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

MANUEL HIDALGO f/k/a MANUEL HIDALGO RODRIGUEZ,

Appellant/Cross-Respondent,

v.

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

Defendants,

and

WESTPORT INSURANCE CORPORATION,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Westport submits this reply brief in further support of its cross-appeal. For the reasons explained below, Hidalgo has failed to rebut Westport's showing that the trial court erred by including interest in the judgment. Hidalgo was not entitled to add interest to the amount the trial court determined would be reasonable, regardless of whether Westport specifically addressed the interest component of the settlement at the reasonableness hearing. Alternatively, Hidalgo has failed to rebut Westport's showing that, even if he was entitled to add interest, the trial court should have computed interest at the statutory rate for tort claims, rather than the catch-all rate.

II. ARGUMENT

A. The Standard of Review is De Novo.

"Issues of statutory interpretation and claimed errors of law are reviewed de novo." *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 145, 173 P.3d 977 (2007). In *Jackson*, the court reviewed de novo the trial court's inclusion of interest in a judgment entered pursuant to a settlement agreement following a reasonableness determination. *Id.* Likewise, in this case, this Court should review de novo the trial court's decision to include interest in the instant judgment.

Nevertheless, even if the Court reviews the trial court's decision for an abuse of discretion, Westport has established an abuse of discretion in this case. "[A]n incorrect legal analysis or other error of law can constitute [an] abuse of discretion." *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). An abuse of discretion also occurs "when a decision rests on untenable grounds or is manifestly unreasonable." *Green v. City of Wenatchee*, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009).

Here, the trial court misconstrued the relevant statutes and case law when it included interest in the judgment. Accordingly, this Court should reverse the trial court's decision to include interest in the judgment, regardless of the applicable standard of review.

B. The Trial Court Erred By Including Interest in the Judgment Because Hidalgo Was Not Entitled to Add Interest to the Amount the Trial Court Determined Would Be Reasonable.

As Westport explained in its opening brief, the trial court should not have included interest in the judgment because, by doing so, the trial court improperly entered a judgment that exceeded the amount it previously determined would be reasonable. In response, Hidalgo argues that the trial court properly included interest in the judgment because Westport did not specifically address the inclusion of interest at the reasonableness hearing. Hence, Hidalgo contends that Westport could not object to the inclusion of interest in the judgment he tendered to the Court.

In support, Hidalgo cites *Jackson*, but *Jackson* does not support his argument. To the contrary, it supports Westport's argument.

Jackson stands for the proposition that, when a court determines the reasonableness of the "amount to be paid" under a settlement agreement, such amount includes both the principal amount of the settlement and any interest to be paid on the outstanding balance. *Jackson*, 142 Wn. App. at 146. That is because "[b]oth principal and interest are components of the settlement." *Id.* As the court explained, "[a] plaintiff may be willing to accept a smaller principal amount if the interest rate on the outstanding balance is higher, and vice versa." *Id.*

Accordingly, in *Jackson*, the trial court's finding that the settlement was reasonable necessarily included the interest component of the settlement, notwithstanding the fact that neither the parties nor the court specifically addressed it at the reasonableness hearing. *Id.* at 147. Once the trial court determined that the settlement was reasonable, the insurer could not object to the inclusion of interest in a judgment based on that settlement. *Id.*

The instant case presents the mirror image of *Jackson*. Here, as in *Jackson*, Hidalgo presented a settlement that included a principal amount and interest. Unlike *Jackson*, however, the trial court determined that the settlement was unreasonable. Applying the holding in *Jackson*, the trial

court's determination that the settlement was unreasonable necessarily included both the principal and interest components of the settlement, even though the interest component was not specifically addressed at the reasonableness hearing. Again, under *Jackson*, "[b]oth principal and interest are components of the settlement" that is either approved or disapproved by the court.¹ *Id.* at 146.

Further, after disapproving the settlement, the trial court determined that the reasonable "amount to be paid" to settle Hidalgo's claim was \$688,875. See *Meadow Valley Owner's Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 819-20, 156 P.3d 240 (2007) ("If the court determines the settlement is unreasonable, RCW 4.22.060(2) requires the court to set a reasonable amount."). Again, applying *Jackson*, such amount was necessarily inclusive of interest, if any, to be paid on the principal amount. Here, the trial court did not include interest in the amount it determined to be the reasonable settlement amount. Rather, after

