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No. 63148-9-I

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

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ERNEST COULTER AND LEROSE COULTER,

Appellants,

v.

ASTENJOHNSON, INC.,

Respondent.

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BRIEF OF RESPONDENT ASTENJOHNSON, INC.

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K & L GATES LLP

G. William Shaw, WSBA # 8573  
Matthew J. Segal, WSBA # 29797  
Kymberly K. Evanson, WSBA # 39973  
Attorneys for Respondent  
AstenJohnson, Inc.

K & L GATES LLP  
925 Fourth Avenue  
Suite 2900  
Seattle, WA 98104-1158  
(206) 623-7580

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## I. INTRODUCTION

This Court previously remanded this case to allow the trial court to determine the reasonableness of Appellants' ("Coulters") settlements with other parties. The purpose of the hearing, as provided by statute (RCW 4.22.060), was for the trial court to either apply the settlement amounts as an offset in favor of Respondent AstenJohnson, Inc. ("Asten"), or to substitute another reasonable amount for an offset. The Coulters had argued that such a hearing was not required, but this Court rejected that argument.

Consistent with this Court's mandate, the trial court held a reasonableness hearing. At the hearing, the court found that the Coulters had failed to meet their burden of proving that their settlements were reasonable. The trial court then properly exercised its broad discretion and determined a reasonable offset in favor of Asten. The court's order comports with the language of RCW 4.22.060. It is also supported by sound public policy – namely, requirement of full disclosure and prevention of double recovery.

Furthermore, the trial court's determination of interest was correct. The Coulters cannot recover prejudgment interest on unliquidated claims, and post-judgment interest accrues only from the date a final judgment in this matter is entered.

Asten respectfully requests that this Court affirm the trial court's order in all respects.

## **II. COUNTERSTATEMENT OF ISSUES**

1. When a Plaintiff fails to meet his or her burden of establishing the reasonableness of a tort settlement, may the court invoke the express language of RCW 4.22.060(2), and determine a reasonable amount by which to offset the Plaintiff's claim against a non-settling defendant?

2. When a Plaintiff seeks only unliquidated tort damages, is the court correct to deny prejudgment interest?

3. When an appellate court reverses a judgment and directs a trial court to make new findings and enter a new judgment, must interest accrue only from the date of the final judgment entered in the case?

## **III. STATEMENT OF THE CASE**

The factual and procedural background of this case are set out in this Court's previous opinion, *Coulter v. Asten Group, Inc.*, 135 Wn. App. 613, 617, 146 P.3d 444 (2006) ("*Coulter I*"). In brief summary, Asten manufactures "machine clothing" for paper machines, including dryer felts. Mr. Coulter worked at the Port Townsend Paper Mill for approximately 45 years, retiring in 1992. From 1962 to 1974, Asten supplied 28 asbestos-containing felts and 10 non-asbestos-containing felts to the Mill. The felts were used on a paper machine during certain times

that Mr. Coulter worked at the Mill. From 1975 to 1992, Asten supplied 18 dryer felts to the Mill, none of which contained asbestos.

The Coulters brought this case against Asten, and more than 25 other defendants. The Coulters alleged that each of these defendants were past manufacturers, sellers or purchasers of asbestos-containing products and were liable for Mr. Coulter's asbestos-related injuries sustained while working at the Mill. *Coulter I*, 135 Wn. App. at 617. By the time trial began in April 2005, Asten was the sole remaining defendant. *Id.*<sup>1</sup>

The jury apportioned 2% of liability to Mr. Coulter, 5% to Asten, and 93% to "all other suppliers of asbestos-containing products to the mill." *Coulter I*, 135 Wn. App. at 617. The jury found that the total damages were \$242,500. On May 31, 2005, the trial court entered judgment against Asten in the amount of \$12,125, plus \$611.31 in taxable costs. *Id.* at 616.

The Coulters appealed. This Court reversed the damage award and instructed the trial court to hold Asten jointly and severally liable for the jury award, less an appropriate offset in Asten's favor. This Court directed the trial court to hold a reasonableness hearing, and calculate a new judgment against Asten, after considering the reasonableness of the

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<sup>1</sup> Those background facts in these paragraphs that are not expressly referenced in this Court's prior opinion are drawn from Asten's opening brief in the prior appeal and the record citations therein, excerpts of which are attached to this brief as Appendix B.

Coulters' settlements with other defendants. *Id.* at 627. This Court held, "While the superior court is not required to base its calculations of offsets on Coulter's pretrial representation of total settlements, a reasonableness hearing under RCW 4.22.060 is in order to determine the proper offset for settlements with other defendants." *Id.* (citations omitted).

After remand, Asten served a set of interrogatories and requests for production on the Coulters. CP 83-85. Among other things, Asten sought to discover whether the Coulters had applied to certain trusts, claims facilities or bankruptcy trust funds, and if not, why not. CP 84.<sup>2</sup> The Coulters refused to respond to the Interrogatories. CP 60. Asten followed up with a letter again requesting information regarding why the Coulters had failed to apply to the great majority of settlement funds for which they were eligible. CP 78. The Coulters' counsel responded: "I am under no duty to explain why we did or did not apply to any of the bankruptcies [sic] or trusts that you identified in your letter. Good luck trying to compel such a response." CP 81.

Asten did move to compel a response, and the court granted the

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<sup>2</sup> These trusts were established by former manufacturers of asbestos-containing products for the purpose of providing compensation to their creditors, which are primarily personal injury plaintiffs. *See, e.g., generally, William P. Shelley et al., The Need For Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 2 Art. 3 (2008).

motion. CP 177, 206-207. The court specifically ordered the Coulters' counsel to "provide full and complete answers and responses to AstenJohnson's Interrogatories and Requests for Production Regarding Reasonableness Hearing and Potential Setoffs, which were served on Plaintiffs on January 15, 2008." CP 207. Despite the court's order, the Coulters' counsel never provided Asten or the court with any information regarding their failure to apply to the various trusts. CP 128.

The trial court held a reasonableness hearing as ordered by this Court. CP 126. The trial court entered findings of fact and conclusions of law, and on March 3, 2009, the trial court entered a new final judgment.<sup>3</sup> CP 135-43.

At the hearing, the Coulters sought an offset of \$94,977 from the judgment against Asten, which purportedly represented the total amount of money they had received from other settling defendants as of the date of the hearing. CP 127. The trial court rejected this figure and determined

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<sup>3</sup> The Coulters' brief assigns error to nearly every finding of fact, but does not argue why they are unsupported by the record or provide contrary citations to refute them. In so doing, the Coulters have failed to comply with RAP 10.3. As the Washington Supreme Court has explained, "It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Improperly challenged findings of fact are considered verities on appeal. *Id.* at 533. Accordingly, this Court should consider the trial court's findings verities.

that an offset in the amount of \$159,392 was reasonable. CP 131. After considering the evidence presented, the court determined that the Coulters had failed to meet their burden of showing that their pretrial settlements with other defendants were reasonable. CP 130. The court further found that “Plaintiffs’ failure to pursue claims against other defendants and responsible bankruptcy trusts is unreasonable.” CP 130. In calculating the proper offset, the trial court considered the numerous other settlement funds to which the Coulters could have applied, but apparently chose not to apply. CP 128-31. The court found that the Coulters had no “incentive to maximize their recovery from bankruptcy trusts and claims facilities,” because “Plaintiffs’ judgment against Asten is subject to a setoff for every dollar received.” CP 127. The court found that “Plaintiffs still have not provided any explanation as to their failure to apply to these trusts,” despite a court order to do so. CP 127-28, 207. The Court also found that the Coulters had not received anything from the majority of named defendants and had received unreasonably low amounts from other defendants. CP 130.

Because the court did not find the settlements reasonable, the court was required under RCW 4.22.060(2) to reduce the Coulters’ claim against Asten by a reasonable amount “determined by the court.” RCW 4.22.060(2). The court did so, and calculated the offset based on several

considerations, including the Coulters' failure to meet their burden of showing reasonableness, the Coulters' (or their counsel's) conduct and defiance of the court's discovery order, and evidence of the funds that the Coulters could have received before trial had they diligently pursued them. CP 127-130. The court exercised its discretion under RCW 4.22.060 and determined a reasonable offset, ultimately concluding that the Coulters were entitled to a judgment against Asten in the amount of \$78,258, plus \$611.31 in taxable costs. CP 132. The court determined that the Coulters were not entitled to prejudgment interest because their tort claims were unliquidated and that post-judgment interest should accrue from the date of the entry of final judgment. CP 131-132. The Coulters now appeal, alleging that the trial court is without discretion to offset a judgment by an amount other than what was actually paid by the other settling defendants. As explained below, the language of the statute and Washington law conclusively demonstrate otherwise, and this Court should affirm the trial court.

