

FILED

NOV 13 2012

COURT OF APPEALS  
STATE OF WASHINGTON

No. 305449

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

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MANUEL HIDALGO f/k/a MANUEL HIDALGO RODRIGUEZ,

Appellant,

v.

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

Respondents.

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**APPELLANT/CROSS-RESPONDENT HIDALGO'S  
RESPONSE/REPLY BRIEF**

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Chelan County Superior Court No. 03-2-01055-8

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## I. INTRODUCTION

In its cross-appeal, intervenor Westport Insurance Co. claims the trial court erred when it included 12 percent prejudgment and post-judgment interest in the judgment against defendant, Ed Stevensen. Judge Sperline did not err. Rather than challenge the inclusion of interest at the time of the reasonableness hearing, Westport instead said nothing for almost three years. As the case law made clear, an insurer was required to object to the inclusion of interest in the settlement agreement at the reasonableness hearing. Because Westport did not, it was barred from objecting later. Further, Judge Sperline was correct when he applied the catch-all section of RCW 4.56.110(4) because the basis of the judgment was a settlement agreement – considered a contract under well-settled law – and not a jury verdict. The inclusion of 12% pre-and post-judgment interest should be affirmed.

In response to plaintiff Manuel Hidalgo's appeal, Westport argues Hidalgo and Stevensen were barred from entering into a new settlement agreement with a different amount. Yet the reasonableness hearing statute and case law do not prohibit another settlement agreement. After conceding the trial court's order was not final and thus not binding, Westport then argues

Hidalgo improperly sought reconsideration which the judge was fully within his discretion to deny. But the plain language of the reasonableness hearing statute says otherwise. Westport fundamentally misunderstands the important differences between the two settlement agreements – changes that were brought about in part because of the criticisms of Westport and the trial court. Because reasonableness hearings are equitable in nature, a premium should be on reaching the right result. By striking the petition for finding new settlement reasonable and supporting materials, Judge Sperline – at Westport’s urging – chose form over substance. The new settlement should have been considered on its own merits.

Finally, Westport’s in-depth attempt by the excellent lawyers brought in after the fact to defend the insurer to demonstrate the supposed lack of merit of Hidalgo’s case against Stevensen was, frankly irrelevant, and should have been ignored by the trial court. Reasonableness must be considered at the time of settlement, taking into account what the parties knew back then and the resources and preparedness of each of the parties back at that time. In presenting its full-bore defense of Stevensen, Westport glosses over the fact that its insured had few resources and no

experts, and would have been unable to present anything close to the same defense that Westport has done here. Because the trial court made no findings, failed to address key *Glover* factors, and made unclear oral statements in place of findings, Judge Sperline may have fallen into that same trap and considered the defense presented by Westport, rather than the defense Stevensen was actually capable of making at the time of the settlement.

Thus, the trial court abused its discretion in failing to hold a reasonableness hearing on the second, final settlement with the fuller supporting evidence provided to the trial court. Further, the trial court abused its discretion in not including findings and specifically addressing all of the relevant *Glover* factors, and choosing \$688,875 as representing the reasonable risk of judgment against Stevensen at the time of settlement. The case should be remanded for a hearing on the second, final settlement and the trial court should consider all the materials submitted in support of it.

## II. RESTATEMENT OF ISSUE ON CROSS-APPEAL

Does Westport have the right to challenge the inclusion of pre- and post-judgment interest in the judgment when it first raised the issue nearly three years after the reasonableness hearing, contrary to *Jackson v. Fenix Underground*?

If so, did the trial court err in ruling pre- and post-judgment interest was appropriate at the catch-all rate in RCW 4.56.110(4) where the parties contracted for an unspecified amount of pre- and post-judgment interest and the judgment arose because of the settlement agreement and not a jury verdict?

## III. RESTATEMENT OF THE CASE ON CROSS-APPEAL

### A. At The Reasonableness Hearing, Westport Never Objected To The Inclusion of Interest In The Settlement Agreement Between Hidalgo And Stevensen

Both the voided original settlement agreement and the second, final settlement agreement between Hidalgo and Stevensen provided for prejudgment and post-judgment interest in an unspecified amount. CP 4403; 5875. In opposing the reasonableness of the settlement agreement, Westport never challenged the inclusion of pre- or post-judgment interest.

At the reasonableness hearing, Westport made just two arguments. First, Westport challenged the amount of the settlement, \$3.9 million, as unreasonably high given that the malpractice claim against Stevensen allegedly “lacked merit.” CP 1787-1805. Second, Westport also argued the agreement was collusive. CP 1805-07. Westport suggested the reasonable value of the claim against Stevensen was around \$75,000. CP 1753, 1807.

Westport never suggested the inclusion of pre- and post-judgment interest was unreasonable or evidence of collusion. Nor did it raise the issue of pre- and post-judgment interest in the supplemental briefing it filed in January 2009, just before the hearing on reasonableness. CP 4557-60. It likewise did not raise the issue when it filed its Submission of Additional Authority just before the hearing. CP 4695-4717.

