

No. 64717-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEIRDRE WRIGHT,

Plaintiff-Respondent,

vs.

LACY LENNON and the marital community of
Lacy Lennon and John Doe Lennon,

Defendants-Respondents,

and

ENCOMPASS INSURANCE COMPANY
OF AMERICA,

Party-Intervenor-Appellant.

2018 MAY -3 PM 6:45
 COURT OF APPEALS
 DIVISION I
 SEATTLE, WA



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A. INTRODUCTION

This appeal arises from Lacy Lennon's ("Lennon") covenant judgment in favor of Deirdre Wright ("Wright") in the amount of \$1.2 million. The settlement agreement ("Agreement") contained a covenant not to execute on Wright's personal assets, an assignment of Lennon's bad faith claims to Wright, and a reservation of Lennon's specific claims against Encompass Insurance Company of America ("Encompass").

The covenant judgment in the amount \$1.2 million was collusive and did not constitute a reasonable settlement under RCW 4.22.060. The Agreement was not bargained for in good faith by counsel for Wright and Lennon. Lennon's counsel merely acquiesced in the number demanded by Wright's counsel. Moreover, because the Agreement was contingent upon a finding of reasonableness by the trial court and did not bind Wright in the event that the trial court determined the \$1.2 million settlement amount was unreasonable, the Agreement gave Wright the unilateral right to accept or reject a lower settlement amount, and Lennon was also a joint-venturer with Wright in the assigned bad faith claims as she reserved certain claims for damages for her personal emotional distress, attorney fees, and damages to her credit or reputation, the settlement was collusive.

Also, shortly before the Agreement was executed, Wright negotiated a settlement with her uninsured/underinsured motors (“UIM”) insurer, American Commerce Insurance Co. (“ACIC”), in which Wright relinquished limits of \$250,000 over and above Encompass’ liability limits of \$100,000 in exchange for ACIC’s payment in the amount of \$100 and a waiver by ACIC of any reimbursement on personal injury protection (“PIP”) coverage. This action severely prejudiced Encompass.

Employing procedures limiting Encompass’ ability to meaningfully participate in the reasonableness hearing, the trial court erroneously determined that the settlement was reasonable, approving a collusive settlement and failing to properly apply the *Glover/Chaussee* factors. This Court should reverse the trial court’s decision on reasonableness of the Lennon/Wright settlement.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its April 17, 2009 order denying Encompass’ requests for full discovery for the reasonableness hearing, the right to present oral argument or live testimony at the hearing, and its request for a jury trial to determine the extent of Wright’s damages.

2. The trial court erred in entering orders on reasonableness of the settlement on December 16, 2009 and January 15, 2010, in particular

finding of fact subsection a. regarding evidence of the releasing person's damages.

3. The trial court erred in entering finding of fact subsection g. regarding evidence of bad faith, collusion, or fraud.

4. The trial court erred entering finding of fact subsection i. regarding evidence of the interests of the parties not being released.

5. The trial court erred in by entering the conclusions of law that the settlement was reasonable and was not the product of bad faith, collusion, or fraud, and the judgment in favor of Wright against Lennon.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. If collusion is present in a settlement, as shown by the undisputed failure of the parties to negotiate at arm's length, the plaintiff's agreement to a nominal settlement with a co-defendant where the plaintiff foregoes extensive UIM coverage in exchange for an agreement by that defendant to withdraw expert witnesses from testifying at trial, and agreement to enter into a joint venture for the prosecution of a bad faith claim, should the trial court find that the settlement is collusive and decline to determine whether the settlement amount was reasonable? (Assignments of Error 2-5)

2. Did the trial court properly apply the *Glover/Chaussee* factors when it determined that there was no fraud or collusion, when it

failed to properly consider the interests of Encompass when approving the settlement as reasonable, and when it determined the nature and extent of Wright's damages without allowing any testimony by medical doctors at the reasonableness hearing or oral argument by Encompass counsel? (Assignments of Error 2-5)

3. Were Encompass' rights as an intervenor under RCW 4.22.060 violated by the trial court's determination of damages in a reasonableness hearing instead of by a trial, by refusing to permit oral argument of counsel or live testimony of witnesses at the hearing, and by the refusal of the trial court to allow Encompass as an intervenor full discovery for the reasonableness hearing? (Assignments of Error 1, 5)

D. STATEMENT OF THE CASE

Encompass issued Lennon an automobile insurance policy which provided coverage with limits of \$100,000 per person. CP 1914.

On February 15, 2006, Deirdre Wright was a passenger in the right front seat of an automobile driven by her husband that was involved in an accident with Lennon's vehicle. CP 1726. Her seat belt was fastened and her seat was equipped with a headrest. CP 1727. She did not lose consciousness in the accident, nor did she strike her head on anything. CP 1741. Her airbag did not deploy. *Id.* Wright and her husband drove the vehicle which was later repaired, back to her home. CP 1728. At the

scene of the accident, Wright got out of her car and spoke with the driver of the vehicle that struck her. *Id.* The ambulance personnel who arrived at the accident scene asked if Wright wanted to be transported to the hospital, and she refused. CP 1741. Later that day, Wright visited her chiropractor. *Id.* On February 16, 2006, the day after the accident, Wright saw her primary care physician, Dr. Joel Konikow. *Id.* His examination revealed that she had a headache, neck pain, and shoulder and back pain. Wright had an MRI on March 7, 2006. *Id.* Her results were normal. *Id.*

Prior to this accident, Wright had been involved in two motor vehicle accidents, one on July 2, 1998, and the other on July 11, 2000. *Id.* In her deposition, Wright denied experiencing any eye problems as a result of these previous accidents, *id.*, but many of the injuries allegedly arising out of the February 15, 2006 accident were the same injuries and/or complaints, specifically her eye problems, about which she had complained previously. *Id.* In 1998, Wright filled out a medical diagnostic chart complaining of eye pain, bloodshot eyes, blurring of vision, watering eyes, and light sensitivity. CP 1455. With the exception of bloodshot eyes, she complained of identical symptoms after the 2000 accident. CP 1741.

Wright also complained of light sensitivity to her ophthalmologist during an eye exam in 2000. *Id.* During her annual exam in 2002, Wright

stated that she was suffering from floaters, dry eyes, irritation, itchiness, headaches, eye strain, and flashes of light, and light sensitivity. *Id.*

In November 2006, Wright filed suit in the King County Superior Court against Lennon for damages arising out of the February 16, 2006 accident. CP 3. Pursuant to its policy terms, Encompass provided Lennon a defense against Wright's claims.¹ CP 1843. Lennon chose to pursue her own resolution of the claim without accepting Encompass' tendered policy limits. CP 1843.

Wright also had applicable UIM coverage with ACIC with limits of \$250,000. CP 1736. Without Encompass' knowledge or consent, Wright entered into a settlement with ACIC in January 2009, in which Wright agreed to forego any claim on the UIM limits in exchange for ACIC's payment of \$100 and a waiver of ACIC's right to reimbursement on the PIP coverage it provided to Wright. *Id.* The agreement was designed to prevent Lennon's later utilization of any of ACIC's experts at trial in the King County lawsuit. CP 547-48.

On January 15, 2009, Lennon entered into a "Settlement Agreement and Assignment of Rights, Judgment, and Covenant Not To

¹ Encompass offered the policy limits of \$100,000 to Wright on Lennon's behalf to resolve all claims in the above-referenced litigation at a 2008 mediation. In January 2009, Wright's attorney returned to Encompass a check for \$100,000 made payable to Wright.

Execute on Stipulated Judgment” with Wright. CP 1808. That Agreement stated that Lennon stipulated and agreed to the entry of judgment against her in the amount of \$1.2 million. CP 1809. The Agreement also provided that Wright would seek a court determination of the reasonableness of that settlement amount and that Lennon “agrees not to oppose Plaintiff’s [Wright’s] motion to approve the settlement, or the amount of the settlement as reasonable, agrees to do nothing to interfere with Plaintiff’s [Wright’s] efforts to obtain court approval of the settlement, and agrees to cooperate with Plaintiff [Wright] as may reasonably [be] required in connection with the efforts by Plaintiff [Wright] and Plaintiff’s attorney to secure court approval of the settlement under RCW 4.22.060.” CP 1810.

The Agreement further stated that Lennon “agrees to cooperate with and does hereby assign to Plaintiff [Wright] all rights, privileges, claims and causes of action that she may have against Encompass, its affiliated companies, and their agents. . .” *Id.* As part of the agreement, Lennon “reserves to herself claims for damages for her personal emotional distress, personal attorney’s fees, personal damages to credit or reputation and other noneconomic damages which arise from the assigned causes of action.” CP 1811.

On January 16, 2009, Wright's attorney gave Encompass notice of a hearing to be held on January 30, 2009, to approve the reasonableness of the settlement with Lennon requesting oral argument. CP 559. Encompass retained counsel to represent its interests once Lennon signed the Agreement.² CP 1271.

Thereafter, by the agreement of the parties after a hearing on February 13, 2009, the trial court, the Honorable Laura Gene Middaugh, continued the reasonableness hearing. CP 1909. The parties stipulated to Encompass' intervention in that action and the trial court entered an order granting intervention. CP 1335-36.

The trial court heard Encompass' motion for stay pending the United States District Court's decision as well as its motion regarding a case schedule, discovery, and a jury right, CP 1320, and entered an amended order on April 17, 2009. in which it denied Encompass' stay motion, denied Encompass a right to a jury on the reasonableness of the settlement, denied Encompass' request for the issuance of a case schedule,

² In January 2009, Encompass filed the an action in the United States District Court for the Western District of Washington alleging six causes of action against Lennon and Wright: (1) violation of Washington State right to jury trial; (2) violation of Washington State due process; (3) violation of Washington State equal protection; (4) violation of federal due process; (5) violation of federal equal protection; and (6) breach of contract. The constitutionality of the reasonableness hearing is reserved in the federal court action, *Encompass Insurance Company of America v. Lacy Lennon and Deirdre Wright*, United States District Court for the Western District of Washington, Case No. CV09-0111JCC, filed between the parties in this matter. CP 977.

and limited Encompass' right to conduct discovery to taking the deposition of attorneys Gary Western and Frank Cornelius, counsel for Lennon, regarding circumstances surrounding the Lennon/Wright settlement. CP 1425-26. The court refused to allow Encompass to take the depositions of Wright's attorneys or representatives of ACIC. CP 1428. The court expressed its view that the reasonableness of the settlement was limited to those materials in existence at the time of the Lennon/Wright settlement. CP 1429.

The limited discovery permitted by the trial court, however, was revealing. In his deposition, attorney Gary Western, Lennon's counsel, admitted the following:

1. Joseph Koplin, Wright's counsel, told Western that as part of the settlement with ACIC, ACIC had agreed to withdraw its experts and that Wright's settlement with ACIC would "get his [Mr. Mannheimer's and ACIC's] experts out of the case." CP 1761. Koplin told Western that the settlement with ACIC involved a "nominal sum." *Id.*

2. Western never reviewed any of Wright's medical records, and never consulted any expert witnesses on any subject at issue in the case. CP 1761-62. Western did not read any depositions, made no attempt to research the potential value of the case by any means, and made no attempt to verify whether Wright's claims were true. CP 1762.

