

67036-1

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No. 67036-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAPITOL SPECIALTY INSURANCE CORPORATION,

Appellant,

v.

YUAN ZHANG,

Respondent.

BRIEF OF APPELLANT
(CORRECTED)

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I. INTRODUCTION

The trial court's orders granting Plaintiff's RCW 4.22.060 Reasonableness Motions should be reversed because Plaintiff's settlements with Hawk Construction, LLC ("Hawk") and Ready Construction, LLC ("Ready") are patently unreasonable when evaluated against the Glover/Chaussee¹ factors.

Plaintiff, Ms. Zhang, brought this construction defect lawsuit against one of Capitol Specialty Insurance Corporation's ("Capitol") insureds, Hawk. Capitol retained defense counsel for Hawk, who then brought a third-party claim against Ready, another of Capitol's insureds. Capitol retained defense counsel for Ready and then attempted, unsuccessfully, to settle all claims against both insureds. Subsequently, Ms. Zhang, Hawk and Ready settled without Capitol's consent in a typical arrangement where Ms. Zhang received large consent judgments in exchange for covenants not to execute against the insureds directly.

The Hawk and Ready settlements are unreasonable because they did not involve *any* compromise by Ms. Zhang. Rather, Ms. Zhang received more through settlement (judgments totaling \$2,381,773) than she had requested in her trial brief (\$2,128,606.72). Ms. Zhang claims

¹ Glover v. Tacoma General Hospital, 98 Wn.2d 708, 658 P.2d 1230 (1983); Chaussee v. Md. Cas. Co., 60 Wn. App. 504, 803 P.2d 1339 (1991).

that she applied a 10% discount to the Hawk settlement, but this “discount” depends on an inflated baseline of damages exceeding what she requested in her trial brief. Moreover, Ms. Zhang did not apply *any* discount to her settlement with Ready.

Pursuant to RCW 4.22.060(1), it was Ms. Zhang’s burden to prove that the settlements were reasonable. She failed in her effort with respect to several of the Glover/Chaussee factors used to assess reasonableness.

First, Ms. Zhang inflated and then failed to support her claimed damages. Second, the settlements did not give Hawk or Ready *any* credit for their defenses. Third, Hawk was not given *any* credit for assignment of its claims against Ready.

Fourth, the settlements failed to consider the relative risks and expenses of continued litigation. While neither Hawk nor Ready would have incurred any costs (because they were being defended by their insurers) or faced any actual risk (because they were inactive limited liability companies without any assets) by proceeding to trial, Ms. Zhang would have incurred attorney fees and risked a defense verdict or a steeply discounted award of damages. Similarly, and fifth, the settlements fail to account for the fact that neither Hawk nor Ready had any ability to pay a settlement or judgment.

Sixth, Hawk and Ready acquired their insurance policies by use of

material misrepresentations, and then they colluded with Ms. Zhang's bad-faith efforts to maximize her recovery under those same policies by, among other things, inflating her damages and, for reasons discussed below, attributing the damages to siding rather than deck work. Seventh, the settlements did not account for Capitol's interests even though Capitol defended its insureds and did nothing to harm their interests.

For all of these reasons, the settlements should have been rejected as unreasonable. The trial court erred in ruling otherwise.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NUMBER 1: The trial court erred by granting Ms. Zhang's RCW 4.22.060 Reasonableness Motion with respect to her settlement with Hawk.

ASSIGNMENT OF ERROR NUMBER 2: The trial court erred by granting Ms. Zhang's RCW 4.22.060 Reasonableness Motion with respect to her settlement with Ready.

Both Assignments of Error raise the same issue: Did the trial court err in its application of the Glover/Chaussee factors to Ms. Zhang's settlements with Hawk and Ready?

III. STATEMENT OF THE CASE

In August, 2007, Ms. Zhang hired Pioli Engineers to inspect the Lake City Park Place Apartments ("The Apartments"), which she was

considering buying for her solely owned company, Lake City Park Place, LLC (“Lake City”). Clerk’s Papers (“CP”) 274; CP 292-374; CP 406. The inspection report documented severe water intrusion problems, warned that “[t]here clearly will be a lot of rot that we cannot see,” and recommended further investigation prior to purchase. CP 298.

Without conducting any further investigation, Ms. Zhang purchased The Apartments and then, on October 15, 2007, contracted with Hawk, for repair work. CP 99. Hawk agreed to: (1) remove all existing vinyl siding and damaged building components beneath the siding; (2) apply new hardiplank siding; (3) remove and replace all damaged decking material; and (4) apply new waterproof decking material. *Id.* For this work, Hawk would be paid a base price of \$97,100 (\$59,300 for the siding work plus \$1,800 per deck for 21 decks) plus \$60 per hour for “all extra work for removing damaged materials underneath the siding & resurfacing concrete large decks. . . .” *Id.*, Ex. A at 8.

At the time of contracting, Ms. Zhang had not shown Hawk the inspection report that warned of significant problems. CP 915. On or about October 27, 2010, Hawk subcontracted with Ready to perform a portion of the repair and re-siding work. CP 24-29.

After they began work on The Apartments in October, 2007, CP 407, Hawk and Ready submitted insurance applications to Capitol which

misrepresented, among other things, that they did not perform siding work and did not perform any work on apartments. CP 812-821. Subsequently, Capitol issued policies to both entities.

The first phase of work, which all parties agree was defective, continued until March of 2008. CP 407-408. Ms. Zhang complains that, during this time, “open areas of the building were exposed to heavy and continuous rain for weeks at a time because no weather protection was ever put on by Hawk and Ready.” CP 407. However, the contract delegated responsibility for temporary protection of The Apartments to Ms. Zhang. CP 100.

To guide the next phase of work, Ms. Zhang hired “construction professionals,”² Rohn Amegatcher and Steelhead General Construction, to review the initial, defective work and to supervise a new round of repairs. CP 275; CP 283-284; CP 826. Beginning in March of 2008, and acting under the direction of Ms. Zhang’s “construction professionals,” Hawk and Ready removed the siding that had been incorrectly installed and began the repairs anew. CP 408; CP 1014-1015. However, complications continued to arise, and Hawk and Ready eventually abandoned the job in or around October, 2008. CP 5 at ¶ 22; CP 9, ¶ 1.5.

² “Construction professionals” is Ms. Zhang’s term. It does not appear that either Mr. Amegatcher or Steelhead General Construction were architects or engineers. See CP 800, 803, ¶s 4(c), 8.

On April 6, 2009, Ms. Zhang filed this lawsuit against Hawk for breach of contract. Capitol retained defense counsel on Hawk's behalf. *See* CP 925 (“... it appears Capitol fulfilled its obligation to defend Hawk...”). Hawk then filed a third-party complaint against Ready for breach of contract, indemnity and negligence, alleging generally that Ready was liable to Hawk to the extent, if any, Hawk was liable to Ms. Zhang. CP 19-29. Accordingly, Capitol retained defense counsel on Ready's behalf. CP 927.