Similarly, Westport made no mention of or argument at the reasonableness hearing that the inclusion of pre- and post-judgment interest was somehow inappropriate. See RP (2/2/09) at 33-67, 78-83, 85.

**B. Hidalgo Moves For Entry Of Judgment Including 12 Percent Pre- And Post-Judgment Interest**

On October 18, 2011, the trial court held a hearing and granted Westport's Motion to Strike Plaintiff's Petition for Finding New Settlement Reasonable. CP 6159-68. Westport was tasked with presenting two orders for trial court's signature: (1) an order formalizing the trial court's decision about the reasonableness of the original settlement, and (2) an order granting Westport's motion to strike because of the "preclusive effect of the Court's previous ruling." CP 6167-68.

Plaintiff also moved for entry of a judgment of the principal amount of \$688,875 plus 12 percent prejudgment and post-judgment interest. CP 5869-73. Hidalgo argued that Judge Sperline's order finding the reasonable amount of the settlement changed only the principal amount of the settlement agreement. CP CP 5869-70; 5918. The judge could not alter the settlement agreement, including the inclusion of pre- and post-judgment interest. CP 5869-70. Westport never objected to the inclusion of pre- and post-judgment interest until almost three years later when the Court went to enter judgment. CP 5870; 5918-19. Hidalgo argued that Westport's belated attempt to raise the issue almost

three years later amounted to an impermissible collateral attack on the reasonableness ruling by the trial court, prohibited by *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007). CP 5871-73; 5919-20.

Further, the parties reduced their settlement agreement to a written contract, so the basis for the judgment is that written contract, not the underlying tort allegation. CP 5921-23. Because the parties did not specify an interest rate, the catch-all interest rate in RCW 4.56.110(4) applies, which in this case amounted to 12%. CP 5921.

Westport objected, arguing that adding prejudgment interest will necessarily exceed the amount the judge found was reasonable. CP 5891-97. In the alternative, Westport argued that Hidalgo was limited to prejudgment interest at the tort rate in RCW 4.56.110(3) and that *Jackson* was wrongly decided. CP 5898-5900.

**C. Judge Sperline Found That Westport Never Objected To The Inclusion of Interest At The Reasonableness Hearing, So Entered Judgment That Included 12 Percent Interest**

On December 14, 2011, Judge Sperline held a hearing on three issues: the entry of the two orders on the reasonableness of the first voided settlement and Westport's motion to strike the

second, final settlement and supporting documents, and entry of the judgment as presented by Hidalgo. RP (12/14/11) at 2-7.

Judge Sperline ruled that the “question of interest” was never before the court for its reasonableness determination. *Id.* at 6. Thus, the judge made a finding that he was “addressing an appropriate amount for a principal of a judgment” at the reasonableness hearing. *Id.* He continued: “We simply did not address, nor was it reasonably contested in that hearing, that in the event judgment was entered and – whether or not that judgment would bear interest.” *Id.* Because the settlement agreement called for pre- and post-judgment interest and Westport never contested the inclusion of them at the reasonableness hearing, interest was appropriate to include. *Id.* at 6-7.

Westport never assigned error to Judge Sperline’s findings that (1) Westport never raised the issue of the inclusion of prejudgment interest at the reasonableness hearing, and (2) he was addressing only the judgment principal at the reasonableness hearing.

#### **IV. ARGUMENT IN RESPONSE TO WESTPORT’S CROSS-APPEAL**

Westport fails to include the standard of review on its cross-appeal. While it never outright says so, Westport's brief reads as if the inclusion of pre- and post-judgment interest is a legal issue requiring de novo review. However, courts have held that awards of prejudgment interest are reviewed for an abuse of discretion. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 925, 250 P.3d 121 (2011) *citing* *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761 (2010). On the other hand, in *Jackson v. Fenix Underground, Inc.*, which involved only post-judgment interest, the Court of Appeals noted that issues of statutory interpretation are reviewed de novo. 142 Wn. App. 141, 143, 173 P.3d 977 (2007).

Regardless of the standard of review, the trial court did err when it included the pre- and post-judgment interest at the rate of

12 percent.<sup>1</sup> Westport raised the issue too late, and the parties contracted for interest at an unspecified rate in their settlement agreement. Because the basis of the judgment was the contract and not a jury verdict arising out of tortious conduct, Judge Sperline reasonably applied the catch-all portion of RCW 4.56.110, which during the current economic times was 12 percent interest.

