

No. 68117-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA;  
STEADFAST INSURANCE COMPANY; and  
HEFFERNAN INSURANCE BROKERS, INC.

Appellants;

v.

THE ESPLANADE CONDOMINIUM ASSOCIATION,

Respondent.

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COURT OF APPEALS OF THE  
STATE OF WASHINGTON  
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**BRIEF OF APPELLANT TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA**

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## **I. INTRODUCTION**

Appellant Travelers Property Casualty Company of America (hereinafter “Travelers”) appeals the trial court’s erroneous award of 12% post-judgment interest in a final judgment entered on November 16, 2011 against its insureds, AF Evans Company (hereinafter “AFECO”) and AFE Spinnaker, LLC (hereinafter “Spinnaker”).

This matter involves allegations by Respondent The Esplanade Condominium Association (hereinafter “Esplanade”) against AFECO and Spinnaker of fraud and misrepresentation in the marketing and sale of a condominium conversion project known as the Esplanade Condominiums. Travelers intervened in that action after Esplanade entered into a consent judgment settlement with AFECO and Spinnaker in the amount of more than \$8,500,000. That settlement included a covenant not to execute the consent judgment against AFECO and Spinnaker as well as an assignment of rights.

Travelers intervened for purposes of challenging the reasonableness of the settlement. Following a reasonableness hearing pursuant to RCW 4.22.060, the Superior Court found the settlement to be unreasonable as a matter of law, specifically finding that the settlement was the result of collusion due to its having not been the result of any

arm's-length negotiations. The Superior Court then found that the reasonable settlement value for the claims made by Esplanade against AFECO and Spinnaker was \$4,461,592.00.

Esplanade then presented a proposed Stipulated Judgment to reduce the reasonable settlement figure to judgment. The proposed judgment included a post-judgment interest rate of 12%. Travelers objected to the interest rate due to the fact that the allegations in this lawsuit were based in tort – fraud and misrepresentation – and that the lower tort rate, then calculated at 5.25%, should have been entered pursuant to RCW 4.56.110 and *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009).

The Superior Court signed the Judgment as proposed, including the post-judgment rate of 12%. Travelers moved for reconsideration, which was denied by the Superior Court. The Superior Court's basis for denial was that the interest rate was agreed by the parties to the settlement. This is the same settlement that the Superior Court had found to be the product of collusion and not negotiated at arm's-length.

This appeal followed.

## II. STATEMENT OF ISSUES

### A. Assignments of Error

1. The trial court erred when it entered a Final Judgment against Travelers' insureds containing a post-judgment interest rate of 12%.
2. The Superior Court further erred when it denied Travelers' Motion for Reconsideration on the interest component of the Judgment by ruling that the 12% rate was an agreed rate pursuant to the settlement agreement between Esplanade and Travelers' insureds.

### B. Issues Pertaining to the Assignment of Error

1. The claims by Esplanade against Travelers' insureds were based primarily in tort. Although the underlying complaint contained additional allegations, the Judgment is at least a "mixed" judgment for purposes of establishing the post-judgment interest rate, predominantly based in tort. As a result, the tort rate set forth in RCW 4.56.110(3)(b) was the appropriate rate for the Judgment in this matter.
2. In responding to Travelers' arguments relating to the interest component of the Judgment, Esplanade argued that because the settling parties had agreed to the 12% rate, the

Court correctly entered that rate in the subject Judgment. The Superior Court accepted this argument and denied Travelers' Motion for Reconsideration. However, the supposed agreement on the interest rate is based solely on the fact that the 12% rate appears on a proposed stipulated judgment that was attached as an exhibit to the settlement agreement between Esplanade and Travelers' insureds. Again, the trial court specifically found that this settlement agreement was not negotiated at arm's length. Moreover, Esplanade presented no evidence whatsoever that the 12% interest rate was specifically negotiated. As a result, the trial court erred when it denied Travelers' Motion for Reconsideration on the interest component of the subject settlement.