On July 2, 2010, the Court entered an Order granting partial summary judgment for Ms. Zhang, finding that Hawk breached its contract “w/ respect to (1) failure to remove and replace siding and (2) failure to remove and replace damaged decks.” CP 271. The Court did not make any determination as to damages and struck from the proposed order several detailed findings suggested by Ms. Zhang's counsel. *Id.*

Following an unsuccessful mediation, Ms. Zhang filed a Trial Brief “asking for \$2,128,606.72,” inclusive of attorney fees. CP 278-279. Less than one week later, Ms. Zhang settled directly with Hawk and Ready, providing defendants with covenants not to execute in return for confessed judgments totaling \$2,381,773, more than \$250,000 above the Trial Brief's prayer. CP 409 (Hawk settlement for \$1,858,873); CP 577 (Ready settlement for \$522,900). Hawk's settlement included an

assignment of Hawk's claims against Ready, and both settlements included an assignment of the insureds' claims against Capitol. CP 409; CP 578. Although Ms. Zhang contends that she settled with Ready on "November 17, 2010," and settled with Hawk on "November 19, 2010," CP 576-577, it appears likely that the dates have been reversed, as the Hawk settlement must have occurred first. *Id.* (Ms. Zhang settled with Ready "after taking an Assignment of Hawk's claims...").

Ms. Zhang filed a Reasonableness Motion with respect to the Hawk settlement on December 14, 2010. CP 405-422. The Court initially granted this motion, CP 493-494, but the order was later vacated, CP 559-560, in order to allow Capitol an opportunity to intervene. Ms. Zhang did not oppose intervention but asked for "Capitol's intervention to be limited to objections of collusion or bad faith between the settling parties." CP 538-539. The Court allowed Capitol's Motion to Intervene and denied Ms. Zhang's "request for limited intervention only." CP 563-564.

Ms. Zhang filed a Reasonableness Motion with respect to Ready on March 17, 2011. CP 572-589. Capitol filed Objections to both Reasonableness Motions on March 23, 2011. CP 773-787; CP 788-798. Ms. Zhang then filed her Replies. CP 931-938; 1012-1017. Ms. Zhang's Reply with respect to the Hawk settlement suggested that the "reasonable" amount of the settlement could be reduced to \$1,684,086.91 based on a re-

calculation of Ms. Zhang's "lost rent" damages. CP 937; CP 1010-1011.

The trial court's order of March 28, 2011, held that Ms. Zhang's settlement with Ready was reasonable to the amount of \$1,684,086.91, CP 1028-1030, but the Court later issued corrected orders *nunc pro tunc* clarifying that the Court had determined that the Hawk settlement was reasonable to the amount of \$1,684,086.91 and that the full amount of the Ready Settlement (\$522,901.61) was also reasonable. CP 1031-1032; 1033-1034.

IV. ARGUMENT

A. Standard of Review

A trial court's decision on a Reasonableness Motion is reviewed for abuse of discretion. Werlinger v. Warner, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). "Abuse of discretion occurs when a decision rests on untenable grounds or is manifestly unreasonable." Green v. City of Wenatchee, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009). A trial court's factual findings made in determining reasonableness are not "disturbed on appeal when supported by substantial evidence." Id. However, the trial court in this case did not make any findings, so "substantial evidence" review does not apply.

To the extent a trial court's reasonableness determination is based on a question of law, such as interpretation of a statute, review is *de novo*.

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Wn. App. 810, 816, 156 P.3d 240 (2007). Here, the trial court committed legal error by failing to hold Ms. Zhang to her standard of proof embodied in RCW 4.22.060(1). Review on this point should be *de novo*.

B. Overview of the controlling law for Reasonableness Motions.

Reasonableness Motions are based on RCW 4.22.060, providing:

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

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

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

the court to be reasonable.

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

(emphasis added). The Washington Supreme Court has identified nine factors that the trial court must consider in determining the reasonableness of a settlement under RCW 4.22.060: (1) the releasing person's damages; (2) the merits of the releasing person's theory of liability; (3) the merits of the released person's defense theory; (4) the released person's relative fault; (5) the risks and expenses of continued litigation; (6) the released person's ability to pay; (7) any evidence of bad faith, collusion or fraud; (8) the extent of the releasing person's investigation and preparation of the case; and (9) the interests of the parties not being released. Glover v. Tacoma General Hospital, 98 Wn.2d 708, 717-18, 658 P.2d 1230 (1983), *overruled on other grounds by* Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988).

In Chaussee v. Md. Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339 (1991), the Court of Appeals confirmed that the same Glover factors apply when evaluating a settlement involving, as here, a consent judgment. "No one factor controls and the trial court has the discretion to

weigh each case individually.” Chaussee, 60 Wn. App. at 512.

In the event that a settlement might affect other, non-settling parties, a trial court which rejects a settlement as unreasonable must determine a reasonable settlement amount. RCW 4.22.060(2). This requirement does not apply here because all parties settled. Nevertheless, out of an abundance of caution, Capitol provided the trial court with proposed, alternative settlement ranges of \$128,465.73 - \$308,693.13 for both Hawk and Ready. CP 774; CP 789. Capitol will not reiterate its alternative calculations in this Brief, as it is requesting that this Court simply reverse the trial court’s orders or, alternatively, reverse and remand for a new reasonableness determination.

C. Application of the Glover/Chaussee factors to Ms. Zhang’s settlement with Hawk.

The trial court abused its discretion by finding Ms. Zhang’s settlement with Hawk to be reasonable without any deduction based on the applicable Glover/Chaussee factors. Seven of the nine Glover/Chaussee factors are relevant to the analysis, as shown below.

1. The releasing person’s damages

Ms. Zhang asserted a single claim against Hawk: Breach of Contract. CP 1-7. Breach of contract damages are “ordinarily base[d] ... on the injured party’s expectation interest with the intent of giving the

injured party the benefit of its bargain.” Water’s Edge Homeowner’s Ass’n v. Water’s Edge Associates, 152 Wn. App. 572, 587, 216 P.3d 1110 (2009). Here, Ms. Zhang’s settlement with Hawk was excessive because it resulted in Ms. Zhang receiving more than the benefit of her bargain.

For the Court’s reference, Ms. Zhang based her settlement with Hawk on the following calculations:

Construction costs:		\$1,224,471.00
Lost rents:	+	\$ 107,880.00
Costs:	+	<u>\$ 43,537.00</u>
Subtotal:		\$1,375,888.00
Attorney fees (36%)	+	<u>\$ 495,319.68</u>
Subtotal:		\$1,871,207.68
“Settlement” deduction (10%)	-	<u>\$ 187,120.77</u>
TOTAL:		\$1,684,086.91

CP 1011. As shown below, Ms. Zhang’s damage calculations are unsupported and unreasonable.