Western never consulted or interviewed any defense counsel on their theory of the case, or any defenses they had, reviewed no pleadings, made no case evaluation, and never discussed any defenses or theories of the case that ACIC had with ACIC's counsel. *Id.*

3. Western had no opinion or knowledge about the case value, and could not speculate about case value and made no representations as to the value of the case. *Id.* Western spoke less than 20 minutes with Koplin when obtaining information from him about the case. *Id.*

4. Western did not bargain or negotiate with Koplin on his demand for a covenant in the amount of \$1.2 million. *Id.* Western refused to sign the covenant provided by Koplin because "I was not representing to the court that \$1.2 million is a reasonable settlement." CP 1762-63. The reason that Lennon agreed to the \$1.2 million demand from Koplin is because "that was the number he [Mr. Koplin] said he had to have." CP 1763.

5. Both Cornelius and Western refused to sign the covenant or endorse it. *Id.*

6. Koplin prepared the covenant. After sending the covenant to Koplin with Lennon's signature, Western had no further involvement in the case. *Id.*

On shortened notice, Wright's counsel scheduled a motion to approve the settlement as reasonable without oral argument. CP 1433, 1435. The motion was to be heard by the trial court on August 21, 2009. The morning of August 21, 2009, the court advised counsel that there would be no oral argument. That afternoon, Judge Middaugh's bailiff further advised counsel that the court wanted Wright's counsel to send "a proposed order," even though she had not stated a basis for her ruling. Wright's counsel contacted the bailiff *ex parte* and secured the right to submit "detailed findings of fact." Wright's counsel prepared findings and conclusions.³ Encompass counsel asked to have argument on the findings and conclusions. The court indicated an intent to rule "ASAP," although Encompass' counsel had not even finished preparing objections to the findings. Encompass submitted its objections to the findings and conclusions. CP 1758. Wright submitted a reply to the objections. CP 1778. Encompass submitted a short response. CP 1788.⁴

Finally, on December 18, 2009, the trial court issued its order on the reasonableness hearing, approving the Wright/Lennon settlement as reasonable and entering findings and conclusions on the settlement.

³ Wright's Proposed Findings and Conclusions are not in the trial court record.

⁴ Encompass also made the court aware of the decision of the Washington Court of Appeals in *Water's Edge Homeowners Association v. Water's Edge Associates*, 152

CP 1865. Encompass filed a timely notice of appeal from the December 18, 2009 order. CP 1888. Wright filed a motion for reconsideration seeking revisions in the trial court's order on the reasonableness hearing. CP 1881. The motion was granted and the trial court entered an amended reasonableness hearing order on January 19, 2010. CP 1908. Encompass filed a timely amended notice of appeal from that order. CP 1922.

E. ARGUMENT

1. Standard of Review

This Court reviews the trial court's determination of reasonableness for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22, *review denied*, 155 Wn.2d 1025 (2005); *Water's Edge*, 152 Wn. App. at 585. The trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

This case differs from other reasonableness hearing appeals in that no hearing (no oral argument of counsel or live testimony of any type) was held by the trial court for the determination of reasonableness. In *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 684 (1997), the court attempted to reconcile the different standards being

Wn. App. 572, 585, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010)

applied to reasonableness hearings, noting that while cases generally rely on *Glover* for the proposition that reasonableness hearings are reviewed for substantial evidence, “*Glover* only says that reasonableness involves factual determinations, and that factual determinations will not be disturbed if supported by substantial evidence.” *Id.* at 40 n.34. The court concluded:

A determination of reasonableness involves two steps: first, determining the historical facts giving rise to the settlement, and, second, deciding whether these historical facts make the settlement reasonable considering the relevant factors outlined in *Glover*. **The second inquiry may be a mixed question of law and fact and should perhaps be reviewed de novo.**

Id. (emphasis added).

The de novo review standard is appropriate here where the reasonableness hearing was conducted upon the review of documents, for which a de novo review is appropriate. *See, e.g., In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004) (“Since the (findings) were made from the same cold record of affidavits and depositions which have been filed here, and the court below did not have the opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony, we

relating to collusive settlements. CP 1793.

should reassess its factual findings as well as its legal conclusions de novo.”).⁵

2. History and Background of Reasonableness Hearings in Washington Covenant Judgment Cases

In 1981, the Washington Legislature enacted a broad product liability and tort reform act. As part of that 1981 Act, the Legislature retained joint and several liability in Washington as a central principle, but it also adopted contribution among joint tortfeasors to more fairly apportion fault among defendants. In the specific context of settlements between a plaintiff and a defendant where there were multiple defendants, the Legislature provided for a hearing on the reasonableness of the settlement. A reasonable settlement amount became the offset against any judgment entered against the nonsettling defendant. RCW 4.22.060(2). The settling defendant was exonerated from all claims by the plaintiff and claims for contribution by the nonsettling defendants.⁶ Settlements were

⁵ See also, *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969) (“Where the record both at trial and on appeal consists entirely of written and graphic material documents, . . . and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.”); *Carlson v. Bellevue*, 73 Wn.2d 41, 48, 435 P.2d 957 (1968) (*de novo* review appropriate where trial court ruled on documentary evidence alone).

⁶ Philip A. Talmadge, *Washington’s Product Liability Act*, 5 U. Puget Sd. Law Rev. 1, 18-20 (1981). Washington’s approach to settlement in tort cases was unique. Thomas V. Harris, *Washington’s Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and The Reasonableness Hearing Requirement*, 20 Gonz. Law Rev. 69 (1984/85).

final, regardless of whether they were approved as reasonable by a trial court. RCW 4.22.060(3).

The Legislature never adopted explicit standards to govern what constituted a “reasonable settlement,” expecting that the courts would develop standards through the common law. Talmadge at 19 n.76; 1981 Senate Journal, reg. sess. (final report, Senate Select Committee on Tort & Product Liability Reform) (1981) at 636. Indeed, our Supreme Court did adopt factors that should be assessed in connection with the reasonableness of a settlement in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983). The settling plaintiff bore the burden to prove the settlement was reasonable, RCW 4.22.060(1), and the nonsettling defendant could argue the settlement was not reasonable in order to obtain a larger offset. Thus, the parties to the litigation had a direct financial incentive to actively participate in the hearing. The nonsettling defendant wanted to be sure that the plaintiff and settling defendant had not entered into a “sweetheart” deal. 1981 Senate Journal at 636-37. The plaintiff wanted to make sure the settlement was reasonable and the offset was small.

The 1986 Washington Legislature largely eliminated joint and several liability in Washington in favor of several liability, thereby nearly eliminating the need for reasonableness hearings. Philip A. Talmadge,

Product Liability Act of 1981: Ten Years Later, 27 Gonz. Law Rev. 153, 167 (1991/92); Thomas V. Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 Gonz. Law Rev. 67 (1986/87).

Despite the fact that true reasonableness hearings under the 1981 Act became a vestigial aspect of Washington law after 1986, they gained new prominence after the 1991 Court of Appeals decision in *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 510, 803 P.2d 1339, *review denied*, 117 Wn.2d 1018 (1991). Because of the potential for producing inflated settlements flowing from collusion where the claimant exonerates the insured from personal liability,⁷ Washington courts, beginning with *Chaussee*, decided to utilize the RCW 4.22.060 reasonableness hearing to ensure that settlements between claimants and insureds did not result in excessive judgments. *Chaussee*, 60 Wn. App. at 509-10.

When an insurer does not defend a case or settle a claim made by a claimant against its insured within policy limits, or otherwise provide coverage to the insured,⁸ the insured and the claimant may negotiate a

⁷ Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitations on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith.

⁸ Washington courts have recognized that bad faith may arise in the insurer's handling of a claim, *Coventry Assocs. v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1992), *review denied*, 145 Wn.2d 1023 (2002) but the Washington Supreme Court has declined to afford insureds coverage by estoppel or a presumption of harm in

settlement in which the insured assigns its coverage rights and any potential bad faith claim against the insurer to the claimant.⁹ In such instances, the insured is presumed to have been harmed by the insurer's conduct,¹⁰ and the settlement constitutes the "presumptive damages" for the subsequent coverage/bad faith action, provided the settlement is reasonable and is not the product of collusion. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002).

An RCW 4.22.060 hearing is conducted on the settlement's reasonableness in the underlying action. *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004), *review denied*, 153 Wn.2d 1009 (2005). If the settlement is reasonable, the burden then shifts to the insurer to show it was the product of fraud or collusion and could not be the appropriate measure of damages in the coverage/bad faith action. *Besel*, 146 Wn.2d at 739.¹¹ An insurer is liable

such cases. *St. Paul Fire & Marine Ins. Co. v. Onvia*, 165 Wn.2d 122, 133, 196 P.2d 664 (2008).

⁹ Often, the insured assigns its coverage/bad faith claims to the claimant. The insurer may be liable to the claimant beyond its policy limits if the bad faith claim is assigned by the insured to it. *Id.*; *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 925, 169 P.3d 1 (2007).

¹⁰ Our Supreme Court has recognized that it is an "impossible" burden for an insurer to rebut the presumption of harm. *Butler*, 118 Wn.2d at 407 (Dolliver, J. dissenting); *Dan Paulson Constr., Inc.*, 161 Wn.2d at 921-22.

¹¹ The parties seeking to prove the reasonableness of a settlement bear the burden of proving its reasonableness, including the absence of any bad faith, fraud, or collusion, a *Chaussee* factor. *Water's Edge*, 152 Wn. App. at 572. If a settlement is

only for that portion of the settlement that is reasonable and paid in good faith. *Id.* at 736.

The case law applying RCW 4.22.060 to settlements between insureds and third parties as a prelude to a coverage/bad faith action by the insured against a liability insurer indicates that the importation of that statute into this insurance setting is a poor fit because the settling insured has no real financial stake in the amount of any settlement. The insured is happy to agree to an inflated settlement figure allowing the claimant to tag the insurer for that inflated figure in the later coverage/bad faith litigation. Moreover, the procedures for the hearing are patently unfair to the insurer which is handicapped by limited notice of the settlement and reasonableness hearing, and a very limited ability to explore the circumstances surrounding the settlement before the hearing. *See, e.g., Green v. City of Wenatchee*, 148 Wn. App. 351, 199 P.3d 1029 (2009); *The Heights at Issaquah Ridge Owners Ass'n v. Derus Wakefield I, LLC*, 145 Wn. App. 698, 187 P.3d 306 (2008), *review denied*, 165 Wn.2d 1029 (2009); *Martin v. Johnson*, 141 Wn. App. 611, 170 P.3d 1198 (2007); *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 116 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008); *Meadow Valley*

found to be reasonable, insurers like Encompass then bear the burden of proving that it was the subject of fraud or collusion pursuant to *Besel*, which would vitiate the settlement entirely. *Id.*

Owners Ass'n v. St. Paul Fire & Marine Ins. Co., 137 Wn. App. 810, 156 P.3d 240 (2007); *Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 154 P.3d 950 (2007), review denied, 163 Wn.2d 1020 (2008); *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005); *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22, review denied, 155 Wn.2d 1025 (2005).