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

#### **A. Esplanade's Tort-Based Claims Against Travelers' Insureds**

This lawsuit arises from the conversion of apartments to condominiums by Declarant AFE Spinnaker and AF Evans Company. Esplanade alleged that Spinnaker and AFECO misrepresented and fraudulently concealed the physical condition of the subject property when offering the condominiums for sale to prospective homeowners. CP 1-28.

Esplanade further alleged that the misrepresentation and fraud by Spinnaker and AFECO induced the purchasers into purchasing a unit, and that the purchasers were ultimately damaged by the misrepresentation and fraud when it turned out that the property needed immediate and costly repairs. CP 1-28.

The original complaint filed in this matter specifically contained claims for the following:

- Actual or Punitive Damages for Failure to Deliver Valid Public Offering Statement
- Misrepresentations and Material Omissions
- Fraudulent Concealment
- Breach of Fiduciary Duty
- Relief from Fraudulent Transfers
- Improper Winding Up of Dissolved LLC and Appointment of Receiver.

CP 1-28.

This was not a case involving new construction. CP 1-28. In fact, although sometimes referred to as a construction defect lawsuit as a matter of short-hand by Esplanade, the lawsuit did not actually involve any claims of defective construction by AFECO or Spinnaker.

Esplanade sued the Declarant, AFE Spinnaker, LLC, the sole member of the Declarant, AFECO and an alleged subsidiary or affiliate of the Declarant, AF Evans Development, Inc. (AFED), because upon information and belief it “procured certain reports for and on behalf of

Declarant, and was materially involved in the preparation of the Public Offering Statement for the Project.” CP 1-28. Additionally, Esplanade joined individuals who were alleged to serve on the Board of Directors during the period of time that the Declarant controlled the Project, claiming that they were individually liable for the fraudulent conduct of Travelers’ insureds. CP 1-28.

Esplanade did not join as a party a contractor or any party who actually performed construction work on the project. CP 1-28. Rather, all of the personnel responsible for the actual work involved in renovating the property and preparing it for sale were provided by the development company AFED. CP 1837-1913; CP 1847. AFED personnel retained independent contractors on behalf of Spinnaker and directed the work performed by those contractors. All of the work performed on behalf of Spinnaker in renovating the property for sale involved interior, cosmetic upgrades, such as paint, carpets, etc. *Id.* No exterior work was performed by anyone on the building envelopes. *Id.*

As a result, the causes of action do not stem from work actually performed, but all arise from the alleged fraudulent acts or omissions by Spinnaker, its affiliated companies, and the members of the Board of Director of AFECO in the sale and marketing of the condominium units.

The basis of Esplanade's Complaint was that the Travelers' insureds collectively knew or should have known that the condition of the buildings, which at the time were approximately 20 years old, was to a point that substantial work was needed before the buildings were "suitable". Esplanade alleged that the building envelopes and roofs had deteriorated to a point that both systems were in need of immediate replacement in 2005/2006. CP 1-28.

In discovery responses asking for the basis for Esplanade's claims, Esplanade alleged that Spinnaker and AFECO should have either (1) performed necessary work to remedy the conditions, or (2) provided reports that adequately described the condition of the property and the amount of money that it would take on the part of the condominium owners to repair the property on their own. CP 2590-2591.

Esplanade claimed that the initial purchasers at the complex relied to their detriment on the Public Offering Statement and attached reports, and that the purchasers were faced with an immediate \$6.8 million construction project. CP 2591.

However, Esplanade also retained additional experts who calculated the damages allegedly sustained by Esplanade as being \$8.1 million, based upon a diminution of value analysis. CP 558-559. This

evaluation of damages would eventually form the basis of the settlement agreement between the parties. *Id.*

The ongoing litigation between Esplanade and Travelers' insureds focused almost exclusively on Esplanade's tort claims. In addition to the specific fraud and misrepresentation based causes of action, Esplanade was asked in discovery to identify the basis for its breach of fiduciary duty claim.