- a. Ms. Zhang was never entitled to the repair of pre-existing damages for free.

It is undisputed that Ms. Zhang’s “construction costs” are based on a repair bid that includes costs attributable to the repair of damage that pre-existed Hawk’s work on The Apartments. CP 838 (“This scope of

repair also addresses replacement of known decayed wall and deck sheathing that was supposed to be removed and replaced by Hawk Construction, but was not.”); CP 849 (same); *see also* CP 866 (explaining that replacement of 40% of the exterior sheathing was necessary “to uncover damage that has been either occurring at the plywood or damage that has been buried behind the plywood.”).

However, Ms. Zhang’s “expectation interest” was to pay for the repair of pre-existing damages on a time and materials basis. CP 99,106 (“Owner will pay all materials...”; “all extra work for removing damaged materials underneath the siding ... will be billed based on \$60 per hour.”) Ms. Zhang was never entitled to the work for free or for a flat-rate. Accordingly, Ms. Zhang’s “construction costs” must be adjusted to reflect only those costs attributable to Hawk’s breach of contract.

The law is clear: In a breach of contract dispute, the non-breaching party must deduct from its damages “any cost or other loss that he has avoided by not having to perform.” Eastlake Constr. Co. v. Hess, 102 Wn.2d 30, 46, 686 P.2d 465 (1984). Ms. Zhang was required to pay Hawk an additional \$60/hour to repair pre-existing damage. CP 106. Ms. Zhang contends that Hawk failed to complete this work, CP 6 at ¶ 26, but the settlement does not account for the fact that she would have been required to pay Hawk additional money to complete the job.

Capitol's expert attributes \$147,879.70 of Ms. Zhang's repair bid to costs that would have incurred anyhow if Hawk had completed its work. CP 801-802 at ¶ 4(f). This conclusion is based in part on the expert's estimate that 80% of the damages currently found at The Apartments pre-existed Hawk's contract. Id.

Ms. Zhang does not dispute the fact that her repair bid includes costs associated with the repair of pre-existing damages but, instead, has offered the testimony of her expert opining that Capitol's 80% estimate of pre-existing damages "is not accurate" and that "it is very hard if not impossible to determine when damage occurred." CP 930 at ¶ 8. This bare argument cannot justify a windfall. Ms. Zhang did not offer any evidence, or even any proposal, to assist the trial court's determination of the amount of Ms. Zhang's total "construction costs" that are attributable to Hawk's breach of contract. Thus, Ms. Zhang failed in her burden of proving reasonableness.

The only evidence in the record on this point is the testimony of Capitol's expert: \$147,879.70 of the repair bid "is attributable to the repair of pre-existing damage which Hawk should have repaired, but did not repair, during its work on the Apartments." CP 801-802 at ¶ 4(f). Because Ms. Zhang would have been obligated to pay this amount *even if* Hawk had completed the contract, the trial court erred by approving the

settlement as reasonable.

b. Ms. Zhang's repair bid includes several items outside the scope of Hawk's contract.

According to an analysis by Capitol's expert, Ms. Zhang's repair bid includes \$199,316.85 in costs associated with tasks – such as roofing work, installing door pans and new deck railings, and replacing headers and rim joists – that were never a part of Hawk's contractual obligations in the first place. CP 801 at ¶ 4(b). Ms. Zhang replied to this argument with the testimony of her expert claiming that the identified work “is not outside Hawks original scope of work,” but “is necessitated by the damage caused by Hawk's work.” CP 929 at ¶ 5. The expert asserts that “replacing the headers and rim joist is mandated due to excessive water damage caused by Hawks failure to properly install siding on the project.” Id. Even assuming this last statement to be true, neither Ms. Zhang nor her expert offer *any* explanation as to how costs associated with other items, such as roofing work and the installation of door plans, can be attributed to Hawk's breach of a siding and deck repair contract. Thus, Ms. Zhang failed to prove that the settlement was reasonable.

c. Ms. Zhang's repair bid includes multiple upgrades.

Capitol's expert identified several material upgrades, including “a second layer of building paper, cedar deck fascias, aluminum glass panel

railings and standing seam panels at roof coping,” within Ms. Zhang’s repair bid. CP 801 at ¶4(a). The amount attributable to these upgrades equals \$42,729.62. *Id.* Ms. Zhang replied to this argument with the unsupported testimony of her expert, Mr. Flores, stating, “In my opinion, the items [identified by Capitol’s expert] are not upgrades but rather attempts to bring the building in compliance with building codes and industry standards.” CP 929 at ¶ 4. Neither Ms. Zhang nor her expert offered any foundation or explanation as to how upgrades, such as cedar deck fascias, were somehow required by the contract, the building code or industry standard. Thus, Ms. Zhang did not meet her burden of proving that the settlement was reasonable.

Moreover, Ms. Zhang’s other expert, Mark Reichlin, who was retained to review and price Mr. Flores’s recommended repairs, CP 488 at ¶ 2, acknowledged that the second layer of building paper could likely be considered an upgrade. CP 828. The trial court erred by approving the settlement as reasonable despite this acknowledgment that the settlement amount included costs attributable to upgrades.

- d. Ms. Zhang’s repair bid includes at least three costs that were always her responsibility.

Ms. Zhang’s bid includes at least three expenses that were always her responsibility under the contract. First, \$147,526.72 is attributed to

architectural and engineering fees, CP 801 at ¶ 4(c), even though the contract specified that Ms. Zhang would be responsible for “Architectural, Engineering and Surveying Services.” CP 99. If Ms. Zhang had paid originally for an architect or engineer to assist with the project but Hawk’s defective work made it necessary to hire a new architect or engineer, then Hawk might be responsible for this cost. However, no evidence suggests that Ms. Zhang previously paid any architectural and/or engineering fees. Rather, Ms. Zhang’s failure to hire an architect and/or engineer is likely one of the primary reasons there were so many problems with the project. CP 801 at ¶ 4(c), CP 803 at ¶ 8. Because architectural and engineering fees were Ms. Zhang’s responsibility, it is unreasonable to attribute this cost to Hawk.

Second, \$42,095.47 is attributed to additional sales tax, CP 801 at ¶ 4(e), even though the contract obligated Ms. Zhang to pay all “Washington State Sales Tax.” CP 100. The total sales tax included in Ms. Zhang’s repair bid exceeds \$80,000, but Capitol acknowledges that some of the sales tax is likely chargeable to Hawk to the extent Ms. Zhang is being forced to re-pay taxes attributable to Hawk’s original work that had to be re-done. Nevertheless, a deduction should have been taken for sales tax that: (a) Ms. Zhang never incurred in the first place because Hawk failed to complete the job; or (b) is attributable to upgrades or other

costs outside the scope of Hawk's contractual obligations. CP. 801 at ¶ 4(e).