To determine the reasonableness of a settlement between claimants and insureds, the *Chaussee* court adopted the nine *Glover* factors for the reasonableness of a settlement: 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. *Chaussee*, 60 Wn. App. at 512, citing *Glover*, 98 Wn.2d at 717. The *Chaussee* court held that a court can weigh those factors in suitably determining whether a settlement is reasonable. *Chaussee*, 60 Wn. App. at 512. No single factor controls, and all factors will not be relevant in each case. *Besel*, 146 Wn.2d at 739 n.2. In actual practice, however, the principal issue in the reasonableness hearing is if

the settlement was the product of fraud or collusion. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002). Wright has the obligation of affirmatively addressing “any evidence of bad faith, collusion, or fraud” in proving the settlement with Lennon was reasonable.¹²

The *Glover/Chaussee* factors regarding collusion do not require proof of fraud. Wright will likely argue here that a trial court may find collusion only where an insurer has proven fraud by “clear cogent and convincing evidence.” This argument should be rejected.

The *Water’s Edge* decision is the first Washington decision to define the parameters of a collusive settlement. The *Water’s Edge* court stated that proof of evidence of bad faith, collusion, or fraud does not require the clear, cogent, and convincing standard that is necessary for fraud. 152 Wn. App. at 595. Courts elsewhere have assessed the circumstances rendering a settlement involving a covenant judgment collusive. See *Continental Casualty Co. v. Westerfield*, 961 F. Supp. 1502 (D.N.M. 1997); *Andrade v. Jennings*, 54 Cal. App. 4th 307 (1997); *Spence-Parker v. Maryland Ins. Group*, 937 F. Supp. 551 (E.D. Va. 1996). In

¹² The amount of a reasonable consent judgment constitutes the presumptive measure of damages for the insurer. But the insurer can overcome that presumption by showing the judgment was the product of fraud or collusion. *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 739, 49 P.3d 887 (2002). The meaning of “collusion” is a question

Westerfield, the court stated that any negotiated settlement involves cooperation to a degree, and that the settlement “becomes collusive when the purpose is to injure the interests of an absent or nonparticipating party, such as an insurer.” *Id.* at 15.

In *Westerfield*, an insured attorney and a malpractice claimant entered into a settlement agreement insulating the attorney from personal liability in exchange for a stipulated judgment and assignment of claims against the malpractice insurers. *Id.* at 1504-05. Citing to case law and a “comprehensive article” on the subject, Stephen R. Schmidt, *The Bad Faith Setup*, 29 Tort & Ins. L.J. 705 (1994), the court identified the following indicators of collusion; the unreasonableness of the settlement amount, concealment, lack of serious negotiation on damages, profit to the insured, and attempts to harm the interest of the insurer. *Id.* at 1505. All factors have the common thread of unfairness to the insurer, “which is probably the bottom line in cases in which collusion is found.” *Id.*

In discussing the nature of a “collusive” suit, the United States Supreme Court in *United States v. Johnson*, 319 U.S. 302, 304-05, 63 S. Ct. 1075, 87 L. Ed. 1413 (1943) noted that a finding of collusion does not require evidence of an intentional misrepresentation to the court, stating:

of law and is reviewed de novo on appeal. *MP Med. Inc. v. Wegman*, 151 Wn. App. 409, 415, 213 P.3d 931 (2009).

The Government does not contend that, as a result of this cooperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment,...**Such a suit is collusive because it is not in any real sense adversary. It does not assume the "honest and actual antagonistic assertion of rights" to be adjudicated -- a safeguard essential to the integrity of the judicial process,** (citations omitted)...Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured...

(Emphasis added.) The Court explained that “collusive” in this context results from a lack of an adversarial relationship between the parties to the litigation.

Ultimately, if a trial court determines that a settlement is reasonable, the consequences can be dire for the insurer. While Washington law contemplates that the settlement amount constitutes the “presumptive” damages in a later coverage/bad faith action and may theoretically be rebutted, *Safeco v. Butler*, 118 Wn.2d 382, 394, 823 P.2d 499 (1992); *Besel*, 146 Wn.2d at 738, there is limited case law in which the insurer has actually rebutted the presumptive damage determination arising out of the hearing. See *Werlinger, supra*, (bankruptcy); *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 901 P.2d 297 (1995) (asbestos settlement); *Water's Edge, supra* (collusion). In fact, once a settlement is

deemed reasonable, the damages in the later bad faith action are effectively set.¹³

In sum, the application of the RCW 4.22.060 reasonableness hearing in the insurance context stacks the deck against the insurer, and, contrary to the *Chaussee* court's intent, actually promotes collusive settlements.

3. The Stipulated Judgment Was Collusive as a Matter of Law and Therefore Cannot Provide the Presumptive Measure of Damages for Encompass' Alleged Bad Faith

Wright did not sustain her burden of addressing fraud or collusion in the reasonableness process before the trial court and the trial court erred in concluding the settlement was not the product of bad faith, collusion or fraud. As a matter of law, the Agreement was the product of collusion between Wright and Lennon. Thus, the amount of that judgment cannot be the presumptive measure of damages in a subsequent bad faith action against Encompass. Instead, Wright must prove the amount of damages, if any, caused by Encompass' alleged bad faith.

a. Failing to Negotiate at Arm's Length Constitutes Collusion

¹³ In some instances, insureds and claimants have even tried to "stack the deck" by entering a consent judgment with findings and conclusions setting up the insurer for the later coverage or bad faith litigation. In *Green, supra*, the insured and the third party agreed to findings of fact and conclusions of law in conjunction with the consent judgment. The Court of Appeals held the insurer was not bound by those findings and conclusions, as it preserved its right to challenge them.

Our Supreme Court has equated collusion with a failure to negotiate at arm's length. *Besel*, 146 Wn.2d at 739; *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wn.2d 255, 257, 199 P.3d 376 (2008). In *Water's Edge*, this Court held that collusion exists when a settlement reveals "a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to the insurer." *Water's Edge*, 152 Wn. App. at 595.

This case involves a "set up" of Encompass to maximize a bad faith claim. Wright's counsel made two time-limited policy limits demands early in the case prior to the completion of discovery and before the deposition discovery of the medical doctors. CP 574. Thereafter, Wright and Lennon settled.

Their Agreement here was not negotiated at arms length. It was signed by Lacy Lennon without any signature by either her personal attorney, Gary Western, or defense counsel, Frank Cornelius. CP 1820. The following facts establish that the Agreement was a collusive settlement and should not be used to establish damages in the bad faith action against Encompass:

- Wright's counsel demanded an arbitrary value that was agreed to without any investigation by Lennon's counsel, Gary Western. Western did not make any attempt to investigate the case, evaluate the settlement value, or

discuss the facts of the case with defense counsel Frank Cornelius. CP 1763.

- Lennon did not have any personal liability under the Agreement and had no incentive to negotiate the settlement amount. She had no financial incentive to minimize the amount of the judgment. CP 582-83.
- No attorney for Lennon signed or endorsed the Agreement. The Settlement Agreement was prepared by Wright's counsel Joe Koplín. CP 575.
- Lennon's assignment of the bad faith claim was, in essence, a joint venture agreement as she retained her claims for emotional distress, attorney fees, damages to credit or reputation and other noneconomic damages. A bad faith claim constitutes one cause of action and Wright and Lennon share this one cause of action. CP 581-82.
- The Agreement was contingent on a finding of reasonableness by the trial court and was not binding on Lennon. CP 581.

The Agreement, and the circumstances surrounding the settlement, establish that the settlement was collusive.

b. Settlement Contingent on Reasonableness

Further evidence of the collusive nature of the Agreement is found in the fact that it was contingent on the court approving the settlement.

Section 4 (c) provides:

c. Settlement Conditioned Upon Outcome of Reasonableness Hearing.

The parties understand and agree that settlement is condition upon the court's approval of the settlement as reasonable. In the event the court finds the settlement

amount of \$1,200,000 not to be reasonable, and approves settlement in any lesser amount, then this settlement is conditional upon Deirdre Wright's acceptance of the court's determination and to entry of a Stipulated Judgment in the amount determined by the court to be reasonable.

CP 581.

This contractual provision expressly provides that the settlement is not binding on Wright in the event that the trial court does not approve the settlement. It was contemplated under RCW 4.22.060 that the parties would present a binding agreement to the court and the determination of reasonableness would not affect the outcome of the settlement. RCW 4.22.060(3) provides that 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..."

Here, Wright sought to hold an "auction" before the trial court on the value of her claim. Wright sought to establish a high, outside and inherently unreasonable number (\$1.2 million) and if the court disagreed and found a "lesser number" is to be appropriate, she could then trump the court's determination of value by saying "No," renegotiate the settlement amount, or proceed to trial. Wright/Lennon's settlement was not a binding settlement. Wright/Lennon asked the trial court to render what amounts to an advisory opinion.

c. Lennon and Wright Are Co-Venturers in the Prosecution of the Bad Faith Claim

The Agreement was further the product of collusion because it contained a covenant not to execute on Wright's personal assets and a partial assignment of Lennon's bad faith claims to Wright reserving certain items of recovery on specific claims of Lennon. CP 579.

There is one cause of action for bad faith against an insurer. The trial court in its findings distinguished *Water's Edge* on the basis that Lennon was not a co-venturer in the bad faith claim, but the trial court misconstrued the Agreement's legal affect as shown by subsection (g) of the amended order approving the Agreement:

The fact that the defendant retained the right to sue her insurance company for any personal damages (emotional distress, attorney fees) does not put her in the position of being tied to the plaintiff's success of the bad faith claim and other assigned claims, as happened in *Water's Edge Homeowners Association v. Water's Edge Associates, supra*. The plaintiff does not agree to pursue these claims for the defendant or rebate her anything from what they recover for her claims; the defendant just retains the right to pursue an independent lawsuit for herself. In addition, while defendant does agree to cooperate in any bad faith claim and not to oppose the reasonableness hearing, she does not agree to actively work for acceptance of the reasonableness of the settlement. In this case, there was no collusion.

CP 1915-16.

An action for bad faith handling of an insurance claim is a tort and harm is an essential element. *Butler*, 118 Wn.2d at 389. Lennon retained her claims for emotional distress, attorney fees, damages to credit or reputation and other noneconomic damages. The purported reservation of certain elements of damages in the assignment splits the bad faith claim. Lennon has a *direct stake* in the prosecution of the bad faith claim and is joint venture, lending credence to the belief that the settlement was the product of collusion.

In *Water's Edge*, the trial court was troubled by the overall structure of the settlement where there was a “joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers as intervenor.” 152 Wn. App. 572 at 595. The trial court found troubling the provision allowing a portion of the proceeds of the bad faith recovery to be kicked back to the defendant. This relationship was characterized as a joint venture:

The fact that Defendants retained the right to recover their \$215,000 contribution toward the settlement, against the insurers and Mr. White's firm, if Plaintiffs prevailed in the malpractice case and/or bad faith case, is further indication of the realignment of interests in the case created by the interjection of coverage counsel. ***The proposal to kick back proceeds of any recovery from the insurers and from Mr. White's firm defined the relationship as a joint venture.***

Id. at 597 (emphasis added). This Court affirmed the trial court on finding a joint venture. *Id.*

The same result should apply here. Wright/Lennon colluded by engaging in a joint venture against Encompass.

d. The Terms of the Covenant Agreement and Failure to Disclose the ACIC Settlement Support the Finding of Collusion

Finally, Wright settled with her UIM insurer for a nominal sum (\$100 and waiver of PIP benefits) in exchange for an agreement to withdraw all of the UIM insurer's experts at trial. CP 1779. Wright stated with respect to that settlement:

The critical term, without which plaintiff would not have settled the UIM claim, was ACIC's agreement to withdraw its experts.

