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No. 65602-3

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

THERESA DUNN, Individually and as guardian of A.D., a minor child, and
KENDALL DUNN
Plaintiffs/Respondents

v.

CATHERINE ANDERSON
Defendant/Respondent

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
Intervenor/Appellant,

FILED
COURT OF APPEALS, DIVISION 1
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RESPONDENTS' BRIEF

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I. SUMMARY OF ARGUMENT

The trial court below found the settlement in question here reasonable. As to this decision, Intervenor Mutual of Enumclaw (MOE) concedes that this Court reviews solely for abuse of discretion. Nonetheless, MOE makes its argument solely on the basis of its own view of the evidence, and then only on the evidence it believes supports its cause. Such an argument is practically worthless in assisting this Court to determine whether based on all of the evidence before it the trial court's decision can be supported.

The reasonableness of the settlement by covenant judgment must be viewed against a backdrop of the position Ms. Anderson was in due to the conduct of Intervenor Mutual of Enumclaw (MOE). MOE at first defended Ms. Anderson under a reservation of rights. However, during the pendency of this litigation MOE filed suit against Ms. Anderson and the Dunns seeking a declaration that it had no duty either to defend or indemnify Ms. Anderson under the homeowners and umbrella policies she carried. MOE moved for summary judgment in these claims and Ms. Anderson through private coverage counsel cross-moved for

summary judgment on her right to a defense. MOE's motions were denied, and Ms. Anderson's motion for summary judgment on a right to defense was granted.

However, the conduct of that defense was completely at odds with the claims made in this appeal. While MOE asserts here that it has defenses that are surely victorious, and in the case of foreseeability certain as a matter of law, the MOE appointed lawyer made no motions for summary judgment, either before, or even after MOE lost its summary judgment motions in the coverage case. The liability issues were thus subject to the uncertainties of a jury trial.

Likewise, MOE here claims that Plaintiffs presented no substantial evidence of significant damages (while completely ignoring the evidence presented by plaintiffs.) However, the MOE lawyer neither took the deposition of either of Plaintiff's damages experts, nor requested any independent examinations under CR 35. Thus at the time of the settlement, Ms. Anderson faced the prospect of being unable to effectively counter plaintiff's allegations of severe injuries.

MOE's appointed lawyer believed that Ms. Anderson faced a substantial chance of an adverse verdict, but MOE refused to

make serious efforts to resolve the case. MOE refused either to waive the limit of her policy, maintaining its reservation of rights or to withdraw its reservation of rights. Instead, it chose to focus its efforts on the declaratory judgment matter, seeking to deprive Ms. Anderson of coverage. Her motion for Summary Judgment of coverage was denied, leaving her with the possibility of substantial personal liability.¹

Under the circumstances the settlement was entirely reasonable, especially in light of Judge Castelberry's reduction of the amount he found to be reasonable. There is simply no reason to reverse his judgment.

II. STATEMENT OF FACTS

A. Underlying Tort Claim

At the time of the events giving rise to this lawsuit, Donald W. Anderson was a co-owner of Midway Plywood and Kendall Dunn (hereafter "K.C.") was a regular customer of Midway. K.C. is a carpenter who regularly bought supplies from Midway. (Deposition of Kendall Dunn [hereafter "K.C. Dunn Dep.'], CP 576-8.

¹ In fact, MOE ultimately obtained a judgment declaring no coverage, which is the subject of a separate appeal joined to this one by order of this Court's commissioner. CA # 66337-2-I.

On a handful of occasions, Donald and his wife, Defendant, Catherine Anderson, socialized with the Dunns. The first time, K.C. and Terry attended a campfire at the Anderson's house. CP 578-81. Another time, for example, Terry and K.C. attended a Mariners game as guests of Donald and his business partner. Midway not only provided tickets to the game, but also a bus to transport its guests to and from Midway to the game. Both Catherine and Donald attended this event. (K.C. Dunn Dep., CP 581.) On another occasion, Terry and Kendall invited the Andersons to their home for a small gathering in celebration of the 4th of July. A couple of times, Donald called K.C. for permission to come over and use the swimming pool with his son, Wade. (K.C. Dunn Dep., CP 578-579.)

At the time of the sexual assault of A.D. that is the subject matter of this lawsuit, in addition to their residence in Snohomish County, Catherine Anderson and her then husband, Donald, owned property, including a cabin, in Plain, Washington (hereafter "cabin"). K.C. is a form and specialty carpenter and assisted Donald with a 3-4 week remodel of the cabin. (K.C. Dunn Dep., CP 582-586). Donald paid approximately \$1,000 per week to K.C.

for his work on the remodel and Donald provided the supplies.
(K.C. Dunn Dep., CP 584).

During the remodel or soon thereafter, Donald told K.C. that he was free to use the cabin. (K.C. Dunn Dep., CP 70-76). K.C. assumed that Donald offered the cabin to him as compensation for giving them a reduced rate on the carpentry work he performed. *Id.* On 6 or 7 occasions, the Dunns used the Anderson's cabin. K.C. and his family typically used the cabin in July and in February, during the kids' school breaks, which Terry took off from her job at Amtrak. Usually, the Dunns allowed A.D. to bring a friend on their visits to the cabin. During most visits, the Dunns had the cabin to themselves, but on one or two occasions Don and/or Catherine were present with their son, Wade. (K.C. Dunn Dep., CP 594.)