**A. Westport Raised Too Late The Issue of The Inclusion Of Interest**

Westport argues that Hidalgo was not entitled to any interest in the judgment entered against Stevensen. BR 46-48. Given the controlling case law in effect since 2007, Westport knew it was required to raise the issue of interest at the reasonableness hearing in February 2009 – and it did not. Its failure to raise the issue back

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<sup>1</sup> In its brief, Westport does not differentiate between pre- and post-judgment interest, and does not argue any separate analysis is required for one or the other. In the interests of thoroughness, though, Hidalgo will briefly explain the legal basis for the inclusion of prejudgment interest. Prejudgment interest is available where the damages amount claimed is liquidated. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 925, 250 P.3d 121 (2011). A liquidated claim is one where the evidence, if believed, makes it possible to compute the amount due with exactness, without reliance on opinion or discretion. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 685, 15 P.3d 115 (2000). Settlement agreements are “widely acknowledged” to represent a liquidated amount with regard to a party’s damages to be used in a later action. *King Cnty v. Puget Sound Power & Light Co.*, 70 Wn. App. 58, 62, 852 P.2d 313 (1993). While not mentioned in the judgment interest statute, case law holds that prejudgment interest is nevertheless also allowed at the statutory judgment interest rate. *Unigard*, 160 Wn. App. at 925 (citing *Mahler v. Szucs*, 135 Wn.2d 398, 429, 9957 P.2d 632 (1998)). Because pre- and post-judgment interest are both governed by the same statute, RCW 4.56.110, for ease of reference, they will be addressed together.

in 2009 is fatal to their claim now. The trial court was also following controlling authority at the time, so it did not err.

In *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P3d 977 (2007), Jackson was injured by a security guard for the Fenix Underground nightclub. *Id.* at 143. Because Fenix's insurer failed to settle the case, Jackson and Fenix agreed to settle separately by entry of a covenant judgment in the amount of \$275,000 in exchange for an assignment of Fenix's rights against its insurer. *Id.* The agreement included 12 percent interest on the judgment. *Id.*

Jackson petitioned the court for an order that the settlement was reasonable. *Id.* at 144. The insurer intervened and argued \$275,000 was an unreasonable amount, but never raised the issue of interest. *Id.* The court found the amount reasonable and entered judgment against Fenix in the principal amount of \$275,000 plus 12 percent interest. *Id.*

The insurer filed a motion for reconsideration arguing that the interest rate was too high and should have been the lower, tort interest rate, as dictated by RCW 4.56.110(3). *Id.* The trial court granted the motion and reduced the interest rate to the tort interest rate. *Id.* at 144-45.

The Court of Appeals reversed the trial court's order granting reconsideration. It first held that once parties are agreed to settle a tort claim, the foundation for the judgment is the written contract, not the underlying tort allegations. *Id.* at 146. It went on to hold that since RCW 4.22.060 provided for reasonableness hearings for the "amount to be paid," that amount naturally had to include interest. *Id.* Because the insurer failed to raise the issue of interest at the reasonableness hearing – which was necessarily being decided at the same time – and only raised it on reconsideration, the insurer was making "in reality a collateral attack on the reasonableness determination." *Id.* at 147.

In short, the clear case law at the time of Hidalgo's petition for reasonableness of the settlement was that interest was included as part of the "amount to be paid" under RCW 4.22.060 and had to be disputed at the time of the reasonableness hearing. Yet despite this controlling case law, Westport never once raised the issue of interest before or during the initial reasonableness hearing in early 2009. Instead, it waited almost three years later to raise the issue. Judge Sperline found that Westport did not raise or address the issue of interest at the reasonableness hearing. RP (12/14/11) at 6. Westport does not dispute that finding; nor does it offer up any

reason why it did not or could not have raised the issue prior to December 2011. Westport had the settlement agreement long enough to be able to include it in its materials opposing Hidalgo's petition for reasonableness, as Exhibit 55 to the declaration of Chris Wadley. See CP 4402-06.

Instead, Westport is doing exactly what *Jackson* says an insurer cannot do – bring up the issue of interest after the trial court has made its ruling on reasonableness. Westport's choice was to address the issue of interest at the reasonableness hearing or not at all. Its attempt to circumvent the trial court's reasonableness ruling was explicitly rejected in *Jackson*. It should be rejected here, as well, because Westport has advanced no good reason why its failure to raise the issue of interest – despite clear controlling authority it was supposed to – should be ignored.

Westport, instead, twists the words of the *Jackson* opinion and RCW 4.22.060 in an attempt to negate its failure to raise the issue of interest back at the time of the original reasonableness hearing. It argues that the \$688,875 the trial court found reasonable had to be inclusive of interest because the trial court never specifically approved interest.

But if that argument were true, then *Jackson* would have come out differently than it did because interest was also never addressed at the reasonableness hearing there. The *Jackson* Court looked to the statute and held that interest is necessarily included in the “amount to be paid,” which is what the judge decides at a reasonableness hearing. If the insurer wanted to object to the inclusion of interest, *Jackson* plainly mandated Westport was to raise it at the time of the reasonableness hearing.

Westport’s argument also ignores RCW 4.22.060(3), which prohibits the court from changing the terms of the agreement:

A determination that the amount paid for a ... covenant not to enforce judgment ... was unreasonable shall not affect the validity of the agreement between the released and the releasing persons.

*See also Meadow Valley Owners Assoc. v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 819-820, 156 P.3d 240 (2007). The first settlement agreement was void by its terms. The second settlement agreement stated the parties would live with whatever amount the judge decided was reasonable, if it found the amount of \$2.9M unreasonable. But the settlement agreement also called for both pre- and post-judgment interest. If the trial court refused to

include interest, he would be reading the interest clause out of the contract, an act prohibited by statute.