CP 1779.

The facts and circumstances surrounding Wright's settlement negotiations demonstrate that she did not believe her case was worth \$1.2 million, but rather Wright and Lennon agreed to this inflated figure solely to effectuate their collusive plan. Wright walked away from \$250,000 of additional insurance limits for the sum of \$100 plus the PIP waiver. CP 1779. Robert Manheimer, counsel for ACIC, wrote a letter to Lennon stating that his witnesses are not available for trial. CP 444. In explaining the settlement with her UIM insurer Wright stated: "The critical term,

without which plaintiff would not have settled the UIM claim, was ACIC's agreement to withdraw its experts." *Id.* The settlement, even by Wright's own admission was collusive.

If Wright and her counsel truly believed Wright's damages were in excess of \$1.2 million, they would not have settled the UIM claim for such a small amount. The agreement by ACIC to withdraw the expert witnesses was part of Wright's strategy to set up Encompass for a bad faith claim.

e. Lennon Had No Financial Incentive to Negotiate the Amount of the Stipulated Judgment

Lennon did not have any personal liability under the Agreement in exchange for the consideration of assigning a portion of her bad faith claim:

g. Covenant Not To Execute or Enforce Stipulated Judgment and Satisfaction of Stipulated Judgment.

In exchange for the above consideration, Plaintiff covenants (1) not to further sue Defendant, (2) not to undertake garnishment, execution, or any other attempts to collect personally on the Stipulated Judgment as against Defendant either now or at any time in the future, (3) not to further pursue any claim of any kind against Defendant regardless of the resolution of Plaintiff's attempt to collect on the unsatisfied amount of the Stipulated Judgment against ENCOMPASS...

CP 582-83.

The *Besel* court recognized that the reasonableness of a settlement with an insured who is not personally liable for a settlement is open to question because the insured will have no incentive to minimize the amount. 146 Wn.2d at 737-38. The *Werlinger* court overturned the reasonableness determination of the trial judge by finding that a \$5 million stipulated settlement was not a reasonable settlement where the underlying insurance policy had limits of \$25,000. 126 Wn. App. at 351. The *Werlinger* court emphasized that the value of a stipulated covenant judgment prejudiced the interest of the insurer who was defending the case. *Id.*

The fact that Lennon paid none of her own money for the settlement and had no personal liability is a very important consideration when determining whether the stipulated judgment amount is indicative of what a jury would award.¹⁴

.....

In summary, the evidence here establishes as a matter of law that the settlement between Wright and Lennon was the product of collusion. Wright did not sustain her burden on the element. There is no need to

¹⁴ Wright will not be prejudiced if the settlement is found to be an unreasonable as she will still have her chance to prove her alleged damages in the bad faith action. The *Werlinger* court noted that in the event the bad faith claim is viable, the plaintiff may still prove damages in the bad faith case in the ordinary way. *Id.* at 351-52.

further consider reasonableness in light of all *Glover/Chaussee* factors because the settlement cannot be the presumptive measure of damages for insurer bad faith, even if it otherwise might be deemed reasonable. The trial court erred when it ruled on the question of reasonableness.

4. The Application of the Glover/Chaussee Factors Do Not Support a Finding of Reasonableness

The trial court erred in finding that three of the *Glover/Chaussee* factors were satisfied: (1) whether there was any “evidence of bad faith, collusion or fraud,” (2) the nature and extent of the released person’s damages, and (3) the consideration of the interests of the parties not being released. The Court’s findings under these factors are not supported by substantial evidence or improperly apply the law. The other *Glover* factors were either not applicable or not in dispute.

Wright bore the burden of proving that a reasonable settlement was reached. *Besel*, 146 Wn.2d at 739.¹⁵ Only after a settlement has been found reasonable by the trial court does the burden shift to the insurer to prevent its legal application based upon proof of fraud. *Id.* Wright did not bear her burden on the three key issues.

¹⁵ The *Chaussee* court stated that the plaintiff has the burden of proof on the issue of the reasonableness of the settlement. 60 Wn. App. at 510-11. The court cited cases from other jurisdictions that have placed the burden of proof on the insured, and explained that these courts have reasoned that an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement.

1. **Evidence of Bad Faith, Collusion or Fraud.** The discussion of collusion, *supra*, applies here. Wright bore the burden of proving the settlement was not collusive in addressing its reasonableness. She did not do so.

2. **The Interests of the Parties Not Being Released.** The trial court's decision on the factor regarding "the interests of the parties not being released" in finding i. was not supported by substantial evidence. *See* Appendix. The trial court's April 17, 2009 order foreclosed the ability of Encompass to fully develop its objections to the settlement. The court did not address the substantive impact of the settlement on Encompass' interests.

The trial court's April 17, 2009 order denied Encompass the right to a jury trial on the reasonableness of the settlement, denied the request for the issuance of a case schedule, limited Encompass' right to conduct discovery to taking the deposition of attorneys Gary Western and Frank Cornelius, counsel for Lennon, regarding circumstances surrounding the Lennon/Wright settlement, and rejected oral argument or live witness testimony for the reasonableness hearing. CP 1425. These actions prejudiced Encompass.

Encompass was an intervenor and had legal standing with the "right to define, explain and defend its own interests directly." *Columbia*

Gorge Audobon Soc'y v. Klickitat County, 98 Wn. App. 618, 630 (1999). The trial court erred when it denied Encompass the right as a party litigant to full discovery, the right to present oral argument and live witness testimony at the reasonableness hearing, and a jury trial for the determination of damages. *Id.*

Despite being a party, Encompass was not permitted to take the deposition of Wright's attorney, Joseph Koplin, or Robert Mannheimer, ACIC's attorney. CP 1854. Encompass was denied access to the terms of the AIC settlement agreement. *Id.* In early January 2009, ACIC informed Encompass that the experts disclosed in its list of witnesses and exhibits were being "withdrawn pursuant to the settlement between plaintiff, Deirdre Wright, and her insurer, ACIC, and would not be available under *Mothershead v. Adams*, 32 Wn. App. 325, 647 P.2d 525, *review denied*, 98 Wn.2d 1001 (1982). CP 547. Wright chose not to seek the \$250,000 of additional insurance limits for the sum of \$100 plus the PIP waiver and the agreement to withdraw its experts. The trial court denied Encompass the right to develop the patent unreasonableness and potentially collusive nature of the Wright/ACIC settlement. CP 1425. These facts should have been examined by the court to determine whether collusion exists – whether the ACIC settlement was a reasonable settlement or was paid for

the purpose of attempting to shield the trier of fact from the truth by withdrawing the expert witnesses.

The refusal of Wright to provide the ACIC settlement documents is analogous to a “Mary Carter” settlement agreement where the full disclosure is shielded from the court. In *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992), *aff’d*, 125 Wn.2d 1, 882 P.2d 157 (1994) the court set forth the requirement that agreements of this type be disclosed:

The existence of an undisclosed agreement between outwardly adversarial parties at trial can prejudice the proceedings by misleading the trier of fact. Such agreements are referred to as “Mary Carter Agreements”. *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). Where appellate courts have permitted such agreements, they also have required pretrial disclosure to the trial court.”

Id. at 103-04. Encompass should have been provided with the settlement documents for the ACIC settlement prior to the hearing and allowed to take the depositions of Robert Mannheimer and Joseph Koplin.

By its April 17, 2009 order, the trial court denied Encompass oral argument at the reasonableness hearing, stating that it would “consider plaintiff’s motion to determine reasonableness of settlement under RCW 4.22.060 on written submissions only...” CP 1429. The trial court subsequently scheduled a reasonableness hearing only to later cancel the

hearing immediately prior to the scheduled date. RCW 4.22.060 provides that “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.” The failure of the court to hold a hearing prejudiced Encompass. CP 1865, 1908. Encompass was unable to provide live testimony of Jerry Searles on the settlement value of the claim, or provide live medical testimony regarding the extent of Wright’s damages. This was a complex medical case and live witness testimony was necessary. There was no opportunity for cross-examination of Wright. The absence of a hearing and the right to pursue discovery in the present case should be contrasted with the careful consideration by the trial court in *Water’s Edge*:

The trial court reviewed a considerable amount of testimony, documents, and briefing, heard argument from both the parties and Farmers, and then took the case under consideration for five months before issuing its ruling.

Water’s Edge, 152 Wn. App. at 582. The *Water’s Edge* court allowed the parties the opportunity to engage in discovery and present live witness testimony at the reasonableness hearing. *Id.* The opportunity to pursue discovery is critical when an insurer opposes the reasonableness of a settlement when collusion is at issue.

The trial court abused its discretion in the entry of the April 17, 2009 order denying Encompass the right to a jury trial for the determination of damages, limiting discovery, and deciding the issue of reasonableness on the pleadings. CP 1425.

Finally, Encompass was providing a legal defense for Lennon at the time she negotiated the settlement with Wright. This case does not present the situation where the insurer was not defending the case or defending under a reservation of rights. The rights of Lennon and Encompass are defined by the insurance agreement and Lennon's negotiation of a settlement on her own prejudiced Encompass. *Hamilton v. Maryland Casualty Co.*, 27 Cal. 4th 718, 729 (Cal. 2002). The Court in *Hamilton* stated that approval at a reasonableness hearing cannot transform an agreed judgment that, by covenant, the insured will never have to pay, into a determination of the existence and extent of the insured's liability. The trial court did not properly consider Encompass' interests by approving the settlement as reasonable.

In *Werlinger, supra*, the court expressly recognized that the interests of the insurer who was defending the case and provided coverage were prejudiced when the insured settled directly with the plaintiff, barring a trial on the merits and a determination of actual damages. 126 Wn. App. at 351. The *Werlinger* court stated that the insurer would be

prejudiced by approval of a \$5 million judgment as reasonable when the insurer defended and did nothing to push the insured into bankruptcy. *Id.* The trial court believed that since the plaintiffs had been granted a discharge of their personal liability to that plaintiff in bankruptcy it was unreasonable for them to settle for any amount in excess of the available policy limits. *Id.*

A majority of jurisdictions do not sanction a pre-verdict settlement when an insurer is defending and acknowledging coverage because the insurer should only be responsible for the settlement in excess of policy limits when the insured is truly abandoned by the insurer. *See* Chris Woods, *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 Tex. L. Rev. 1373 (1997). *Hamilton* is the foremost case representing this position.

In *Hamilton*, the insurer agreed to defend its insured in a personal injury lawsuit, but refused a settlement demand within policy limits. The California Supreme Court held when an insurer is defending and acknowledging coverage, the insured cannot enter into a stipulated judgment that would establish presumptive damages in a subsequent bad faith action to thereby prejudicing the rights of the insurer. *Id.* at 725-26. The *Hamilton* court stated that the stipulated “judgment provides no

reliable basis to establish damages resulting from a refusal to settle, an essential element of plaintiffs' cause of action.” *Id.*

Under *Hamilton*, allowing this procedure when the insurer is present and defending elevates the interests of the insured above a level supported by public policy, and allows an insured to breach duties owed to the insurer when the insured has not been truly abandoned. This would be an unjustified breach of the insurance policy by the insured. The insurer may in fact prevail at trial, and entering into the consent judgment, the insured forecloses a trial on the merits where the actual damages are determined.