#### **IV. ARGUMENT**

RCW 4.22.060 grants a trial court broad discretion in determining whether tort settlements are reasonable and by what amount to offset a judgment against a non-settling defendant. Here, in evaluating the Coulters' settlements, the trial court considered the factors laid out in

*Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983), to the extent possible, given the Coulters' failure to provide any of the required information. After determining that the Coulters did not meet their burden of showing their settlements were reasonable, the trial court properly exercised its discretion and applied a reasonable offset to the judgment against Asten. Because the court concluded that the Coulters' settlements were not reasonable, the court was not required to offset the judgment against Asten solely by the amount paid by the settling defendants. Finally, the trial court correctly determined that the Coulters are not entitled to prejudgment interest on their unliquidated tort claims and that post-judgment interest accrues from the date final judgment is entered. The judgment should be affirmed.

**A. The Standard of Review is Abuse of Discretion.**

It is well-established that a trial court's determination of reasonableness is reviewed for abuse of discretion. *Green v. City of Wenatchee*, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009) (citing *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005)). Factual findings underlying the reasonableness determination will not be disturbed on appeal when supported by substantial evidence. *Howard v. Royal Specialty Underwriting*, 121 Wn. App. 372, 380, 89 P.3d 265 (2004) (quoting *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901

P.2d 297 (1995) (citing *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983))). Substantial evidence is evidence that would persuade a fair-minded person of the asserted statement's truth. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 400, 161 P.3d 406 (2007) (citing *Central Puget Sound Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 419, 128 P.3d 588 (2006) (quoting *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994))).

Despite overwhelming case law to the contrary, the Coulters argue that a *de novo* standard of review applies, contending that the question before this Court is one of “pure statutory interpretation.” App. Br. at 9. In an effort to obtain a more lenient standard of review, the Coulters claim to challenge the “purely legal conclusion of the court,” *Id.* n. 2, but have in reality assigned error to nearly every one of the court’s findings of fact. The Coulters cannot seriously contend that their argument is “purely legal” while simultaneously challenging nearly all of the court’s 34 factual findings.

Furthermore, the Coulters’ suggestion that a footnote in *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 39 n.1, 935 P.2d 684 (1997), supports a *de novo* standard is misplaced. The *Mavroudis* Court expressly did not reach the issue of whether the ultimate determination of reasonableness was a mixed question. *Id.* This court has held since

*Mavroudis* that the standard of review is abuse of discretion. *See e.g., Werlinger*, 126 Wn. App. at 349.

Finally, the Coulters clearly attempt to challenge the factual findings of the trial court. Regardless of how the challenge is labeled, the crux of their argument is that the trial court erred when it rejected the Coulters' proposed offset and entered an amount it found reasonable instead. The issue on appeal is the propriety of the court's calculations and the factual information upon which the court based those calculations. This Court should review the trial court's order for abuse of discretion. Under either the correct standard of review, abuse of discretion coupled with substantial evidence, or under the Coulters erroneously proposed *de novo* standard, the trial court did not err.

**B. The Trial Court's Offset of the Judgment Against Asten was Correct.**

1. The trial court's order was consistent with RCW 4.22.060.

When this Court remanded this case to the trial court, it held "While the superior court is *not required* to base its calculations of offsets on Coulter's pretrial representation of total settlements, a reasonableness hearing under RCW 4.22.060 is in order to determine the proper offset for settlements with other defendants." *Coulter I*, 135 Wn. App at 627 (emphasis added).<sup>4</sup> At the hearing, the Coulters sought an offset of

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<sup>4</sup> The Coulters also argued before the trial court that "the Court of Appeals

\$94,977 from the judgment against Asten. CP 127. The trial court rejected this figure and determined that an offset in the amount of \$159,392 was more appropriate. CP 131. In reaching this conclusion, the trial court found:

Plaintiffs named 26 defendants together with 100 Doe defendants in their complaint. Plaintiff[s] took settlements from 15 entities, only 4 of whom were named defendants. Of the 15 settlements, 8 were for less than \$1500, and one was for only \$61.00. The court finds that even a nuisance settlement of a claim against a defendant not in bankruptcy should not fall below \$3000. Most of the named defendants have paid nothing toward Plaintiffs' damages. The court lacks sufficient information to find the amounts received from settling defendants reasonable. Further, the Plaintiffs' failure to pursue claims against other defendants and responsible bankruptcy trusts is unreasonable.

CP 129-30.

The trial court acted well within its statutory discretion to offset the judgment in this manner, particularly in light of the "scant information" provided by the Coulters. CP 129. The plain language and legislative history of the statute support the result below.

With respect to the plain language, RCW 4.22.060 provides:

A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is

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has made it clear that the trial court is not required to base its determination of the offset on the total amount of the Coulter's settlements." CP 23.

reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement *in which case the claim shall be reduced by an amount determined by the court to be reasonable.*

RCW 4.22.060(2) (emphasis added).

Once the court determined that the Coulters had failed to meet their burden of showing reasonableness, the court was required by the plain text of the statute to offset the judgment against Asten by an amount “determined by the court to be reasonable.” *Id.*

The Coulters contend that the trial court’s offset of \$159,392 was too high. But where, as here, the settling party fails to meet their burden to establish reasonableness, and withholds information that the trial court has ordered them to produce, the trial court does not abuse its discretion by determining a reasonable offset based on the record before it.

The legislative history of RCW 4.22.060 further supports the trial court’s broad discretionary power to determine a reasonable offset. In *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 795 P.2d 1193 (1990), the Supreme Court observed:

The final report of the Senate Select Committee on Tort and Product Liability Reform contained the following comments on RCW 4.22.060:

The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors including the provable liability of the released parties and liability limits

of the released party's insurance.

There is a legitimate concern that claimants will enter into “sweetheart” releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was entered into.

Senate Journal, 47th Legislature (1981), at 636.

As the above comments indicate, the Legislature was mainly concerned with two aspects of the settlement process: that the courts retain broad discretionary powers in determining reasonableness, and that the interests of nonsettling parties be taken into consideration throughout the proceeding.

*Schmidt*, 115 Wn.2d at 157-58.

The trial court’s decision in this case perfectly captures both of these important concerns. First, the trial court recognized and exercised its discretion to determine a reasonable offset after concluding that the Coulters had failed to meet their burden. Second, the court considered the impact of the Coulters’ settlements on Asten as the non-settling party. Specifically, the court found that “[e]very dollar recovered from a bankruptcy trust would simply reduce Asten’s liability by a dollar, netting zero gain.” CP 127. Recognizing the impact of the Coulters’ conduct on Asten, the court considered evidence that the Coulters had not diligently sought out other settlements to which they were entitled, had not received anything from the majority of named defendants, had received unreasonably low amounts from other defendants, and had failed to

comply with a court order compelling them to provide certain information to the court and opposing counsel. CP 129-130. Each of these considerations constitutes the “interests of the non-settling party” and was reflected in the court’s calculation of a reasonable offset. *Schmidt*, 115 Wn.2d at 158.

The realization of the Legislature’s goals as stated in the Senate Report depends on the trial court’s discretion to determine a reasonable offset if the settling parties fail to show their settlement was reasonable. Accepting the Coulters’ arguments in this case would undermine the protection for non-settling defendants envisioned by the Legislature and specifically written into the statute.

2. The trial court properly considered the *Glover* factors.

In *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983), *overruled on other grounds, Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988), the Washington Supreme Court laid out nine factors trial courts should consider in the context of a reasonableness hearing under RCW 4.22.060. Those factors are:

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

*Glover*, 98 Wn.2d at 717. The court emphasized that “no one factor should control. The trial judge faced with this task must have discretion to weigh each case individually.” *Id.* at 718. All of the *Glover* factors are not necessarily relevant in every case. *Werlinger*, 126 Wn. App. at 351 (citing *Besel v. Viking Insurance Co. of Wisconsin*, 146 Wn.2d 730, 739 n.2, 49 P.3d 887 (2002)). The burden of proof regarding the reasonableness of the settlement is on the party requesting the settlement. *See Brewer*, 127 Wn.2d at 522.