¹ Hidalgo, of course, faults Westport for failing to specifically address the settlement's interest component at the reasonableness hearing. But he, too, could have raised it if he wanted to ensure that the interest component was deemed reasonable, even if the principal amount was found unreasonable. Hidalgo, however, never mentioned the interest component during the hearing. Indeed, in the first sentence of his reasonableness petition, he requested only that "the Court find that \$3,800,000 is a reasonable judgment amount" for his claim, without requesting any additional finding that interest on that amount was also reasonable. CP 555. Thus, Hidalgo was apparently content to keep the interest component out of the trial court's purview, banking on the assumption that the trial court would find the settlement reasonable, thereby precluding Westport, under *Jackson*, from later challenging the inclusion of interest in the judgment. But, the trial court found that the settlement was unreasonable and, under *Jackson*, the interest component necessarily fell along with it.

analyzing the probability of success and the potential range of damages, should Hidalgo press his claim to trial, the trial court determined that the reasonable amount to settle Hidalgo's claim was \$688,875. CP 6017-18. Accordingly, if Hidalgo and Stevensen wanted to enter a new settlement for an amount that would bind Westport in a later coverage action, they were free to stipulate to the entry of a judgment in the amount the court determined would be reasonable. *See Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 602, 216 P.3d 1110 (2009). They could not, however, enter a judgment binding Westport that exceeded the amount the court determined would be reasonable by adding interest to that amount.² *Id.*

Hidalgo's position incorrectly presumes that, because the trial court did not specifically address the interest component of his settlement at the reasonableness hearing, that component was deemed reasonable, notwithstanding the fact that the trial court determined that the settlement itself was unreasonable. That position, however, cannot be reconciled with *Jackson*, which, as discussed above, holds that both the principal and

² The inclusion of interest cannot be justified on the grounds that Hidalgo must successfully sue Westport for bad faith before he can recover the judgment amount. Westport can only be responsible to pay the reasonable settlement value of Hidalgo's claim, and Hidalgo is not entitled to recover a premium on that amount because he has chosen to pursue recovery exclusively from Westport. *See* Allan D. Windt, 2 Insurance Claims & Disputes 5th § 6:29 (Westlaw, database updated March 2012) (explaining that an "insurer should never have to pay...a premium" because the plaintiff has chosen to settle and pursue recovery from the defendant's insurer).

interest components of the settlement are included in the court's reasonableness determination, regardless of whether the parties or the court specifically address the interest component in the context of the reasonableness hearing. *Jackson*, 142 Wn. App. at 146-47. Hidalgo's position is also inconsistent with the requirement that the plaintiff bear the burden to establish the reasonableness of the settlement. *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339 (1991). Here, Hidalgo never established that either the settlement or the inclusion of interest in the settlement's principal amount was reasonable.

Hidalgo also incorrectly accuses Westport of ignoring RCW 4.22.060(3), which prohibits the trial court from changing the terms of a settlement agreement. Westport does not contend that the trial court should have changed the terms of the agreement. If, notwithstanding the court's determination that \$688,875 was the reasonable "amount to be paid" to settle Hidalgo's claim, Hidalgo and Stevensen chose to settle Hidalgo's claim for more than that amount (by, for example, adding interest to it), they were free to do so. But they were not entitled to a judgment binding Westport to any amount that exceeded the amount the trial court previously determined to be reasonable. Rather, to the extent they sought to enter a judgment that would bind Westport in future

litigation, they were constrained to enter a judgment in the amount the court previously determined would be reasonable – no more and no less.

Accordingly, the trial court erred when it entered a judgment that included not only the amount it previously determined to be reasonable (\$688,875), but also interest on that amount.

C. Even If Hidalgo Was Entitled to Add Interest, the Trial Court Should Have Computed Interest at the Statutory Rate for Tort Claims, Rather than the Catch-All Rate.

As Westport also explained in its opening brief, even if the trial court properly included interest in the judgment, it erred when it computed interest at the catch-all rate under RCW 4.56.110(4), rather than the applicable tort rate under RCW 4.56.110(3)(b), because the judgment was founded upon Stevensen's alleged tortious conduct.

In response, Hidalgo argues that the trial court properly computed interest at the catch-all rate under RCW 4.56.110(4) because the judgment was based on a contract – namely, the settlement agreement – and none of the other categories of interest provided in the statute applies. Again, Hidalgo relies upon *Jackson* to support his argument. *Jackson* is, however, distinguishable.

In *Jackson*, the trial court determined that a written settlement agreement calling for the inclusion of 12% interest was reasonable. *Jackson*, 142 Wn. App. at 144. Accordingly, in entering a judgment based

on the agreement, the court was confronted with the issue of whether to apply RCW 4.56.110(1), which states that judgments founded on written contracts shall bear interest at the rate specified in the contract, or RCW 4.56.110(3), which sets the interest rate for judgments founded on tortious conduct. The court held that, as between those two categories, the former applied because (1) the parties agreed on a specific rate of interest; (2) RCW 4.56.110(1) “manifests a legislative intent to allow contracting parties the freedom to specify a different interest rate”; and (3) the trial court approved the settlement agreement as reasonable. *Id.* at 146.