The *Hamilton* court concluded a reasonableness hearing in the underlying action is not an appropriate forum in which to determine the measure of damages caused by an insurer's bad faith. For the determination of reasonableness for purposes of comparative liability the court examines “whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries.” *Id.* at 326. In making this determination, the trial court's primary concern is whether the settling tortfeasor is paying *less* than its proportionate share of the plaintiff's loss. *Id.* In contrast, for the purpose of establishing an insurer's liability for the amount of a settlement entered into by its insured, the insurer's concerns

are whether the tortfeasor is paying *more* than its proportionate share or too easily admitting liability. *Id.* The court explained that the evidentiary showing at the reasonableness hearing is not designed to test those questions and cannot be a substitute for an actual trial.” *Id.* at 327.

3. The Releasing Person’s Damages. The trial court’s finding a. on the question of Wright’s actual damages is not supported by substantial evidence. *See* Appendix. It largely ignored key evidence on Wright’s preexisting conditions.

The extent of Wright’s damages was disputed. CP 1731. This case was complex with many doctors and experts, and was highly controversial as to the quality and nature of the claims of Wright’s traumatic brain injury and vision-related problems. *Id.* The defense experts found no such damage and found that Wright was normal. CP 1730. Jerry Searles, Encompass’ claims handling expert, concluded that \$1.2 million was an inflated settlement figure. CP 1731.

The trial court did not allow any oral argument by counsel or any live testimony by any of the medical doctors on the extent of Wright’s damages. Instead, the court simply adopted the valuation of the case proposed by Wright’s expert, Mark Honeywell. CP 1437.

.....

In summary, in the application of the *Glover/Chaussee* factors, the trial court erroneously concluded that Wright sustained her burden of proving the settlement with Lennon was reasonable.

F. CONCLUSION

The trial court erred in finding the Lennon/Wright settlement reasonable. The trial court's decision on the reasonableness of the settlement should be reversed. Costs on appeal should be awarded to Encompass.

DATED this 3d day of May, 2010.

Respectfully submitted,



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APPENDIX

HON. LAURA GENE MIDDAUGH

RECEIVED

APR 22 2009

TALMADGE/FITZPATRICK

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

DEIRDRE WRIGHT,

Plaintiff,

v.

LACY LENNON and the marital community
of Lacy Lennon and John Doe Lennon,

Defendants,

and

ENCOMPASS INSURANCE COMPANY
OF AMERICA,

Party Intervenor.

No.: 06-2-37312-0 KNT

**AMENDED ORDER ON PARTY
INTERVENOR ENCOMPASS
INSURANCE COMPANY OF
AMERICA'S MOTION FOR JURY
TRIAL, DISCOVERY, ISSUANCE OF
SCHEDULING ORDER, AND STAY OF
PROCEEDINGS**

THIS MATTER having come before the Court on March 13, 2009 on motion of Intervenor Encompass Insurance Company of America for Jury Trial, Discovery, and Issuance of Scheduling Order. Appearing before the court were Joseph L. Koplin and Elizabeth A. LePley of Moschetto and Koplin, Inc., P.S. for Plaintiff, Frank A. Cornelius, Jr. of Lee Smart for Defendant Lennon, and Douglas F. Foley of Foley & Buxman, PLLC and Phillip A. Talmadge of Talmadge/Fitzpatrick for Intervenor Encompass. The court considered the pleadings already filed in this matter and further considered:

- 1 1. Encompass' Motion and Memorandum re: Jury Demand, Discovery and
- 2 Issuance of Scheduling Order;
- 3 2. Plaintiff's Response to Encompass' Motion and Memorandum; and
- 4 3. Encompass' Reply to Plaintiff's Response.

5 The Court further considered Encompass' Motion dated January 27, 2009 to Stay
6 Reasonableness Hearing during the pendency of Encompass Insurance Company of America
7 v. Lennon and Wright, No. C09-0111JCC, currently pending in United States District Court
8 for the Western District of Washington.

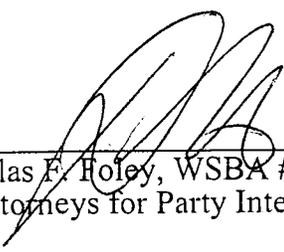
9 HAVING reviewed the above-referenced pleadings, and having heard argument of
10 counsel, it is hereby ORDERED as follows:
11

- 12 1. Encompass' motion for a stay is DENIED.
- 13 2. Encompass' request for a jury trial is DENIED.
- 14 3. Encompass' request for issuance of a civil case schedule is DENIED.
- 15 4. Encompass' request for full discovery pursuant to a Scheduling Order is
16 DENIED; however, discovery is GRANTED for the limited purpose of taking the
17 depositions of attorneys Gary A. Western and Frank A. Cornelius, Jr., but only with respect
18 to the facts and circumstances surrounding entry into (1) the settlement agreement between
19 American Commerce Insurance Company and Wright, and (2) the settlement agreement
20 between Wright and Lennon, including the nature and extent of any prior communications
21 between Mr. Western and (1) Mr. Koplin, (2) Mr. Mannheimer, and/or (3) American
22 Commerce Insurance Company with respect to the UIM settlement agreement entered into
23 between Wright and ACIC.
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1 PRESENTED BY:

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4 
Douglas F. Foley, WSBA #13119
Of Attorneys for Party Intervenor Encompass

5

6 Philip A. Talmadge, WSBA #6973
Of Attorneys for Party Intervenor Encompass
301/3733

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CERTIFICATE OF SERVICE

I, Douglas F. Foley, certify that I served the foregoing document on the attorneys of record, by the means indicated:

Joseph L. Koplín *Via U.S. Mail*
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Michael Brown *Via U.S. Mail*
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Seattle, WA 98161
Attorneys for Defendant

Robert A. Mannheimer *Via U.S. Mail*
A Professional Service Corporation
9500 Roosevelt Way NE, Ste. 303
Seattle, WA 98115-2252
Attorneys for American Commerce Insurance Company

Dated this 14th day of April, 2009.



Douglas F. Foley, WSBA #13119

301/3733

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TALMADGE/ FITZPATRICK

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

DEIRDRE WRIGHT

Plaintiff/Petitioner,

vs.

LACY LENNON, et ux,

Defendant/Respondent.

No. 06-2-37312-0 KNT

ORDER ON REASONABLENESS HEARING

JUDGMENT SUMMARY

Judgment creditor: Deirdre Wright

Judgment debtor: Lacy Lennon

Principal judgment amount: \$1,200,000

Interest to date of judgment: None requested

Attorney's fees: None requested

Costs: None requested

Other recovery amount: n/a

Principal judgment shall bear interest at statutory rate per annum

Attorney's fees, costs & other recovery amounts shall bear interest at n/a % per annum

Attorney for judgment creditor: Joseph Koplin

Attorney for judgment debtor: Michael W. Brown

Other: n/a

ORDER APPROVING SETTLEMENT

COPY

1 THIS MATTER came before the undersigned Judge on the plaintiff's MOTION FOR
2 REASONABLENESS HEARING TO APPROVE SETTLEMENT WITH DEFENDANT LACY
3 LENNON. The matter was heard without oral argument. The Court considered the documents
4 marked with an * which are listed on the attached Appendix (copy of Docket). The court makes
5 the following Findings of Fact and Conclusions of Law and Order:.

- 6
- 7 1. This hearing was originally set for 7/15/09, without oral argument. The Court allowed the
8 defendant's insurance company, Encompass Insurance Company, to intervene. The
9 matter was continued to allow the Intervener insurance company, Encompass Insurance
10 Company to respond and Encompass Insurance Company was allowed to do additional
11 discovery regarding the circumstances surrounding the agreement that was reached
12 between the plaintiff and the defendant, their insured.
 - 13 2. . The Court allowed additional submissions at the request of Intervener Encompass
14 Insurance Co. after the decision in *Water's Edge Homeowners Assoc. v. Water's Edge*
15 *Associated, et al* 216 P. 3rd 1110 (Div. 2, 1990). Final briefing in this matter was received
16 on or about 10/31/09. The Court received and considered over 400 pages of documents
 - 17 3. The purpose of a reasonable hearing is not to determine what verdict a jury would have
18 brought had the case been presented to the jury. It is to determine if the settlement
19 reached by the parties is reasonable, that is if it is rational, shows sound judgment under
20 the circumstances of the case, and is not extreme or excessive. The Supreme Court
21 has stated nine factors that should be considered in determining whether a settlement is
22 "reasonable" and should be approved. The Court considered these factors as follows:

23 a. The releasing person's damages:

- 24 i. In general: The plaintiff claims long term medical issues from the auto
25 accident which has caused her to incur \$60,952.12 in medical specials,
26 \$647,209 in loss of earning capacity, and \$8,350-\$13,700 in future
27 education costs. She claims emotion distress as a result of this. She had
28 some soft tissue injury after the accident, but this has resolved, What
29 remains, according to the plaintiff, is long term impairment which makes it

ORDER APPROVING SETTLEMENT

1 impossible for her to work full time at the computer or like tasks that
2 require visual concentration, thus making her unable to return to work in
3 the job she had before the accident or similar jobs. She had one job post-
4 accident but was unable to maintain it. She reports lost social interaction
5 because of the accident and the inability to do the recreational activities
6 the she engaged in before the accident. The plaintiff supports her claim
7 through lay witnesses and experts in the fields of optometry, neurology, a
8 general practice physician and other experts including physical and
9 vocational treatment providers, and an economist.

10 The defendant lists two experts who refute her claims – Dr. Bersinger, an
11 ophthalmologist and Dr. Muscatel a doctor in neuropsychology. There
12 were additional experts that had been identified by another intervener,
13 American Commerce Insurance Company, which was the plaintiff's
14 underinsured motorist insurance provider. However, the plaintiff settled
15 with American Commerce Insurance Company and they were dismissed
16 from the case. The defendant indicated in intent to call the experts that
17 had been provided by American Commerce Insurance Company even
18 though American Commerce Insurance Company was no longer part of
19 the case. The Plaintiff filed a motion to object and exclude American
20 Commerce Insurance Companies experts as witnesses. That motion was
21 pending at the time of the settlement with the defendant.

