

NO. 64516-1-I

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

MUTUAL OF ENUMCLAW INSURANCE COMPANY,
a Washington corporation,

Appellant,

v.

UNIGARD INSURANCE COMPANY,
a Washington corporation,

Respondent.


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BRIEF OF APPELLANT

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INTRODUCTION

Respondent Unigard Insurance Company (“Unigard”) filed this action to recover environmental cleanup costs as an assignee under a Settlement Agreement and Assignment (“Agreement”) between Unigard’s insured, Newmarket I General Partnership (“Newmarket”), and Appellant Mutual of Enumclaw Insurance Company’s (“MOE”) insured, Charles Engelmann (“Engelmann”). The trial court ruled on summary judgment that MOE had committed bad faith by failing to defend Engelmann from Newmarket’s claim. The trial court’s rulings on bad faith precluded MOE from asserting any policy defenses, with only the issue of the amount of MOE’s liability based on the Agreement remaining for determination.

The trial court erred by ruling that MOE was liable for 100% of Newmarket’s cleanup costs, even though Engelmann did not assume 100% liability under the terms of the Agreement. It compounded the error by failing to consider whether shifting *all* liability for the cleanup costs to Engelmann under the Agreement is “reasonable” for purposes of imposing liability on MOE, and instead limited MOE’s defenses to whether the Agreement was the product of fraud or collusion. The trial court also caused unfair prejudice to MOE by needlessly telling the jury that it was guilty of bad faith, and later erred by awarding Unigard prejudgment interest at the contract rate of 12%.

A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it construed the Agreement between Engelmann and Newmarket as an assumption of liability for 100% of Newmarket's environmental cleanup costs, when the Agreement itself contains express language to the contrary.

2. The trial court erred when it misapplied Washington bad faith law to conclude that MOE was not entitled to either defend on the issue of Engelmann's liability under the Agreement or challenge whether an assumption of 100% liability for Newmarket's cleanup costs was "reasonable," and instead limited MOE's defenses to whether the Agreement was the product of fraud or collusion.

3. The trial court unfairly prejudiced MOE when it denied MOE's request that the jury not be told that it had been found liable for Newmarket's cleanup costs as a result of bad faith conduct, when the only issue at trial was the amount of reasonable cleanup costs and legal fees.

4. The trial court erred when it denied MOE's motion seeking a new trial due to the errors described above.

5. The trial court erred when it awarded prejudgment interest on the amount awarded by the jury for incurred cleanup costs and legal fees, which necessarily required exercise of the jury's discretion and formation of opinions and therefore was an unliquidated amount.

6. The trial court erred when it awarded prejudgment interest at the contract rate of 12%, when the primary basis for imposing liability on MOE without regard to its policy limits or coverage defenses was its tortious bad faith failure to defend Engelmann from Newmarket's claim.

Issues Pertaining to Assignments of Error

1. Whether a settlement agreement under which a defendant pays a fixed sum of money and assigns all rights against his insurer to the plaintiff operates as an assumption of liability for *all* of the claimant's injuries and damages, where the agreement itself states that the defendant denies any further liability and makes no admission of law or fact?

2. Whether an insurer found guilty of bad faith is precluded from asserting those defenses that remain available to its insured after a settlement and/or from challenging whether the assumption of liability for 100% of the claimant's injuries and damages is "reasonable" in circumstances where applicable law results in either no liability or allocated shares based on equitable factors?

3. Whether it is unfairly prejudicial to instruct the jury that an insurer is liable for environmental cleanup costs and legal fees because of bad faith conduct, when the only issue at trial is the reasonable amount of clean up costs and fees?

4. Whether a trial held solely to determine the amount of reasonable environmental cleanup costs and other damages based on expert testimony necessarily required exercise of the jury's discretion and formation of opinions in determining damages?

5. Whether the imposition of liability on an insurer for a settlement entered into by its insured based on estoppel due to a finding of bad faith, without regard to policy limits or defenses and that results in liability far in excess of policy limits, arises primarily in tort for purposes of setting the interest rate for an award of prejudgment interest?

B. STATEMENT OF THE CASE.

1. Basis for Unigard's Claim against MOE.

Unigard filed this action against MOE seeking to recover environmental cleanup costs and other expenses incurred by or on behalf of its insured Newmarket. Unigard sought to enforce rights assigned to Newmarket by MOE's insured Engelmann under a Settlement Agreement and Assignment ("Agreement"). Unigard claimed that MOE was liable to it as Engelmann's assignee for breach of contract, violation of the Consumer Protection Act ("CPA") and bad faith. CP 3-8.

Newmarket's claim against Engelmann was based on the discovery of contamination at commercial property Engelmann sold to Newmarket on October 3, 1980. CP 272-86. The site of a former dry cleaning

operation, Engelmann had purchased the property on February 15, 1979, and was the owner for approximately nineteen months. CP 270-71. Engelmann never conducted dry cleaning operations at the site and testified at his deposition that the dry cleaners had ceased operations well before he purchased the property. CP 233. Newmarket filed suit against Engelmann and other former owners of the property after the discovery of contamination and receipt of a “potentially liable person” letter from the Department of Ecology in 1996. CP 5, 15-16.

2. Denial of Homeowners Liability Coverage by MOE and Settlement by Insured Engelmann.

MOE did not insure the commercial property sold by Engelmann to Newmarket where the dry cleaning operation had been located. Rather, MOE had issued Engelmann a homeowners policy insuring a house located on property adjacent to the commercial property sold to Newmarket. That policy included liability coverage for “Personal Liability” with limits of \$300,000 for each “occurrence.” CP 287-312.

MOE denied liability coverage to Engelmann for Newmarket’s claim under the homeowners policy based on the fact that the policy did not insure the site of the dry cleaning operation, and did not defend the lawsuit against him. Engelmann entered into the Agreement with Newmarket. CP 22-26. *See Appendix 1.*

In paragraphs 2.1 and 2.2 of the Agreement Engelmann agreed to pay Newmarket \$20,000.00 and to assign it all of his rights against any available insurance coverage. CP 23-24. In paragraphs 2.3 and 2.4 Newmarket agreed to release Engelmann except to the extent that the claim could be satisfied by assigned insurance rights and to dismiss him from the lawsuit. CP 24. No judgment was ever agreed to or entered against Engelmann and the lawsuit was dismissed with prejudice. CP 28-29. *See Appendix 2.*

The Agreement does not include an admission of liability or assumption of responsibility for 100% of Newmarket's cleanup costs by Engelmann. Rather, paragraph 1.7 reserves all issues of law and facts with respect to Newmarket's claims, as follows:

1.7 Newmarket and Engelmann now desire to resolve fully and finally, without admission or adjudication of any issue of fact or law as between them other than as set forth above, all remaining disputes between them relating to the Contribution Action, the Facility, and the Site.

CP 23. The Agreement also provides at paragraph 5.1 that neither party admits any liability to the other, as follows:

5.1 This Agreement is the result of compromise and accord, and shall not be considered an admission of liability or responsibility by any party hereto, who continue to deny any liability for any and all claims related to the Site, the Facility and the Contribution Action.

CP 25. There is no language in the Agreement by which Engelmann accepted liability on Newmarket's claim beyond the \$20,000.00 payment called for by paragraph 2.1.

3. Motions Decided before Trial.

The trial court granted Unigard's cross motion for summary judgment seeking a determination that MOE committed a breach of contract by failing to defend Engelmann from Newmarket's lawsuit claim and denied MOE's motion for reconsideration. CP 616-19. The trial court subsequently granted Unigard's Motion for Partial Summary Judgment on Bad Faith, Estoppel and Consumer Protection Act Claims and denied MOE's motion for reconsideration. CP 620-24. MOE was estopped from asserting coverage defenses to Newmarket's claim against Engelmann as a result of these rulings.

The trial court also denied MOE's motion to limit its liability for Newmarket's cleanup costs to the \$20,000.00 actually paid by Engelmann under the Agreement. CP 59-60. But the trial court did not make any specific findings regarding the extent of Engelmann's liability under the Agreement, which remained at issue prior to trial.

4. Rulings at Trial and Jury Verdict for Unigard.

Unigard's trial brief argued that MOE was estopped from asserting any defenses at trial related to liability as a result of its bad faith failure to

defend Engelmann from Newmarket's claim. According to Unigard, all that was left to be determined was the total amount of cleanup costs and related expenses to be imposed on MOE as damages. Unigard asserted that the jury should be instructed that MOE is liable for all reasonable and appropriate cleanup and investigation costs related to the former dry cleaning site. CP 61-75.

MOE's trial brief argued that Engelmann had not agreed to any liability above and beyond the \$20,000.00 to be paid by him under the Agreement or stipulated to entry of a covenant judgment. This meant that Engelmann's liability to Newmarket for amounts in excess of \$20,000.00, if any, remained to be determined at trial. MOE explained that even though it had been found to have acted in bad faith, it could not have any greater liability to Unigard than what could be imposed on Engelmann under the Agreement. CP 116-18.

MOE's trial brief also asserted that even if Engelmann had agreed to assume liability for 100% of Newmarket's cleanup costs under the Agreement, MOE would be entitled to a determination whether such a settlement was "reasonable" before liability would be imposed on it because of bad faith. CP 118. MOE explained that as a passive landowner who did not cause or contribute to the pollution at the site, Engelmann had defenses to Newmarket's claim for strict liability under

the Model Toxics Control Act (“MTCA”). Moreover, even if Unigard were able to establish a basis for finding Engelmann liable to Newmarket for cleanup costs, MOE argued that under applicable law equitable factors would require an allocation of responsibility between Engelmann and Newmarket. CP 119-121.

The trial judge agreed with Unigard and concluded that the trial would be conducted solely to determine the amount of reasonable cleanup costs and related expenses, with MOE’s defenses limited to the issue of whether the Agreement was the product of fraud or collusion. VRP 56-57. MOE was not permitted to present any evidence on liability issues, even though it offered Charles Engelmann’s deposition testimony in order to prove Engelmann had either no liability to Newmarket or at worst would have been liable only for an allocated share of the cleanup costs based on equitable factors. VRP 44-46, CP 227-312.

Unigard stated to the trial court that it would not seek general damages for bad faith. VBR 19. The parties also agreed that the amount of CPA damages was an issue for the court to determine. VRP 33, 79. MOE did not attempt to show that the Agreement itself was the product of fraud or collusion. This meant that the only issue for the jury to decide was the reasonable and necessary amount of cleanup costs incurred by or on behalf of Newmarket and recoverable legal expenses. MOE objected

before trial to the jury being told that it had been found guilty of bad faith and CPA violations as both inherently prejudicial and unnecessary because the basis for MOE's liability was irrelevant to determining the amount of reasonable cleanup costs and legal fees. VRP 7.

Again siding with Unigard, the trial court instructed the jury that MOE had been found liable on claims for breach of contract, CPA violations, and bad faith failure to defend its insured. VPR 40. Thereafter, Unigard's counsel made repeated references in her opening statement to bad faith conduct by MOE and that MOE had been found guilty by the court of bad faith and wrongfully failed to defend Engelmann from Newmarket's claims. VPR 71-72. MOE also unsuccessfully objected to jury instruction number six, which again informed the jury that MOE been found guilty of bad faith and CPA violations. VRP 92, CP 657.

The trial court rejected MOE's proposed jury instructions and a special verdict form that would have asked the jury to consider factors relevant to whether liability would have been imposed on Engelmann as a result of Newmarket's claim, stating that "[t]he Court's already ruled, and liability issues are not a part of this case. " VRP 94-97, CP 137-145. Instead, the trial court instructed the jury that MOE was "liable for all

damages contemplated by the Settlement Agreement,” unless it concluded that the Agreement was “the product of fraud or collusion.” CP 658.

The jury returned a verdict awarding damages in the amount of \$1,033,488.99 to Unigard for all of the incurred cleanup costs, expenses, settlement payments and defenses costs claimed at trial, and an additional \$312,500.00 for future economic damages. CP 319. The total verdict amount is \$1,345,988.99.

5. Motions and Rulings after Trial.

Unigard and MOE each filed motions after trial. MOE filed a motion asking the trial court to grant it a new trial pursuant to CR 59(a)(8) on the grounds that it had (1) erroneously construed the Agreement as imposing liability on Engelmann for 100% of Newmarket’s cleanup costs and related expenses, (2) misapplied bad faith law by depriving MOE of the opportunity to either defend the issue of Engelmann’s liability in excess of \$20,000.00 on the merits, or in the alternative challenge whether shifting 100% of the liability for cleanup costs to Engelmann was “reasonable” for purposes of imposing liability on MOE, and (3) caused unfair prejudice to MOE by needlessly telling the jury it was guilty of bad faith. CP 676-83. The trial court denied MOE’s motion for new trial. CP 597-98.

Unigard filed a motion seeking prejudgment interest at the contract rate of 12% on the portion of the jury verdict awarding \$1,033,488.99 for incurred damages. CP 320-331. MOE objected to the imposition of prejudgment interest on grounds that the amount awarded was subject to the jury's discretion and therefore was unliquidated. CP 470-73. MOE also argued that an award of prejudgment interest should be calculated at the tort rate of approximately 2.3%, because the primary basis for MOE's liability for amounts substantially in excess of its \$300,000 policy limit was the court's finding that it had committed the tort of bad faith. CP 468-70. MOE's arguments were rejected and the trial court entered a judgment including interest at 12% on amounts awarded as incurred damages. CP 611-15. The court also awarded Unigard its attorney fees and costs incurred in the suit. *Id.*

C. SUMMARY OF ARGUMENT

The trial court found that MOE had committed the tort of bad faith and as a result was estopped from asserting coverage defenses to Newmarket's claim against Engelmann. Nonetheless, MOE's liability to Unigard for environmental cleanup costs on the assigned claims is no greater than Engelmann's liability under the Settlement Agreement and Assignment itself. Engelmann never agreed to liability beyond his \$20,000.00 settlement payment, but was not released to the extent of

available insurance. Under the Washington case law cited by both parties, this means that the amount of Engelmann's additional liability under the Agreement, if any, remained to be determined. *See Kagele v. Aetna Life and Casualty Company*, 40 Wn. App. 194, 197-198, 698 P.2d 90, *rev. denied*, 103 Wn.2d 1042 (1985). The trial court erred when it concluded that "liability issues are not a part of this case" and refused to allow MOE to defend the issue of Engelmann's liability beyond his \$20,000.00 payment to Newmarket. VRP 94-97.

Under Washington bad faith law an insurer that is estopped from asserting coverage defenses because of bad faith is nonetheless only liable for a settlement entered into by its insured that is both "reasonable" and entered into in good faith. *E.g., Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). While the trial court allowed MOE to defend on the issue of the amount of reasonable cleanup and defense costs, it permitted no evidence and made no determination on the issue of whether imposing liability on Engelmann for 100% of Newmarket's cleanup costs was "reasonable." It is not enough to simply show that the settlement was not the product of fraud or collusion, which only establishes good faith and does not address the other criteria of *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339, 812 P.2d 487 (1991). Even if Engelmann had accepted liability for 100% of Newmarket's cleanup costs

under the Agreement, the trial court's judgment lacks an adequate foundation because it failed to consider whether shifting *all* liability for the site contamination to Engelmann would have been "reasonable" under the circumstances existing at the time.

Instructing the jury that MOE had been found guilty of bad faith had no relevance to the issues at trial and therefore was inherently unfairly prejudicial. A jury trial was held solely to determine the amount of reasonable cleanup and defense costs to be awarded, which represented an unliquidated amount prior to verdict that is not subject to an award of prejudgment interest. The trial court erred when it awarded prejudgment interest and applied the 12% contract rate to a judgment arising primarily from the tort of bad faith. *See Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 208 P.3d 557 (2009)

D. ARGUMENT.

1. Standard of Review.

This appeal presents numerous questions of law, which are reviewed *de novo* on appeal. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The issues of law on appeal include interpretation of the Agreement between Newmarket and Engelmann, proper application of Washington bad faith law as a result of the court's rulings on summary judgment, and the award of prejudgment

interest at the contract rate of 12%. The decision to deny MOE's motion for a new trial pursuant to CR 59(a)(8) also is subject to *de novo* review. *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

The question whether MOE was unfairly prejudiced by the court's comments and instructions to the jury that it had committed bad faith is subject to review for abuse of discretion. *See State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

2. The Trial Court Misconstrued the Settlement Agreement and Assignment.

The trial court concluded before trial that absent fraud or collusion MOE would be held responsible for 100% of Newmarket's reasonable cleanup costs determined by the jury. To the extent the court reached this conclusion based on construction of the Settlement Agreement and Assignment ("Agreement"), it committed an error of law.

Settlement agreements are contracts and subject to contract rules of interpretation. *Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 938, 568 P.2d 780 (1977). Interpretation of a contract is a question of law for the court. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1995). Errors of law are reviewed *de novo* on

appeal. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Engelmann did not assume liability for Newmarket's cleanup costs under the plain language of the Settlement Agreement and Assignment. *See* Appendix 1. Rather, the parties agreed that Engelmann was not conceding any issue of fact or law on Newmarket's claims, as follows:

1.7 Newmarket and Engelmann now desire to resolve fully and finally, without admission or adjudication of any issue of fact or law as between them other than as set forth above, all remaining disputes between them relating to the Contribution Action, the Facility, and the Site.

CP 23. The Agreement also provides that neither party admits any liability to the other, as follows:

5.1 This Agreement is the result of compromise and accord, and shall not be considered an admission of liability or responsibility by any party hereto, who continue to deny any liability for any and all claims related to the Site, the Facility and the Contribution Action.

CP 25. There is *no* language in the Agreement by which Engelmann assumed responsibility for Newmarket's cleanup costs.

Rather, paragraphs 2.1 through 2.4 of the Settlement Agreement and Assignment release Engelmann from any personal liability in exchange for payment of \$20,000.00 and an assignment that permitted Newmarket to pursue its claims directly against MOE, including any

claims held by Engelmann because of bad faith. As a result, the settlement agreement left both the issue of Engelmann's liability and the amount of Newmarket's damages undetermined.

The settlement between Engelmann and Newmarket is comparable to the settlement in *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 698 P.2d 90 (1985), with the exception that in *Kagele* the insured contractor did not agree to any cash payment.¹ In *Kagele* the parties settled with no admission of liability and an assignment of the insured's rights to the claimant. The court held that the agreement was not determinative of the insured contractor's liability and did not relieve the insurer of any liability. The summary judgment dismissal of claims against the insurer was reversed and the case sent back to the trial court.

Although MOE was estopped from asserting coverage defenses as a result of the court's bad faith ruling, its liability is still based on the settlement entered by its insured. *See, e.g., Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002) (applying bad faith rule to settlements). As in *Kagele, supra*, the Agreement did *not* determine Engelmann's liability beyond \$20,000.00. The trial court erred to the extent it concluded that Engelmann became liable for 100% of

¹ The trial court denied MOE's motion seeking a determination that Engelmann's liability under Agreement was limited to the \$20,000.00 actually paid to Newmarket. CP 59-60.

Newmarket's environmental cleanup costs and related expenses as a result of entry in the Agreement.²

3. The Court Misconstrued Washington Bad Faith Law.

Under Washington law an insurer that commits bad faith is estopped from asserting coverage defenses and instead becomes liable for any "reasonable" settlement entered into by its insured in good faith. *E.g.*, *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002) ("An insured may independently negotiate a settlement if the insurer refuses in bad faith to settle a claim. In such a case, the insurer is liable for the settlement to the extent the settlement is reasonable and paid in good faith."). Establishing "reasonableness" requires more than simply proof that the settlement was not the product of fraud or collusion.

"Reasonableness" in a bad faith case is determined using the criteria of *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 803 P.2d 1339, 812 P.2d 487 (1991). *Besel, supra*, 146 Wn.2d at 734 ("We hold the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant

²The trial court's bad faith ruling does not have the result of making MOE the insurer of Newmarket for its own liability. Rather, MOE's obligations remain tied to the liability of its own insured. *See Ledcor Indus. (USA), Inc., v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10-11, 206 P.3d 1255 (2009) (bad faith estoppel does not create coverage beyond scope of policy insuring language).

judgment is reasonable under the *Chaussee* criteria.”). These criteria include factors relevant to the insured’s potential liability and liability defenses. *See Chaussee, supra*, 60 Wn. App. at 512.³

When the insured has entered into a settlement that has been approved by the court as reasonable based on the *Chaussee* factors, the burden shifts to the insurer that show the settlement is nonetheless the product of fraud or collusion, *i.e.*, was not entered into in good faith.⁴ *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002), *citing Besel and Chaussee, supra* (“We concluded once a court determined the covenant judgment to be reasonable, it was presumptively reasonable and the burden shifted to the insurer to show that the settlement was the result of fraud or collusion.”) While good faith is one of the *Chaussee* factors, finding that a settlement is “reasonable”

³ The factors listed by the *Chaussee* court are (1) the releasing person's damages; (2) the merits of the releasing person's liability theory; (3) the merits of the released person's defense theory; (4) the released person's relative faults; (5) the risks and expenses of continued litigation; (6) the released person's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing person's investigation and preparation of the case; and (9) the interests of the parties not being released.

⁴ Newmarket could have entered into a settlement with Engelmann that included a covenant judgment and then sought a determination from the court that the judgment was “reasonable” based on the *Chaussee* factors, but did not. MOE would have then been entitled to participate in the determination whether the settlement was “reasonable.” *See, e.g., Mutual of Enumclaw v. T&G Construction, Inc.*, 165 Wn.2d 255, 261, 199 P.3d 176 (2008)

requires at least consideration of the other factors to satisfy the *Besel* test for imposing liability on an insurer that commits bad faith. Those factors include liability issues and relative fault. *Chaussee, supra*, 60 Wn. App. at 512.

The court allowed MOE to challenge whether the amount of cleanup costs claimed as damages by Unigard was reasonable by conducting a trial on the issue of damages. But it committed an error of law by denying MOE the opportunity to either (1) litigate Engelmann's liability to Newmarket on the merits (because liability was not determined by Agreement as explained above), or (2) to challenge whether imposition of liability on Engelmann for 100% of Newmarket's cleanup costs was "reasonable" in light of the *Chaussee* factors.⁵ Consideration of the *Chaussee* factors is a prerequisite under Washington bad faith law to imposing liability on an insurer for a settlement entered into by the insured.

Unigard's judgment lacks an adequate foundation, even if Engelmann had accepted liability for 100% of Newmarket's cleanup costs

⁵ Failure to require a reasonableness determination on liability issues before entering a judgment against MOE based on the jury verdict means that the court's rulings on the effect of MOE's bad faith are internally inconsistent. MOE was allowed to litigate the reasonable amount of damages in spite of the bad faith ruling, but was not allowed to challenge in any way whether imposition of liability for 100% of the cleanup costs on Engelmann was itself reasonable.

in the Agreement. The trial court did not allow or consider any evidence on the issue of whether shifting *all* liability to Engelmann for the site cleanup costs was itself reasonable. An insurer that commits bad faith is nonetheless only liable for a “reasonable” settlement entered into in good faith. *See Besel* and *VanPort, supra*. Establishing that the settlement embodied by the Agreement was “reasonable” is an element of Unigard’s claim to recover damages from MOE for bad faith. *See Chaussee*, 60 Wn. App. at 515.⁶ The trial court’s failure to address whether shifting liability for 100% of the cleanup costs to Engelmann was reasonable under the *Chaussee* criteria requires reversal of the trial court’s judgment.

4. MOE Was Prepared to Demonstrate at Trial that Engelmann Had Little or No Liability to Newmarket.

MOE’s trial brief outlined the reasons why Engelmann had limited or no liability to Newmarket beyond the \$20,000.00 he actually agreed to

⁶ In affirming the dismissal of the claims being pursued as the result of a covenant judgment and assignment, the *Chaussee* court stated as follows:

The Nodells were required to prove that the settlement was reasonable. The judicial hearing on the guardianship that did not consider all of the *Glover* factors was insufficient. Taken together, the exhibits presented at trial presented sufficient evidence of liability, the merits of the defense theory, and the relative faults of the parties, but failed to show the risks and expense of litigation or *Chaussee's* ability to pay and therefore were insufficient to prove that the settlement was reasonable.

pay under the Agreement. CP 152-54. Engelmann owned the property for approximately nineteen months and no dry cleaning operations were conducted during his period of ownership. CP 146. MOE offered Engelmann's deposition testimony at trial as evidence that he did not engage in any activity that would have caused a "release" of contaminants for purposes of liability under the Model Toxics Control Act ("MTCA") contribution statute, RCW 70.105D.080, under which Newmarket sought recovery in the underlying action. VRP 44-46. CP 227-312.

As a passive owner who did not cause a release of contaminants and did not own the property at the time the Department of Ecology initiated the cleanup in 1996, Engelmann had little or no liability to Newmarket under the standard of liability imposed by MTCA, as follows:

RCW 70.105D.040

Standard of liability – Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

- (a) The owner or operator of the facility;
- (b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

The Act makes current owners and operators of contaminated facilities, as well as owners and operators at the time hazardous substances are released, strictly liable for cleanup costs. RCW 70.105D.040(1)(b) and

(2). *See also Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn. 2d 891, 897-98, 874 P.2d 142 (1994).

For former owners like Engelmann, however, only those persons who owned or operated a facility *at the time of a disposal or release of hazardous substances* are liable for their allocated share of any resulting remedial action costs. *See RCW 70.105D.040(1)(b)*. *See also Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 599, 937 P.2d 1148 (1997). While a “release” does not require a showing of intentional conduct, a “release” *does* require some active conduct or direct introduction of a hazardous substance into the environment. *See RCW 70.105D.020(25)*. Passive migration – *i.e.* the movement and transport of previously-released contamination through soil, groundwater, or air due solely to natural forces – is *not* a “release” for purposes of establishing MTCA liability. *Taliesen v. Razore Land Co*, 135 Wn. App. 106, 135, 144 P.3d 1185 (2006).

Even assuming there was a basis for imposing liability on Engelmann under RCW 70.105D.040, he could *not* have been found liable to Newmarket for 100% of its cleanup costs. RCW 70.105D.080 creates a private right of action for recovery based on application of “equitable factors,” as follows:

RCW 70.105D.080

Private right of action -- Remedial action costs.

Except as provided in RCW 70.105D.040(4) (d) and (f), a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. In the action, natural resource damages paid to the state under this chapter may also be recovered. *Recovery shall be based on such equitable factors as the court determines are appropriate. . . .*

(Italics added.) Determining Engelmann's liability on Newmarket's contribution claim under RCW 70.105D.080 requires allocation "based on such equitable factors as the court determines are appropriate." *See also Taliesen, supra*, 135 Wn. App. at 139-40.

In *Dash Point Village Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 937 P.2d 1148 (1997), the court endorsed the use of the following "Gore factors" (applicable in the allocation process for CERCLA contribution actions under 42 U.S.C. § 9613) for purposes of equitable allocation under RCW 70.105D.080:

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- (2) the amount of the hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned ...;
- and (6) the degree of

cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Dash Point, supra, 86 Wn. App. at 608 n.24. See also *Car Wash Enterprises v. Kampanos*, 74 Wn. App. 529, 548, 874 P.2d 868 (1994) (applying equitable allocation to MTCA contribution claim).

Shifting liability for 100% of Newmarket's cleanup costs to Engelmann, who by available evidence was a passive owner that did not cause a "release" of hazardous substances during his period of ownership and did not conduct dry cleaning operations on the property, is unreasonable on its face given the equitable allocation required by the authorities discussed above. The trial court erred by refusing to either (1) allow MOE to defend on the issue of whether Engelmann was liable to Newmarket for amounts over and above \$20,000.00 settlement payment, or (2) consider whether shifting 100% liability to Engelmann for cleanup costs was a "reasonable" settlement for purposes of imposing liability on MOE.

5. The Court Needlessly Caused Unfair Prejudice to MOE.

In spite of objections the trial court told the jury that MOE had been found to have acted in bad faith as the basis for its liability. Newmarket's counsel subsequently made references to MOE's bad faith and violations of the Consumer Protection Act to the jury. The court's

instruction number six again informed the jury over objections that MOE had been found guilty of bad faith conduct. VRP 92. CP 657.

In determining whether to allow the jury to hear information that would be considered prejudicial, the court must weigh the probative value of the evidence against its potential prejudicial impact. *See State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). *See also* ER 403. The trial court's decision to allow certain information to be presented to the jury is reviewed for abuse of discretion. *See State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

At trial the jury's only function was to determine the amount of reasonable clean up costs and legal expenses incurred by Newmarket and/or Engelmann.⁷ Bad faith conduct by MOE as the basis for its liability played no role in this determination and therefore had no relevance at trial. *See* ER 401 ("relevant evidence" means evidence tending to make a fact of consequence to the action more or less probable). As a result, the information had no probative value.

"Unfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury. *See State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). "Unfair prejudice"

⁷ Although the court's instructions allowed MOE to defend on the issue of whether the Agreement was the product of fraud or collusion, MOE did not contest this issue.

also may result from an “undue tendency to suggest a decision on an improper basis — commonly an emotional one.” *See State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983). Once the jury was told MOE had been found guilty of “bad faith” and Consumer Protection Act violations, it was unnecessarily labeled in the jury’s eyes as a wrongdoer. When balancing the probative value of that information against its prejudicial effect, the scale is entirely one sided.

The trial court abused its discretion by telling the jury that MOE was guilty of bad faith and CPA violations, instead of simply stating that the court had determined that MOE was liable for the reasonable cleanup costs and legal expenses as determined by the jury.

6. The Court Erred by Denying MOE’s Motion for New Trial.

MOE filed a motion seeking a new trial on grounds that the trial court (1) erroneously construed the Agreement as imposing liability on Engelmann for 100% of Newmarket’s cleanup costs and related expenses, (2) misapplied bad faith law by depriving MOE of the opportunity to either defend the issue of Engelmann’s liability on the merits, or in the alternative challenge whether shifting 100% of the liability for cleanup costs to Engelmann was “reasonable” for purposes of imposing liability on MOE, and (3) caused unnecessary prejudice to MOE by telling the jury it

was guilty of bad faith. CP 676-83. MOE relied on CR 59(a)(8), which provides as follows:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

. . .

(8) Error in law occurring at the trial and objected to at the time by the party making the application; . . .

MOE opposed the relief sought by Unigard that led to the trial court's rulings regarding imposition of liability for 100% of Newmarket's cleanup costs and objected to the jury being told it had been found guilty of bad faith and Consumer Protection Act violations. The trial court's decision to deny MOE's motion for a new trial is subject to *de novo* review. See *Aluminum Co. of America v. Aetna Casualty & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). The court erred by denying MOE's motion for new trial for the same reasons described in sections D.2. through 5. above.

7. The Reasonable Amount of Incurred Cleanup Costs and Legal Expenses was an Unliquidated Sum Not Subject to an Award of Prejudgment Interest.

The trial court erred by granting Unigard's motion for prejudgment interest on incurred amounts in reliance *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wn.2d 654, 15 P.3d 115 (2000). This is an error of law to be reviewed *de novo*. See *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

In *Weyerhaeuser, supra*, Weyerhaeuser sought coverage for environmental cleanup costs from its insurer Commercial Union. The parties litigated coverage issues under the insurance policy and whether Commercial Union was entitled to a set off for other payments to the insured. Ultimately Weyerhaeuser prevailed in the litigation and sought prejudgment interest for past cleanup costs based on the invoice dates showing when the expenses were incurred.

The *Weyerhaeuser* court explained that amounts claimed as damages are liquidated and therefore subject to prejudgment interest if "the evidence furnishes data which, if believed, make it possible to compute the amount due with exactness, without reliance on opinion or discretion." 142 Wn.2d at 685, citing *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968). Finding this test satisfied, the Court stated as follows:

Weyerhaeuser persuasively argues its claims fit within the *Prier* framework. Here, the parties disputed the amount of insurance coverage available and the amount of damage sustained. Once liability was established, however, calculating the amount due required no discretion - it equaled the invoices for the cleanup work performed. The questions before the jury were simply ones of liability and did not involve opinion or an exercise of discretion regarding the amount of the award, as would be the case with general damages.

142 Wn.2d at 686. As a result, Commercial Union was found liable for prejudgment interest because once coverage was established under the insurance policy, the damages were fixed by the amounts actually paid by its insured Weyerhaeuser for past cleanup costs as shown by the invoices.

In this case the court held that Mutual of Enumclaw was estopped from denying coverage to its insured Engelmann because of bad faith. Coverage was no longer at issue. A trial was held solely to determine the reasonable amount of cleanup costs and related expenses. Unigard presented expert testimony and other evidence at trial to support the *amounts* claimed as damages. VRP 4-43.

In *Weyerhaeuser* the damages were fixed by the amounts paid by the insured with only the question of the insurer's liability for those payments to be determined. In this case the amount of recoverable damages was the only issue submitted to the jury. If the jury was not expected to exercise discretion and form opinions in determining damages,

what was the purpose of allowing expert testimony and holding a trial? The trial court erred by awarding prejudgment interest on the incurred damages determined by the jury, which were an unliquidated sum prior to verdict.

8. Unigard is not Entitled to Prejudgment Interest at the Contract Rate of 12%.

Even if the award of prejudgment interest to Unigard is upheld, it is not entitled to interest at the contract rate of 12%. See RCW 4.56.110(4) and 19.52.030. Rather, any award of prejudgment interest must be calculated based on RCW 4.56.110(3), which provides as follows:

RCW 4.56.110

Interest on judgments.

Interest on judgments shall accrue as follows:

. . .

(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.

RCW 4.56.110(3), which is based on the average bill rate for twenty-six week treasury bills plus 2%, applies to judgments “founded upon tortious conduct” and applies to the judgment in this case.

In *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 208 P.3d 557 (2009), Woo sued Fireman’s Fund on claims for breach of contract by failure to provide a defense, bad faith and under the Consumer Protection Act. Woo prevailed. The trial court subsequently entered a judgment against Fireman’s Fund that became subject to the provisions of RCW 4.56.110. The *Woo* Court stated the issue on appeal and its holding as follows:

What is the governing interest rate on a judgment based on claims of tortious conduct, breach of contract, and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW? Because the judgment before us is not divisible and is primarily based on the tortious conduct of the defending insurers, we hold that the governing rate is that specified in RCW 4.56.110(3), the rate for “[j]udgments founded on the tortious conduct of individuals or other entities.”

150 Wn. App. at 162. The Court explained that RCW 4.56.110 requires that only one rate of interest is applied to a judgment, even when more than one type of claim is present. *Id.* at 167. Moreover, an award of damages for bad faith *or* applying estoppel to deny coverage are remedies that “sound in tort” under Washington law. *Id.* at 172.

Although portions of the judgment against Fireman's Fund included remedies for contract claims, the *Woo* Court held that the interest rate applicable to tort claims also applied to "mixed judgments" in bad faith cases, as follows:

Considering the component parts of the judgment, it is clear that it is primarily based on amounts founded on or based on the tortious conduct of Fireman's Fund. In fact, over \$1,000,000 of the total judgment is based on such conduct, without consideration of the portion of attorney fees which we are unable to characterize on this record. We conclude that since the legislature chose to impose different interest rates on judgments based on what they are founded on, application of the tortious conduct interest rate to this mixed judgment best effectuates the intent of the legislature. Accordingly, application of RCW 4.56.110(3) to the entire judgment in this case is most persuasive.

Id. at 173. Thus, the entire judgment was subject to the interest rate prescribed by RCW 4.56.110(3).

In this case Unigard sued Mutual of Enumclaw as the assignee of Engelmann's claims for breach of contract, failure to defend, bad faith and CPA violations. These are the same claims asserted against Fireman's Fund in *Woo, supra*. Due to the trial court's ruling that it committed bad faith, MOE was prevented from relying on coverage defenses or its \$300,000 homeowners policy liability limit, and instead had a judgment entered against it including a principal amount of \$1,345,988.99. CP 287-312, 319. The only basis for imposing liability on MOE for cleanup costs

and expenses far in excess of its \$300,000 policy limit is bad faith. As in *Woo*, the primary basis for the judgment against MOE is the finding that it committed the tort of bad faith, because it was found liable for an amount far in excess of policy limits and without regard to coverage defenses, based on the application of the tort remedy of estoppel.⁸ The trial court committed an error of law by applying the 12% contract rate of interest, rather than the tort rate prescribed by RCW 4.56.110(3), when it calculated the amount of prejudgment interest to be awarded on incurred damages.

E. CONCLUSION.

The trial court committed errors of law when it concluded that MOE is responsible for 100% of Newmarket's environmental cleanup costs as the result of a Settlement Agreement and Assignment entered into by its insured Engelmann and MOE's bad faith failure to defend Engelmann from Newmarket's claim. MOE is entitled to a new trial addressing the issue of Engelmann's liability, if any, to Newmarket in excess of his \$20,000.00 settlement payment. At the very least the trial court's judgment must be vacated and the case remanded for a determination under the *Chaussee* factors of whether shifting liability for

⁸ The fact that Unigard did not recover general damages as a result of the trial court's bad faith finding does not change the tort nature of the estoppel remedy imposed by the court.

100% of Newmarket's cleanup costs to Engelmann under the Agreement is "reasonable" for purposes of imposing liability on MOE, as required by Washington bad faith law.

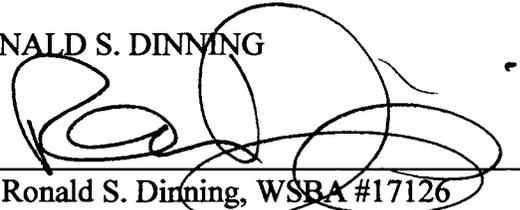
The trial court abused its discretion by informing the jury that MOE had been found guilty of bad faith prior to a trial limited to determining the amount of reasonable cleanup costs and recoverable legal expenses. The trial court also committed errors of law by awarding prejudgment interest on the incurred damages determined by the jury, and by granting prejudgment interest at the contract rate of 12% in circumstances where the primary basis for MOE's liability is estoppel due to a finding of tortious bad faith.

The Court of Appeals should vacate the trial court's judgment, including amounts awarded as prejudgment interest and attorney fees and costs, and remand the case for further proceedings consistent with the relief sought on appeal.

DATED this 25 day of March, 2010.

Respectfully submitted,

RONALD S. DINNING

By 

Ronald S. Dinning, WSBA #17126
Of Attorneys for Respondent

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APPENDIX 1

SETTLEMENT AGREEMENT AND ASSIGNMENT

This Settlement Agreement and Assignment (the "Agreement") is entered into as of the Effective Date by and between Joseph R. Illing, John A. Denneby, B. A. Williams, Kenneth Wilcox, Sandra Schenkar and David Schenkar d/b/a NewMarket I General Partnership (collectively, "NewMarket"); and C.W. Engelmann, and C.W. Engelmann Construction, Inc., a Washington corporation (collectively, "Engelmann"), in accordance with the terms, conditions and definitions set forth below.

Recitals

Whereas,

1.1 NewMarket owns certain real property located in Thurston County, Washington, currently known as 5800-06 Pacific Avenue Southeast, Lacey, Washington, and formerly known as 5814 Pacific Avenue Southeast, Lacey, Washington (hereinafter referred to as the "Site"). The Site consists of and includes the real estate situated in Thurston County described as follows:

Parcel 1:

The North 154 feet of Tract 23, Lacey Villas, according to the plat thereof recorded in Volume 10 of Plats, at page 23, records of the Auditor of Thurston County, State of Washington.

Parcel 2:

Tract 24 of Lacey Villas, according to the plat thereof recorded in Volume 10 of Plats, at page 23, records of the Auditor of Thurston County, State of Washington.

Parcel 3:

Tract 23 of Lacey Villas, according to the plat thereof recorded in Volume 10 of Plats, at page 23, records of the Auditor of Thurston County, State of Washington.

Parcel 4:

The South 170 feet of Tract 25, Lacey Villas, according to the plat thereof recorded in Volume 10 of Plats, at page 23, records of the Auditor of Thurston County, State of Washington.

1.2 From approximately 1961 until approximately 1979, the Lacey Laundromat (the "Facility") operated at the Site and discharged wastes, including drycleaning solvents containing PCE, to a septic system. C. W. Engelmann and Shirley

J. Engelmann purchased the Site on or about February 15, 1979. Between 1979 and October 3, 1980, the owners of the property and C. W. Engelmann Construction Co. gutted and reconstructed the Facility. NewMarket purchased the Site from C. W. Englemann on or about October 3, 1980.

1.3 In 1991, the Washington Department of Ecology ("DOE" or "Ecology") identified PCE in former Thurston County Water District #2 Well #1 near the Site. Further investigation also revealed contamination in the area of the former Facility drainfield.

1.4 In or about September 1996, Ecology gave formal notice to NewMarket that it had credible evidence to support a finding that NewMarket was potentially liable under the Washington Model Toxics Control Act, RCW chapter 70.105D ("MTCA"), for the release of hazardous substances at the Site. Based on the prospect of DOE enforcement, NewMarket entered the Voluntary Cleanup Program with DOE with respect to the Site. Further investigation has revealed soil and groundwater contamination at the Site.

1.5 In or about July 1997, Ecology gave formal notice to Englemann, among others, that it had credible evidence to support a finding that Englemann was potentially liable under the Washington Model Toxics Control Act, RCW chapter 70.105D ("MTCA"), for the release of hazardous substances at the Site.

1.6 In or about 2001, NewMarket instituted a suit for contribution against Engelmann, namely *Iling, et al., v. Wolden, et al.*, Thurston County, Washington Case No. 01-2-01285-9 ("the Contribution Action"), for costs incurred investigating and remediating contamination at the Site.

1.7 NewMarket and Engelmann now desire to resolve fully and finally, without admission or adjudication of any issue of fact or law as between them other than as set forth above, all remaining disputes between them relating to the Contribution Action, the Facility, and the Site.

Agreement and Release

NOW, THEREFORE, in consideration of and in reliance upon the definitions, recitals, mutual promises, covenants, understandings and obligations set forth herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, NewMarket and Engelmann mutually agree as follows:

2.1 Engelmann agrees to pay to NewMarket or its designee the sum of Twenty Thousand Dollars and No Cents (\$20,000.00) (the "Settlement Amount") by issuance of a check payable to Unigard Security Insurance Company, to be delivered to Gary Sparling, attorney at Soha & Lang, P.S., within ten (10) days after this Agreement has been executed by all parties.

2.2 Engelmann hereby assigns to NewMarket or its designee all rights of every type and nature, whether contractual, extracontractual or otherwise, that Engelmann may have against any insurance company or companies that provided or may have provided insurance coverage to Engelmann for liabilities arising out of the Site and/or the Facility. This assignment includes, but is not limited to, all rights that may be available through the Washington Insurance Guaranty Association ("WIGA") for any insurer that is insolvent. Engelmann will cooperate with NewMarket or its designee in the prosecution of any action or claim against any insurer or WIGA with respect to the rights assigned pursuant to this agreement. Engelmann will also furnish to NewMarket or its designee copies of all correspondence and other documents presently in the possession of Engelmann or Engelmann's attorneys relating to the insurance rights assigned hereunder.

2.3 Engelmann and NewMarket hereby fully, forever and irrevocably release and discharge each other from any and all past, present or future claims, of every kind and nature, legal, equitable, or otherwise, whether presently known or unknown, that either of them have asserted or could have asserted against the other in the Contribution Action; *provided, however*, that NewMarket's claims against Engelmann are not released to the extent they may be satisfied through the rights assigned under Paragraph 2.2 of this Agreement, and NewMarket agrees to look only to those rights to satisfy its claims and not to any other assets or rights possessed by Engelmann. Subject to the foregoing, this release includes, but is not limited to any and all claims for reimbursement of costs or expenses incurred in the investigation, defense and/or settlement of any claim, including all attorneys' fees, and any and all claims for contribution, indemnity and/or subrogation, relating to the Facility and/or the Site.

2.4 Upon payment of the Settlement Amount and exchange of an executed copy of this Agreement, the parties will enter a stipulated order dismissing all claims in the Contribution Action with prejudice and without costs.

3. NON-ASSIGNMENT OF RIGHTS

NewMarket represents and warrants that it has not assigned, transferred, conveyed or sold or purported to assign, transfer, convey or sell to any entity or person any cause of action, chose in action, or part thereof, arising out of or connected with the matters released herein, and that it is the only entity entitled to recover for any damages under such claims, causes of action, actions and rights. This Agreement may not be assigned.

4. RIGHTS AS TO NON-PARTIES

It is expressly agreed and understood that this Agreement in no way affects the rights of NewMarket and/or Engelmann with respect to any person or organization not a party to this Agreement.

5. GENERAL PROVISIONS

5.1 This Agreement is the result of compromise and accord, and shall not be considered an admission of liability or responsibility by any party hereto, who continue to deny any liability and disclaim any responsibility for any and all claims related to the Site, the Facility and the Contribution Action.

5.2 This Agreement is an integrated agreement and contains the entire agreement regarding the matters herein between the signatories hereto. No representations, warranties, or promises, have been made or relied on by any signatory hereto other than as set forth herein. This Agreement supersedes and controls any and all prior communications between any of the parties or their representatives relative to the matters contained herein. This Agreement can only be modified by a writing signed by both parties and this provision cannot be orally waived.

5.3 This Agreement is not an insurance policy and the signatories do not intend that it will be interpreted as such. It is also expressly agreed and understood by the parties that the terms of this Agreement have been mutually negotiated by the parties and that the language of this Agreement shall not be presumptively construed against any party hereto.

5.4 NewMarket and Engelmann represent and warrant:

a. That they are citizens of the United States and/or business entities duly organized and validly existing in good standing under the laws of one of the states of the United States; and

b. That they have taken all necessary corporate and legal actions to duly approve the making and performance of this Agreement and that no further corporate or other approval is necessary; and

c. That the making and performance of this Agreement will not violate any provisions of law or of their articles of incorporation or by-laws; and

d. That the terms hereof are contractual and not by way of recital, and that NewMarket and Engelmann have signed this Agreement of their own free act.

5.5 Each of the terms of this Agreement is binding upon each of the signatories hereto, their respective successors, transferees, assigns, representatives, principals, agents, officers, directors and employees.

5.6 If any provision of this Agreement or any portion of any provision of this Agreement is declared null and void or unenforceable by any court or tribunal having jurisdiction, then such provision or such portion of a provision shall be considered

separate and apart from the remainder of this Agreement which shall remain in full force and effect.

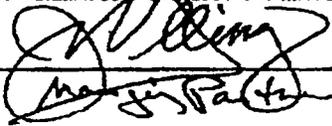
5.7 The persons signing this Agreement represent and warrant that they are duly authorized to execute this Agreement on behalf of NewMarket and Engelmann, respectively, and to bind said persons and entities, to the terms, conditions, provisions, duties, and obligations set forth in this Agreement.

5.8 This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, but all such counterparts shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto by their duly authorized representatives, affix their signatures hereto as of the dates indicated below.

Dated: 7-9-07

Joseph R. Illing, Managing Partner
NewMarket I General Partnership



Dated: 8-14-07

C.W. Engelmann

C.W. Engelmann.

Dated: 8-14-07

C.W. Engelmann Construction, Inc.

By: C.W. Engelmann,
Its Sole Officer, Director
and President-Secretary

APPENDIX 2

FILED
SUPERIOR COURT
THURSTON COUNTY WASH.

07 AUG 24 AM 11:51

BETTY J. BROWN
CLERK
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY
EX PARTE

JOSEPH ILLING, et ux., et al.,

Plaintiffs,

v.

WILLIAM WOLDEN, et al.,

Defendants.

No.: 01-2-01285-9

**STIPULATION AND ORDER
FOR DISMISSAL OF ALL CLAIMS**

I. STIPULATION

Come now the parties to this action, by and through their undersigned counsel, and hereby stipulate and agree that all claims that have been or could have been asserted in this lawsuit by any party be dismissed with prejudice and without fees or costs to any party.

DATED this 21st day of August, 2007.

SOHA & LANG, P.S.

By Gary A. Sparling
Gary A. Sparling, WSBA No. 23208
Attorneys for Plaintiffs

DATED this 22 day of August, 2007.

FRISTOE, TAYLOR, SCHULTZ, LTD., P.S.

By Don Taylor
Don Taylor, WSBA No. 4134
Attorney for Defendants C.W. Engelmann
and C.W. Engelmann Construction, Inc.

**STIPULATION AND ORDER FOR
DISMISSAL OF ALL CLAIMS - 1**
No.: 01-2-01285-9
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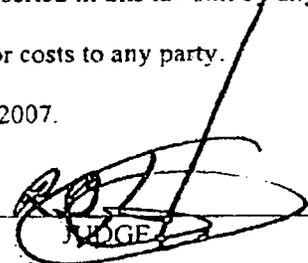
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II. ORDER OF DISMISSAL

This matter having come on before the undersigned judge of the above entitled court upon the above Stipulation of counsel, it is hereby ordered, adjudged and decreed that this lawsuit and all claims that have been or could have been asserted in this lawsuit by any party be and hereby are dismissed with prejudice and without fees or costs to any party.

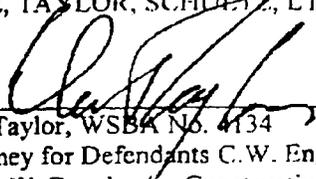
DATED this 24 day of August, 2007.



JUDGE
RICHARD D. HICKS

Presented by:

FRISTOE, TAYLOR, SCHULTZ, LTD., P.S.

By 
Don Taylor, WSBA No. 4134
Attorney for Defendants C.W. Engelmann
and C.W. Engelmann Construction, Inc.

Approved as to form;
Notice of Presentation Waived

SOHA & LANG, P.S.

By: _____
Gary Sparling, WSBA No. 23208
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Linda Voss, declare that on March 25, 2010 a copy of *BRIEF OF APPELLANT* was delivered via ABC Legal Services to the following counsel of which a true and correct copy is attached hereto:

Karen Weaver
SOHA & LANG
Suite 2400
701 – 5th Avenue
Seattle, WA 98104

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED IN Seattle, Washington this 25th day of March, 2010.



Linda Voss