K.C. and Terry planned to spend time at the Chelan cabin with A.D. and her friend, D.J. during the week of July 23, 2006. (K.C. Dunn Dep., CP 595-596.) K.C. received permission from Don to use the cabin during this week. Believing that they would have the cabin to themselves, Plaintiffs were surprised to find Catherine Anderson had not yet left the cabin by the time they arrived on July 23 in the afternoon. Catherine told the Dunns that

since the weather was nice, she and her friend planned to stay another night. (Deposition of Terry Dunn [herein after "T. Dunn Dep.'], CP 626-627; Declaration of Catherine Anderson [herein after C. Anderson Decl.], CP 665).

Around 8:30 or 9:30 p.m. on July 23, Donald Anderson called the Dunns and said that he and his son, Wade, had broken down at the pass. (T. Dunn Dep., CP 627; C. Anderson Decl., CP 665). Even though the Dunns had no knowledge that Don planned to be in Eastern Washington, K.C. agreed to drive to the pass to tow Donald and Wade back to the cabin. (K.C. Dunn Dep., CP 597-598). Because A.D. had a fever, she and Terry were asleep in one of the bedrooms by the time K.C. returned with Donald and Wade. (T. Dunn Dep., CP 627-628). Cathy and Donald slept in another bedroom, while K.C. slept in the "big bed" in the bunk room. Wade, D.J., and A.D. slept in bunk beds in the bunk room. (T. Dunn Dep., CP 631-632).

Around noon on July 24, Catherine Anderson left the Cabin to return to Snohomish County. (T. Dunn Dep., CP 628.) Before she left, she asked that Terry and K.C. allow Donald and Wade to remain at the cabin for the duration of the Dunn's stay. (Terry Dunn Dep., CP 628-620). When Catherine Anderson made this request,

she knew that A.D. and D.J., 11 years old, were staying at the house and that Donald had a substantial history of sexually abusing minors. She knew or should have known that Donald's presence at the cabin put A.D. and D.J. at risk for sexual molestation. See C. Anderson Decl., CP 664-665.

On the evening of July 24, 2006, Donald and Wade joined Terry K.C., D.J., and A.D. for dinner and sitting on the porch looking at the stars and socializing. (T. Dunn Dep., CP 630; K.C. Dunn Dep., CP 599-605) Unbeknownst to the Dunns, during the evening, while D.J. was sitting on a chair next to Donald, Donald rubbed D.J.'s back over her shirt. He then stuck his hand down the back side of her pants and rubbed the skin of her buttocks. D.J. told him to stop and slapped his hand. She immediately asked A.D. to switch places with her, but when A.D. asked why, D.J. did not tell her. (T. Dunn Dep., CP 640-641)

Before retiring for bed, Wade, A.D., and D.J., asked to sleep on the porch in their sleeping bags under the stars. Terry and K.C. were concerned about the girls sleeping outside, their biggest fear being exposure to wild animals. They told the girls they would discuss the matter inside and that one of them would come to check on them in a few minutes and give them a final decision. (T.

Dunn Dep., CP 632-633). Before going upstairs, K.C. attempted to tell Donald that he and Terry were going upstairs, but Donald did not respond and appeared to be sleeping. (K.C. Dunn Dep., CP 607).

Terry and K.C. went upstairs to prepare for bed and to discuss the kids' request. (K.C. Dunn Dep., CP 605) After Terry and K.C. went upstairs, A.D. dozed off and woke up to Donald lying next to her. He had placed a blanket over her head and placed her hand on his bare chest where she felt a significant amount of hair. He then took his hand and rubbed her thigh, and fondled her breasts and vagina. She was afraid that he would throw her into the river. She started to scream. (T. Dunn Dep., CP 638-639; Royer Decl., 5.A., CP 442).

Terry and K.C. were upstairs for 8 or 9 minutes before they heard A.D. screaming. (K.C. Dunn Dep., CP 606). Terry thought it was a dog and K.C. ran down the stairs to check things out. As he ran out, A.D. and D.J. passed him in the kitchen and ran up the stairs screaming that Don had touched their private parts. (K.C. Dunn Dep., CP 608-609; T. Dunn Dep., CP 633-634.) Terry and the girls hastily gathered their things while K.C. confronted Donald. Donald was lying down next to where A.D. had been on

the porch when K.C. approached him. K.C. grabbed him and asked “what the hell just happened?” Predictably, Donald denied that anything happened. K.C. told Donald to follow him into the garage. During the “discussion,” in the garage, Donald gave K.C. permission to hit him, but Wade walked into the garage before K.C. could respond. K.C. felt it would be quite inappropriate to have a physical altercation with Donald in front of Wade. (K.C. Dunn Dep., CP 608-611.)

The Dunns, A.D. and D.J. were emotionally distraught and left the Cabin at about 12:30 A.M. They were in such a hurry to leave that they forgot their dog. They discovered the dog was missing while on the highway and well on their way home. K.C. turned his truck around to retrieve the dog, while Terry and the girls waited for him in the other car. (K.C. Dunn Dep., CP 615-616; T. Dunn Dep., CP 634-636.)