22 Both sides provided declarations from attorneys with extensive
23 experience in these types of cases. The declaration of the attorney
24 provided by the plaintiff basically said that based on his extensive
25 experience and a review of the file, he believed the amount of \$1.2 million
26 was reasonable, while the declaration of the attorney provided by the
27 defense, with similar qualification, said he believed the amount of \$1.2
28 million was unreasonable.
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ORDER APPROVING SETTLEMENT

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ii. Specifically:

1. Dr. Bersinger, the defense ophthalmologist, finds no current abnormalities that would interfere with the plaintiff's ability to function on the same level as before the accident. He does note light sensitivity and says this is frequently associated with head injury, will resolve on its own and colored glasses may be used in the interim. He also notes "computer fatigue" and says this should get better over time but does not relate it to the accident. He attacks the plaintiff's significant expenses for vision therapy on the grounds that while there appears to be a correlation between this kind of treatment and recovery, it is unclear whether the correlation is merely time, as opposed to treatment, related. He states that the plaintiff has "fully recovered from any eye related issues."
2. Dr Muscatel, the defense neurophysiology expert, finds all tests within normal limits, opining that the negative results she had with plaintiff's expert Dr. Goodwin were because she having a bad day and she had a better day when she took the tests he administered. He finds no neuro-cognitive impairment; finds that she might have psychological problems.
3. The plaintiff's many experts report objective – that is measurable- as well as subjective symptoms based on the plaintiff's reports. The plaintiff's experts cover all aspects of plaintiff's care and treatment and her special damages are supported by the evidence.
4. The problem with plaintiff's experts per the defendant is that they are heavy on optometrists, as opposed to "real" doctors like Dr. Bensinger who is an ophthalmologist. However, the plaintiff does

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have an M.D. (plaintiff's family doctor), a neuropsychologist, and one the optometrist is a professor from the University of Oregon.

5. The problem with plaintiff is that she did not report that she had claimed these exact symptoms from prior accidents, which decrease her credibility and reliability. However, she had reported the accidents and stated what she recalled as being the symptoms after those accidents, though her recollection was faulty. There was no report that the symptoms that she had after the prior accidents, even if she had them before, were present at the time of this accident. All experts on both sides report that the plaintiff was open and really trying to cooperate and comply with all testing and requests. The plaintiff's experts identify her problems as physical, resulting from the accident. The defendant's experts state they think she has psychological problems that may be interfering with her ability to go back to work or perform her normal activities.

The plaintiff did have MRI's that were all normal. However, one of the plaintiff's doctors has reviewed the MRI and found an abnormal spot.

6. The defendant's problems with her case are several. The defendant failed to identify any rehabilitation or economist experts to rebut plaintiff's experts. In addition, while no ruling had been made on whether the remaining defendant would be able to use the expert witnesses paid for and identified by the released defendant/intervener, there is a likelihood that the motion excluding those witnesses would have been granted. All parties agree that the defendant's position was much stronger when the released defendant's experts were available. Also, the plaintiff by

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all reports (including defense experts) is personable, not dissembling, not a malingerer, and sincere in her expressions of symptoms, problems and the emotional turmoil these have caused in her life. She will be a sympathetic witness.

7. In sum the defendant's hope is that the jury accepts their two experts opinions that there was no or little injury to the plaintiff from the accident and that her continued symptoms are either the result of psychological issues or misdiagnosis by the people she consulted. Their obstacles are the sheer weight of the experts that the plaintiff has consulted who will support her position, that many of these consults have been not for purposes of litigation but for treatment, and that the plaintiff is seen as very motivated and appears likeable and sympathetic. Should the jury accept the plaintiff's position that she has continued problems, the defense did not identify any experts to provide testimony against the plaintiff's economist and vocational rehabilitation experts.

While clearly the jury could have awarded a substantially lower verdict than \$1.2 million, there was a clear danger that amount or higher could have been awarded.

- b. The merits of the releasing person's liability theory: Liability was not at issue. This was a rear end collision. The defendant admitted liability
- c. The merits of the released person's defense theory: The defense was as to damages, not liability. See discussion in (a) above.
- d. The released person's relative faults: The released person/plaintiff had no fault for the accident. There was no evidence or argument that the plaintiff was intentionally malingering or failed to mitigate her damages.
- e. The risks and expenses of continued litigation: Both parties risked higher costs of litigation. However, no data was presented on the amount of these costs. The

1 Plaintiff, obviously, risked a significantly lower judgment if the case went to trial
2 and the jury accepted the defense position in whole or in part. The defendant's
3 personal risk was significant. No documents except one contained an
4 expression of the minimal value of the case. Around a week before trial, Mr.
5 Gary Western, an experienced personal injury defense attorney, was consulted
6 by the defendant, who was being represented in this litigation by another
7 attorney provided by the insurance company/intervener. The defendant
8 expressed concern about the status of the case, that the insurance company had
9 turned down a policy limits offer, and that she might be facing significant personal
10 liability. Mr. Western stated that while he would not say whether he believed that
11 \$1.2 million was a reasonable settlement figure, he felt that after even his
12 cursory review of the file that the case was most likely worth more than
13 \$100,000, which was the policy limits, that the amount of \$1.2 million was not
14 outside the bounds of a verdict, and therefore recommended the ultimate
15 settlement to the defendant. Thus, absent the settlement, the defendant risked
16 personal exposure and entry of a judgment against her. The defendant might
17 have been protected from having to personally pay the judgment and could have
18 brought a "bad faith" case against her own insurance company, but this would
19 have entailed time, expense and exposure to her and would not have removed
20 the judgment from her record, even if it was ultimately paid. With the settlement,
21 the defendant assigned her right to sue her insurance company for bad faith to
22 the plaintiff, who now bears all the risks and costs associated with such a suit.
23 Both parties personally also saved having to be in court for 12-14 days of trial,
24 under the stress of trial, and away from jobs or family for that period of time.

- 25 f. The released person's ability to pay: No direct evidence was presented on this
26 issue.
27 g. Any evidence of bad faith, collusion, or fraud: One of the main focuses of the
28 Intervener Insurance Company's argument is that the agreement reached by the
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1 plaintiff and the defendant, their client, was collusive in that under the agreement,
2 the defendant/their insured, has nothing to lose by agreeing to the amount. In
3 fact, the defendant does have something to lose: if the agreement is found to be
4 not reasonable, the case will go to trial and she may still be faced with a
5 judgment and will be back where she was facing the consequences of going to
6 trial. This distinguishes the case from WATER'S EDGE HOMEOWNERS
7 ASSOCIATION v. WATER'S EDGE ASSOCIATES, supra is also distinguished
8 because in this case the defendant herself, being concerned about personal
9 liability, contacted an attorney and initiated settlement discussions. She was
10 provided with the settlement figure that had previously been proposed by the
11 plaintiff, and the plaintiff's exchange of their right to collect against her for any
12 "bad faith" claim she had. The defendant/ insured was faced with going to trial or
13 settling on the eve of trial. She had little negotiating power on her own against
14 the plaintiff in light of her insurance company's decision not to settle and little
15 time in which to make the decision or have an independent attorney investigate
16 the claim. A request for continuance of the trial had recently been denied. The
17 defense position had been weakened by the dismissal of the Intervener
18 American Commerce Insurance Co. and the withdrawal of their experts. The
19 fact that the defendant retained the right to sue her insurance company for any
20 personal damages (emotional distress, attorney's fees) does not put her in the
21 position of being tied to the plaintiff's success of the bad faith claim and other
22 assigned claims, as happened in WATER'S EDGE HOMEOWNERS
23 ASSOCIATION v. WATER'S EDGE ASSOCIATES , supra. The plaintiff does not
24 agree to pursue these claims for the defendant or rebate her anything from what
25 they recover for her claims; the defendant just retains the right to pursue an
26 independent lawsuit on these issues for herself. In addition, while the defendant
27 does agree to cooperate in any bad faith claim and not to oppose the
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ORDER APPROVING SETTLEMENT

1 reasonableness hearing, she does not agree to actively work for acceptance of
2 the reasonableness of the settlement. In this case, there was no collusion.

3 Intervener also alleges collusion between the plaintiff and the plaintiff's
4 underinsured motorist carrier, American Commerce Insurance CO., who was
5 released and dismissed from the case. That insurance company had potential
6 liability of \$250,000. It settled with plaintiff for around \$61,000 (\$100 and
7 forgiveness of recovery of medical bills paid) and the agreement to withdraw its
8 experts. This agreement was entered into weeks before the agreement between
9 the plaintiff and the defendant. The defendant did not participate in the
10 discussions. At that time, since the defendant had rejected prior offers, it seemed
11 that the case was going to go to trial. This agreement gave the plaintiff
12 something of value – a distinct advantage as far as expert witnesses and only
13 one defendant to have to litigate against – and also gave the released insurance
14 company something of value – no further costs of trial, and no further exposure
15 to payment of damages (a savings of around \$190,000). As between these two
16 parties this appeared to be a very beneficial and reasonable deal to both sides.

17 h. The extent of the releasing person's investigation and preparation of the case:

18 As indicated above, the defendant had little time to obtain independent counsel
19 and investigate this claim for settlement. The defendant's attorney reviewed
20 plaintiff's case, by reviewing the plaintiff's settlement materials, Things were
21 moving rapidly toward trial and the defense position had been weakened by the
22 settlement between American Commerce Insurance Company and the plaintiff.
23 The defendant's personal attorney did speak to the defense attorney appointed
24 by the insurance company, but he does not appear to have given contrary
25 information to the defendant's "settling" attorney.

26 i. The interests of the parties not being released: Intervener Encompass Insurance

27 Company has had the ability to protect its interests during this case and, as the
28 party involved in settlement negotiations, has had access to necessary
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1 information and discovery. In addition, it was allowed additional discovery and
2 time after the reasonableness hearing was noted so it could address the
3 "collusion" argument.
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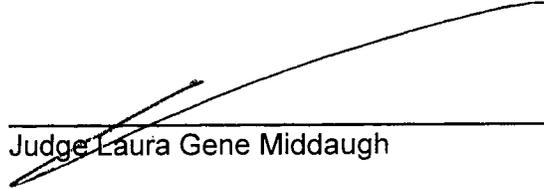
5 Based on the above, enters the following:

6 **CONCLUSIONS OF LAW:**

7 The court concludes that the \$1.2 million settlement between Plaintiff and Defendant Lacy
8 Lennon to be a reasonable settlement amount and was not the product of bad faith, collusion or
9 fraud.

10 **ORDER:** Judgment shall be entered in the amount of \$1.2 million dollars (\$1,200,000) in favor
11 of plaintiff Deirdre Wright and against Defendant Lacy Lennon.