Third, \$53,184 of Ms. Zhang's repair bid is attributed to temporary protection of the building, CP 801 at ¶ 4(d), even though the contract required Ms. Zhang to pay for the "[t]emporary ... protection of existing or new structures." CP 100. Ironically, Ms. Zhang based her claim against Hawk in large part on Hawk's failure to protect The Apartments from the weather. CP 407 at 3:16-18. However, the contract clearly states that protection of the building was Ms. Zhang's responsibility. CP 100. Because Ms. Zhang failed to offer any evidence supporting attribution of these costs to Hawk, she failed to carry her burden of proof.

e. Ms. Zhang's repair bid is excessive in general.

Ms. Zhang's repair bid (\$1,224,471.74) exceeds Hawk's repair bid (\$887,693) by \$336,788. CP 411, 415. Capitol's expert testified that, on balance, Hawk's bid was more reasonable with the correct answer lying somewhere between the two numbers but closer to Hawk's bid. CP 800 at ¶ 3; 5-6. The term "reasonable settlement" suggests a compromise between plaintiff's and defendant's positions, but Ms. Zhang's settlement with Hawk does not include any compromise on the bid amount.

Ms. Zhang asserts that the settlement includes a "10% reduction in damages due to the risks inherent in litigation/trial." CP 409 at 5:18-19.

However, this 10% “reduction” is illusory because Ms. Zhang’s overall settlement scheme asserted that Hawk was responsible for \$2,065,415 in damages, *id.* at 5:17, and Ready was responsible for \$522,900. CP 577 at 6:8. Thus, Ms. Zhang’s settlement formula begins at \$2,588,315, which represents a 21.6% markup on the prayer for relief (\$2,128,606.72) contained in her Trial Brief. CP 278. Applying a 10% “reduction” to a portion³ of this settlement formula results in a total “settlement” recovery that still exceeds the prayer in Ms. Zhang’s Trial Brief.

Moreover, the 10% “reduction,” even if not illusory, has already been consumed by the deductions noted in subsections (a) – (d), above, which apply both to Ms. Zhang’s bid and Hawk’s bid. *See* CP 802 at ¶ 5 (after deductions to account for upgrades, etc., Ms. Zhang’s bid totals \$591,739.38 and Hawk’s bid totals \$373,598.64). Thus, the settlement does not include any actual compromise to reflect the parties’ divergent repair bids. Accordingly, it should have been rejected as unreasonable.

f. Ms. Zhang failed to establish any diminution in value.

In Water’s Edge, an \$8.75 million settlement based on cost of repair was held to be unreasonable where the settling plaintiff “could not prove diminution in value.” 152 Wn. App. at 576-77, 585-87. The Court

³ The settlement with Ready does not even purport to include any “reduction.”

of Appeals explained, in part: “The injured party may normally recover the reasonable cost of remedying the defects in construction *if* the cost is not clearly disproportionate to the probable loss in value to the party.” Id., at 587 (emphasis added; internal quotations omitted).

Ms. Zhang claims Hawk breached its contract by failing to properly install new siding and failing to repair pre-existing damage. CP 276 at 4:16-19. This is the same work Ms. Zhang contends she must now complete. CP 838 (“This scope of repair also addresses replacement of known water damage wall and deck sheathing that was supposed to be removed and replaced by Hawk Construction, but was not.”). Thus, The Apartments are in the same general condition today as they were prior to the contract with Hawk; there has not been any diminution in value.

In reply to this argument, Ms. Zhang argued that Capitol bore the burden of demonstrating that “diminution in value” rather than “cost of repair” was the proper measure of damages. CP 935-936. However, Ms. Zhang’s burden of proof argument is tempered by RCW 4.22.060(1), providing that “[t]he burden of proof regarding the reasonableness of the settlement offer shall be on the party requesting the settlement.” Moreover, Capitol satisfied its burden by presenting evidence indicating that “cost of repair” was not the proper measure of damages.

For example, Capitol's expert testified that 80% of the damages currently found at The Apartments pre-existed Hawk's work, and that if Ms. Zhang had conducted a proper inspection prior to entering her contract with Hawk, "the price of the original contract would have been much higher (approaching the amount of Plaintiff's and Hawk's bids analyzed above)." CP 803 at ¶s 7-8. By attempting to conduct the repairs "on the cheap," Ms. Zhang was merely treading water. Ms. Zhang's own repair bid confirms that The Apartments' siding still needs replacement and the underlying building components still require repair. CP 838-848, Ex. 4. Because The Apartments are in the same general condition today as they were prior to Hawk's work, there has not been any substantial diminution in value, and, therefore, "cost of repair" was not the proper measure of damages. Accordingly, Ms. Zhang's settlement should be deemed unreasonable pursuant to Water's Edge.

g. Ms. Zhang's "lost rent" damages are excessive and unsupported.

Ms. Zhang's settlement with Hawk included \$250,680 in "lost rent," CP 412, calculated by multiplying \$200/month by 39 units over 30 months; plus \$16,680 for Unit 103 because it was allegedly rendered uninhabitable. CP 491, ¶s 5-6. Capitol's Objections to the Reasonableness Motion pointed out that: (1) the 30 month period was

excessive in light of the fact that repairs were scheduled to last only 5 months; and (2) Ms. Zhang had counted Unit 103 twice. CP 779 at 7. In reply to this argument, Ms. Zhang suggested that the Court could reduce the lost rent figure to \$107,880 to account for 12 months of a rent concession rather than 30. CP 937 at 7. The Court accepted this suggestion and held that the settlement was reasonable when the lost rent figure was reduced to \$107,880. *Compare* CP 1031-1032 (Order finding settlement reasonable to the amount of \$1,684,086.91) *with* CP 938 (suggesting same number if “lost rent” figure was adjusted consistent with Ms. Zhang’s Reply Brief).

However, the “lost rent” figure is still excessive and unreasonable because there is no justification for 12 months of rent concessions when repairs are only scheduled to last 5 months. CP 869. Moreover, Ms. Zhang has not presented any evidence to prove that she has actually provided or has committed to provide her tenants with a rent concession during repairs.

h. Ms. Zhang’s costs are excessive and unsupported.

The Settlement amount also includes \$43,537 in “costs,” but the vast majority of these costs are attributable to expert investigation. CP 937 (Ms. Zhang argued in the alternative that she “should be awarded \$6,707.62 of her costs exclusive of expert costs.”). As a general rule,

expert fees are not recoverable as “costs” under Washington law. Jordan v. Berkey, 26 Wn. App. 242, 245, 611 P.2d 1382 (1980). Although Ms. Zhang’s contract with Hawk provided that the prevailing party in any dispute would be entitled to recovery of “attorneys fees and costs,” CP 103, no evidence suggests that the parties intended such recovery to exceed what is generally allowed under Washington law.

i. Ms. Zhang’s attorney fees are excessive and unsupported.