On the way home, Terry contacted Defendant Anderson to discuss the sexual assault. During the conversation, Terry asked her whether Donald had ever done anything similar in the past and Catherine said, “No.” (T. Dunn Dep., CP 636). This was the first of three to four conversations that Terry had with Catherine Anderson over the next couple of days. (T. Dunn Dep., CP 646).

The Dunns arrived home in Snohomish County at about 4:00 A.M. The girls were so distraught that they slept on a mattress in Terry and K.C.'s room. (T. Dunn Dep., CP 637-638. K.C. Dep., CP 613.)

Because A.D. and D.J. were so upset, they were Terry's and K.C.'s main concern after leaving the cabin. For that reason, K.C. waited until the following day to call the police in Chelan County. (K.C.Dunn Dep., CP 613, 617.) Donald was charged in Chelan County with two counts of child molestation in the 1st degree as to A.D. and later pled guilty to these charges. Donald also pled guilty to assault with sexual intent in the 4th degree as to D.J. (Declaration of Sidney Stillerman Royer [hereafter "Royer Decl."], ¶ 5.C., CP 442). Mr. Anderson currently resides in King County and is in the community under a SSOSA. (C. Anderson Decl., ¶9, CP 665).

After a few phone calls, about a week after Donald molested A.D. and D.J., Catherine Anderson finally disclosed to Terry that Donald had a history of child molestation. At the time of the call, Catherine told Terry that she was leaving her attorney's office and that the attorney had advised her to disclose Donald's history to Terry. Terry recalls Catherine acknowledging that

Donald had molested Catherine's niece. Terry cannot remember whether Catherine disclosed the fact that Donald had molested his sister. (T. Dunn Dep., CP 644-655.)

A couple of months after the molestation of A.D. and D.J., Terry contacted Catherine Anderson's niece, K.N., who was about 27 when Terry spoke to her. K.N. told Terry that Donald had molested her hundreds of times in a hot tub while she was growing up. She also stated to Terry that on several occasions, her aunt, Catherine Anderson, was present in the hot tub while Donald was naked and molested her. (T. Dunn Dep., CP 646-647.) Terry discovered that Donald had also sexually abused his younger sister when she was 8 and he was 14. (T. Dunn Dep., CP 649-650.) Information about Donald's previous sexual molestation of his minor niece and minor sister is contained in a psychological evaluation performed by Terry Copeland, Ph.D., after Catherine Anderson's niece, K.N., revealed that Donald had sexually abused her over a period of years. (T. Dunn Dep., CP 649-650; Royer Decl., ¶ 5.D., CP 442.)

A.D. and her parents have experienced severe and persistent emotional pain and suffering as a proximate result of Catherine Anderson's negligent conduct. (K.C. Dunn Dep., CP

608-623; T. Dunn Dep., CP 637-638; Royer Decl., ¶¶ 5.A., B., CP 442.)

B. Procedural Facts

Plaintiffs filed the lawsuit regarding their underlying tort claims against Catherine Anderson on July 10, 2007. Plaintiffs contend that Catherine Anderson's negligence proximately caused the sexual molestation of A.D. by Catherine's ex-husband Donald Anderson. A.D. asserts claims for personal injury. Terry and Kendall assert statutory claims for loss of consortium and independent claims related to bystander infliction of emotional distress. Catherine Anderson appeared by and through Bruce Lamb, who was retained by Mutual of Enumclaw (hereafter "MOE") under a reservation of rights.

On November 2, 2007, MOE filed a second lawsuit, Snohomish County Cause No. 07 2 08468 0, for declaratory relief on the issue of coverage. MOE asserted in this lawsuit that it had no duty to defend or to indemnify Ms. Anderson for any of the claims brought in the tort suit. CP 364-374.

MOE, through Mr. Lamb, requested mediation, to which plaintiff agreed. JoAnne Tompkins served as the mediator on February 6, 2008. Despite having requested mediation, MOE

offered no money at mediation to settle the case. Plaintiffs then made a “drop dead” demand, which MOE rejected. (Royer Decl. 8, CP 443). Instead MOE chose to pursue the issue of coverage.

On June 27th, 2008, MOE moved for summary judgment on the coverage issue, and Catherine Anderson cross moved for summary judgment on the duty to defend. CP of related appeal No. 66337-2-1 (“Coverage appeal”) 293-304. The Court denied MOE’s motion and granted Anderson’s motion on August 26th, 2008. CP Coverage Appeal, 53-54, 161-163. MOE then requested reconsideration, which was denied. CP Coverage Appeal 155. Plaintiffs moved for summary judgment on the coverage issue on June 2, 2009, which the court denied, finding that there were issues of material fact as to whether Plaintiffs’ claims were covered under the MOE policy. CP Coverage Appeal 133-147, 53-54.

On September 16, 2008, Plaintiffs’ counsel attempted to reopen negotiations with MOE and made another demand to MOE. MOE made an offer and Plaintiffs made a counter demand. MOE made another small offer, not even close to the lower end of the reasonable settlement range. After speaking with MOE’s counsel, it appeared that MOE did not understand the psychological damages of the three Plaintiffs. For that reason, Plaintiffs’ counsel

perceived that further negotiations would be fruitless and did not respond to MOE's last offer. Royer Decl. 10., CP 443-444.

On February 25, 2009 Catherine Anderson and the Dunns entered into a stipulated judgment with a covenant not to execute.

In general, the **Settlement Agreement** contains the following terms and conditions:

1. Catherine Anderson, Terry Dunn, Kendall Dunn, and A.D., by and through her settlement guardian ad litem, Nick Bacetich, stipulate to a judgment in the amount of \$400,000.
2. Catherine Anderson agrees to assign her claims both under the insurance policy and claims of bad faith against her insurer, MOE, to the Dunns. The Dunns would seek satisfaction of the settlement funds out of the MOE policy.
3. The reasonableness of the stipulated judgment is to be determined by the Court.
4. After the trial court approves the reasonableness of the settlement, the plaintiff would seek approval by a court commissioner in an SPR 98.16W hearing.
5. That plaintiffs covenant not to execute or enforce the judgment against Catherine Anderson personally.
6. That Defendant Catherine Anderson will cooperate in the presentation of the assigned claims.
7. That the agreement is binding.

CP 360-368.

Plaintiffs presented the Declaration of Bruce Lamb in support of the reasonableness of the settlement. Mr. Lamb is the MOE counsel retained to defend Ms. Anderson under a reservation of rights in the underlying tort claim. Mr. Lamb concludes that Ms. Anderson was at risk for a significant judgment being entered against her. He states:

At the time the agreement was entered, my client's insured, MOE, was contesting coverage for the claims against her. The lawsuit which I defended carried the risk of a significant judgment being entered against her, and the purpose of the agreement was to avoid the trauma and emotional distress of further litigation and to protect assets, earnings, reputation and personal liability of Ms. Anderson.

Lamb Decl., ¶ 6, CP 669.

The prospect of an unfavorable verdict against Ms. Anderson and the impact of that on her and her family were significant. Given the severity of the injuries sustained by **three members** of the Dunn family, \$400,000 settlement is well within the reasonable range of total damages that a jury would be likely to award. (Royer Decl., ¶¶1-7, CP 441-443). Plaintiffs also presented thorough psychological reports detailing the degree of harm resulting from the molestation of A.D. CP 447-457, Ex.1 at

reasonableness hearing.² The damages aspect of this case will be discussed further below.

Plaintiff presented the declaration of Gerald Tarutis, CP 671-675. Mr. Tarutis is a seasoned attorney with vast experience litigating personal injury matters. Further, he has been appointed numerous times by superior courts in several Washington counties to serve as a guardian ad litem for minors and for disabled adults who have suffered significant personal injuries. In his capacity as GAL, he is usually in the position of making recommendations to the court about the reasonableness of any settlement reached on behalf of the litigant for whom he is serving as guardian. In this case, Mr. Tarutis is the litigation GAL and Nic Bacetich is the settlement GAL. Mr. Tarutis reviewed the psychological assessments of the Dunns, Terry and Kendall's depositions, the complaint, the answer, and relevant law pertaining to the underlying tort claims. Based on his review, his education, and vast experience making recommendations to the court about the reasonableness of proposed settlements, Mr. Tarutis concluded that

² Dr. Jon Conte's report about A.D. was admitted as an exhibit at the reasonableness hearing. Unfortunately, it was only in the preparation of this brief that Respondent's counsel determined that only the index of exhibits, and not the exhibit itself was requested by Appellant to be included in the Clerk's Papers. The exhibit has been ordered and will be included in Supplemental Clerk's papers.

he would assess the value of a case like this in Snohomish County Washington to be in excess of \$400,000.

The trial Court herein found settlement to be reasonable, specifically finding that the settlement was not a “deal” reached between the Defendant and the Plaintiffs at the expense of the insurance company” but reduced the amount of the settlement he deemed reasonable from \$400,000 to \$260,000. CP12.

Plaintiffs have chosen not to appeal the reduction of the settlement amount, notwithstanding reservations of the standard used by the trial court for this reduction. Intervenor MOE filed this appeal, initially seeking discretionary review. CP 1-6.

III. ARGUMENT AND AUTHORITY

A. Standard for determination of reasonableness

The Washington Supreme Court has established guidelines by way of factors to be considered in making reasonableness determinations. *Chaussee v. Maryland Casualty Co.*, 60 Wash. App. 504, 512, 803 P.2d 1339 (1991) (*quoting Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *overruled* on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, review denied, 756 P.2d 717 (1988)). In analyzing the reasonableness of the settlement, Washington law requires

consideration of the following factors set forth in *Glover* and in *Chausee*:

- A. Releasing person's Damages;
- B. The merits of the releasing person's liability theories;
- C. The merits of the released person's defense theories;
- D. The released person's relative fault;
- E. Any Third Party Not Released
- F. The risks and expenses of continued litigation
- G. The released person's ability to pay;
- H. Any evidence of bad faith, collusion, or fraud; and
- I. The extent of the releasing person's investigation and preparation of the case.

No single criterion controls and all nine are not necessarily relevant in all cases. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002). It follows that MOE's argument, considering as it does only three of the factors, without any indication as to why they are more important than the others or

why the facts surrounding the others does not outweigh the facts pertaining to these three is inherently insufficient to upset the trial Court's determination that the settlement at the reduced amount was reasonable.

“A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence.” *Brewer v. Fibreboard*, 127 Wash.2d 512, 524, 901 P.2d 297 (1995). *Mavroudis v. Pittsburgh Corning*, 86 Wash. App 22, 39 n.34, 935 P.2d 684 (1997) is not to the contrary. The Court there expressly declined to consider the issue, as the parties agreed with the *Brewer* formulation. Nor has the Supreme Court at any time retreated from its decision in *Brewer*. Accordingly the trial court's determination of reasonableness is reviewed for abuse of discretion.

Finally, if this Court finds substantial evidence to support the reasonableness decision, it may affirm on the basis of consideration of any and/or all of the *Glover/Chausee* factors. An appellate Court can affirm a trial court's decision on any grounds supported by the record. *State v. Costich*, 152 Wash.2d 463, 477, 98 P.3d 795 (2004); *Verbeek Properties, LLC v. Greenco Environmental, Inc.*, 159 Wash.App. 82, 90, 246 P.3d 205 (2010).

B. *Tegman v. Accident & Medical Investigations, Inc.* is irrelevant to the reasonableness determination.

In *Rollins v. King County Metro Transit*, 148 Wash. App.370, 199 P.3d 499 (2009), this Court held that *Tegman v. Accident & Medical Investigations, Inc.* 150 Wash.2d 102, 75 P.3d 497 (2003) is concerned with joint and several liability, and so is irrelevant in a case with one defendant charge only with negligence. *Rollins*, *supra* at 379. MOE recognizes this holding, but argues that it doesn't apply here. "The Dunns could have avoided this issue by dismissing Mr. Anderson and his intentional torts from the case before they settled, but they chose to keep him in the case." App. Br. at 10. Appellant cites no authority for this proposition, and with all due respect, it makes no sense.

Any effect that *Tegman* might have on the reasonableness of the settlement can only be for its potential application *when the case was tried*. So long as the only defendant at the time of trial was Ms. Anderson, and the claim against her was for negligence, this court's holding in *Rollins* makes *Tegman* irrelevant. This Court discussed with approval the instructions given by the trial Court in *Rollins*:

The jury here was instructed that plaintiffs had to prove that Metro was

negligent, that Metro's negligence was a proximate cause of plaintiffs' injury, that there may be more than one proximate cause of an injury, and that its verdict should be for Metro if it found the sole proximate cause of injury was a cause other than Metro's negligence. The court also instructed the jury about calculating damages:

In calculating a damage award, you must not include any damages that were caused by acts of the unknown assailants and not proximately caused by negligence of the defendant. Any damages caused solely by the unknown assailants and not proximately caused by negligence of defendant King County must be segregated from and not made a part of any damage award against King County

Rollins, supra at 379. If we substitute Ms. Anderson for Metro, and Mr. Anderson for the unknown assailants, we can see what the instructions at trial would be. Since the harm here was indivisible, the only way Ms. Anderson could avoid liability for the entire amount of the damages was if the jury found her not to be negligent, or her negligence not to be a proximate cause. This is always the case, irrespective of *Tegman*.

As shown by the briefing before the trial court herein, Plaintiffs' counsel were well aware of the *Rollins* holding and its

implications. There simply was no reason to have Mr. Anderson in the case at time of trial, and there was no possibility he would be. He was dismissed from the case by voluntary nonsuit. CP 676-678. The plaintiffs had an absolute right to do so at any time prior to resting their case. CR 41(1)(B). There was simply no reason to consider *Tegman* or segregation of damages in determining whether the settlement was reasonable.

C. Strength of Plaintiffs' and Defendant's Cases

It is unclear what point MOE is trying to make in this regard. The finding of the Trial Court relevant to these factors is set out as follows in the Court's Memorandum Decision:

There is clear exposure to the Defendant. She knew of her husband's sexual deviancy and the risk of A.D. and her friend. She did not warn them and left knowing that he would be at the cabin with two young girls without the presence of any adult who would be aware of the risk. And, although there may be certain legal arguments under *Tegman* and *Rollins*, [see above] nevertheless for settlement purposes, this defendant has substantial exposure and risk.

CP 11 (Bracketed material added.)

It is thus clear that the trial court considered these factors. It appears that MOE is arguing that the trial court was "wrong" in his assessment, or that he should have

given different weight to the plaintiff's and defendant's cases. However, the trial court's action is reviewed for abuse of discretion, and will not be overturned if there is substantial evidence to support it.

There is certainly substantial evidence to support the trial judge's finding in this regard. Significantly it is supported by the opinion of the lawyer MOE hired to defend Ms. Anderson.

At the time the agreement was entered, my client's insured, MOE, was contesting coverage for the claims against her. The lawsuit which I defended carried the risk of a significant judgment being entered against her, and the purpose of the agreement was to avoid the trauma and emotional distress of further litigation and to protect assets, earnings, reputation and personal liability of Ms. Anderson.

Lamb Decl., ¶ 6, CP 669. (Emphasis added.)

Equally important, MOE distorts both the law and the relevant evidence to criticize the trial judge's finding. It is untrue as claimed by MOE that Plaintiffs' case depended on a finding that the Dunns were business invitees of the Andersons. App. Br. at 13. It was and always had been the case that Plaintiffs alleged that Ms. Anderson would be liable for her negligence even if the Dunns were licensees.

If it were determined the Dunns were licensees, Catherine Anderson had a duty to protect them from reasonably foreseeable criminal misconduct. A licensee is a social guest that is a person who has been invited but does not meet the legal definition of invitee. In *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975), the court adopted the standard of care for licensees outlined in the *Restatement (Second) of Torts*. §342:

A possessor of land is subject to liability for physical harm caused to licensees by a condition of the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an **unreasonable** risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees that the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved.

Memel, at 689, 691 (emphasis added). The possessor fulfills his duty by making the condition safe or warning of its existence. In this case, Catherine Anderson failed to fulfill her duty. She failed to ensure that Donald was away from the premises and she failed to warn the Dunns about his sexually predatory history with minor girls.

Even though a landowner has no duty to warn licensees about open and apparent dangers from natural (or artificial) conditions, Donald Anderson's pedophilic tendencies were not open and apparent dangers and posed an unreasonable risk of harm to A.D. and her friend. Without warning from Catherine Anderson, the Dunns would have no reason to know about Don's pedophilia. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d at 134 (1994); see also *Restatement (Second)*, § 342, illus. e.

Catherine Anderson failed to fulfill the duty owed even to a licensee outlined in the *Restatement (Second) of Torts*, §. 342. She knew of Donald's previous criminal acts of pedophilia and should have known that he posed an unreasonable risk of harm to A.D. and D. J. Despite this, she failed to warn the Dunns. Reasonable parents in the position of the Dunns would never have allowed Don to have contact with their minor daughter. Had Catherine warned the Dunns about Donald, they would not have been at the Cabin, nor would they have allowed Donald to have any contact with A.D.

Defendant claims that a landowner liable for only known dangerous physical conditions and not for foreseeable dangerous criminal acts, citing for that proposition *Peterson v. State*, 100

Wash 2d. 421, 671 P.2d 230 (1983) without specific page reference. Peterson does not so state, nor is it the law. As stated by the Court of Appeals in *Niece v. Elmview Group Home*, 79 Wash.App. 660, 904 P/ 2d 784 (1995) in a passage expressly approved by the Supreme Court in affirming the court of Appeals decision:

[T]here is no reason to differentiate between foreseeable harms caused by potentially hazardous physical conditions (*McLeod*), visitors (*Shepard*) or staff.” *Niece*, 79 Wash.App. at 669, 904 P.2d 784.

Niece v. Elmview Group Home 131 Wash.2d 39,47 n.4, 929 P.2d 420 (1997).

Likewise MOE has either intentionally or not distorted the facts to suit its argument that the Dunns could not be business invitees. For example, MOE simply ignores the fact that Mr. Dunn was a regular customer of Donald Anderson’s business, and that Donald Anderson provided not only use of the cabin, but other “perks” which a jury could easily find were in order to maintain Mr. Dunn as a good customer. Most notably, it was Mr. Dunn’s belief that the cabin was a *quid pro quo* for his giving Mr. Anderson a reduced rate for remodeling the cabin. (K.C. Dunn

Dep. CP 70-72; 74-75). A jury could therefore find that the use of the cabin by the Dunn family was in completion of an agreement that financially benefited Mr. Anderson and the marital community.

Defendant cites no authority for the proposition that the business benefit obtained by the property owner must be contemporaneous with the use of the land by the business invitee. Furthermore, a jury could reasonably find that use of the cabin by his family was a benefit conferred by Mr. Anderson in maintaining good will of a valued customer. As stated in *McKinnon v. Washington Federal Savings & Loan Association*, 68 Wn.2d 644, 650, 414 P.2d 773 (1966), adopting *Restatement (Second) of Torts*, § 332 (1965):

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly *or indirectly* connected with business dealings with the possessor of the land. (Emphasis added.)

Finally, with regard to foreseeability, MOE again severely misconstrues the law and the facts. *Youngblood v. Schireman* 55 Wash. App 95, 765 P.2nd 1312 (1988) does not support the proposition that there was no liability if the Dunns were licensees

as a matter of law. The knowledge of danger that the defendants had in those cases does not in any way resemble Ms. Anderson's knowledge of her husband's propensities. This is not a situation in which Mr. Anderson was a one-time offender many years ago. In fact, Mr. Anderson had molested both his sister and his niece multiple times over a period of years. More importantly, Ms. Anderson had received and read the report by Terry F. Copeland, PhD. Who had been retained by Mr. Anderson's criminal lawyer for use in sentencing and cited by MOE for its statement that Mr. Anderson presents a low risk for future offenses. Also in that report, however, Dr. Copeland indicates that Mr. Anderson reported that his current sexual fantasies in 2003 were roughly 50% to thoughts of adult women, and 50% to minor females. Plethysmograph testing showed it was actually about evenly split between sadism rape of an adult female and sadism rape of a minor female. CP 144 Ms. Anderson knew that Mr. Anderson had molested the niece multiple times while nude in a hot tub, and that he did so to orgasm on practically each occasion. She knew that the niece was so traumatized by this that she had tried to commit suicide twice. And in fact at the time the Dunns were at the Andersons' cabin, the niece had already filed a lawsuit against the

Andersons for this molestation. Here, under these circumstances, the question is of reasonable foreseeability of Mr. Anderson molesting minor females. Put another way, is this information that a reasonable parent would expect to have in fulfilling his or her duty of protecting his or her child? And by the same token, would a reasonable person in Ms. Andersons' position certainly know that this is information that a parent would need in protecting his or her child? There is certainly a jury question on this matter.