Judge Sperline did not abuse his discretion in including interest, and this Court should affirm the trial court's inclusion of pre-and post-judgment interest.

**B. Because The Basis Of The Judgment Was A Settlement Agreement And Not A Jury Verdict, 12 Percent Interest Was Appropriate**

The trial court properly included interest at the catch-all rate in RCW 4.56.110(4) because the contract – which settled the issues between the parties – explicitly called for pre- and post-judgment interest at an unspecified amounts.

Westport argues that the judgment was based on Stevensen's tortious conduct, so the tort rate in RCW 4.56.110(3) applies pursuant to *Unigard Insurance Co. v. Mutual of Enumclaw Insurance Co.* (MOE). BR 48-50. It also argues that *Jackson* is different because the parties put a specific interest rate in the settlement agreement and the settlement agreement was found reasonable there. BR 49-50. Neither argument holds water.

First, the rule cited by Westport in *Unigard* applies only to judgments based on jury verdicts, not settlement agreements, a fact specifically noted in *Unigard*. In that case, Unigard – as an

assignee of MOE's insured – sued MOE for its bad faith in refusing to defend and cover its insured. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 916-17, 250 P.3d 121 (2011). The case went to trial and the jury returned a verdict against MOE for past and future economic damages. The court added prejudgment interest for the past economic damages, treble damages under the Consumer Protection Act and attorney's fees. The judgment was then entered based on the jury verdict. Under this set of facts, the Court of Appeals held that the tort interest rate in RCW 4.56.110(3) applied, rather than the catch-all rate in (4). *Id.* at 928.

But the *Unigard* Court differentiated that case from the facts in *Jackson v. Fenix Underground*. The court noted that a judgment arising out of a jury verdict is different than a judgment arising out of a settlement agreement:

We said in *Jackson*, "Once parties have agreed to settle a tort claim, the foundation for the judgment is their written contract, not the underlying allegations of tortious conduct." .... But our statement in *Jackson* referred to the allegations of tort liability that were resolved by the settlement in the underlying suit. That was the contract that became the foundation for the judgment in question. In this case, the judgment in question resolved Unigard's bad faith claim, as to which there was no settlement agreement.

*Id.* at 926 (internal citations omitted) (emphasis added). In short, the *Unigard* Court held that courts do not look to the underlying character of the claims when the judgment is based on a settlement agreement. Because the settlement agreement governs the judgment against Stevensen, it would be inappropriate for a court to look at the character of the underlying claims.

Further, the catch-all provision of RCW 4.56.110(4) applies because the judgment does not fit in any of the first three categories. Section (1) calls for interest at the rate specified in a written contract. That does not apply here. Section (2) calls for 12% interest for judgments for unpaid child support. That does not apply here. Section (3)(a) calls for interest for judgments founded on tortious conduct against public agencies at two percentage points above the 26 week T-bill. Section (3)(b) requires interest for judgments founded on the tortious conduct of individuals at two percentage points above the prime rate. Neither subsection applies here because the judgment arose out of a contract. Finally, section (4) is the catch-all for all judgments not falling under sections (1), (2) or (3), calling for interest at the maximum rate permitted under RCW 19.52.020, which is 12% in these economic times.

Because RCW 4.56.110 (1), (2) and (3) did not apply, section (4) necessarily applies. Thus, the judge did not abuse his discretion in applying 12% pre-and post-judgment interest.

To the extent Westport argues that *Jackson* was wrongly decided, Westport is proverbially barking up the wrong tree. Westport's issue is with the interest on judgments statute, not *Jackson*. It is well-settled law that settlement agreements are contracts. *Trotzer v. Vig*, 149 Wn. App. 594, 203 P.3d 1056 (2009); *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983) Thus, by the terms of the interest on judgment statutes, judgments arising out of settlement agreements cannot fall under (3). To reach the conclusion Westport advocates for would require carving out an exception for settlement agreements in RCW 4.56.110 that is simply not supported by the plain language of the statute and would also require overturning decades of case law holding that settlement agreements are contracts.

Judge Sperline did not abuse his discretion and this Court should affirm the inclusion of 12 percent pre- and post-judgment interest.

## **V. REPLY ARGUMENT IN SUPPORT OF HIDALGO'S APPEAL**

Westport concedes that the trial court's oral ruling on reasonableness of the first settlement was not a final order, and thus it cannot have preclusive effect. BR 43. Instead it argues that the parties had no right to enter into the second, final settlement agreement. Contrary to Westport's assertion, there is simply no case law prohibiting the parties from doing so.

Westport also tries to fit Hidalgo's petition on the second, final settlement and the supporting materials into the reconsideration box. Westport argues in essence that the judge did not abuse his discretion in refusing to reconsider its earlier reasonableness ruling and striking the new settlement materials. But Westport fundamentally misunderstands two things: that reasonableness hearings are equitable proceedings where getting a decision right is at a premium, and that the differences between the two settlement agreements were significant and material. Plus the new supporting materials provided to the court were provided because of the trial court's own admission of his lack of familiarity with civil cases.

In an attempt to demonstrate that Judge Sperline did not abuse his discretion, Westport dives deep into the details of Stevensen's representation of Hidalgo, in an attempt to show he did a perfectly lovely job representing Hidalgo. But the excellent lawyering done by Westport's lawyers now has no bearing on whether the settlement was reasonable back then, which is determined at the time of the settlement based on the information and resources the parties had at that time. Stevensen was in a very poor position with no experts and few resources, facing an opponent who was well-financed and well-prepared with multiple experts.

The trial judge abused his discretion in refusing to consider the second, final settlement and materials supporting it and in setting the reasonableness amount of the first, voided settlement at \$688,875.

**A. Westport Is Simply Wrong To Argue That The Second, Final Settlement Agreement Was Impermissibly Entered Into**

Westport contends that Hidalgo and Stevensen do not have the right to enter into the second, final settlement agreement. BR 46. It claims there is no case that allows a second, different settlement to happen, so therefore Stevensen and Hidalgo were not

permitted to do so. Hidalgo and Stevensen's only option was to agree to the amount the judge found reasonable.

Westport's theory finds no support in RCW 4.22.060 or in the case law it claims supports its proposition. While Westport is correct to say that no Washington appellate court has explicitly approved this scenario, it is also true there is no state appellate court decision disapproving of what occurred here. This appears to be an issue of first impression, yet rather than admitting it, Westport stretches the actual meaning of the cases it cited to claim what Hidalgo and Stevensen did was inappropriate.

In *Meadow Valley Owner's Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 814 156 P.3d 240 (2007), a condominium association, developer and general contractor were involved in litigation over construction defects involving water intrusion. St. Paul agreed to defend under a reservation of rights. *Id.* After three failed mediations, the parties agreed to settle separately with a covenant judgment in the amount of \$7.2M and an assignment of rights. *Id.* at 815. The plaintiff petitioned for reasonableness of the settlement. *Id.*

The trial court found the settlement was not reasonable, and found a lower amount, \$6.4M, was the reasonable value. *Id.* at 815-

16. The parties then entered into a new settlement agreement using the \$6.4M figure. *Id.* at 816. The insurer appealed arguing that by finding \$6.4M was the appropriate amount, the trial court altered the settlement agreement, which is prohibited by RCW 4.22.060(3). *Id.* Because the court found the settlement unreasonable, the plaintiff's only option was to proceed to trial and prove damages in the bad faith action. *Id.* at 821.

The Court of Appeals disagreed and held that where the trial court determines the settlement amount was unreasonable and finds a different amount reasonable, as RCW 4.22.060(2) requires it to do, the parties can then enter into a new settlement agreement for the new amount found reasonable. *Id.* at 822. The court agreed that the trial court was prohibited from changing any of the terms of the settlement agreement, including the amount, so as "to prohibit the court from interfering with the settlement process." *Id.* at 819-20. But nothing kept the parties from negotiating a new settlement agreement using the amount found reasonable by the court.

The Court of Appeals said nothing about the parties being prohibited from entering into a new settlement agreement with different terms, as the court's holding makes clear:

We conclude that after a court determines a settlement amount is unreasonable, neither RCW 4.22.060 nor caselaw precludes the parties from then agreeing to entry of a new stipulated judgment in the amount the court determined to be reasonable.

*Id.* The issue was simply not before the court, and the policy underlying RCW 4.22.060 of prohibiting the courts from interfering with the settlement process actually supports Hidalgo and Stevensen's second and final settlement agreement.

Similarly, the *Water's Edge Homeowners Assoc. v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009) does not prohibit a second settlement with different terms. In that case, a condominium owners' association brought claims against the property's former owners, developers, contractors and managers. *Id.* at 578. After some of the insurers failed to settle the case and issued reservation of rights, the parties entered into a settlement, where the defendants paid \$215,000 up front, but could recover that amount if the later bad faith suit was successful, and stipulated to an \$8.75M judgment against them in exchange for an assignment of rights against the insurers. *Id.* at 581-82. The defendants were also allowed to recover a portion of the damages from the later suit against the insurer, if successful. The trial court

found the settlement not reasonable, finding that something closer to \$400,000 would have been reasonable. *Id.* at 582.

The trial court was mainly concerned with collusion, citing (among other things) the “joint venture type relationship” between the parties because the plaintiff agreed to “kick back” some of the proceeds from any recovery in the later suit and reimburse the defendants their up-front payment of \$215,000. *Id.* at 595. The Court of Appeals held the trial court did not err in finding evidence of collusion in the agreement and relationship between the parties. *Id.* at 596.

Despite the ruling the settlement was not reasonable, the parties presented a judgment to the court in the amount of \$8.75M. *Id.* at 601. The insurer objected, arguing the judgment conflicted with the court’s ruling on reasonableness. *Id.* Rather than revise the settlement agreement to reflect the amount the judge found was reasonable, the plaintiff then submitted a revised proposed judgment with the judgment amount blank, for the judge to fill in as he saw fit. *Id.* at 602. The trial judge refused to sign it and dismissed the matter. *Id.* Citing to *Meadow Valley*, the Court of Appeals held that this approach violated RCW 4.22.060(3) because

a trial court cannot adjust the amount paid under the agreement. *Id.* at 602.

Like in *Meadow Valley*, the issue of whether a second, final settlement was appropriate was never addressed. Nor could it have been, as that issue was not before the court.

If, as Westport argues, the parties are not allowed to enter into a different settlement, that would in effect do what RCW 4.22.060(3) says a trial court cannot do: adjust the amount of the settlement agreement. If what a court rules as the reasonable amount is the only amount the parties are allowed to enter judgment for, then a trial judge is absolutely setting the terms of the settlement agreement in violation of RCW 4.22.060(3).

**B. Westport Fails To Recognize That The Language of RCW 4.22.060, The Equitable Nature of Reasonableness Hearings, And Important Differences In The Two Settlement Agreements All Take The Second, Final Settlement Outside The Realm of Reconsideration**

Westport argues that no new reasonableness hearing is required because the trial court does not have to reconsider his earlier decision on reasonableness. BR 43-46. This argument ignores the plain language of RCW 4.22.060, the equitable nature of reasonableness hearings and the important differences in the two settlement agreements.

RCW 4.22.060(1) requires that a hearing be held on the issue of reasonableness. RCW 4.22.060(3) prohibits the court from changing the terms of the settlement agreement. As *Meadow Valley* recognized, the intent of this statute was “to prohibit the court from interfering with the settlement process.” 137 Wn. App. at 820. By arguing that Hidalgo and Stevensen are stuck with the figure Judge Sperline found as reasonable for the first, void settlement regardless of the merits of the second settlement, Westport is encouraging the court to interfere with the settlement process. As courts have noted over and over again, “Washington law strongly favors the public policy of settlement over litigation.” *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007).

Westport’s argument that Hidalgo is stuck with the reasonable amount from the first settlement is especially troubling given that the second, final settlement contains different terms to address criticisms raised by both Westport and the trial court. Plaintiff also provided significantly more supporting material to address the judge’s inexperience with civil litigation.

Westport does not dispute that by its own terms, the first settlement agreement was void when the judge ruled the amount

was unreasonable. Nor does it dispute that the second, final settlement agreement contained different terms, though it acts as if those different terms are of no consequence. The opposite is true.

One of the biggest changes to the second, final settlement was to take out the clause allowing Stevensen to retain a portion of his emotional damages. It was this same type of arrangement that the Court of Appeals criticized in *Water's Edge*, calling it a "joint venture" and holding that it was properly considered evidence of collusion. 152 Wn. App. at 595. Both Westport and Judge Sperline criticized the clause. At the reasonableness hearing, Westport's lawyer argued:

And then again, most egregiously is the fact that Mr. Stevensen not only bought his peace with this settlement agreement, but he also potentially is looking to profit down the road, which is unheard of as far as I know of.

And again, I know of no case law that says you cannot only do that but hey, you can set yourself up for a nice pay day at the end of the road too. As the *Water's Edge* court, I think, correctly identified, when the two parties join in pursuit of a common objective, which is to get money from the insurance company, there's no longer adversity there. That's a joint venture that they've now entered into.

RP (2-2-09) at 62. Westport's attorney used the same language as the *Water's Edge* Court, "joint venture," which Judge Sperline then used later in his ruling. *Id.* at 87. Because *Water's Edge* disapproved of these "joint ventures," and because Westport and

Judge Sperline used the same term to describe the arrangement between Hidalgo and Stevensen, that clause was dropped in the second, final settlement. Without findings from the trial court, however, it is hard to tell what, if any, Judge Sperline's use of the term "joint venture" meant. Was he concerned about collusion? Did he reduce the settlement amount because of that concern?

In addition, the parties eliminated the contingent nature of the agreement, making the second settlement final, regardless of whether the trial court found it reasonable. Judge Sperline appeared uncomfortable with the idea of contingent covenant settlements:

The statute on a court's review of the reasonableness of settlement is – or at least was, the last time I looked at it – silent, in regard to whether or not the Court has an obligation to consider a settlement, which is contingent upon a finding of reasonableness. That is, contingent upon a future event.

My view has always been that it is inappropriate for the Court to enter a reasonableness determination, with that kind of settlement, for a couple of reasons.

One of them is that, it's really asking the Court to make an advisory ruling. Almost as if the question were: If we were to settle on this amount, would you find that reasonable?

And, secondly, because it has a potential to – of giving rise to this sort of repetitive submission of a series of settlements.

CP 6161. So Hidalgo and Stevensen addressed the trial court's concern by taking out the contingent nature of the agreement. They understood the court's concern about repetitive submissions and ensured that would not happen in this case. The second settlement agreement was final, regardless of the trial court's decision.

Westport's arguments that Hidalgo is stuck with the first oral reasonableness determination also clashes with the equitable nature of the reasonableness hearings. Reasonableness hearings for covenant judgments under RCW 4.22.060 are equitable proceedings. *Bird v. Best Plumbing Group, LLC*, No. 86109-9, 2012 WL 5269734, at \*5 (Wash. Oct. 25, 2012). The purpose of equity is to ensure that complete justice is done. *Equal Emp't Opportunity Comm'n v. Gen. Tel. Co. of Northwest, Inc.*, 599 F.2d 322, 334 (9th Cir. 1979), *affirmed* 100 S. Ct. 1698, 446 US 318, 64 L. Ed.2d 319 (1979). Accordingly, "equity has been the extraordinary justice administered to enlarge, supplant, or override strict law that has been too narrow and rigid in scope." Thomas O. Main, Traditional Equity and Contemporary Procedure, 78 Wash. L. Rev. 429 (2003).

The purpose of equitable reasonableness hearings should be to reach the right result. Westport's insistence that plaintiff is stuck with the judge's first oral ruling because it did not meet the

strict requirements of CR 59 is inconsistent with the nature of equitable proceedings.

Upon hearing about the trial court's lack of complex civil litigation experience, plaintiff's counsel recognized they had done the trial court a disservice and admitted as much. After addressing some of the concerns of the judge (and the criticisms of Westport) with the second, final settlement, plaintiff supplemented the record – which was still open because no final order had been entered – with significantly more support for plaintiff's liability chances.

Rather than consider the new materials on their own merits and try to reach the right result, Judge Sperline struck the materials, holding the plaintiff was bound by his earlier ruling. This elevates form over substance, ignoring the purpose of equitable proceedings.

**C. Westport Glosses Over The Fact That Reasonableness Is Supposed To Be Judged At The Time Of The Settlement And That Judge Sperline Failed To Address Key Glover Factors**

Westport spends a lot of time and pages covering just exactly how the excellent new lawyers brought in to defend Westport would have defended Stevensen in the underlying legal malpractice claim. BR 3-17, 30-39. But those arguments miss the

point and are irrelevant. The settlement agreement is supposed to be judged at the time the agreement is made based on the information the parties had back then and the arguments made at that time. *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 541, 901 P.2d 297 (1995); *Bird*, 2012 WL 5269734, at \*9. It would be an abuse of discretion to look beyond the information the parties had at the time of settlement or to consider arguments not made by the parties back at that time. The idea is to evaluate the risk both parties faced back at the time of the settlement. If the trial court considered arguments and evidence not advanced by the parties prior to settlement that would be improper. But because the trial judge entered no findings, we do not have a clear idea what information the judge was swayed by.

Westport argues that it is unfairly punished by the rule that requires settlement to be judged at the time they were made. BR 42. According to it, Stevensen allegedly sat around and did nothing on his case, and then was rewarded for his alleged failure to properly defend himself. However, Westport's complaint is especially hypocritical given that it was Westport's own actions that put Stevensen in this position to begin with. Westport withdrew the defense of Stevensen without settling Hidalgo's claim. For Westport

to now complain that Stevensen did not defend himself in the way Westport's own lawyers would have after withdrawing the defense is particularly troubling.

But Westport's claim that Stevensen did nothing before settling with Hidalgo is also factually inaccurate. Prior to settling, Hidalgo moved for summary judgment on several issues. He provided significant briefing to the court supporting his motions. CP 19-20, 21-37, 179-195, 370-76. Based on that briefing, Stevensen succeeded in convincing the judge to dismiss two of Hidalgo's claims: negligent infliction of emotional distress and the Consumer Protection Act violations. CP 514. It is worth noting that Stevensen successfully winning dismissal on two of Hidalgo's claims is more than the lawyers Westport hired to defend him managed to do.

Westport's attempts to argue now how it would have defended the case simply highlight just how important the duty to defend and settle is to individuals, most of whom do not have the resources to marshal an excellent defense, like the belated defense of Stevensen Westport puts forth now. *See Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010).

If Westport wanted a say in the defense of the legal malpractice case against Stevensen, it should have continued with the defense or settled the case, as it had several opportunities to do prior to the exhaustion of the policy limits. Instead, Westport withdrew the defense, leaving Stevensen in a precarious position, exposed to a significant judgment and unable to pay for a proper defense on his prosecutor's salary. In spite of its actions, Westport now has the audacity to criticize Stevensen for doing what he could to protect himself when he could not afford to hire the high-powered lawyers the insurer was able to hire on its behalf.

Westport also argues that trial court judges are not required to make findings about all of the *Glover* facts. BR 39-42. But judges are required to deal with the *Glover* factors that are important to the case. See *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 513 (noting that all of the important factors that influence how much a case is worth must be addressed). Without a clear articulation about the important *Glover* factors and why they influenced the trial court's decision, a reviewing court is unable to do its job. It was unclear from Judge Sperline's oral ruling whether he truly looked at the position of the parties at the time of the settlement.