Ms. Zhang failed to adequately support the inclusion of \$495,319.68 in attorney fees in the Hawk settlement. *See* CP 1010-1011 (setting forth components of settlement deemed reasonable). After Capitol’s initial objections to the excessive amount of fees, Ms. Zhang submitted invoices documenting attorney fees of \$306,853.75, composed of 736.3 hours of attorney time at an average rate of \$377.56/hour plus 219.06 hours of paralegal/legal secretary time at an average rate of \$131.73/hour. CP 1009. From this base amount, Ms. Zhang seeks a mark-up of 61% to reach her total claimed fees of \$495,319.68 based on a 36% contingency rate.

Ms. Zhang was only entitled to recover her *reasonable* attorney fees calculated by multiplying a reasonable hourly rate by a reasonable number of hours and then adjusting the total to reflect various factors such

as, *e.g.*, the contingent nature of the attorney's right to be paid. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 593-602, 675 P.2d 193 (1983); *also see* Allard v. First Interstate Bank of Washington, 112 Wn.2d 145, 150-151, 768 P.2d 998 (1989) ("A trial court may consider the existence of a contingent fee agreement in making its award of attorneys' fees, but should not rely solely on the terms of such an agreement in determining the amount. The court must independently decide what constitutes a reasonable award.") (internal citations omitted). The Court in Bowers upheld an upward adjustment of 50% as a result of a contingent fee agreement. 100 Wn.2d at 601. Ms. Zhang failed to explain why a greater adjustment is appropriate in this case.

Similarly, Ms. Zhang failed to justify the high rates for her attorneys or the excessive amount of time they spent on the case. In contrast to Ms. Zhang's claimed, "base" fees of \$306,853.75, Hawk's carriers spent only \$75,137.50 in defense of Hawk. CP 719. While it might be reasonable to expect that Ms. Zhang would incur more attorney fees than Hawk, the record is devoid of any explanation as to why Ms. Zhang's "base" fees exceeded Hawk's fees by more than 400%

This Court's task is made more difficult by the lack of any written findings or specific reasons for the amount of the attorney fee award. *See, e.g.*, Brand v. Dept. of Labor & Indus., 139 Wn.2d 659, 674, 989 P.2d

1111 (1999) (where the trial judge “made no specific findings regarding what factors justified his decision [with respect to attorneys fees] . . . we [the court] are unable to determine whether the exercise of the trial court’s discretion was ‘manifestly unreasonable or based upon untenable grounds or reasons.’”). Because Ms. Zhang failed to support the inclusion of nearly \$500,000 in attorney fees in her settlement with Hawk, her Reasonableness Motion should have been denied.

2. The merits of the released person’s defense theory

The Settlement Agreement is unreasonable because it does not give Hawk any credit for its defenses. In addition to arguments about the proper measure of damages, discussed above, Hawk’s defense counsel intended to argue that: “(1) plaintiff withheld pertinent information from Hawk concerning the condition of the building . . . directly impacting the anticipated scope of work; [and] (2) Ready / Hawk’s work was completed at the direction of a construction manager hired by plaintiff, who also inspected and accepted the work as performed.” CP 280.

With respect to the first defense, the evidence is undisputed that Ms. Zhang had been warned, prior to her purchase of The Apartments, that there were significant problems with the building and further inspection was needed. A pre-purchase inspection report advised Ms. Zhang:

It is important that this invasive inspection be done prior to purchase of this building due to the large spectrum of possible problems that this building may have due to the vast amount of deferred maintenance of the building envelope. There clearly will be a lot of rot that we cannot see; however, for contractor to provide somewhat of an accurate estimate for repairs that are needed, they will have to have a better idea of their scope of work.

CP 885 (emphasis added). Despite this recommendation, Ms. Zhang neither conducted any further inspections nor provided a copy of the report to Hawk. *See* CP 915 (“Q. Did you give him any documents from Pioli? A. No.”). Based on this information, a jury could have concluded that Ms. Zhang’s poor planning and inadequate scope of repair were the ultimate source of the problems with the repair project.

With respect to the balconies, the report documented “a considerable amount of rot and/or moisture staining” and stated:

Regardless of how much rot is found in the balconies, a major renovation of all wood framed balconies and wood railings on this building will need to be performed. The original details of these balconies are poor from a moisture exclusion standpoint. The balconies should be redesigned with adequate flashing on the building/deck joint, the deck edges, the railing caps, and the railing/building transition among others.

CP 885-896 (emphasis added). Consistent with this statement, Ms. Zhang testified that she knew, prior to her contract with Hawk, that seven or eight decks would have to be replaced. CP 914. Nevertheless, Ms. Zhang hired

Hawk only for deck repair work. CP 830. Under these facts, a jury could have concluded that Ms. Zhang withheld important information from Hawk and was herself responsible for many of the problems that arose.

With respect to the second defense, Hawk's Trial Brief explained:

[P]laintiff had an on-site manager during Phase II of the work named Rohn Amegatcher who provided direction for the work performed by Ready (and, as noted above, some by Hawk) and inspected it. This included specific directions on how to interface siding work with decks, how to interface the windows with the siding materials as a result of the removal of the rigid insulation materials during Phase II, and so on. On the issue of whether the completed work was performed in accordance with applicable codes and standard construction practices, plaintiff cannot complain of conditions which are the result of directions given by her own agent to Ready and Hawk.

CP 288; *see also* CP 275 (admitting Ms. Zhang hired "construction professionals" following Phase 1); CP 826 (Steelhead General Construction invoice for, among other things, "Coordination & Supervision"). If a jury believed that directions provided by Ms. Zhang's "construction professionals" were the ultimate source of the problems, Ms. Zhang's recovery would have been limited or, possibly, nonexistent.

In light of the above, the trial court abused its discretion by approving the settlement as reasonable even though it did not give Hawk *any* credit for its defenses but, rather, resulted in Ms. Zhang receiving judgments exceeding the amount she requested in her trial brief.

3. The released person's relative fault

Hawk brought third-party claims alleging that Ready was responsible for any defective work at The Apartments. However, the Hawk settlement provides Ms. Zhang with both the full cost of repair and an assignment of Hawk's rights against Ready. The settlement valued the assigned claims at \$0 even though they were immediately settled for \$522,900. *See* CP 426 (Hawk settlement dated November 19, 2010); CP 577:3 (stating that the Ready settlement took place on November 17, 2010). The result is a windfall recovery. Accordingly, Ms. Zhang's Reasonableness Motion should have been denied.

4. The risks and expenses of continued litigation

Proceeding to trial would not have cost Hawk anything because it is undisputed that Hawk was being defended by its insurers. *See, e.g.*, CP 925 (“[I]t appears Capitol fulfilled its obligation to defend Hawk”). Moreover, as explained in the next subsection, Hawk was an inactive company and did not have any assets at the time of the settlement. Thus, Hawk neither saved any money nor eliminated any actual risk through the settlement.