12 Dated _____ 12/14/09 _____

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15 _____
16 Judge Laura Gene Middaugh
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06-2-37312-0

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<input type="checkbox"/>	85	01-12-2009 NOTICE OF HEARING /QUASH TRIAL	2

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<input type="checkbox"/>	122B	01-27-2009	DECLARATION DOUGLAS F FOLEY	3
<input type="checkbox"/>	122C	01-27-2009	DECLARATION RICHARD GRAVES	37
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<input checked="" type="checkbox"/>	128	<input type="checkbox"/> 01-29-2009	MEMORANDUM IN OPPSTN/ENCOMPASS	211
<input type="checkbox"/>	129	02-02-2009	NOTICE OF HEARING/STATUS CONFERENCE	1

☐	130	02-02-2009	NOTICE OF HEARING	2
☐	131	02-10-2009	MEMORANDUM FOR STAT CONF /PLA	16
☐	132	02-10-2009	DECLARATION OF MAILING	2
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☐	134	02-23-2009	NOTICE OF HEARING /JURY DEMAND	2
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☐	136	02-27-2009	ORDER DIRECT CLERK NOT TO DISMISS	2
☐	137	02-27-2009	ORDER OF INTERVENTION /ENCOMPASS	2
☐	138	03-06-2009	RESPONSE /PL/MT	60
☐	139	03-11-2009	REPLY TO JURY DEMAND/DISCOVERY /ENC	10
☐	140	☐ 03-13-2009	MOTION HEARING CR MICHAEL TOWNSEND JR	1
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☐	147	☐ 07-01-2009	NOTICE OF HEARING /APPROVE SETTLMNT	2
*☐	148	☐ 07-01-2009	MOTION FOR REASONABLENESS HRG /PLA	5
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☐	150	☐ 07-01-2009	AFFIDAVIT/DCLR/CERT OF SERVICE	1
*☐	151	☐ 07-13-2009	DECLARATION OF JERRY SEARLES	285
*☐	152	07-13-2009	MEMORANDUM OPPOS MTN /INTERVENOR	13
*☐	153	☐ 07-14-2009	REPLY TO RESPONSE TO MOTION /PLTF	4
☐	154	☐ 07-14-2009	AFFIDAVIT/DCLR/CERT OF SERVICE	2
*☐	154A	☐ 09-02-2009	OBJECTION / OPPOSITION /INTERVENOR	20
*☐	154B	☐ 09-04-2009	RESPONSE /PLTF	8
☐	154C	☐ 09-04-2009	AFFIDAVIT/DCLR/CERT OF SERVICE	2
*☐	155	☐ 09-08-2009	REPLY RE COLLUSION /INTERVENOR	5
*☐	156	☐ 10-20-2009	BRIEF RE COLLUSION & AUTHORITIES/IN	12
*☐	157	☐ 10-20-2009	DECLARATION OF DOUGLAS F. FOLEY	37
*☐	158	☐ 10-28-2009	RESPONSE OF PLTF TO ENCOMPASS	11
*☐	159	☐ 10-30-2009	REPLY TO RESPONSE	12

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RECEIVED

JAN 20 2010

TALMADGE/ FITZPATRICK

**IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY**

DEIRDRE WRIGHT

Plaintiff/Petitioner,

vs.

LACY LENNON, et ux,

Defendant/Respondent.

No. 06-2-37312-0 KNT

AMENDED

ORDER ON REASONABLENESS HEARING

JUDGMENT SUMMARY

Judgment creditor: Deirdre Wright

Judgment debtor: Lacy Lennon

Principal judgment amount: \$1,200,000

Interest to date of judgment: None requested

Attorney's fees: None requested

Costs: None requested

Other recovery amount: n/a

Principal judgment shall bear interest at 2.173 % per annum

Attorney's fees, costs & other recovery amounts shall bear interest at n/a % per annum

Attorney for judgment creditor: Joseph Koplin

Attorney for judgment debtor: Michael W. Brown

Other: n/a

ORDER APPROVING SETTLEMENT

Page 1 of 14 (including attachment)

ORIGINAL

1 THIS MATTER came before the undersigned Judge on the plaintiff's MOTION FOR
2 REASONABLENESS HEARING TO APPROVE SETTLEMENT WITH DEFENDANT LACY
3 LENNON. Plaintiff filed a Motion for Reconsideration. The Court indicated that it would
4 entertain the motion and sent notice that the defendants could file a response to the Motion for
5 Reconsideration. No response was received. The matter was heard without oral argument.
6 The Court considered the documents marked with an * which are listed on the attached
7 Appendix (copy of Docket). The court makes the following Findings of Fact and Conclusions of
8 Law and Order:

- 9 1. This hearing was originally filed 1/16/09 and set, without oral argument, on January 30,
10 2009. The Court allowed the defendant's insurance company, Encompass Insurance
11 Company, to intervene. The matter was continued to allow the Intervener insurance
12 company, Encompass Insurance Company to respond and Encompass Insurance
13 Company was allowed to do additional discovery regarding the circumstances
14 surrounding the agreement that was reached between the plaintiff and the defendant,
15 their insured.
- 16 2. The Court allowed additional submissions at the request of Intervener Encompass
17 Insurance Co. after the decision in *Water's Edge Homeowners Assoc. v. Water's Edge*
18 *Associated, et al* 216 P. 3rd 1110 (Div. 2, 1990). Final briefing in this matter was received
19 on or about 10/31/09. The Court received and considered over 400 pages of documents
- 20 3. The purpose of a reasonable hearing is not to determine what verdict a jury would have
21 brought had the case been presented to the jury. It is to determine if the settlement
22 reached by the parties is reasonable, that is if it is rational, shows sound judgment under
23 the circumstances of the case, and is not extreme or excessive. The Supreme Court
24 has stated nine factors that should be considered in determining whether a settlement is
25 "reasonable" and should be approved. The Court considered these factors as follows:
 - 26 a. The releasing person's damages:
 - 27 i. In general: The plaintiff claims long term medical issues from the auto
28 accident which has caused her to incur \$60,952.12 in medical specials,
29

ORDER APPROVING SETTLEMENT

1 \$647,209 in loss of earning capacity, and \$8,350-\$13,700 in future
2 education costs. She claims emotion distress as a result of this. She had
3 some soft tissue injury after the accident, but this has resolved, What
4 remains, according to the plaintiff, is long term impairment which makes it
5 impossible for her to work full time at the computer or like tasks that
6 require visual concentration, thus making her unable to return to work in
7 the job she had before the accident or similar jobs. She had one job post-
8 accident but was unable to maintain it. She reports lost social interaction
9 because of the accident and the inability to do the recreational activities
10 the she engaged in before the accident. The plaintiff supports her claim
11 through lay witnesses and experts in the fields of optometry, neurology, a
12 general practice physician and other experts including physical and
13 vocational treatment providers, and an economist.

14 The defendant lists two experts who refute her claims – Dr. Bersinger, an
15 ophthalmologist and Dr. Muscatel a doctor in neuropsychology. There
16 were additional experts that had been identified by another intervener,
17 American Commerce Insurance Company, which was the plaintiff's
18 underinsured motorist insurance provider. However, the plaintiff settled
19 with American Commerce Insurance Company and they were dismissed
20 from the case. The defendant indicated in intent to call the experts that
21 had been provided by American Commerce Insurance Company even
22 though American Commerce Insurance Company was no longer part of
23 the case. The Plaintiff filed a motion to object and exclude American
24 Commerce Insurance Companies experts as witnesses. That motion was
25 pending at the time of the settlement with the defendant.

26 Both sides provided declarations from persons with extensive experience
27 in these types of cases. The declaration of attorney Honeywell provided
28 by the plaintiff basically said that based on his extensive experience and
29

1 a review of the file, he believed the amount of \$1.2 million was
2 reasonable, while the declaration provided by the defense, from Mr.
3 Searles, an person with over 40 years of experience in the claims
4 department of Safeco Insurance Company, said he believed the amount
5 of \$1.2 million was unreasonable.

6 ii. Specifically:

- 7
- 8 1. Dr. Bersinger, the defense ophthalmologist, finds no current
9 abnormalities that would interfere with the plaintiff's ability to
10 function on the same level as before the accident. He does note
11 light sensitivity and says this is frequently associated with head
12 injury, will resolve on its own and colored glasses may be used in
13 the interim. He also notes "computer fatigue" and says this should
14 get better over time but does not relate it to the accident. He
15 attacks the plaintiff's significant expenses for vision therapy on the
16 grounds that while there appears to be a correlation between this
17 kind of treatment and recovery, it is unclear whether the
18 correlation is merely time, as opposed to treatment, related. He
19 states that the plaintiff has "fully recovered from any eye related
20 issues."
 - 21 2. Dr Muscatel, the defense neurophysiology expert, finds all tests
22 within normal limits, opining that the negative results she had with
23 plaintiff's expert Dr. Goodwin were because she having a bad day
24 and she had a better day when she took the tests he
25 administered. He finds no neuro-cognitive impairment; finds that
26 she might have psychological problems.
 - 27 3. The plaintiff's many experts report objective – that is measurable-
28 as well as subjective symptoms based on the plaintiff's reports.
29 The plaintiff's experts cover all aspects of plaintiff's care and

1 treatment and her special damages are supported by the
2 evidence.

- 3
- 4 4. The problem with plaintiff's experts per the defendant is that they
5 are heavy on optometrists, as opposed to "real" doctors like Dr.
6 Bensinger who is an ophthalmologist. However, the plaintiff does
7 have an M.D. (plaintiff's family doctor), a neuropsychologist, and
8 one the optometrist is a professor from the University of Oregon.
- 9 5. The problem with plaintiff is that she did not report that she had
10 claimed these exact symptoms from prior accidents, which
11 decrease her credibility and reliability. However, she had reported
12 the accidents and stated what she recalled as being the
13 symptoms after those accidents, though her recollection was
14 faulty. There was no report that the symptoms that she had after
15 the prior accidents, even if she had them before, were present at
16 the time of this accident. All experts on both sides report that the
17 plaintiff was open and really trying to cooperate and comply with
18 all testing and requests. The plaintiff's experts identify her
19 problems as physical, resulting from the accident. The defendant's
20 experts state they think she has psychological problems that may
21 be interfering with her ability to go back to work or perform her
22 normal activities.

23 The plaintiff did have MRI's that were all normal. However, one of
24 the plaintiff's doctors has reviewed the MRI and found an
25 abnormal spot.

- 26 6. The defendant's problems with her case are several. The
27 defendant failed to identify any rehabilitation or economist experts
28 to rebut plaintiff's experts. In addition, while no ruling had been
29 made on whether the remaining defendant would be able to use

1 the expert witnesses paid for and identified by the released
2 defendant/intervener, there is a likelihood that the motion
3 excluding those witnesses would have been granted. All parties
4 agree that the defendant's position was much stronger when the
5 released defendant's experts were available. Also, the plaintiff by
6 all reports (including defense experts) is personable, not
7 dissembling, not a malingerer, and sincere in her expressions of
8 symptoms, problems and the emotional turmoil these have caused
9 in her life. She will be a sympathetic witness.

10
11 7. In sum the defendant's hope is that the jury accepts their two
12 experts opinions that there was no or little injury to the plaintiff
13 from the accident and that her continued symptoms are either the
14 result of psychological issues or misdiagnosis by the people she
15 consulted. Their obstacles are the sheer weight of the experts
16 that the plaintiff has consulted who will support her position, that
17 many of these consults have been not for purposes of litigation but
18 for treatment, and that the plaintiff is seen as very motivated and
19 appears likeable and sympathetic. Should the jury accept the
20 plaintiff's position that she has continued problems, the defense
21 did not identify any experts to provide testimony against the
22 plaintiff's economist and vocational rehabilitation experts.

23 While clearly the jury could have awarded a substantially lower
24 verdict than \$1.2 million, there was a clear danger that amount or
25 higher could have been awarded.

- 26 b. The merits of the releasing person's liability theory: Liability was not at issue.
27 This was a rear end collision. The defendant admitted liability
- 28 c. The merits of the released person's defense theory: The defense was as to
29 damages, not liability. See discussion in (a) above.