As part of *Glover* analysis, a trial court is supposed to take into account the posture and preparedness of the parties at the time of the settlement. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002). If he had, the disparity in the resources and preparation of the parties would have been obvious. Stevensen had no experts. He had not done, nor could he afford to do much investigation, unlike Hidalgo's lawyers. Nor could he have done the kind of investigation into the case that Westport's lawyers did while opposing the petition finding settlement reasonable.

Importantly, it was improper for Judge Sperline to put any stock into Westport's argument that most of the evidence had been found to be "newly discovered" by Judge Friel at the reference hearing, and thus could not be evidence a reasonably prudent lawyer would have found. Judge Sperline stated that he found "the most significant" problem in Hidalgo's liability case "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." RP (2/2/09) at 90.

His reliance on this argument is fatal because it was never advanced by Stevensen up to and at the time of the settlement. In fact, the argument is a red herring. Because some smart lawyers

came in after the settlement to defend the insurer and thought up new legal defenses is irrelevant because they were not advanced at the time of the settlement. Thus, it was an abuse of discretion for the trial court to rely on them.

In addition, without clear findings we have no real idea if the criminal trial detail emphasized in the facts by Westport both here and below were relied on by the trial judge or how they affected his civil liability assessment. The fact recitation is also one sided, in part by omitting what Stevensen admitted he did not know to address.

For example, Stevensen never questioned Detective Perez or any other officers about Perez's control or coercive techniques with D.E. and M.E. See CP 2161-2219. Nor did he address these improper and coercive tactics with other witnesses to help explain why children would make up these accusations about a large number of people. See *e.g.*, CP 2212-14. The prosecution's opening statement relied on Dr. Shipman's completely unsound conclusions that there was "proof" in the form of slides demonstrating abuse in 1994, the only year Hidalgo could have been involved. CP 2122.

Yet Stevensen made no attempt to challenge that “proof” of 1994 abuse in opening or cross of Dr. Shipman, despite well-known contradictory medical criteria and available experts. See CP 2410-13. In fact, all Stevensen did in the Shipman cross was acquiesce, so the doctor read his whole report to the jury which had not all come out in direct. *Id.* Stevensen then had him say M.E. mentioned only her father as her abuser. CP 2413.

The various supposedly corroborative medical findings brought out in direct were unrebutted. See CP 2410-13. Stevensen accepted that someone abused one of the sisters in 1994, which was an important admission and helped the prosecution. Had Stevensen attacked the alleged medical evidence to create substantial doubt of any abuse in 1994 – the only time Hidalgo was in the area – would have been powerful for the defense and would have been more powerful when combined with the coercive reasons the children would make up such horrible accusations.

All of the evidence was generally known in the community at the time of Hidalgo’s trial. CP 1023-84, 1170-79, 1186-87, 1189-91, 4754-58, 5337-44, 5827-35. In tandem they were the strongest liability argument in the malpractice case against Stevensen.

Despite plaintiff's theory of liability against Stevensen that included several experts, somehow Judge Sperline did not seem to recognize that Hidalgo's argument provided proof there was no abuse and provided the exact explanation for why the girls would make up such horrible accusations – the coercive and improper questioning of Detective Perez and others. In his ruling he suggested he found it “particularly persuasive” that so many others had been convicted at the time Hidalgo went to trial. RP (2/2/09) at 90. He went on to say:

in my experience when children make allegations of these kind, jurors look for some reason other than the truth of the allegations as to why they would such an allegation so they look carefully at, well, the parties were in a divorce setting. Mom was trying to get custody. Or they look at, well, somebody coached them into testifying this way or some other reason.

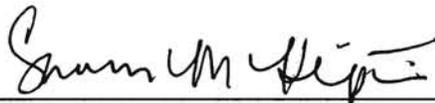
*Id.* at 91. Judge Sperline seemed to have completely misunderstood the evidence plaintiff presented that included the exact alternate explanations that juries look for.

## **VI. CONCLUSION**

Plaintiff respectfully requests that this Court affirm the trial court's inclusion of 12 percent pre- and post-judgment interest because Westport failed to object until almost three years after the reasonableness hearing. This Court should also hold that Judge

Sperline abused his discretion when he refused to perform a reasonableness hearing with respect to the second, final settlement with different terms and better supporting evidence and materials. The trial court also abused its discretion when it did not enter findings addressing the pertinent *Glover* factors, particularly the specific posture and preparedness of the parties at the time of the settlement. It is unclear if the trial court considered evidence and arguments thought up by Westport after the fact. Judge Sperline also abused his discretion in for finding \$688,875 was the reasonable risk faced by Stevensen at the time of the settlement.

RESPECTFULLY SUBMITTED this 9th day of November, 2012.



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**CERTIFICATE OF SERVICE**

The undersigned states that:

I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. That on the date below, I served copies of the foregoing via US mail, postage prepaid, to the following:

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DATED this 9th day of November, 2012, at Bellevue, Washington.



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Kendra Short