In this case, by contrast, Hidalgo and Stevensen did not include any specific rate of interest in their settlement agreement, nor did the trial court determine that their settlement agreement was reasonable. Consequently, neither RCW 4.56.110(1) nor its legislative intent to allow contracting parties the freedom to specify a different interest rate applies. Rather, the issue in this case is whether to apply the rate set forth in RCW 4.56.110(3)(b) for judgments founded upon tortious conduct, or the catch-all rate under RCW 4.56.110(4) for judgments not otherwise described in RCW 4.56.110(1)-(3).

As between these two provisions, RCW 4.56.110(3) most accurately reflects the basis for the judgment. Hidalgo claimed that Stevensen was negligent, seeking damages on a tort theory of recovery.

CP 3625-28. The judgment was entered against Stevensen to resolve Hidalgo's tort claim. Accordingly, the judgment was "founded on the tortious conduct" of Stevensen, as required to trigger the interest rate under RCW 4.56.110(3).

Nevertheless, Hidalgo argues that *Jackson* is controlling because, in that case, the court opined that the judgment based upon the parties' settlement agreement was founded upon a contract. *Jackson*, 142 Wn. App. at 146. But, in relying on *Jackson*, Hidalgo ignores the two facts that distinguish it from the instant case. Specifically, in *Jackson*, (1) the parties agreed upon a specific interest rate for the judgment; and (2) the trial court determined that the settlement, including the parties' agreed-upon interest rate, was reasonable. The court's decision to apply the interest rate for contracts specifying a particular interest rate cannot be divorced from those two facts, which are not present in this case. Here, as noted above, Hidalgo and Stevensen did not agree upon any specific interest rate, and neither of their settlements was found reasonable by the trial court. Hence, *Jackson* is inapposite with regard to the court's selection of the appropriate interest rate.

Finally, as Westport pointed out in its opening brief, to the extent the Court nevertheless finds *Jackson* apposite on this issue, the Court should overrule it. Contrary to the *Jackson* court's holding, the liability of

a defendant who has been sued for tortious conduct remains “founded on...tortious conduct,” RCW 4.56.110(3)(b), irrespective of whether the plaintiff’s suit is resolved by a settlement or a trial on the merits. In other words, the manner in which the suit is resolved does not change the nature of the claim on which the defendant’s liability is based. Indeed, but for the defendant’s tortious conduct, the plaintiff would have no basis upon which to sue the defendant in the first place. Thus, any judgment entered against the defendant to resolve the plaintiff’s suit is “founded on...tortious conduct.” RCW 4.56.110(3)(b).

In response to this point, Hidalgo argues that Westport is “barking up the wrong tree” because “Westport’s issue is with the interest on judgment statute, not *Jackson*.” But that is not true. Westport takes no issue with the text of the interest statute, which unambiguously states that the tort rate of interest applies to judgments “founded on...tortious conduct.” RCW 4.56.110(3)(b). Rather, Westport takes issue with the *Jackson* court’s interpretation of the statute, insofar as this Court construes *Jackson* to require application of the catch-all rate in RCW 4.56.110(4), rather than the tort rate in RCW 4.56.110(3), to the instant judgment. This Court has the authority to overrule a prior, incorrect interpretation of a statute. *Jepson v. Dep’t of Labor & Indus.*, 89 Wn.2d 394, 407, 572 P.2d 10 (1977) (“The doctrine of stare decisis is not applicable to statutory

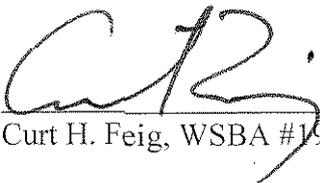
construction...when it is decided that earlier interpretations are wanting, faulty, or even wrong.”). Accordingly, to the extent this Court views *Jackson* as controlling the outcome of this case with respect to the rate of interest to be applied to the judgment, the Court should overrule *Jackson* as wrongly decided.

III. CONCLUSION

For the above reasons, this Court should reverse the trial court insofar as the trial court included interest in the judgment. 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 20th day of December, 2012.

NICOLL BLACK & FEIG PLLC



Curt H. Feig, WSBA #19890

-and-

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CERTIFICATE OF SERVICE

I certify that on the 20th day of December, 2012, I caused a true and correct copy of the Reply Brief of Respondent/Cross-Appellant to be served on the following in the manner indicated below:

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