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- d. The released person's relative faults: The released person/plaintiff had no fault for the accident. The defendant driver /released party admitted liability for the accident. There was no evidence or argument that the plaintiff was intentionally malingering or failed to mitigate her damages.
- e. The risks and expenses of continued litigation: Both parties risked higher costs of litigation. However, no data was presented on the amount of these costs. The Plaintiff, obviously, risked a significantly lower judgment if the case went to trial and the jury accepted the defense position in whole or in part. The defendant's personal risk was significant. No documents except one contained an expression of the minimal value of the case. Around a week before trial, Mr. Gary Western, an experienced personal injury defense attorney, was consulted by the defendant, who was being represented in this litigation by another attorney provided by the insurance company/intervener. The defendant expressed concern about the status of the case, that the insurance company had turned down a policy limits offer, and that she might be facing significant personal liability. Mr. Western stated that while he would not say whether he believed that \$1.2 million was a reasonable settlement figure, he felt that after even his cursory review of the file that the case was most likely worth more than \$100,000, which was the policy limits, that the amount of \$1.2 million was not outside the bounds of a verdict, and therefore recommended the ultimate settlement to the defendant. Thus, absent the settlement, the defendant risked personal exposure and entry of a judgment against her. The defendant might have been protected from having to personally pay the judgment and could have brought a "bad faith" case against her own insurance company, but this would have entailed time, expense and exposure to her and would not have removed the judgment from her record, even if it was ultimately paid. With the settlement, the defendant assigned her right to sue her insurance company for bad faith to the plaintiff, who now bears all the risks and costs associated with such a suit.

1 Both parties personally also saved having to be in court for 12-14 days of trial,
2 under the stress of trial, and away from jobs or family for that period of time.

3 f. The released person's ability to pay: No direct evidence was presented on this
4 issue.

5
6 g. Any evidence of bad faith, collusion, or fraud: One of the main focuses of the
7 Intervener Insurance Company's argument is that the agreement reached by the
8 plaintiff and the defendant, their client, was collusive in that under the agreement,
9 the defendant/their insured, has nothing to lose by agreeing to the amount. In
10 fact, the defendant does have something to lose: if the agreement is found to be
11 not reasonable, the case will go to trial and she may still be faced with a
12 judgment and will be back where she was facing the consequences of going to
13 trial. This distinguishes the case from WATER'S EDGE HOMEOWNERS
14 ASSOCIATION v. WATER'S EDGE ASSOCIATES, supra is also distinguished
15 because in this case the defendant herself, being concerned about personal
16 liability, contacted an attorney and initiated settlement discussions. She was
17 provided with the settlement figure that had previously been proposed by the
18 plaintiff, and the plaintiff's exchange of their right to collect against her for any
19 "bad faith" claim she had. The defendant/ insured was faced with going to trial or
20 settling on the eve of trial. She had little negotiating power on her own against
21 the plaintiff in light of her insurance company's decision not to settle and little
22 time in which to make the decision or have an independent attorney investigate
23 the claim. A request for continuance of the trial had recently been denied. The
24 defense position had been weakened by the dismissal of the Intervener
25 American Commerce Insurance Co. and the withdrawal of their experts. The
26 fact that the defendant retained the right to sue her insurance company for any
27 personal damages (emotional distress, attorney's fees) does not put her in the
28 position of being tied to the plaintiff's success of the bad faith claim and other
29 assigned claims, as happened in WATER'S EDGE HOMEOWNERS

1 ASSOCIATION v. WATER'S EDGE ASSOCIATES , supra. The plaintiff does not
2 agree to pursue these claims for the defendant or rebate her anything from what
3 they recover for her claims; the defendant just retains the right to pursue an
4 independent lawsuit on these issues for herself. In addition, while the defendant
5 does agree to cooperate in any bad faith claim and not to oppose the
6 reasonableness hearing, she does not agree to actively work for acceptance of
7 the reasonableness of the settlement. In this case, there was no collusion.

8
9 Intervener also alleges collusion between the plaintiff and the plaintiff's
10 underinsured motorist carrier, American Commerce Insurance CO., who was
11 released and dismissed from the case. That insurance company had potential
12 liability of \$250,000. It settled with plaintiff for around \$61,000 (\$100 and
13 forgiveness of recovery of medical bills paid) and the agreement to withdraw its
14 experts. This agreement was entered into weeks before the agreement between
15 the plaintiff and the defendant. The defendant did not participate in the
16 discussions. At that time, since the defendant had rejected prior offers, it seemed
17 that the case was going to go to trial. This agreement gave the plaintiff
18 something of value – a distinct advantage as far as expert witnesses and only
19 one defendant to have to litigate against – and also gave the released insurance
20 company something of value – no further costs of trial, and no further exposure
21 to payment of damages (a savings of around \$190,000). As between these two
22 parties this appeared to be a very beneficial and reasonable deal to both sides.

23 h. The extent of the releasing person's investigation and preparation of the case:

24 As indicated above, the defendant had little time to obtain independent counsel
25 and investigate this claim for settlement. The defendant's attorney reviewed
26 plaintiff's case, by reviewing the plaintiff's settlement materials, Things were
27 moving rapidly toward trial and the defense position had been weakened by the
28 settlement between American Commerce Insurance Company and the plaintiff.

29 The defendant's personal attorney did speak to the defense attorney appointed

1 by the insurance company, but he does not appear to have given contrary
2 information to the defendant's "settling" attorney. The plaintiff had done
3 extensive discovery and pre-trial preparation.

- 4
5 i. The interests of the parties not being released: Intervener Encompass Insurance
6 Company has had the ability to protect its interests during this case and, as the
7 party involved in settlement negotiations, has had access to necessary
8 information and discovery. In addition, it was allowed additional discovery and
9 time after the reasonableness hearing was noted so it could address the
10 "collusion" argument.

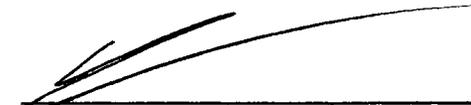
11 Based on the above, enters the following:

12 **CONCLUSIONS OF LAW:**

13 The court concludes that the \$1.2 million settlement between Plaintiff and Defendant Lacy
14 Lennon to be a reasonable settlement amount and was not the product of bad faith, collusion or
15 fraud.

16 **ORDER:** Judgment shall be entered in the amount of \$1.2 million dollars (\$1,200,000) in favor
17 of plaintiff Deirdre Wright and against Defendant Lacy Lennon. This Amended ORDER ON
18 REASONABLENESS HEARING supersedes and replaces the ORDER ON
19 REASONABLENESS HEARING filed 12/16/09

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22 Dated 1/15/10

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25 _____
26 Judge Laura Gene Midaugh
27
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ORDER APPROVING SETTLEMENT

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<input type="checkbox"/>	99	01-13-2009 MOTION IN LIMINE /DEFT	21
<input type="checkbox"/>	100	01-14-2009 NOTICE OF DEPOSITION /VIDEO	1
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<input checked="" type="checkbox"/>	119	01-16-2009 MEMORANDUM /PLTF	30
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<input checked="" type="checkbox"/>	127	01-29-2009 DECLARATION DOUGLAS FOLEY	3
<input checked="" type="checkbox"/>	128	<input type="checkbox"/> 01-29-2009 MEMORANDUM IN OPPSTN/ENCOMPASS	211
<input type="checkbox"/>	129	02-02-2009 NOTICE OF HEARING/STATUS CONFERENCE	1

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<input type="checkbox"/>	54	11-10-2008 DISCLOSURE /PLTF/WITNESS SUPP	24
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<input type="checkbox"/>	56	12-23-2008 NOTICE WITHDRAW & SUBSTITUT COUNSEL	1
<input type="checkbox"/>	57	12-23-2008 NOTICE RE: EVIDENTIARY RULE 904	4
<input type="checkbox"/>	58	12-23-2008 OBJECTION / OPPOSITION / PLTF	2
<input type="checkbox"/>	59	12-23-2008 OBJECTION / OPPOSITION / PLTF	3
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<input type="checkbox"/>	73	01-05-2009 MOTION SHORTEN TIME	3
<input type="checkbox"/>	74	01-05-2009 DECLARATION OF FRANK CORNELIUS	4
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<input type="checkbox"/>	76	01-05-2009 AFFIDAVIT/DCLR/CERT OF SERVICE	2
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<input type="checkbox"/>	81	01-09-2009 AFFIDAVIT/DCLR/CERT OF SERVICE	1
<input type="checkbox"/>	82	01-09-2009 REPLY IN SUPPT OF MTN TO CONT	4
<input type="checkbox"/>	83	01-09-2009 MT FR LV TO FILE SPPLMNTL RSPNS	32
<input type="checkbox"/>	84	01-09-2009 DECLARATION /FRANK CORNELIUS	2
<input type="checkbox"/>	85	01-12-2009 NOTICE OF HEARING /QUASH TRIAL	2

APPENDIX

Electronic Court Records

Case Selection Report Problems Security Login Help

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06-2-37312-0

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Case Title: WRIGHT VS LENNON

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Select	Index	Date	Description	Pages
<input type="checkbox"/>	1	11-29-2006	SUMMONS & COMPLAINT	7
<input type="checkbox"/>	2	11-29-2006	SET CASE SCHEDULE	5
<input type="checkbox"/>	3	11-29-2006	CASE INFORMATION COVER SHEET	3
<input type="checkbox"/>	4	12-12-2006	CONFIRMATION OF SERVICE	2
<input type="checkbox"/>	5	12-15-2006	AFFIDAVIT/DCLR/CERT OF SERVICE	2
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<input type="checkbox"/>	7	01-03-2007	NOTICE OF APPEARANCE /DEF	1
<input type="checkbox"/>	8	01-22-2007	ANSWER TO COMPLAINT /DEF	2
<input type="checkbox"/>	9	02-01-2007	JURY DEMAND RECEIVED - TWELVE	1
<input type="checkbox"/>	10	04-20-2007	CONFIRM. JOIN.: NO STATUS CONFER.	3
<input type="checkbox"/>	11	04-20-2007	NOTICE WITHDRAW & SUBSTITUT COUNSEL	1
<input type="checkbox"/>	12	05-03-2007	MOTION TO CHANGE ASSIGN AREA	3
<input type="checkbox"/>	13	05-03-2007	NOTICE OF HRG /CHANGE CASE ASSGNMNT	2
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<input type="checkbox"/>	15	06-08-2007	ORDER FOR CHANGE OF JUDGE	1
<input type="checkbox"/>	16	06-18-2007	NOTICE OF ATTY CHANGE OF ADDRESS	2
<input type="checkbox"/>	17	06-26-2007	NOTICE WITHDRAW & SUBSTITUT COUNSEL	1
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<input type="checkbox"/>	30	05-27-2008	NOTICE OF ABSENCE/UNAVAILABILITY	2
<input type="checkbox"/>	31	05-28-2008	ORDER OF INTERVENTION/AGREED/ACIC	4
<input type="checkbox"/>	32	06-02-2008	JOINDER IN JURY DEMAND	2
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<input type="checkbox"/>	34	06-30-2008	DECLARATION DAN CACKOWSKI	2
<input type="checkbox"/>	35	06-30-2008	MOTION TO CONTINUE TRIAL DATE	5
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<input type="checkbox"/>	38	07-11-2008	NOTICE WITHDRAW & SUBSTITUT COUNSEL	1
<input type="checkbox"/>	39	07-21-2008	ORD FOR CONTINUANCE OF TRIAL DATE	2

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 64717-2-I to the following parties:

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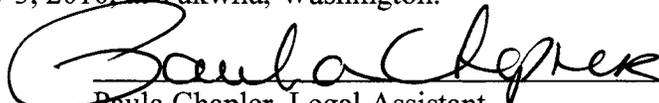
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Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 3, 2010, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick