8 Million Settlement Unreasonable and Concluded that the Reasonable Settlement Amount Was \$688,875.

“When an insurer refuses to settle a claim in a liability lawsuit, the insured may, without the insurer's consent, negotiate a settlement with the plaintiff and assign the coverage and bad faith claims to the plaintiff in exchange for a covenant not to execute against the insured.” *Green v. City of Wenatchee*, 148 Wn. App. 351, 363, 199 P.3d 1029 (2009). “If the

consent judgment is reasonable, it becomes the presumptive measure of damages in a subsequent bad faith action against the insurer.” *Id.*

In *Glover v. Tacoma General Hospital*, the court identified the following factors that the trial court should consider in determining whether a settlement is reasonable:

[T]he releasing person’s damages; the merits of the releasing person’s liability theory; the merits of the released person’s defense theory; the released person’s relative faults; the risks and expenses of continued litigation; the released person’s ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing persons’ investigation and preparation of the case; and the interests of the parties not being released.

98 Wn.2d 708, 717, 658 P.2d 1230 (1983). Importantly, “[n]ot all factors are relevant in a given case.” *Green*, 148 Wn. App. at 1035. Further, the plaintiff bears the burden to prove that the settlement is reasonable. *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339 (1991). If the trial court determines that the proposed settlement is unreasonable, it must set a reasonable amount. *Meadow Valley Owners Ass’n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 820, 156 P.3d 240 (2007).

This Court reviews a trial court’s reasonableness decision for an abuse of discretion. *Bird v. Best Plumbing Group*, 161 Wn. App. 510, 524, 260 P.3d 209 (2011), *review granted*, 172 Wn.2d 1010, 259 P.3d 1109 (2011).. “A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.” *Id.* “[D]iscretion is abused

only where no reasonable person would have taken the view adopted by the trial court.” *Id.* Accordingly, this Court will affirm a trial court’s reasonableness determination so long as “the record contains enough evidence to support the trial court’s conclusion.” *Martin v. Johnson*, 141 Wn. App. 611, 620, 170 P.3d 1198 (2007).

In this case, the trial court did not abuse its discretion when it found the \$3.8 million settlement unreasonable and concluded that the reasonable settlement amount was \$688,875. Rather, the record contains sufficient evidence to support the trial court’s decision.

1. The Trial Court Appropriately Focused on the Merits of Hidalgo’s Claim and Its Finding that Hidalgo Was Not Likely to Prevail Was Supported By the Evidence.

In making its reasonableness determination, the trial court appropriately focused on the merits of Hidalgo’s claim and Stevensen’s defenses because “whether to settle, and under what terms, turn[s] in large part on the risk of an adverse judgment.” *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 264, 199 P.3d 376 (2008). Further, the trial court’s conclusion that Hidalgo had little chance of prevailing was supported by the evidence.

The standard of care for an attorney is one of reasonableness. To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a

reasonable, careful, and prudent lawyer in the practice of law. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). “The standard of care to be exercised and the scope of the attorney’s duty to the client are determined at the time the services are rendered rather than at the time of trial.” *Martin v. Nw. Wash. Legal Servs.*, 43 Wn. App. 405, 408, 717 P.2d 779 (1986). Also, “mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986).

In this case, the evidence supported the trial court’s conclusion that Hidalgo was unlikely to prove that Stevensen was negligent. First, Stevensen performed a reasonably diligent pretrial investigation, given the available time and resources. He reviewed the relevant police reports. CP 3296. He learned that a number of individuals had admitted or been convicted of sexually abusing the girls. He interviewed 10 witnesses, including all of the State’s witnesses. CP 3297. He also met with Hidalgo on a number of occasions to discuss the case, but Hidalgo was uncommunicative and failed to provide Stevensen with any useful information. CP 4383-84. Further, although Stevensen advised Hidalgo to request a continuance so that he could perform additional investigation, Hidalgo refused and demanded an immediate trial. CP 4385. Even so,

Stevensen moved for a continuance the day before Hidalgo's trial, but the court denied the motion. CP 1956.