In contrast, the judgments Ms. Zhang obtained through settlement exceed the amount she requested in her trial brief. *Compare* CP 509 (confessed judgment in the amount of \$1,858,873) and CP 566 (confessed

judgment in the amount of \$522,900) *with* CP 278 (trial brief sought \$2,128,606.72). Moreover, proceeding to trial would have triggered a higher contingency rate under Ms. Zhang's fee agreement with her attorneys. CP 467. Thus, the settlement saved Ms. Zhang money, eliminated risk and provided her with judgments exceeding her best case scenario at trial.

Focusing on the risks and expenses of continued litigation, the settlement heavily favored Ms. Zhang. Because it was unbalanced, the settlement should have been deemed unreasonable.

5. The released person's ability to pay

Hawk never had any assets with which to pay any portion of a settlement or judgment. CP 921 at 10:4-8 (Hawk "closed" in 2008 due to tax problems); *see also* CP 923, ("Yesterday and today 4 of our workers did not come to work because [Hawk] could not pay them. He doesn't even have any money for gas or lunch.").

Moreover, Hawk was an inactive limited liability company at the time of the settlement. Its registration with Washington's Secretary of State expired on November 30, 2008, CP 919, which is four months before the lawsuit was filed and nearly two full years prior to the settlement. Thus, Hawk was not only insolvent at the time of the settlement, but it also lacked any ability to make money.

In Werlinger, 126 Wn. App. at 351-52, a settlement was declared unreasonable because the insured had received a discharge in bankruptcy. The Court of Appeals explained: “[T]he 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.” 126 Wn. App. at 351. Although Hawk never declared bankruptcy, the underlying dynamic here is the same: Hawk had no exposure in this matter because it had no assets and had ceased doing business prior to the lawsuit even being filed. Thus, “the released person’s ability to pay” is a significant factor, and the trial court abused its discretion by approving the settlement as reasonable even though the settlement gave no consideration to this factor.

6. Evidence of bad faith and collusion

A settlement should be rejected as unreasonable if the settlement’s “overall structure” reflects “a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to [the insurer] as intervenor.” Water’s Edge, 152 Wn. App. at 595. That is exactly what occurred here: The Settlement Agreement was beneficial to both Hawk and Ms. Zhang yet highly prejudicial to Capitol.

The Settlement Agreement contains the usual language indicating that the parties “are aware of the uncertainties of litigation” and, therefore,

“desire to reach an amicable settlement and resolution.” CP 426.

However, the actual terms of settlement do not reveal any compromise by Ms. Zhang. In exchange for her promise to never collect from Hawk, Ms. Zhang received a judgment for \$1,858,873 plus an assignment of Hawk’s claims against Ready. Ms. Zhang immediately settled the claims against Ready for \$522,900; leaving Ms. Zhang with judgments totaling \$2,381,773. This amount is patently unreasonable because it exceeds the prayer in Ms. Zhang’s Trial Brief (\$2,128,606, CP 278) by more than a quarter-million dollars.

Capitol, on the other hand, being the party from whom Ms. Zhang hopes to recover her excessive judgments, was deprived of any ability to ensure that the settlement considered Hawk’s defenses, the proper measure of damages and the other Glover/Chaussee factors.

Moreover, the Settlement Agreement was carefully worded to maximize Ms. Zhang’s coverage claims against Capitol. For example, the Settlement Agreement attempts to empower Ms. Zhang to recover from Capitol “all costs and attorney fees paid by Hawk or its insurance companies,” CP 427, ¶ II(2) (emphasis added), even though Capitol already paid Hawk’s attorneys fees. *See* CP 925.

Similarly, while settlement agreements typically contain language stating that neither party admits liability, the Settlement Agreement here

states that The Apartments have “sustained severe damage from faulty and/or defective construction,” and then proceeds to attribute the entire repair cost to siding work with no mention of Hawk’s work on the decks. CP 426-427, ¶ II(1). This language is an attempt to influence the coverage dispute, as Ms. Zhang’s pre-purchase inspection report clearly documented pre-policy knowledge of damage to the decks, CP 896, and the insurance policy excludes coverage for damages that were known to have occurred prior to policy inception. *See* CP 933 (Ms. Zhang wrote: “Capitol will rely on an exclusion which allegedly precludes coverage for ‘preexisting damages’...”).

“[A] covenant not to execute raises the specter of collusive or fraudulent settlements” because it leaves an insured with little “incentive to minimize the amount of a judgment.” Besel v. Viking Ins. Co., 146 Wn.2d 730, 737-38, 49 P.3d 887 (2002). That is precisely the problem here. As shown in subsections (1) – (5), above, Hawk could have insisted on a much lower settlement based on, *e.g.*, the value of Hawk’s claims against Ready, the fact that only a portion of Ms. Zhang’s repair bid is attributable to Hawk’s breach of contract, and the fact that Ms. Zhang would have faced considerable risk and expense had she been forced to proceed to trial. *See* Heights at Issaquah Ridge Owners Ass’n v. Derus Wakefield I, LLC, 145 Wn. App. 698, 705, 187 P.3d 306 (2008)

(explaining that other Glover/Chaussee factors “inform the questions of bad faith, collusion and fraud.”). However, Hawk did not push these points because it did not need to: Ms. Zhang promised to never collect from Hawk.

“Collusion” is defined as: “1. a secret agreement for fraudulent or treacherous purposes; conspiracy.... 2. *Law.* a secret understanding between two or more persons prejudicial to another, or a secret understanding to appear as adversaries through an agreement.” Webster’s Encyclopedic Unabridged Dictionary of the English Language, p. 291 (1989 ed.). Here, even though the parties expended some effort to make the Settlement Agreement appear to be the product of legitimate negotiation, CP 426, the amount of the settlement does not include any suggestion of compromise but, rather, only an effort to maximize the coverage claims against Capitol.

In addition to collusion, the circumstances surrounding this case and its settlement are indicative of bad faith, both by Ms. Zhang and by Hawk, all to the prejudice of Capitol. Ms. Zhang knew from her pre-purchase inspection report that The Apartments required major repairs. CP 882-900. Nevertheless, she did not show this report to Hawk, CP 915, but, rather, negotiated a contract with a relatively small base price (\$97,100) that also required Hawk to maintain liability insurance. CP 103.

By April of 2008, Ms. Zhang had already decided that Hawk's and Ready's work was defective, and she had even requested insurance information so she could potentially make a claim. CP 284-285. Nevertheless, Ms. Zhang did not make an insurance claim but allowed Hawk and Ready to continue on the job.

After her settlements with Hawk and Ready, Ms. Zhang began an aggressive, libelous pursuit of Capitol. On or about December 9, 2010, Ms. Zhang's attorney sent a letter to the Insurance Commissioner invoking RCW 48.30.15 "based on [Capitol's] failure to defend" Hawk in the above-captioned matter. CP 924. The letter continued: "Although it appears Capitol may have fulfilled its obligation to defend Hawk, it breached its obligation to indemnify it by failing to respond to Zhang's tender..." *Id.* Upon demand, Ms. Zhang's attorney issued a retraction letter which removed the false suggestion that Capitol had breached its duty to defend and eliminated the false allegation that Capitol had not responded to Zhang's settlement tender. CP 925. The obvious purpose of Ms. Zhang's letter was to trigger the remedies of RCW 48.30.015 – which include treble damages, attorney fees and costs – in order to intimidate Capitol into an early settlement. Ms. Zhang has never offered any justification for her false accusations against Capitol.

For its part, Hawk started work on The Apartments *and then*

applied to Capitol for insurance while misrepresenting, among other things, that Hawk: (1) performed only painting and carpentry work; (2) did not perform any demolition work, siding work, or work on apartments; and (3) did not subcontract out any of its work. CP 813-814.

To summarize, Capitol issued an insurance policy based on materially false representations and now, even though it defended its insured and attempted to settle the claims, faces collection attempts on inflated judgments which were designed to maximize coverage. Accordingly, the settlement should have been rejected as unreasonable.

7. The interest of parties not being released

In Werlinger, the Court of Appeals explained:

And the interest of the insurer, as a third party affected by the settlement, was another Glover factor weighing against a determination that the amount was reasonable. It would be prejudicial to [the insurer] to approve a \$5 million judgment as reasonable when [the insurer] did defend and did nothing to push Warner into bankruptcy.

126 Wn. App. at 351. Similarly, Capitol defended Hawk and played no role in its insolvency. The trial court erred by approving as “reasonable” a settlement that, to Capitol’s prejudice, does not give Hawk any credit for the Glover/Chaussee factors discussed above.

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D. Application of the Glover/Chaussee factors to Ms. Zhang's settlement with Ready.

As discussed below, the trial court erred by finding Ms. Zhang's settlement with Ready to be reasonable without any deduction based on the applicable Glover/Chaussee factors. It is important to keep in mind that Ms. Zhang never possessed any direct claims against Ready. Rather, Ms. Zhang, as Hawk's assignee, settled Hawk's third-party claims against Ready. CP 577. Accordingly, the Glover/Chaussee analysis must focus on the value of Hawk's third-party claims against Ready.

1. The releasing person's damages

Hawk's Third-Party Complaint alleged two claims – breach of contract and negligence – both of which generally alleged that to the extent Hawk was liable to Ms. Zhang, Ready was liable to Hawk. CP 21-22. Thus, one would expect the Ready settlement to consist of a portion of Hawk's overall liability reflected in the Hawk settlement. However, Ms. Zhang employed a completely different, and incorrect, measure of damages to justify her \$522,900 settlement with Ready.

For the Court's reference, Ms. Zhang's settlement with Ready is based on the following calculations:

Amount spent on Phase I repairs:	\$380,546.89
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Hawk's attorney fees:	+	\$ 75,137.50
Hawk's costs:	+	\$ 21,043.25
Amount spent "representing" Hawk:	+	<u>\$ 45,132.47</u>
TOTAL:		\$522,901.61 ⁴

CP 580. As shown below, neither Ms. Zhang's damage formula nor the alleged component amounts can be sustained.

- a. Ms. Zhang fails to justify or support recovery of "out of pocket" costs.

Even though Ms. Zhang based her settlement with Hawk upon "cost of repair," she based her derivative settlement with Ready upon \$380,000 in alleged "out-of-pocket" costs. As a result, the combined settlements fund a complete repair of The Apartments and also return to Ms. Zhang all of her out-of-pocket expenses. Thus, Ms. Zhang receives the full benefit of her contractual bargain and is simultaneously absolved of her payment obligation under the same contract. This result is fundamentally unreasonable and is inconsistent with the rule that contract damages are generally measured by a party's "expectation interest." Water's Edge, 152 Wn. App. at 587.

To justify her "out-of-pocket" damages, Ms. Zhang wrote:

⁴ These numbers actually add up to \$521,860.11.

Since it is impossible to create a perfect allocation of damages caused by Ready's work, the parties agreed that the best way to set damages was to use the total amount Ms. Zhang paid. The \$380,000 is reasonable considering that it includes the amount Ready was paid for its work – none of which was done correctly, the damage caused by its work that Hawk tried to repair, and damages arising out of its indemnity obligations.

CP 1014. Ms. Zhang's theory is fundamentally flawed: no evidence or sound argument is presented to explain why Ready should be obligated to pay to Hawk "the total amount Ms. Zhang paid." For example, there is no evidence that Hawk refunded any payments to Ms. Zhang and, therefore, might have a right to recoup such refunds from Ready. Similarly, if the settlement is based on Ready's "indemnity obligations" to Hawk, as Ms. Zhang asserts, then the Ready settlement should have been an allocated portion of the Hawk settlement.

Moreover, the invoices Ms. Zhang submitted do not support her claim that she "paid \$380,000 for the Phase 1 repairs." CP 577. "Phase 1 lasted from approximately October of 2007 to March of 2008." *Id.*, at 3. However, Ms. Zhang submitted only five invoices from that time frame. CP 608-699. The remaining fifty invoices correspond either with the second repair attempt or with other work after Hawk and Ready walked off the job in or around October, 2008. *See* CP 5 at ¶ 22 (alleging Hawk "failed to complete the construction work"); CP 8-9, ¶ 1.5 (discussing

second repair attempt from “July 2008 through October 2008”).

The invoices suggest that Ms. Zhang may have paid \$252,805.18 to Hawk. CP 609. However, Ms. Zhang fails to explain why Ready should reimburse Hawk for amounts Hawk already received from Ms. Zhang. Similarly, there is no explanation why Ready should pay Hawk for amounts Ms. Zhang apparently paid to material suppliers.

Even if Ms. Zhang’s theory of damages was sound, her evidence is not. For example, the Hawk invoice dated July 21, 2008 (without a “PAID” stamp) seeks payment of \$30,000 for damage repair “on South & North side of Building.” CP 677. Meanwhile, the Hawk invoice dated August 19, 2008 (with a “PAID” stamp) appears to include the same charges divided into an \$18,000 charge for north side repairs and a \$12,000 charge for the south side repairs. CP 678. Similarly, the \$9,731.52 “invoice” from B&W Construction Services Corp. is actually a quote, so it does not prove any payment. *Id.* Moreover, the quote is for the installation of railings, a task that is outside of Ready’s contractual scope. CP 24-29. Likewise, the last four Home Depot “invoices” listed on Ms. Zhang’s spreadsheet, CP 609, appear to come from one document, titled “Purged Customer Order Report.” Page one of this report shows *credits* in the amounts of \$3,433.58; \$19,873.11 and \$86.11; yet Ms. Zhang lists all three of these amounts as part of her costs.

Ms. Zhang bore the burden of demonstrating that her settlement with Ready was reasonable. RCW 4.22.060(1). However, Ms. Zhang failed to explain why her “out-of-pocket” costs constitute a proper measure of damages arising from Hawk’s claims against Ready. Further, she failed to adequately support such costs. Accordingly, the trial court’s reasonableness determination should be reversed.

- b. Ms. Zhang cannot recover attorney fees and costs that Hawk never paid.

Ms. Zhang’s settlement with Ready includes \$142,354.72 in attorney fees and costs allegedly incurred by Hawk. CP 580. However, there is no evidence that Hawk incurred any fees or costs in this matter. Rather, all available evidence indicates that Hawk’s defense was funded by its insurers. *See* CP 925 (“[I]t appears Capitol fulfilled its obligation to defend Hawk”). Absent some evidence that Hawk actually paid any defense fees or costs, there is no basis for including those amounts in the settlement of Hawk’s assigned claims against Ready.

Moreover, Ms. Zhang has failed to adequately support the amount of fees and costs. In particular, of the \$142,354.72 in fees and costs allegedly incurred by Hawk, \$45,132.47 were allegedly incurred while Hawk was being represented by Ms. Zhang’s attorneys, Casey & Skoglund PLLC, following Hawk’s settlement. However, Hawk only

required representation for, at most, the 3 day period between the November 19, 2010 settlement, CP 576, and the November 22, 2010 trial date. CP 276. Ms. Zhang defends the amount of fees upon the basis that “the last weeks before trial are the most expensive and time consuming,” CP 1016 at 5:8-10, but Casey & Skoglund were not “representing” Hawk under any definition of the word until the November 19, 2010, settlement, just three days, not “weeks,” before trial.

The fee invoices Ms. Zhang produced to support this portion of the settlement reveals that Ms. Zhang is attempting to recover fees incurred after her settlement with Ready. CP 1020-1027. The record lacks any explanation for why the Ready settlement should include attorney fees incurred after settlement of Hawk’s assigned claims against Ready. Accordingly, the Reasonableness Motion should have been denied.

2. The merits of the released person’s defense theory

Ms. Zhang asserts that she “did nothing that would cause Ready to perform its work deficiently,” CP 584, but this claim ignores the undisputed fact that Ms. Zhang retained her own construction supervisors that directed Hawk’s and Ready’s work. *See* CP 826 (Steelhead General Construction invoice in the amount of \$15,855.84 for, among other things, “Coordination & Supervision”); CP 275 (admitting Ms. Zhang hired “construction professionals” following the initial repair attempt). Ready

cannot be held responsible for defects or damages that derived from instructions or advice given by Ms. Zhang's representatives.

Further, as discussed in greater detail in the context of Ms. Zhang's settlement with Hawk, Ms. Zhang failed to provide Hawk with critical information (*i.e.*, her pre-purchase inspection report) that would have impacted Hawk's and Ready's scope of work and, probably, the contract price. This failure to provide critical information likely contributed to the problems that were experienced during the repairs. CP 803 at ¶ 8. Accordingly, the trial court erred by approving the settlement as reasonable when it did not include *any* deduction for Ready's defenses.

3. The risks and expenses of continued litigation

Proceeding to trial would not have cost Ready anything because Ready was being defended by its insurers. *See* CP 927 (“[I]t appears Capitol may have fulfilled its obligation to defend Ready...”). Moreover, as explained in the next subsection, Ready was an inactive company at the time of the settlement. No evidence in the record rebuts the notion that Ready was essentially immune from judgment. Thus, Ready neither saved any money nor eliminated any actual risk through the settlement, while Ms. Zhang, as discussed above in Section C(4), received *more* than she could have possibly received at trial without triggering the higher contingency rate associated with a trial. Accordingly, the trial court

abused its discretion by approving as reasonable a settlement that gave no consideration to this Glover/Chaussee factor.

4. The released person's ability to pay

Like Hawk, Ready's registration with the Secretary of State expired on November 30, 2008. CP 926. Thus, before the lawsuit was even filed, Ready was an inactive limited liability company with no ability to pay any judgment or settlement. The trial court abused its discretion by approving as reasonable a settlement that gave no consideration to this factor.

5. Evidence of bad faith and collusion

For purposes of this factor, Capitol incorporates the relevant portions of its argument on the same factor with respect to the Hawk settlement, found in Section C(6) of this brief. As with the Hawk settlement, the "overall structure" of the Ready settlement reflects "a joint effort to create, in a nonadversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to [the insurer] as intervenor." Water's Edge, 152 Wn. App. at 595. This is reflected, in part, by the fact that the Ready settlement is based on a measure of damages – Ms. Zhang's out-of-pocket costs plus attorney fees that Hawk never incurred – that has no application to claims actually being settled. *See, supra*, Section D(1).

Ready, like Hawk, obtained its insurance from Capitol through

material misrepresentations. Ready's application, completed when work on The Apartments was ongoing, misrepresented that Ready: (1) performed only painting and carpentry work; and (2) did not perform any demolition work, siding work, or work on apartments. CP 817-818.

Similarly, as Ms. Zhang's attorney did with respect to Hawk, he sent a libelous letter to the Insurance Commissioner complaining of Capitol's treatment of Ready. CP 927. And, as was the case with the Hawk settlement, the Ready settlement attempts to obligate Capitol to pay for Hawk's attorney fees even though Capitol already paid those fees in the first place. CP 596-597.

Because Ms. Zhang's settlement with Ready was designed to maximize the benefit to Ms. Zhang at Capitol's prejudice, the settlement should have been rejected as unreasonable.

6. The interests of parties not being released

Because Capitol defended Ready and played no role in its insolvency, the trial court should not have approved as "reasonable" a settlement that, to Capitol's prejudice, did not give Ready any credit for the Glover/Chaussee factors discussed above. Werlinger, 126 Wn. App. at 351.

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V. CONCLUSION

As demonstrated above, Ms. Zhang did not carry her burden of proving that her settlements with Hawk and Ready were reasonable. Accordingly, Ms. Zhang's Reasonableness Motions should have been denied. Capitol respectfully requests that this Court reverse the trial court's orders granting the Reasonableness Motions. If this Court deems it necessary to determine an alternative, reasonable amount for the settlements, then Capitol respectfully requests that this matter be remanded to the trial court for further proceedings.

DATED this 14th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Brian C. Hickman, declare as follows:

1) I am a citizen of the United States and a resident of the State of Oregon. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Gordon & Polscer, L.L.C., whose address is 9755 SW Barnes Road, Suite 650, Portland, Oregon 97225.

2) By the end of the business day on November 14, 2011, I caused to be mailed to counsel of record at the addresses, postage prepaid, and in the manner described below, the following documents:

• **APPELLANT’S BRIEF**

Todd Skoglund
Casey & Skoglund
114 West McGraw St.
Seattle, WA 98119

- U.S. Mail
- Hand Delivery
- Telefax
- UPS
- E-mail

Counsel for Respondent: Yuan Zhang

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

DATED this 14th day of November, 2011.



Brian C. Hickman
Of Attorneys for Appellant