Here, the trial court articulated the *Glover* factors and recognized the framework through which it was required to evaluate the Coulters’ pretrial settlements and determine a reasonable offset. CP 129. The court then concluded that due to the paucity of information provided by the Coulters, the court was unable to evaluate seven of the nine factors. CP 129. The court found, “Other than the judgment from the trial against defendant Asten, Plaintiffs have provided none of the required information. The only *Glover* factors the court can determine from the scant information provided are (1) the releasing person’s damages, which are \$242,500; and (2) the merits of the releasing person’s liability theory....” CP 129.

The Coulters ignore this finding and instead contend that “[t]he trial court’s failure to find that any of the *Glover* factors weigh against the settlement amounts should have meant that the settlements were

reasonable.” App. Br. at 11. This argument turns the *Glover* analysis on its head. Not only is the burden on the settling party to show reasonableness, *Adams v. Johnson*, 71 Wn. App. 599, 605, 860 P.2d 423 (1993),, but it would be an absurd result if a settling party could refuse to provide the court with necessary information and then secure reversal because the court could not consider what was withheld. Commentators have taken note of the importance of disclosure by settling parties in evaluating the evolving interplay between tort law and asbestos trusts. See, e.g., William P. Shelley et al., *The Need For Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 J. Bankr. L. & Prac. 2 Art. 3 (2008); Mark A. Behrens, *What’s New in Asbestos Litigation*, 28 Rev. Litig. 501, 549-556 (2009).

Furthermore, the trial court examined the settling parties’ conduct in reaching the settlements, a consideration embodied under *Glover*’s direction to look for evidence of bad faith or collusion. *Glover*, 98 Wn.2d at 717. While the court did not make an explicit finding of bad faith, the court did find that the Coulters had no “incentive to maximize their recovery” from other available funds, that they had submitted claims to only a small number of available bankruptcy trusts, had received unreasonably low amounts from certain defendants, and that they (or their counsel) refused to provide Asten or the court necessary information. CP 127-29. Again, recent commentaries confirm that the trial court’s

concerns about the timing of applications to these trusts, and the potential for double recovery are valid. *E.g.*, Behrens, 28 Rev. Litig. at 553; Shelley, 17 J. Bankr. L. & Prac. 2 Art. 3, at 16-17.<sup>5</sup>

Ultimately, the court ruled that without more information, it could not find that the settlements were reasonable under *Glover*. The court found:

Of the 15 settlements, 8 were for less than \$1500, and one was for only \$61. The court finds that even a nuisance settlement of a claim against a defendant not in bankruptcy should not fall below \$3000. Most of the named defendants have paid nothing toward the Plaintiffs' damages. The court lacks sufficient information to find the amounts received from settling defendants reasonable. Further, the Plaintiffs' failure to pursue claims against other defendants and responsible bankruptcy trusts is unreasonable.

CP 130. Though neither party argued that the settlements were unreasonable in the trial court, "the trial court must make an objective finding, based on the *Chausee/Glover* factors, that the settlement is reasonable," and "the parties' agreement or disagreement with the reasonableness of the settlement is irrelevant to this analysis." *Howard*, 121 Wn. App. at 378.

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<sup>5</sup> Such concerns particularly cannot be ignored with respect to the Coulter's trial law firm, Brayton Purcell, which has been tied to well-documented manipulation and abuse of the trust process and concurrent discovery, to the point of having its *pro hac vice* privileges revoked in Ohio. *See Kananian v. Lorillard Tobacco Co.*, 2007 WL 4913164 (Trial Order) (Ohio Com.Pl. Jan 19, 2007) (NO. CV442750).

The Coulters had the burden to establish reasonableness. The court properly considered the *Glover* factors and determined that the Coulters did not meet it.

3. The court is not required to offset by only the amount paid.

After the court determined that the Coulters' pretrial settlements were not reasonable, the plain language of RCW 4.22.060(2) *required* the Court to offset the Coulters' claim "by an amount determined by the court to be reasonable." RCW 4.22.060(2). The Coulters argue that the court is bound to offset by only the actual "amount paid" under the settlement agreements. But, they omit reference to the remainder of the language in RCW 4.22.060(2) ("However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable."). Under the Coulters' proposed construction, a trial court would be required to offset by any amount *paid*, even if the court determined that the amount paid was unreasonable.

Courts routinely determine reasonable offsets, even without articulating their reasoning to the extent the trial court did here. For example, in *Schmidt*, 115 Wn.2d 148, the trial court rejected the parties' proposed settlement of \$50,000 and ruled that an offset of \$150,000 was more appropriate. *Id.* at 156. The court refused to hear from the

plaintiffs' expert because the judge "felt the parties themselves had provided ample material upon which to make a decision." *Id.* at 159. On appeal, the Supreme Court concluded that the trial court had properly exercised its "broad discretionary powers in determining reasonableness", *Id.* at 157-158, even though the application of the \$150,000 offset resulted in entirely discharging the liability of two named defendants. *Id.* at 158-159.

Similarly, in *Meadow Valley Owners Assoc. v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 819-20, 156 P.3d 240 (2007), this Court upheld the trial court's determination that a \$2.4 million attorney fee award was unreasonable. The court concluded that a \$1.6 million award was more appropriate. That court noted, "[t]he purpose of a reasonableness hearing is to determine whether the settlement is reasonable under the *Glover/Chausee* factors.<sup>6</sup> If the court determines the settlement is unreasonable, RCW 4.22.060(2) requires the court to set a reasonable amount." *Id.* at 820. In *Meadow Valley*, the court used the "lodestar" method to determine a more reasonable amount of attorneys'

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<sup>6</sup> In *Chausee v. Maryland Casualty Co.*, 60 Wn. App. 504, 509-10, 803 P.2d 1339 (1991), the Washington Supreme Court extended the *Glover* factors to determine the reasonableness of a settlement between an insured and a claimant for a stipulated judgment and covenant not to execute. The *Chausee* court concluded there was no logical distinction between the two settings because of the same concerns regarding the impact of the settlement on other parties and the risk of fraud or collusion. *Id.* at 512.

fees, while here, the trial court considered, *inter alia*, the Coulters' recalcitrance in pursuing available funds and refusal to provide the court with adequate information regarding the settlements. CP 128, 130. In both cases, the trial court's ability to use its "broad discretionary powers" to determine a reasonable amount is envisioned by the statutory language. *See also Howard*, 121 Wn. App. 372 (determining that \$20 million settlement was unreasonable, but that \$17.4 would be reasonable).

The above-cited authority conclusively demonstrates that once a trial court finds that the proponent of a settlement has failed to establish a reasonable settlement, the court is required to set a reasonable amount and has considerable discretion in doing so. The trial court properly applied that discretion here.

4. *Brewer v. Fibreboard* does not support reversal.

The Coulters rely heavily on a portion of the holding in *Brewer v. Fibreboard*, 127 Wn.2d 512, 901 P.2d 297 (1995), to support their argument that a trial court may only offset a judgment by the amount actually paid to a settling plaintiff. The Coulters misstate *Brewer's* holding and misapply it to the facts of this case.

In *Brewer*, the plaintiff settled with a bankruptcy trust for \$175,000. Both the trial court and the parties agreed that the settlement was reasonable, and the trial court agreed and offset the judgment against the remaining defendants in the amount of \$175,000. The plaintiff

appealed, arguing that he had only received \$21,000 from the trust, and due to the trust's undisputed financial problems as established by the record, he was likely never to receive the remaining amount. *Id.* at 530 & n. 69. The plaintiff claimed that the trial court should have offset his award by only the \$21,000 he had actually been paid, as opposed to the \$175,000 he had been promised. The Supreme Court agreed, finding that "the better and fairer result would be achieved by valuing the settlement for set-off purposes at \$21,000." *Id.* at 532.

The Coulters contend that this holding removes the trial court's discretion to offset a judgment by any amount other than that actually paid to the plaintiff. This argument grossly overstates *Brewer's* holding. Critically, the trial court in *Brewer* had first determined that the \$175,000 settlement was *reasonable* and calculated the offset as if that amount had been paid, even though it had not been. In other words, the court determined that \$175,000 was appropriate, and proceeded as if the plaintiffs had received \$175,000, even though they had not and there was clear evidence in the record that they would not.<sup>7</sup>

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<sup>7</sup> Justice Talmadge's dissent highlights the difference between this case and the situation in *Brewer*. He observed, the majority in *Brewer* "found that the \$175,000 settlement . . . was reasonable, but did not use the amount of the reasonable settlement to calculate the offset to any judgment entered against the non-settling defendants. This approach is contrary to RCW 4.22.060(2). Instead, the majority has found that the offset in this case should be an amount different from the amount of the settlement it determined to be reasonable, that is, \$21,000 in monies

Here, by contrast, the trial court first determined that the Coulters failed to show that the settlements into which they had entered were reasonable. CP 130 (“The court lacks sufficient information to find the amounts received from settling defendants reasonable. Further, the Plaintiffs’ failure to pursue claims against other defendants and responsible bankruptcy trusts is unreasonable.”). Consequently, the court exercised its statutory authority to determine that \$159,392 was an appropriate offset amount based upon a variety of factors, including evidence that the Coulters had not diligently sought out other settlements, had not received anything from the majority of named defendants, had received unreasonably low amounts from other defendants, and had failed to comply with a court order compelling them to provide certain information to the court and opposing counsel. *See* CP 131.

Furthermore, unlike in *Brewer*, there is no evidence in the record that the future settlements the court considered will not be paid. Importantly, the Coulters presented *no* evidence to opposing counsel or the court to support the reasonableness of their settlements. Nor did they provide evidence regarding the various funds to which they chose not to

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actually received from the [settling defendant].” *Brewer*, 127 Wn.2d at 543 (Talmadge, J., dissenting). The situation here is exactly the opposite. The court determined that the Coulters failed to meet their burden of showing that the settlements were reasonable and then applied a reasonable offset as determined by the court.

apply, despite the court's order compelling them to do so. CP 128.

Though the Coulters speculate generally on appeal about the uncertainty of obtaining settlements from certain trusts, App. Br. at 17-18, nothing in the record supports this premise. The trial court could not consider information that the Coulters' counsel refused to disclose.

Finally, nothing in *Brewer* or RCW 4.22.060 precludes a trial court from taking notice of other available funds as a component of its determination that the settlements received by a plaintiff are unreasonable. In this case, the record contained liquidated amounts reflecting projections of what the Coulters would actually receive from various trusts. *See* CP 58, 75-76. In the absence of sufficient information from the Coulters, the trial court relied in part of this evidence in determining a reasonable offset. On the record before it, taking notice of the awards the Coulters could have obtained had they pursued them was not an abuse of discretion.

5. The trial court properly applied joint and several liability.

The Coulters contend that principles of joint and several liability require the trial court to offset the judgment by only the \$94,977 they contend they received. App. Br. at 14. The Coulters suggest that the trial court was improperly "operating under principles of comparative fault" when it considered the reasonableness of the Coulters' settlements. *Id.* This argument is unsupported by the record. Asten was found to have been 5% responsible for the Coulters' damages, which would have been

equal to a \$12,125 judgment under a comparative fault model. But the trial court's award of \$78,000 far exceeds Asten's "comparative" liability.. The trial court followed this Court's instruction to the letter in determining a new damage award.

**C. The Court Correctly Calculated Interest.**

1. The Coulters are not entitled to prejudgment interest.

The Coulters are not entitled to prejudgment interest in this case. A party is only entitled to prejudgment interest if the damages awarded are liquidated. *State of Washington Dep't of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 789, 161 P.3d 372 (2007). Damages that cannot be calculated without the use of discretion are not liquidated. *Id.* at 790 (citing *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 773, 82 P.3d 660 (2004)). A trial court's award of prejudgment interest is reviewed for abuse of discretion. *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

The trial court twice determined that the Coulters were not entitled to prejudgment interest because their tort damages were not liquidated. CP 54, 142. The Coulters do not assign error to those rulings, but instead argue that they are entitled to prejudgment interest "accruing between the time of entry of the first judgment and the time of entry of the second judgment entered after this court's opinion in *Coulter I.*" App. Brief at 20 n. 4. Prejudgment interest does not apply to this period.

Recognizing that they are not entitled to prejudgment interest on their unliquidated tort claims, the Coulters rely on *Hadley v. Maxwell*, 120 Wn. App. 137, 144, 84 P.3d 286 (2004), for the proposition that their damage award “became liquidated” on the date of entry of the original judgment. Therefore, they contend 12% interest applies to the period between May 31, 2005 and March 3, 2009. App. Br. at 23. This argument is unsupportable.

As the Supreme Court recently held, “[n]othing in [Washington] case law or the underlying jurisprudence supports the proposition that the character of damages changes from unliquidated to liquidated by virtue of being *decided*.” *Fluor Daniel*, 160 Wn.2d at 790 (citing *Weyerhaeuser Co., v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 686, 15 P.3d 115 (2000)) (emphasis in original). “Instead, the moment damage claims are decided, they become subject to the civil rules and laws governing judgments.” *Id.* at 791. In *Fluor Daniel*, a construction contractor argued it was entitled to prejudgment interest on an arbitration award. Like the Coulters here, the contractor argued that once the arbitrator determined the amount of damages, the award became liquidated such that the contractor was entitled to prejudgment interest between the date of the award and the trial court’s entry of judgment. The Supreme Court rejected this argument, explaining that an arbitration award, like a jury award, is subject to substantial modification by the court such that the fact of it

having been decided does not render it a claim for a fixed sum entitled to prejudgment interest. *Id.* at 793. The fact of the Coulters' appeals does not change the nature of their original claims for unliquidated tort damages. *See Hansen v. Rothaus*, 107 Wn.2d 468, 471, 730 P.2d 662 (1986) (neither settlement agreements nor stipulations to damages relate back and render the damages liquidated when the cause of action arose).

The Coulters' reliance on *Hadley* is misplaced. *Hadley* merely holds that an unchallenged jury award on an unliquidated claim results in a liquidated claim for purposes of a second trial on liability alone. *Hadley*, 120 Wn. App. at 139-40. There was no second trial on liability in this case. Moreover, unlike the unchallenged jury award in *Hadley*, the Coulters' jury award was subject to further modification by the court through the reasonableness hearing process. "Prejudgment interest is not properly allowed in Washington if the amount of the claim is determinable only through a standard of reasonableness as contrasted with a fixed standard." *JACO Environmental Inc. v. Am. Int'l Specialty Lines Ins. Co.*, No. 2:09-cv-0145, 2009 WL 1591340, \*8 (W.D. Wash. May 19, 2009); *see also Fox v. Mahoney*, 106 Wn. App. 226, 230, 22 P.3d 839 (2001) (prejudgment interest not allowed where jury entitled to exercise discretion to determine if plaintiff's medical expenses were reasonable); *Car Wash Enters., Inc. v. Kampanos*, 74 Wn. App. 537, 549, 874 P.2d 868 (1994) (calculation of contribution share in environmental claim required

discretion, making prejudgment interest inappropriate); *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980) (claim which requires a determination of reasonableness is unliquidated); *Ski Acres Dev. Co. v. Douglas G. Gorman, Inc.*, 8 Wn. App. 775, 508 P.2d 1381 (1973) (same).

Under the Coulters' flawed interpretation of *Hadley*, any appeal would convert a jury award into a "liquidated sum" on which prejudgment interest could accrue. This is not the law. As further discussed below, under RCW 4.56.110, awards on appeal may be subject to a certain measure of *post-judgment interest* depending upon the circumstances surrounding the appeal, but prejudgment interest is inapplicable.<sup>8</sup>

Finally, the Coulters provide no authority for their assertion that prejudgment interest, even if appropriate, should accrue at 12%. The interest rate for judgments founded on tortious conduct is set by RCW 4.56.110(3). RCW 19.52.020, and its 12% rate, does not apply to interest on tort damages.

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<sup>8</sup> The Coulters' reliance on *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654,658, 15 P.3d 115 (2000), and *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968), is equally unhelpful. Both cases reiterate the well-established proposition that it is the "character of the claim" which determines whether prejudgment interest applies. In *Weyerhaeuser*, prejudgment interest was awarded only on the damages that Weyerhaeuser factually established through the presentation of invoices. *Weyerhaeuser*, 142 Wn.2d at 686. Similarly, the *Prier* court awarded prejudgment interest on the amount of fixed repair costs proved by contracts and undisputed by either party. *Prier*, 74 Wn.2d at 35. Here,

2. The Coulters are entitled to post-judgment interest only from the date of final judgment.

The Coulters are entitled to post-judgment interest only from the date the trial court entered final judgment (on March 3, 2009). CP 127-28. Where an appellate court's mandate requires a trial court to make new findings and enter a new judgment, post-judgment interest runs only from the date the new judgment is entered. *Fisher Properties Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990) ("Awards reversed on review do not bear interest."); *see also* RCW 4.56.110.

Here, this court reversed the trial court's initial damage award of of \$12,125, and remanded the case to the trial court with instructions to hold a reasonableness hearing and calculate an entirely new damage award. As detailed above, a reasonableness hearing necessarily requires the trial court to exercise its discretion to determine a proper offset. More was required of the trial court than "simple recomputation." *Id.* at 374. As in *Fisher*, this court "left it in the trial court's hands to determine damages.... The mandate necessitated new findings and a new judgment, not a simple mathematical computation." *Id.* (citing *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 237 P. 1002 (1925)). RCW 4.22.060 specifically directs the trial court to exercise its discretion. Moreover, the words of

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the Coulters' claims have always been for unliquidated tort damages.

this Court's mandate make clear that more than simple recalculation was required. This Court stated, "While the superior court *is not required* to base its calculations of offsets on Coulter's pretrial representation of total settlements, a reasonableness hearing under RCW 4.22.060 is in order to determine the proper offset for settlements with other defendants."

*Coulter I*, 135 Wn. App. at 627 (emphasis added).

*Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 610 P.2d 387 (1980), further illustrates this point. In *Fulle*, the trial court denied a claim for a certain amount because it was barred by the statute of limitations. The appellate court reserved, finding that the claim was not barred and directed the trial court to modify its judgment and enter the damages sought on the claim. The only action necessary from the trial court was mathematical compliance with the mandate. *Id.* at 523. The court held that the remand was "merely for amendment of the original judgment." *Id.* Accordingly, the court concluded that "[u]nder such circumstances, interest on that claim shall date back to and shall accrue from the date the original judgment was entered." *Id.*

Here, unlike *Fulle*, this Court's remand required more than amendment of the original judgment. The trial court was required to make new findings and exercise its discretion in setting a reasonable offset of the judgment against Asten. As previously noted, even the Coulters argued below that the trial court was "not required to base its

determination of the offset on the total amount of the Coulter's settlements." CP 23.

Under these circumstances, where an appellate court directs "that a new money judgment be entered, interest runs from the entry of such new judgment."<sup>9</sup> *Fulle*, 25 Wn. App. at 522; *see also Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 763, 980 P.2d 796 (1999) (where remand does not require new factfinding or the exercise of discretion by the trial court but only a "mere mathematical problem," interest runs from the date of the original judgment).

This court directed the trial court to make new findings and enter a new judgment. Therefore, post-judgment interest is appropriate only from the date of the trial court's final entry of judgment.

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<sup>9</sup> *Fulle* has been relied on in other jurisdictions for an analogous proposition that where a trial court must exercise discretion on remand, post-judgment interest does not accrue on any amount added to the initial judgment. *Long v. Hendricks*, 114 Idaho 157,162, 754 P.2d 1194 (Ct. App. 1988) (collecting cases) (where an award was increased on remand, post-judgment interest was denied on the added sum during the interjudgment period when the new amount was not ascertainable before the proceedings on remand); *see also Yeager Garden Acres, Inc. v. Summit Constr. Co.*, 32 Colo. App. 242, 513 P.2d 458 (1973) (same). Here, the trial court's 2005 judgment was reversed and, therefore, no post-judgment interest should accrue for the period of the appeal. Should this Court determine, however, that the trial court's original award was "partially affirmed" on appeal, then post-judgment interest at a rate of 5.125% is appropriate only on the original award of \$12,125. Post-judgment interest on the additional post-remand sum would accrue only from the entry of final judgment on March 3, 2009.

3. The post-judgment interest rate is 2.294%.

This case is entirely based upon tort claims and, therefore, the applicable interest rate is determined by statute. RCW 4.56.110(3) provides

Judgments founded upon the tortious conduct of individuals or other entities...shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry.

RCW 4.56.110(3); *see also Woo v. Fireman's Fund Ins. Co.*, 150 Wn.App 158, 208 P.3d 557 (2009). Final judgment was entered in this case on March 3, 2009. CP 128. The equivalent coupon issue yield as of February 4, 2009 was .294%. *See Appendix*. Accordingly, the correct interest rate is 2.294%.<sup>10</sup>

## V. CONCLUSION

The trial court's order should be affirmed. RCW 4.22.060 confers broad discretion upon the trial court to determine a reasonable offset from a tort judgment involving non-settling defendants. The statute requires the

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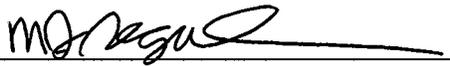
<sup>10</sup> The trial court's March 3, 2009 did not specify an interest rate for post-judgment interest. The rate indicated in the court's findings and conclusions (dated May 30, 2008) was 3.365%. Although this issue is largely moot because Asten has already satisfied the judgment, given that the rate for post-judgment interest varies by month, that rate is no longer applicable. *See* RCW 4.56.110(3).

trial court to determine a reasonable amount when, as here, the proponents of the settlement fail to meet their burden of showing reasonableness. The Coulters are not entitled to prejudgment interest because their damages are not liquidated. Finally, post-judgment interest at a rate of 2.294% should accrue from March 3, 2009, the date of final judgment in this case.

DATED this 22nd day of July, 2009.

Respectfully submitted,

K&L GATES LLP

By 

G. William Shaw, WSBA # 8573

Matthew J. Segal, WSBA # 29797

Kymerly K. Evanson, WSBA # 39973

Attorneys for Respondent

AstenJohnson, Inc.

# APPENDIX A

The Honorable Sharon Armstrong  
Hearing Date: Friday, May 2, 2008

Hearing Time: 9:00 am  
With Oral Argument

KING COUNTY, WASHINGTON

JUN - 2 2008

SUPERIOR COURT CLERK  
KIM C. PHIPPS  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ERNEST COULTER and LEROSE  
COULTER,

Plaintiffs,

v.

ASTENJOHNSON, INC.,

Defendant.

No. 01-2-34675-0 SEA

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
REASONABLENESS HEARING  
AND AWARD OF DAMAGES

**CLERK'S ACTION REQUIRED**

THIS MATTER came on before the Court upon the motion of plaintiffs Ernest Coulter and LeRose Coulter ("Plaintiffs") for a reasonableness hearing and award of damages against defendant AstenJohnson, Inc. ("Asten"). The Court, having reviewed the pleadings submitted by the parties and having heard the argument of counsel, makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. On April 4, 2005, the jury in this action awarded Plaintiffs a total of \$242,500 in damages for claims of product liability and negligence. The jury awarded \$98,000 in economic damages, \$110,500 in non-economic damages, and \$34,000 for loss of consortium.

2. The jury apportioned 2% of the liability to Mr. Coulter, 5% to Asten, and 93% to "all other suppliers of asbestos-containing products to the mill." On May 31,

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 1

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 2005, this Court entered judgment against Asten in the amount of \$12,125, plus \$611.31  
2 in taxable costs.

3 3. The jury's award did not include lost wages, medical expenses, or any out-  
4 of-pocket expenses previously incurred by Plaintiffs. The economic damages award was  
5 for future medical costs and out-of-pocket expenses only. The non-economic damages  
6 award included past and future pain and suffering for Mr. Coulter. The loss of consortium  
7 award to Mrs. Coulter was for past and future loss of consortium.

8 4. On September 25, 2006, the Washington Court of Appeals reversed the  
9 trial court's judgment, applying joint and several liability and holding that Asten's liability  
10 is \$237,650 plus costs, minus applicable setoffs. The Court of Appeals remanded the case  
11 to the trial court in order to determine the proper offset for Plaintiff's settlements with  
12 other defendants and bankruptcy trusts.

13 5. The Supreme Court of Washington denied certiorari of the appellate  
14 court's decision on September 6, 2007.

15 6. To date, Plaintiffs contend that they have received \$94,977 in settlements  
16 from other defendants and bankruptcy trusts. Asten does not challenge the reasonableness  
17 of the specific agreed-upon settlement amounts between Plaintiffs and the various settling  
18 defendants.

19 7. Plaintiffs' judgment against Asten is subject to a setoff for every dollar  
20 received. Accordingly, Plaintiffs did not have an incentive to maximize their recovery  
21 from bankruptcy trusts and claims facilities. (Every dollar recovered from a bankruptcy  
22 trust would simply reduce Asten's liability by a dollar, netting zero gain.)

23 8. Plaintiffs' records show that they submitted claims to only a small number  
24 of available bankruptcy trusts.

25 9. Based upon Mr. Coulter's work exposure and disease, data obtained from  
relevant bankruptcy trusts indicate that Plaintiffs can receive settlement amounts from

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 2

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 many additional bankruptcy trusts. These include the following operating trusts: ABB  
2 Lummus; A-Best Products; Babcock & Wilcox; Congoleum Corp.; Federal Mogul / T&N  
3 Flintkote; Fuller-Austin, Inc.; J.T. Thorpe Co.; Kaiser Aluminum; Keene; NARCO;  
4 OCF/Fibreboard; Pittsburgh Corning; Porter-Hayden; Quigley Company; Shook &  
5 Fletcher; Synkoloid; USG; and U.S. Minerals.

6 10. Via interrogatories and a subsequent letter, Asten requested that Plaintiffs  
7 explain their failure to apply to various bankruptcy trusts. Plaintiffs' counsel expressly  
8 refused to do so, despite the Court's order of March 13, 2008 that compelled their  
9 response to such interrogatory.

10 11. To date, Plaintiffs still have not provided any explanation as to their failure  
11 to apply to these trusts.

12 12. Based upon Mr. Coulter's exposure and disease, the total liquidated  
13 settlement value from the above-referenced trusts is \$34,214.

14 13. Plaintiffs are scheduled to obtain settlement amounts in the future due to  
15 their pending claims against the following bankrupt entities: Armstrong; A.P. Green;  
16 Harbison-Walker; Owens-Corning; and W.R. Grace. Together, Plaintiffs can expect to  
17 recover an additional \$18,774 from these entities.

18 14. Plaintiffs are scheduled to recover additional settlement amounts from  
19 several bankruptcy trusts from which Plaintiffs already reached settlement agreement or  
20 from which Plaintiffs' claims remain pending. These include the following: Celotex,  
21 from which Plaintiffs are likely to recover \$1,327 within the next two years; and Eagle-  
22 Picher, from which Plaintiffs can expect to receive \$400.00.

23 15. Plaintiffs can expect to recover additional settlement amounts from other  
24 bankruptcy trusts that are not yet operating, including ASARCO, G.I. Holdings, and  
25 Wickes. The Court estimates that Plaintiff will likely recover \$2,500 from such entities.

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 3

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1           16.     Altogether, Plaintiffs can expect to receive \$57,215 in the future from  
2 various bankruptcy trusts.

3           17.     Plaintiffs previously settled with the Bartells Asbestos Settlement Trust in  
4 the amount of \$8,000, although the Settlement Trust only paid a total of \$800. In addition  
5 to a monetary settlement, however, a specific provision in the global settlement agreement  
6 allowed Plaintiffs to name E.J. Bartells as a non-participating defendant in its lawsuit and  
7 thereby maintain state jurisdiction in its claims against Asten and other defendants. The  
8 court finds that the value of this benefit is the remainder of the full settlement value,  
9 which is \$7,200.

10          18.     *Glover v. Tacoma General Hospital*, 98 Wn. 2d 708 (1983), requires this  
11 court to consider multiple factors in determining whether a given settlement is reasonable:  
12 the releasing person's damages; the merits of the releasing person's liability theory; the  
13 merits of the released person's defense theory; the released person's relative faults; the  
14 risks and expenses of continued litigation; the released person's ability to pay; any  
15 evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation  
16 and preparation of the case; and the interests of the parties not being released. Other than  
17 the judgment from the trial against defendant Asten, Plaintiffs have provided none of the  
18 required information.

19          19.     The only *Glover* factors the court can determine from the scant information  
20 provided are (1) the releasing persons' damages, which are \$242,500; and (2) the merits of  
21 the releasing person's liability theory, which is that his asbestosis was caused by exposure  
22 to asbestos, and all exposures to asbestos contributed to his injury, such that every  
23 defendant who exposed plaintiff to asbestos should be jointly and severally liable for the  
24 Plaintiffs' injuries and damages.

25          20.     Plaintiffs named 26 defendants together with 100 Doe defendants in their  
complaint. Plaintiff took settlements from 15 entities, only 4 of whom were named

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 4

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 defendants. Of the 15 settlements, 8 were for less than \$1500, and one was for only  
2 \$61.00. The court finds that even a nuisance settlement of a claim against a defendant not  
3 in bankruptcy should not fall below \$3000. Most of the named defendants have paid  
4 nothing toward the Plaintiffs' damages. The court lacks sufficient information to find the  
5 amounts received from settling defendants reasonable. Further, the Plaintiffs' failure to  
6 pursue claims against other defendants and responsible bankruptcy trusts is unreasonable.

7 21. At a minimum, Asten is entitled to setoffs for amounts received to date by  
8 Plaintiffs from settling defendants and bankruptcy trusts, for amounts agreed to and to be  
9 received from settling defendants and bankruptcy trusts, for amounts that can be obtained  
10 by application to existing bankruptcy trusts, and for amounts that can be obtained from  
11 bankruptcy trust expected to soon become available.

12 22. Asten is entitled to an initial setoff of \$94,977 for the settlement amounts  
13 currently received by Plaintiffs from settling defendants and bankruptcy trusts.

14 23. For purposes of determining the applicable setoff, Plaintiffs are not entitled  
15 to reduce their settlement recovery by any amounts allocated to future wrongful death or  
16 loss of consortium claims. Future wrongful death claims would include only funeral  
17 expenses and perhaps a nominal additional award for loss of consortium, an insufficient  
18 amount to justify any reduction in the setoff. Additionally, Plaintiffs present no authority  
19 permitting a segregation of settlement amounts in the manner they propose.

20 24. Asten is entitled to a setoff for the amounts that Plaintiffs would have  
21 received had they diligently applied to appropriate bankruptcy trusts, including amounts  
22 that Plaintiffs are scheduled to obtain in the future should they decide to apply to these  
23 bankruptcy trusts. Plaintiffs are scheduled to recover liquidated settlement values from  
24 these trusts in the amount of \$34,214.

25 25. Asten is also entitled to a setoff in for the amounts that Plaintiffs are  
scheduled to obtain in the future due to their pending claims against the following

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW - 5

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 bankrupt entities: Armstrong; A.P. Green; Harbison-Walker; Owens-Corning; and W.R.  
2 Grace. Together, Plaintiffs are scheduled to recover \$18,774 from these entities.

3 26. Asten is further entitled to a setoff for the amounts that Plaintiffs are  
4 scheduled to obtain in the future from its current settlement agreement with the Asbestos  
5 Settlement Trust for Celotex and pending applications to the Eagle-Picher Settlement  
6 Trust. Asten is entitled to a setoff in the amount of \$1,327 for the amount Plaintiffs are  
7 scheduled to recover from Celotex and \$400.00 from their expected settlement with  
8 Eagle-Picher.

9 27. Asten is also entitled to setoffs for the amounts that Plaintiffs can expect to  
10 recover from other bankruptcy trusts that are not yet operating, including ASARCO, G.I.  
11 Holdings, and Wickes. The Court estimates that Plaintiffs will likely recover \$2,500 from  
12 such entities.

13 28. Altogether, Asten is entitled to a setoff of \$57,215 for the amount that  
14 Plaintiffs can expect to receive in the future from various bankruptcy trusts.

15 29. Asten is entitled also to a setoff in the amount of \$7,200 for the value of  
16 Plaintiffs' agreement with the Bartells Asbestos Settlement Trust.

17 30. In summary, the judgment against Asten is subject to, at a minimum, the  
18 following setoffs: (1) \$94,977 (settlement recovery to date); (2) \$57,215 (likely future  
19 recovery from future trust applications); and (3) \$7,200 (remaining value of E.J. Bartells  
20 settlement agreement).

21 31. Plaintiffs are not entitled to pre-judgment interest on any of the jury's  
22 award since Plaintiffs' economic damages are not liquidated.

23 32. Pursuant to RCW 4.56.110, Plaintiffs are not entitled to post-judgment  
24 interest since the Washington Court of Appeals reversed the Court's initial entry of  
25 judgment and directed that a new money judgment be entered. Once the Court makes its

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 6

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

1 findings regarding the appropriate setoff, post-judgment interest runs only from the entry  
2 of such new judgment at a rate of 3.635%.

3 33. Applying the applicable setoffs and the two percent of liability apportioned  
4 by the jury to Mr. Coulter, Plaintiffs are entitled to judgment against Asten in the amount  
5 of \$78,258, plus \$611.31 in taxable costs.

6 34. Plaintiffs shall present a judgment that is consistent with the findings and  
7 conclusions stated herein.

8  
9 ORDERED this 30th day of May, 2008.

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11   
12 JUDGE SHARON S. ARMSTRONG

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FINDINGS OF FACT AND CONCLUSIONS  
OF LAW- 7

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KIRKPATRICK & LOCKHART  
PRESTON GATES ELLIS LLP  
925 FOURTH AVENUE  
SUITE 2900  
SEATTLE, WASHINGTON 98104-1158  
TELEPHONE: (206) 623-7580  
FACSIMILE: (206) 623-7022

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KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

The Hon. Sharon Armstrong  
Hearing Date: Friday, Feb. 12, 2009  
Hearing Time: 4PM  
Oral argument requested

PHOTOCOPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

ERNEST COULTER and LEROSE  
COULTER,

Plaintiffs,

v.

ASTENJOHNSON, INC., et al.,

Defendant.

) Cause No. 01-2-34675-0SEA

) FINAL JUDGEMENT AND ORDER

) ~~PROPOSED~~

) CLERK'S ACTION REQUIRED

THIS MATTER originally came before the court upon the motion of plaintiffs Ernest and LeRose Coulter for a reasonableness hearing and award of damages against defendant AstenJohnson, Inc. ("Asten"), following an award of damages by a jury. The plaintiffs were represented by Delaney L. Miller, Brayton Purcell, LLP. The defendant was represented by Kevin A. Rosenfield, Kirkpatrick & Lockhart Preston Gates Ellis LLP. The court, after review of the pleadings submitted by the parties, and after considering the arguments of counsel, entered Findings of Fact and Conclusions of Law. Based on the foregoing:

NOW THEREFORE IT IS HEREBY ORDERED

1. Plaintiffs are entitled to judgment against defendant Asten in the amount of \$ 78,258.00, plus \$ 611.31 in taxable costs, consistent with and for the reasons set forth in the court's FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: REASONABLENESS HEARING AND AWARD OF DAMAGES, entered May 30, 2008, which is hereby incorporated and made a part of this Final Judgment

1 - FINAL JUDGMENT AND ORDER ~~PROPOSED~~  
J:\WA\27129\2nd Appeal\JUDGMNT - ORD.wpd

BRAYTON ♦ PURCELL, LLP  
Columbia Square Building  
111 SW Columbia Street, Suite 250  
Portland, Oregon 97201  
Tel: (503) 295-4931; Fax: (503) 241-2573

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and Order (copy attached).

DONE IN OPEN COURT this 3<sup>rd</sup> day of March, 2009.

Sharon A. Armstrong  
HONORABLE SHARON ARMSTRONG

Presented by:  
BRAYTON ♦ PURCELL, LLP

C. O. Carter  
Cameron O. Carter, WSBA #33326  
Attorneys for Plaintiff(s)

Dated this 3 day of February, 2009.

Notice of Presentment Waived,  
Copy Received:  
K & L GATES LLP

G. William Shaw  
G. William Shaw, WSBA # 8573  
Kevin A. Rosenfield, WSBA # 34972  
Attorneys for Defendant AstenJohnson, Inc.

Dated this 3 day of March, 2009.

2 - FINAL JUDGMENT AND ORDER [PROPOSED]  
J:\AWA\27129\2nd Appeal\UUDGMNT - ORD.wpd

BRAYTON ♦ PURCELL, LLP  
Columbia Square Building  
111 SW Columbia Street, Suite 250  
Portland, Oregon 97201  
Tel: (503) 295-4931; Fax: (503) 241-2573

# APPENDIX B

Return  
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No. 56469-2-I

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

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Ernest Coulter, et ano.,  
Appellants/Cross-Respondents,

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

v.

MAR - 1 2008

AstenJohnson, Inc.,  
Respondent/Cross-Appellant.

---

RESPONSE/OPENING BRIEF OF RESPONDENT/CROSS-  
APPELLANT ASTENJOHNSON, INC.

---

PRESTON GATES & ELLIS LLP

Fredric C. Tausend, WSBA # 3148  
Matthew J. Segal, WSBA # 29797  
Michael K. Ryan, WSBA # 32091  
Sarah C. Johnson, WSBA # 34529  
Attorneys for Respondent/Cross-Appellant  
AstenJohnson, Inc.

PRESTON GATES & ELLIS LLP  
925 Fourth Avenue  
Suite 2900  
Seattle, WA 98104-1158  
(206) 623-7580

6. Whether, if this Court concludes that the judgment below should not be affirmed in full, the jury's finding of contributory negligence does not bar the Coulter's recovery, and retrial is not required, an accurate accounting of all settlement set-offs must be incorporated into a judgment on remand? (Appellants' Assignment of Error 1).

7. Whether, if this Court concludes that the judgment below should not be affirmed in full, the jury's finding of contributory negligence does not bar the Coulter's recovery, and retrial is not required, that this Court should otherwise conclude that the hazardous waste exception stated in RCW 4.22.070(3)(a) does not apply to this case? (Appellants' Assignment of Error 1).

### **III. STATEMENT OF THE CASE**

#### **A. Background of Case**

The Coulter originally brought this action in December 2001, naming approximately twenty-five defendants in their complaint. CP 1-33. The Coulter alleged that each of these defendants were past manufacturers, sellers or purchasers of asbestos-containing products and were liable for Mr. Coulter's asbestos-related injuries sustained while working at the Port Townsend Paper Mill (the "Mill"). CP 5-8. In particular, the complaint alleged five causes of action: negligence liability

for personal injury; strict products liability; civil conspiracy; fraud, deceit and negligent misrepresentation; and loss of consortium. CP 8-31.

On June 19, 2003, the Coulters filed a second lawsuit regarding Mr. Coulter's asbestos-related claims. This lawsuit named four additional defendants, including Scapa Dryer Fabrics, Inc. ("Scapa"). CP 450-481. The two complaints were virtually identical and alleged the same five causes of action. CP 414-444, 450-478. On December 26, 2003, the Coulters moved to consolidate the two cases on the basis that they addressed similar issues of law and fact. CP 409-411. This motion was granted on February 2, 2004, and the two cases were consolidated before King County Superior Court Judge Sharon Armstrong, the court's Chief Asbestos Judge. CP 482-483.

This case was tried before Judge Armstrong between March 7 and April 4, 2005. At the time of trial, only two defendants, Asten and Scapa, remained in the case. After jury selection and in the midst of opening arguments, the Coulters, without explanation, dismissed Scapa. RP 3/10 (Flygare) p. 3.<sup>2</sup> The case then proceeded against only Asten, and the jury

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<sup>2</sup> In preparing the record on review, both parties designated distinct excerpts of the trial court proceedings from certain of the same dates. To avoid confusion as to which transcript is being cited, Asten has identified the different transcripts by reference to the court reporter's name. Therefore, for the report of proceeding dates on which both parties have designated separate sections of the transcript, the cited section will be

heard approximately two weeks of testimony from various fact and expert witnesses before delivering its verdict on April 4, 2005.

**B. Background Regarding Asten and Dryer Felts**

Asten manufactures “machine clothing” for paper machines, including dryer felts. Pl’s Ex. 164; RP 3/10 (Flygare) p. 3. The purpose of a dryer felt is to remove moisture from the paper stock as it is pressed and dried to make finished paper products. RP 3/10 (Flygare) p. 4. Each dryer felt is approximately 300 feet long and 250 inches wide. Pl’s Ex. 164. Dryer felts manufactured by Asten were used on paper machine number 2 at the Mill during certain periods of time in which Mr. Coulter worked at the Mill. *Id.* From 1962 to 1974, Asten supplied 28 asbestos-containing dryer felts and 10 non-asbestos-containing dryer felts to the Mill that were used on this paper machine. *Id.* From 1975 to 1992, Asten supplied 18 dryer felts to the Mill, none of which contained asbestos. *Id.*

**C. Mr. Coulter’s Work at the Mill**

Mr. Coulter worked at the Mill for approximately 45 years, ending with his retirement in 1992.<sup>3</sup> In the course of his employment, Mr.

---

identified as from the “Flygare,” the “Rau” or the “Moore” transcript.

<sup>3</sup> In their Opening Brief, the Coulters state that Mr. Coulter worked at the Mill only from 1951 to 1984. App. Br. at 3. Mr. Coulter’s testimony, however, indicates that he began his permanent employment at the Mill in 1951, and that he did not retire until 1992. RP 3/14 p. 34. Mr. Coulter

Coulter held various positions at the Mill, each with its own distinct job responsibilities. From 1951 to 1966, Mr. Coulter worked in the shipping department of the Mill. RP 3/14 p. 34. From 1951 to 1953, Mr. Coulter's primary responsibility was driving a forklift to move finished rolls of paper once they were taken off the paper machine. RP 3/14 pp. 47-49. He then spent an additional 13 years loading the paper rolls into freight cars and unloading various items that were shipped to the Mill. RP 3/14 p. 54. Mr. Coulter would unload "anything that came in and had to go to the Mill," including asbestos cement. *Id.* Mr. Coulter's job responsibilities also included cleaning up after installation of asbestos insulation bricks and mixing asbestos cement for use in boiler insulation. RP 3/14 pp. 17-26. Mr. Coulter also worked in the Mill's lime kiln between 1966 and 1984, and in the utility department from 1984 until his retirement in 1992. RP 3/14 pp. 34-35.

In the course of his employment in the shipping department between 1951 and 1966, Mr. Coulter had some limited exposure to dryer felts. RP 3/14 pp. 49-54. Mr. Coulter testified that on ten or fewer occasions he assisted in removing dryer felts from the paper machine by hooking them to a truck and driving the truck outside of the Mill where the

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also briefly worked at the Mill between 1946 and 1948. RP 3/14 pp. 8-12.

felts were deposited. RP 3/14 pp. 50-52. Mr. Coulter did not testify about any additional work with dryer felts. Thus, Mr. Coulter's limited work with dryer felts occurred sometime between 1951 and 1966.<sup>4</sup>

Mr. Coulter's extensive smoking history was also discussed at trial. Mr. Coulter began smoking around the age of 15, in approximately 1943, and continued to smoke for 25 years until the early 1970s. RP 3/14 pp. 76-78. Mr. Coulter testified that for a substantial portion of that time he smoked approximately three packs of cigarettes a day. RP 3/14 p. 77.<sup>5</sup>

#### **D. Choice of Law Discussion**

Mr. Coulter was exposed to various asbestos-containing products over the course of his 45-year career at the Mill. RP 3/14 pp. 17-26 (work with asbestos cement, bricks and boiler insulation); pp. 27-30 (work with pipe insulation products); pp. 54-59 (work unloading and moving bags of

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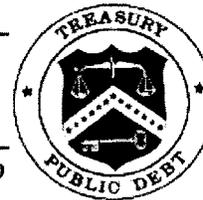
<sup>4</sup> Because the Mill's records regarding installed dryer felts indicate that Asten first supplied an asbestos-containing dryer felt in 1962, Mr. Coulter would only have worked with Asten's dryer felts between 1962 and 1966. Pl.'s Ex. 164; RP 3/14 pp. 49-54.

<sup>5</sup> Although the Coulter's brief refers to Mr. Coulter as "elderly and infirm" (App. Br. at 27) Mr. Coulter testified at trial regarding his active lifestyle. In particular, Mr. Coulter testified that he regularly works and volunteers at the Odd Fellows Hall doing odd jobs, including hanging drywall, cleaning the hall and mowing the lawn. RP 3/14 pp. 82-85. Mr. Coulter also testified that he currently helps out "old widows" with various odd jobs. RP 3/10 (Flygare) pp. 21-22. The jury also heard evidence from Dr. Victor Roggli who testified that in his opinion Mr. Coulter does not have asbestosis. RP 3/23 pp. 28-29, 44-47, 52.

# APPENDIX C

# PUBLIC DEBT NEWS

Department of the Treasury • Bureau of the Public Debt • Washington, DC 20239



For Immediate Release  
February 04, 2009

CONTACT: Office of Financing  
202-504-3550

## TREASURY AUCTION RESULTS

Term and Type of Security		49-Day Bill
CUSIP Number		912795K91
High Rate <sup>1</sup>		0.290%
Allotted at High		3.97%
Price		99.960528
Investment Rate <sup>2</sup>		0.294%
Median Rate <sup>3</sup>		0.260%
Low Rate <sup>4</sup>		0.200%
Issue Date		February 05, 2009
Maturity Date		March 26, 2009
	<b>Tendered</b>	<b>Accepted</b>
Competitive	\$93,455,750,000	\$29,982,033,500
Noncompetitive	\$18,075,000	\$18,075,000
FIMA (Noncompetitive)	\$0	\$0
<b>Subtotal<sup>5</sup></b>	<b>\$93,473,825,000</b>	<b>\$30,000,108,500<sup>6</sup></b>
SOMA	\$0	\$0
<b>Total</b>	<b>\$93,473,825,000</b>	<b>\$30,000,108,500</b>
	<b>Tendered</b>	<b>Accepted</b>
Primary Dealer <sup>7</sup>	\$71,500,000,000	\$16,973,445,000
Direct Bidder <sup>8</sup>	\$1,160,000,000	\$1,107,183,500
Indirect Bidder <sup>9</sup>	\$20,795,750,000	\$11,901,405,000
<b>Total Competitive</b>	<b>\$93,455,750,000</b>	<b>\$29,982,033,500</b>

<sup>1</sup> All tenders at lower rates were accepted in full.

<sup>2</sup> Equivalent coupon-issue yield.

<sup>3</sup> 50% of the amount of accepted competitive tenders was tendered at or below that rate.

<sup>4</sup> 5% of the amount of accepted competitive tenders was tendered at or below that rate.

<sup>5</sup> Bid-to-Cover Ratio: \$93,473,825,000/\$30,000,108,500 = 3.12

<sup>6</sup> Awards to combined Treasury Direct systems = \$0.

<sup>7</sup> Primary dealers as submitters bidding for their own house accounts.

<sup>8</sup> Non-Primary dealer submitters bidding for their own house accounts.

<sup>9</sup> Customers placing competitive bids through a direct submitter, including Foreign and International Monetary Authorities placing bids through the Federal Reserve Bank of New York.

# APPENDIX D

**RCW 4.56.110**  
**Interest on judgments.**

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

[2004 c 185 § 2; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

**Notes:**

**Application -- Interest accrual -- 2004 c 185:** See note following RCW 4.56.115.

**Application -- 1983 c 147:** "The 1983 amendments of RCW 4.56.110 and 4.56.115 apply only to judgments entered after July 24, 1983." [1983 c 147 § 3.]

**Effective date -- 1980 c 94:** See note following RCW 4.84.250.

**RCW 4.22.060****Effect of settlement agreement.**

(1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party.

The burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.

(2) A release, covenant not to sue, covenant not to enforce judgment, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid pursuant to the agreement unless the amount paid was unreasonable at the time of the agreement in which case the claim shall be reduced by an amount determined by the court to be reasonable.

(3) A determination that the amount paid for a release, covenant not to sue, covenant not to enforce judgment, or similar agreement was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

[1987 c 212 § 1901; 1981 c 27 § 14.]