Based on the evidence available to him, Stevensen developed a defense theory targeting the credibility of Hidalgo's two young accusers and the admitted child molesters who were identified as the State's witnesses. CP 3313, 3988. Given the number of people who had admitted or been convicted of sexually abusing the girls, Stevensen did not believe he could plausibly argue that the girls were making everything up. Instead, he believed he could create reasonable doubt by acknowledging that the girls had been abused, but that they exaggerated the scope of their accusations until they ultimately accused almost every adult that they knew, including Hidalgo. CP 3313-14.

At trial, Stevensen elicited evidence consistent with his theory. He aggressively cross-examined D.E. and M.E. concerning their accusations, eliciting contradictory statements that he highlighted during his closing argument. CP 2244-51, 2263-78, 2312-15, 2325, 2544-2553. Stevensen also highlighted the girls' history of behavioral problems and psychiatric treatment. CP 2542-43, 2552-53. He also had M.E. and D.E. identify all of the individuals whom they had accused of abuse, arguing that the sheer number of accusations, alone, created reasonable doubt. CP 2244-51, 2312-15, 2561.

Turning to the State investigators, Stevensen refrained from impugning their integrity or good faith without supporting evidence. Instead, he challenged their ability to thoroughly investigate the girls' accusations. Among other things, Stevensen pointed out that Perez's ability to investigate the girls' accusations was compromised by his relationship with them. CP 2539-40. He also argued that the authorities were overwhelmed by the number of accusations. CP 2539.

Stevensen then discredited the testimony of the State's only corroborating eyewitness, Gary Filbeck. Stevensen impeached Filbeck with prior inconsistent statements and elicited an admission that Filbeck had lied to the jury. CP 2354-62, 2541. Stevensen also pointed out that Filbeck was a convicted child molester and that Filbeck agreed to testify against Hidalgo to get a better deal from the State. CP 2540-41.

Consistent with his theory, Stevensen did not dispute the State's medical evidence substantively. CP 4385-86. Instead, after unsuccessfully objecting to it, he discounted the medical evidence by attacking its relevancy. Stevensen elicited evidence that Dr. Isert's examination occurred before Hidalgo had even met the girls. CP 2296, 2538. Stevensen also highlighted the fact that neither doctor could identify the girls' abusers from their examinations. CP 2296, 2413, 2538.

Finally, Stevensen elicited favorable testimony from Ri.E., Roberson, and Hidalgo's wife, in which all three stated that they had never witnessed any sexual abuse involving the children, let alone abuse involving Hidalgo. CP 2441-42, 2469, 2494. Hidalgo's wife also testified that Hidalgo was not in the area for most of the time the girls had claimed he was abusing them. CP 2452-67.

Stevensen's strategy was, in large part, successful as Hidalgo avoided convictions on five of the six counts against him, including those which could have resulted in a life sentence. CP 2582-85. And, while the jury did convict Hidalgo on one count of molestation involving D.E., that fact alone cannot establish malpractice. *State v. Wilkinson*, 12 Wn. App. 522, 526, 530 P.2d 340 (1975).

Nevertheless, Hidalgo alleged that Stevensen was negligent by failing to uncover and present the evidence that later led this Court to grant his personal restraint petition, including the medical evidence and the evidence of the State's improper investigative techniques that were developed after Hidalgo was convicted. In making that allegation, however, Hidalgo ignored the fact that he won his reversal, not by demonstrating that such evidence was reasonably discoverable prior to his trial, but instead by proving just the opposite – that Stevensen could not have discovered it with reasonable diligence. CP 3242.

Obviously, M.E.'s recantation was not available to Stevensen at the time of trial. CP 2604. That recantation was, of course, the pivotal piece of evidence from which all of the other evidence presented in support of Hidalgo's personal restraint petition flowed. Indeed, Hidalgo himself characterizes this event as his "big break." Appellant's Br. at 8.

Hidalgo nevertheless contended that Stevensen should have presented other evidence of the State's alleged improper investigative techniques, including the testimony of Ri.E., who testified at Harold and Idella's personal restraint hearing that Detective Perez was loud, demanding, and threatening, and that his sisters had told him that Perez had pressured them into making accusations. CP 681, 4919. The State, however, refused to permit Stevensen to interview Ri.E. before the trial, and the court denied Stevensen's request to continue the trial so that he could interview Ri.E. CP 1956, CP 3314-15.

Moreover, when Stevensen was finally able to interview Ri.E. shortly before he testified, Stevensen found that Ri.E. lacked credibility. CP 3314-15. Thus, in the absence of corroborating evidence, Stevensen made the strategic decision to limit Ri.E.'s testimony to generally disclaiming the existence of abuse in the home, rather than attempting to use him to impugn Perez. CP 3314-15.

Further, Hidalgo cites no admissible evidence that Stevensen could have used to prove that the State authorities had acted improperly. Rather, he cites only hearsay contained newspaper articles and discussions amongst defense attorneys regarding Perez. CP 1023-84, CP 4754-58. Moreover, Perez was not present when either of the girls made their accusations against Hidalgo, nor was he assigned to investigate those accusations. CP 1868-71, 2157, 3970. Hence, any evidence Stevensen may have offered concerning Perez's conduct would arguably have had limited effect in Hidalgo's case. In light of these circumstances, Stevensen's decision not to accuse Perez or the other State authorities of improper conduct was reasonable. Indeed, mounting an attack against the State authorities without adequate proof would have risked inflaming the jury and could have resulted in Hidalgo being convicted on more charges, including those that carried a potential life sentence.

Hidalgo also accused Stevensen of malpractice for failing to attack the State's medical evidence. But Stevensen had no reason to question Dr. Isert's and Dr. Shipman's conclusions that the girls had been abused in the past, given the number of individuals who had already admitted to abusing them. To the contrary, as a matter of trial strategy, Stevensen conceded that the girls had been abused in the past and focused on attacking the relevancy of the medical evidence in Hidalgo's case. CP 4385-86.

Moreover, even the medical evidence that was later discovered would not necessarily have been persuasive in avoiding a conviction. Hidalgo was only convicted of abusing D.E., and neither Dr. Milnes nor Dr. Adams expressed any opinions that contradicted the occurrence of sexual abuse involving D.E. To the contrary, Dr. Milnes testified that his examination of D.E. was entirely consistent with the history of abuse that D.E. had disclosed to the State authorities. CP 3032-33, 3048, 3051.

Further, while Drs. Milnes and Adams found no physical evidence of abuse involving M.E., they also testified that they could not rule out that such abuse had occurred. CP 2896-97, 3105, 3115-18, 3138. In fact, Dr. Adams admitted that a child's disclosure of abuse is the "most important" evidence and that "the frequent finding of normal anal genital examination must always be reported as being consistent with a history of molestation, as given by the child." CP 3110-11. In any event, Hidalgo was not convicted of abusing M.E. Thus, the fact that the medical evidence concerning M.E. might have been questioned was largely irrelevant.

In light of the above, the trial court's conclusion that Hidalgo's chances of success were "not very good" was supported by the evidence, and its reasons for reaching that conclusion made perfect sense. CP 6017. As the court explained, the most important reason for its conclusion was

“the role played by newly discovered evidence as opposed to what reasonable diligence or due diligence on Mr. Stevensen’s part would have revealed in August of ’95.” CP 6018. The basis for that conclusion is obvious in light of the record, which showed (as Judge Friel concluded) that the evidence Hidalgo relied on in his personal restraint petition was, in fact, not reasonably discoverable prior to Hidalgo’s trial.

Secondarily, the court cited the “theoretical nature of the plaintiff’s theory applied only to [D.E.] as opposed to as it would apply to [D.E.] and [M.E.]” CP 6018. There, the court was referring to the evidence as it pertained to D.E. (whom Hidalgo was convicted of molesting), as opposed to M.E. (whom Hidalgo was not convicted of molesting). In that regard, most of the evidence that Hidalgo relied upon to prove malpractice pertained to M.E., rather than D.E. The evidence pertaining to D.E., by contrast, tended to confirm, rather than discredit, her accusations of sexual abuse. For example, while M.E. recanted her accusations, D.E. steadfastly maintained that she was abused by Hidalgo. CP 3881, 4518-19, 4531. Also, while some questions were raised about the medical evidence pertaining to M.E., Dr. Milnes’s examination of D.E. was consistent with her allegations of sexual abuse. CP 3032-33, 3048, 3051.

Finally, the court cited the fact that, at the time of Hidalgo’s trial, numerous individuals had admitted or been convicted of abusing D.E. and

M.E., thus making “the kind of enterprise that [Hidalgo] now urge[s] should have been followed...an extremely difficult proposition.” CP 6018. There, the court was referring to the comparative difficulty in attempting to undermine all of the girls’ accusations by mounting an all-out offensive against the State’s investigative team, rather than simply attacking the credibility of their particular accusations against Hidalgo.

Accordingly, the trial court’s oral findings and conclusions were supported by the extensive evidentiary record before it. This Court should, therefore, affirm the trial court’s reasonableness determination.⁴

2. The Trial Court Was Not Required to Enter Written Findings, Comment on Every Piece of Evidence, or Detail Its Analysis of Every *Glover* Factor.

Hidalgo nevertheless criticizes the trial court for failing to enter written findings supporting its decision. Hidalgo also faults the trial court for failing to comment on particular pieces of evidence he submitted at the reasonableness hearing and failing to specifically address all of the *Glover* factors. Hidalgo’s criticisms are, however, without merit.

⁴ Notably, Westport raised additional defenses to show that the settlement was unreasonable, including the statute of limitations, common-law immunity, and collateral estoppel based on Judge Friel’s conclusion that the evidence presented at Hidalgo’s personal restraint hearing was “newly discovered.” CP 1792-93,1800-04. The trial court, however, rejected Westport’s limitations and immunity defenses, and its oral decision made clear that the court independently evaluated the evidence to determine whether Stevensen reasonably should have discovered exculpatory evidence prior to Hidalgo’s criminal trial, rather than relying on Judge Friel’s conclusion. CP 6015, 6018-20.

First, the trial court was not required to enter written findings in support of its decision. Rather, written findings are only required (with limited exceptions not applicable here) in “actions tried upon the facts without a jury or with an advisory jury.” CR 52(a)(1).

Second, the trial court was not required to specifically list, cite, or comment on the evidence it relied upon. *Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn. App. 572, 585, 216 P.3d 1110 (2009). Nor was the trial court required to specifically detail its analysis of every *Glover* factor. *Id.* See also *Martin*, 141 Wn. App. at 620; *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 407, 161 P.3d 406 (2007); *Werlinger v. Warner*, 126 Wn. App. 342, 351, 109 P.3d 22 (2005). Indeed, Washington courts have affirmed a trial court’s reasonableness determination in instances where the trial court simply mentions that the parties addressed the relevant *Glover* factors in their briefs and the trial court considered the briefs. *Water’s Edge*, 152 Wn. App. at 585.

In this case, the record makes clear that the trial court diligently evaluated the parties’ voluminous submissions (which included thousands of pages of exhibits), heard extensive arguments, and reached its decision after considering the *Glover* factors. CP 6015-20. The court also explained the reasons for its decision, including the calculations it made to determine the reasonable settlement amount. Hidalgo’s attempt to criticize the court

because it did not enter written findings, or because it did not comment on every piece of evidence or every *Glover* factor, is without merit. Indeed, Hidalgo's criticisms are belied by his own attorney's comments at the end of the hearing, when Hidalgo's attorney acknowledged the thoroughness of the trial court's analysis and stated that it was "hard to find fault with everything [the Court has] done." CP 6021. Hidalgo's criticisms are further undermined by the fact that, following the court's decision, he had ample opportunity to either submit proposed findings or request clarification of the court's ruling, but failed to do so. CP 5848-65.

Finally, the case law cited by Hidalgo is inapposite. First, he cites *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), but that case merely stands for the proposition that, when imposing discovery sanctions, the trial court should state its reasons on the record. This case does not involve discovery sanctions and, in any event, the trial court stated its reasons for finding the settlement unreasonable.

Hidalgo also cites *Green*, where, on remand, this Court directed the trial court to enter written findings when evaluating the reasonableness of the settlement at issue in that case. 148 Wn. App. at 369. *Green* is distinguishable, however, because the trial court had erroneously based its reasonableness determination on stipulated facts presented by the insured and the claimant, instead of independently evaluating the evidence under

the *Glover* factors. *Id.* Hence, the Court required written findings to ensure that the trial court employed the proper analysis on remand. *Id.* Here, by contrast, the hearing transcript makes clear that the trial court properly evaluated the evidence in light of the *Glover* factors.⁵

3. The Trial Court Did Not Abuse Its Discretion in Calculating the Reasonable Settlement Amount.

Hidalgo also argues that the trial court abused its discretion when it calculated the reasonable settlement amount by multiplying the midpoint of a potential damages award by the median chance of success. Hidalgo contends that the court should have used the maximum potential damages award and the highest likelihood of success, rather than midpoints.

The court's decision to use midpoints was not an abuse of discretion. To the contrary, multiplying the midpoint of a potential damages award by the median likelihood of success is an established methodology for determining a reasonable settlement amount. Allan D.

⁵ Notably, *Green* supports the trial court's refusal to credit the admissions that Stevensen purportedly made in the affidavit he submitted in support of Hidalgo's reasonableness petition. CP 4689-94. As *Green* established, the settling parties cannot prove that a settlement is reasonable by stipulating to liability. *Green*, 148 Wn. App. at 368. Moreover, as Westport pointed out, Stevensen's affidavit in support of Hidalgo's petition contradicted testimony he previously provided in the case. CP 4382-98. Similarly, the fact that Stevensen apparently was not prepared to defend himself at trial weighs in favor of the trial court's decision, rather than against it. Stevensen's apparent choice not to prepare his case made it more likely that he would "settle for an inflated amount to escape exposure," calling into question the reasonableness of the settlement. *Chaussee*, 60 Wn. App. at 510. Indeed, it would be perverse to permit a defendant to do nothing, settle for an inflated amount, and then weigh the defendant's inaction in support of the settlement.

Windt, 1 Insurance Claims & Disputes 5th § 5:1 (Westlaw, database updated March 2012) (explaining that the settlement value of a case should be determined by multiplying the “mid-point of the expected verdict range” by the perceived chance of a favorable verdict). Indeed, Hidalgo’s proposed calculation is unreasonable because it is entirely one-sided and fails to account for the full range of potential outcomes.

B. The Trial Court Did Not Err in Refusing to Reconsider Its Finding that the Reasonable Settlement Amount Was \$688,875.

Hidalgo contends that the trial court erred when it refused to reconsider its determination that the reasonable settlement amount was \$688,875 and, accordingly, denied Hidalgo’s second reasonableness petition. In that regard, Hidalgo argues that the trial court should not have relied on its prior reasonableness determination because it was never reduced to a written order. Hidalgo also argues that RCW 4.22.060 required the court to hold a new hearing on the second settlement. As shown below, Hidalgo’s contentions have no merit.

1. The Trial Court Did Not Abuse Its Discretion When It Found No Grounds to Reconsider Its Decision.

First, while it is true that an oral decision is not final and may be reconsidered or changed before it is made the subject of a final order, that does not mean the decision has no effect or that the court is required to reconsider it. *In re Leith's Estate*, 42 Wn.2d 223, 226, 254 P.2d 490

(1953). Rather, the issue of whether to reconsider an oral ruling rests “within the discretion of the court.” *Id.* Thus, a trial court’s refusal to reconsider an oral ruling will not be disturbed absent a “clear showing” that its decision was an abuse of discretion. *Id.*

Here, the trial court did not abuse its discretion when it found “no grounds justifying reconsideration” of its earlier oral decision that the reasonable settlement amount was \$688,875. As the court observed, none of the affidavits Hidalgo submitted in connection with his second reasonableness petitions were “newly discovered” or could not have been presented at the prior reasonableness hearing. CP 6139. To the contrary, Hidalgo acknowledged that his second reasonableness petition was an attempt to relitigate the issue based on his attorneys’ purported failure to provide the court with “better material and expert analysis” in connection with his first reasonableness petition. CP 5462. Hidalgo was not, however, entitled to a “second bite at the apple” because he was dissatisfied with the outcome of the first hearing. Karl B. Tegland, et al., 15A Washington Practice: Handbook on Civil Procedure § 65.1 (2011-12 ed.).

Additionally, the fact that the second settlement agreement was final, rather than conditional upon a finding of reasonableness, was irrelevant to the court’s decision concerning the reasonable settlement amount. CP 6137. *Red Oaks Condo. Owners Ass’n v. Sundquist Holdings,*

Inc., 128 Wn. App. 317, 326, 116 P.3d 404 (2005). Likewise, the fact that Stevensen did not reserve the right to recover damages from Westport in the second settlement agreement did not justify reconsideration because the court based its decision on the merits of Hidalgo's claim, which had not changed since the date of the court's ruling. CP 6017-19.

2. RCW 4.22.060 Did Not Mandate a Second Hearing.

Second, RCW 4.22.060 did not mandate a second reasonableness hearing. RCW 4.22.060 states that “[a] hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence.” Here, such a hearing was held on February 2, 2009 and, at the conclusion of the hearing, the court found that the proposed settlement was unreasonable and, pursuant to RCW 4.22.060(2), determined that the reasonable settlement amount was \$688,875. The court thus fulfilled its obligation to provide Hidalgo with a hearing on the “reasonableness of the amount to be paid,” and nothing in the statute entitled Hidalgo to multiple hearings on the same issue just because he was dissatisfied with the court's decision.

Indeed, construing the statute to require repeated reasonableness hearings would be absurd and, therefore, should be avoided. *Oden Inv. Co. v. City of Seattle*, 28 Wn. App. 161, 164, 622 P.2d 882 (1981). Doing so would undermine the trial court's efforts in connection with the first

reasonableness hearing. It would also permit settling parties to relitigate the issue, *ad infinitum*, by entering into a series of “new” settlement agreements until they obtained the outcome they desired. Instead, the trial court correctly concluded that, in the absence of changed circumstances justifying reconsideration, Hidalgo was not entitled to relitigate its prior determination that the reasonable settlement amount was \$688,875.

The court’s decision was also consistent with the manner in which courts have handled matters when a proposed settlement is found to be unreasonable but the court determines that a lesser amount would be reasonable. When that occurs, the parties may enter a new settlement for the amount the court determined would be reasonable, and the court will enter a judgment in that amount that binds the insurer. *See, e.g., Water’s Edge*, 152 Wn. App. at 602-603; *Meadow Valley*, 137 Wn. App. at 820; *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 376-77, 89 P.3d 265 (2004). No case, however, holds that the parties may relitigate the issue by entering a new settlement for a different amount.

C. The Trial Court Erred By Including Interest in the Judgment.

1. Hidalgo Was Not Entitled to Add Interest to the Amount the Court Found Would Be Reasonable.

RCW 4.22.060 “provides for a hearing on the issue of the reasonableness of the ‘amount to be paid’” in a settlement agreement. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146, 173 P.3d

977 (2011). For purposes of the court's determination, the "amount to be paid" includes not only the principal amount of the settlement, but also any interest to be paid on the outstanding balance. *Id.* As previously discussed, if the trial court finds that the settlement is reasonable, it becomes the presumptive measure of damages in a later insurance coverage action against the insurer. *Green*, 148 Wn. App. at 363. Further, if the court finds that the settlement is unreasonable, it must set a reasonable amount. *Meadow Valley*, 137 Wn. App. at 820.

In this case, the trial court held a hearing to evaluate the reasonableness of Hidalgo's and Stevensen's first settlement, which included prejudgment and postjudgment interest. The court found that the settlement was unreasonable and declared that the reasonable amount to be paid was \$688,875. The court did not include prejudgment or postjudgment interest in the amount it found would be reasonable.

At that point, Hidalgo and Stevensen had the option to enter into a second settlement for the amount the court determined would be reasonable, if they wanted some measure of presumptive damages for a later coverage action against Westport. *Water's Edge*, 152 Wn. App. at 602. They could not, however, enter an agreed judgment for any additional amount and bind Westport to it. Hence, the trial court should not have

entered the proposed judgment, which improperly added \$134,755.27 and postjudgment interest to the amount the court found would be reasonable.

Notwithstanding the above, Hidalgo will likely rely on *Jackson* to argue that the judgment properly included interest. *Jackson* is inapposite, however, because, in that case, the trial court *approved* the parties' settlement, which included a specified rate of interest, as reasonable. *Jackson*, 142 Wn. App. at 144. Hence, in holding that the trial court should have included the agreed-upon rate of interest in the judgment, this Court stated that “[b]oth principal and interest” were components of the settlement that was approved by the trial court. *Id.* at 146.

In this case, by contrast, the trial court disapproved of the settlement that included interest and declared that the reasonable amount to be paid was \$688,875. The court did not include interest in such amount. Consequently, to the extent Hidalgo wanted to enter a judgment that would bind Westport in subsequent litigation, he was limited to entering an agreed judgment for the amount the trial court determined would be reasonable, \$688,875, without adding interest to that amount.

2. Even If Interest Was Appropriate, the Court Should Have Included Interest at the Statutory Tort Rate.

Alternatively, even if Hidalgo was entitled to interest, the trial court erred by computing interest at the catch-all rate of 12%, rather than

the tort rate. RCW 4.56.110 sets the interest rate for four categories of judgments: (1) breach of contract where an interest rate is specified; (2) child support; (3) tort claims; and (4) all other claims. “In determining the appropriate interest rate, the court should examine the component parts of the judgment, determine what the judgment is primarily based on, and apply the appropriate category.” *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 925, 250 P.3d 121 (2011).

In this case, the judgment was entered against Stevensen to resolve Hidalgo’s tort claims. Thus, the judgment was founded on Stevensen’s alleged tortious conduct, and the tort interest rate should have applied.

Hidalgo will likely rely on *Jackson* to argue that the trial court properly applied the catch-all interest rate because the judgment was entered against Stevensen following their settlement agreement. Again, however, *Jackson* is distinguishable. In that case, the parties’ settlement provided for interest at a specified rate, thus triggering RCW 4.56.110(1), and the court approved the settlement as reasonable. *Jackson*, 142 Wn. App. at 143-44. Here, by contrast, the settlements did not provide for interest at a specified rate, and neither settlement was found reasonable.

Finally, to the extent this Court reads *Jackson* to mandate application of the catch-all rate to all judgments following the settlement of tort claims, Westport respectfully submits that *Jackson* was wrongly

decided. The fact that the parties resolve tort claims through settlement, rather than a trial, does not change the fact that the defendant's liability is "founded upon [his or her] tortious conduct." RCW 4.56.110(3)(b). Hence, in such situations, the tort interest rate should apply.

V. CONCLUSION

For the above reasons, this Court should affirm the trial court's decision denying Hidalgo's first reasonableness petition and concluding that the reasonable settlement amount was \$688,875. The Court should also affirm the trial court's refusal to reconsider its decision in connection with Hidalgo's second reasonableness petition. Nevertheless, the Court should reverse the trial court insofar as the trial court included interest in the judgment. In that regard, the Court should remand the case with instructions to either enter a judgment without interest, or to include interest at the applicable tort rate, rather than the catch-all rate.

Respectfully submitted this 17th day of September, 2012.

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