The trial judge's finding that there was substantial risk to Ms. Anderson was based on more than substantial evidence. There is nothing about the judge's examination of these factors that requires reversal.

D. Damage to the Dunns.

Again MOE's argument cherry picks evidence for the defense, and simply ignores the evidence for the Plaintiffs. Again the finding of the judge is supported by ample evidence. The trial court cited to the report of Dr. Conte, who is an internationally known expert on the effects of sexual abuse on children. He stated:

What is of considerable concern in A's case is that although she had a number of resiliency factors, was abused once by fondling, and reacted

immediately to seek help, she continues to be troubled with symptoms of anxiety and post traumatic stress, She has many of the features of post traumatic stress disorder in children. She is hypervigilant and hyper-alert when outside of her home. I am particularly concerned that she reports beliefs and attitudes which can have a profoundly negative impact on behavior over time. As noted on the [Cognitive Distortions Scale], she has ideas of **self criticism, self-blame, helplessness, and preoccupation with danger**

...

Childhood sexual abuse is an adult disorder in that the most serious, negative, and debilitating effects of the experience are not seen until adulthood.

...

Risk factors for anxiety and depressive disorders are especially high.

Conte report, Ex. 1, Supp. CP at 4-6

Dr. Conte recommended about a year of therapy in the immediate future, expected to cost between \$4500 and \$7500 and to plan for one to three courses of therapy lasting one to two years in the future.

As the trial judge noted, both Mr. and Mrs. Dunn testified that A.D. has been severely impacted by this incident. Because of it, she changed school, no longer trusts adult men and has flashbacks and dreams of the abuse.³

³ MOE apparently inadvertently failed to order a report of proceedings of the live testimony at the reasonableness hearing. I have spoken with counsel for

The trial judge's finding that Ms. Dunn seemed to be the more affected of the parents by the molestation of A.D. is also borne out by the testimony at the hearing and Dr. Conte's report. CP 5, 109-14. The ranges for a reasonable settlement of her claim assigned by the trial Court are extremely conservative in light of the very clear testimony she gave of the daily impact of this event on her life and relationship with her daughter. See, e.g. CP 652.

Mr. Dunn was diagnosed with moderately severe Post-Traumatic Stress Disorder by Laura Brown, PhD., a clinical psychologist specializing in treatment of trauma survivors. CP116-119.

Defendant's only response is that the Dunns have not sought treatment. This is not true, as Ms. Dunn's treatment records are in the Court file and were before the judge. CP 163-203. These records also show participation by Mr. Dunn to deal with marital issues raised by the abuse. Ms. Dunn told Dr. Conte, that while her counselor was nice, she did not think she got much out of it. CP 112. It is my recollection, although it is difficult to say for certain without a Report of Proceedings, that Ms. Dunn testified that she did not have the money to start counseling with another therapist. (See fn.3) See also CP271-2.

MOE, and he has indicated that he intends to do so. I have no objection to the late filing of this RP. If there are matters in the testimony which need to be emphasized, I may ask permission to file a supplemental memo solely to do so.

As for A.D., her lack of therapy is part of her damages. Her mother and father testified that she simply is not ready to deal directly with the issues raised by the abuse, and that this itself is a source of some distress to them CP 292, 655-657.

E. Substantial evidence supports the Trial Court's finding that there was no collusion of bad faith in the settlement.

The trial Court found that MOE was aware at all times of the negotiations between Anderson and the Dunns. This is supported by the declaration of Anderson's coverage counsel, along with correspondence attached thereto. CP 81-98. MOE was also aware that Ms. Anderson was considering litigation against it, and that her position was that MOE was acting in bad faith with regard to its fiduciary duties. *Ibid.* Mr. Wilmer also stated that the settlement was made after arms length negotiations. These negotiations spanned a significant amount of time, and various drafts were exchanged. CP 82

MOE cites *Water's Edge Homeowners Association Farmer's Insurance Exchange* 152 Wash.App 572, 216 P.3d 110 (2009) for the proposition that the facts of this case show incontrovertible evidence of collusion. The facts of *Water's Edge* are so different from this case, as to make the citation entirely irrelevant.

In that case coverage counsel contacted the adverse parties without notice to their attorney, wrote a ghost letter for them to send to the insurer critical of their lawyer, and recommended that the adverse parties contact the coverage counsel for independent representation. The coverage counsel also undermined the appointed counsel's efforts to reduce the defendant's exposure, by withdrawing a pending summary judgment motion regarding the claims of liability. According to the court, the parties appeared to have a "joint venture" type relationship in which the HOA agreed to kick back some of the proceeds of any recovery from Farmer's or from defense counsel from a malpractice action. And finally, the coverage counsel insisted that the settlement be binding regardless of the trial courts' reasonableness determination. Coverage counsel also agreed to testify to the reasonableness of the amount, and the parties apparently expected the trial court to believe this testimony. However, apparently the trial court did not and instead found the agreement was collusive.

There is absolutely nothing of these shenanigans that went on this case. Mr. Wilner, whom counsel for MOE unjustifiably maligns, not only kept Mr. Lamb, the appointed defense counsel, conversant with his actions in representing Ms. Anderson's

interests, but also kept MOE's coverage counsel aware of what was going on. For example, it is striking that MOE counsel Mr. Trompeter accused Mr. Wilner in the trial court of completing the covenant judgment without any notice to Mr. Lamb, when in fact Mr. Wilner had advised both Mr. Lamb and Mr. Trompeter of this possibility before the mediation in this matter. See Declaration of Wilner, Exhibit A, CP 85. Indeed, Mr. Lamb *SIGNED* the covenant judgment. CP 370. Furthermore, Mr. Wilner's billing records to Ms. Anderson, subpoenaed by MOE show numerous contacts with Mr. Lamb about the possibility of settlement. CP 310-328.

Contrary to MOE's assertion, there was a clear interest for the plaintiffs in having the covenant judgment be for a reasonable amount. It is only if the amount is reasonable that the settlement amount will be binding on the insurance company. *MOE v. T&G Construction, Inc.* 165 Wash.2d 255, 267, 199 P.3d 376 (2008). In that regard it should be noticed that in the *Water's Edge* case, the evidence supported a finding that the plaintiffs' potential damages were approximately \$500,000.00, and the covenant judgment was for \$8,750,000.00. The court emphasized this factor in determining that the settlement was unreasonable. Here, there are three individual claims, each with a substantial value. \$400,000.00 is

well within the reasonable range of settlement value for these claims.

F. The actions of MOE itself created extreme risks for its insured, by relying in its coverage defense to her detriment.

In its response to the motion for reasonableness, counsel for MOE urged a point unusual for its candor. Though jettisoned in its brief here, this argument perhaps more than any accusation of collusion shows why Ms. Anderson was put into the position in which settlement by covenant judgment was the only reasonable option. After describing the factors that would indicate little risk of a liability finding MOE counsel stated, “[R]ather than pursue or develop these theories, or attempting [sic] to dismiss the claim on summary judgment, Ms. Anderson instead began developing case for settlement for covenant judgment for the lawsuits in section.” MOE’s memo at CP 405.

This is a staggering admission by MOE. Despite its obligation to provide Ms. Anderson with a defense, and despite the fact that the suit was filed July of 2007, by the time of the settlement in February of 2009, Defense counsel hired by MOE had made no motions for summary judgment, had retained no defense experts, had requested no CR 35 examinations, and had

not depose any of plaintiffs' damage experts. It was not Ms. Andersons who "failed to pursue or develop these theories" it was MOE. MOE's position was that there was no coverage, and this theory was pursued to the detriment of their insured. Mr. Lamb did not raise any of the legal arguments made by MOE here. This certainly is not the fault of Ms. Anderson or her coverage counsel. MOE was simply putting all its eggs in one basket, and kept the eggs in that basket even after it appeared that their coverage case was much weaker than they thought.

The potential risks and costs of continued litigation is one of the *Glover/Chausee* factors. By acting solely to prosecute its position that it had no duty to cover or defend Ms. Anderson while at the same time failing to vigorously defend Ms. Anderson in the underlying tort case, MOE ramped up the pressure on Ms. Anderson to the point that a covenant judgment was not only a reasonable action for her to take; it was the ONLY reasonable action for her to take. While MOE brags to this court about the invincibility of its liability positions, none of these positions were ever urged in the trial court where they belonged. It is the height of gall for MOE to act this way toward its insured and then accuse

her coverage counsel of collusion when he acts to protect her interest.

IV. CONCLUSION

Appellant has made no case whatsoever that the trial Court abused its discretion in determining that the settlement was reasonable. There was substantial evidence to support the significant damages of the plaintiffs. There was substantial evidence to support the absence of collusion.

Perhaps most important, while MOE here argues that its liability defenses were far stronger than the trial judge gave credit for, it candidly admitted in the trial court that its appointed lawyer failed to bring summary judgment motions (and failed to investigate plaintiffs' damage) instead concentrating its efforts on denying its duties to Ms Anderson. The settlement herein was reasonable when made. Having been reduced by a third by Judge Castleberry, it is more than reasonable from the viewpoint of MOE. The trial court should be affirmed.

Respectfully submitted this 10th Day of June,

LEEMON & ROYER, PLLC


Mark Leemon, WSBA #5005
Attorney for Respondent

DECLARATION OF SERVICE

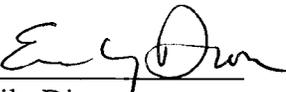
I, Emily Dion, certify under penalty of perjury under the laws of the State of Washington that, on 6-10-11 I caused the following documents to be served on the person listed below in the manner shown:

1. Respondent's Brief

Patrick Trompeter
David Collins
James Beecher
Hackett, Beecher & Hart
1601 Fifth Avenue, Suite 2200
Seattle, WA

VIA U.S. MAIL

Signed at Seattle, Washington, this 10 day of June, 2010



Emily Dion