Esplanade acknowledged that a breach of fiduciary duty claim is grounded in tort. "Finally, the argument that the contractual relationship between declarants and unit purchasers bars any tort claim for breach of fiduciary duty, would simply eviscerate the statute requiring declarant-appointed directors to exercise fiduciary duties." CP 710-713. Moreover, Esplanade provided an expansive history on fiduciary duty:

Indeed, a common-law fiduciary duty is a duty of utmost integrity, loyalty, and honor:

Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty

by the disintegrating erosion of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not be consciously lowered by any judgment of this court.

*Kane v. Klos*, 50 Wn.2d 778, 784, 314 P.2d 672 (1957) (quoting *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)).

In 1989, the Washington legislature enacted the Washington Condominium Act.

The legislature followed the UCA recommendation and imposed fiduciary duties on declarant-appointed board members: “In the performance of their duties, the officers and members of the board of directors are required to exercise [if appointed by the declarant] the care required of fiduciaries of the unit owners. RCW 64.34.308.

CP 881-882.

Esplanade consistently characterized all of its causes of action, however, identified as being based on tort. In its opposition to a Motion for Summary Judgment seeking dismissal of certain claims based on the Economic Loss Rule, Esplanade argued that its claims were based in tort.

[the] tort claims at issue here [include] fraudulent concealment, CPA violations, and violations of specific statutory duties (here WCA duties to prepare an accurate POS (RCW 64.34.405) and to act as fiduciaries of the unit purchasers (RCW 64.34.308)).”

CP 712-725.

Further, in submitting the settlement agreement to the Superior Court seeking a finding that the \$8.6 Million settlement was reasonable, Esplanade argued as follows:

“With respect to the tort-based claims, the evidence discloses that all of the defendants were equally informed of the need to correct the POS disclosure, all had an equal duty to do so, and none acted on that duty.”

CP 1022.

Moreover, at the time that the parties entered into the settlement agreement, several dispositive motions were pending which focused the case on the tort claims. In addition to the Economic Loss Rule motion discussed above, AFECO had filed a Motion for Partial Summary Judgment Re Fraudulent Concealment seeking dismissal of this claim on its merits based on the defense of truth. CP 866-874.

Another Motion for Partial Summary Judgment sought dismissal of Esplanade’s claims based on Esplanade’s failure to, “establish justifiable reliance on a false or deceptive statement attributable to the Evans Defendants.” CP 907-917.

Rather than respond to these motions, however, Esplanade entered into the settlement agreement that prompted Travelers’ intervention.

**B. Facts Relating to the Parties' Unreasonable Settlement and the Subsequent Entry of Judgment**

On November 20, 2009, nearly a year after this lawsuit commenced, the suit was tendered to Travelers. CP 2005-2055. Travelers' accepted the defense of Spinnaker and AFECO under a reservation of rights. CP 2220-2232. Travelers also filed a Declaratory Judgment Action in the United States District Court for the Western District of Washington seeking a declaration that it did not owe any coverage obligation for the liability insurance claims arising from this action. See *Travelers Property Cas. Co. of America v. A.F. Evans Co., et. al.*, Western District Cause No. CV-10-01110-JCC. That action remains pending.

As trial in this matter approached, the parties attended mediation on July 8, 2012. CP 2005-2055. Travelers' claims personnel and counsel attended mediation in an effort to settle the claims. CP 2056-2079. Nonetheless, Esplanade, AFECO, AFED, and Spinnaker, proceeded to negotiate a settlement agreement that included a covenant not to execute and stipulated judgments that exceeded the value of the claim. The amount of settlement was \$8.1 million, plus penalties and fees that would bring the total settlement to more than \$8.6 million. CP 3616-3630.

In that settlement, Underlying Defendants, Travelers' insureds, agreed to allow stipulated judgments to be entered against them in exchange for a covenant by Esplanade that it would not seek to execute those judgments against the settling defendants. Rather, those defendants assigned their rights under the Travelers and Steadfast policies of insurance to Esplanade. CP 3617-3618. Travelers intervened in the Superior Court action for purposes of challenging the reasonableness of the \$8.1 settlement. CP 971-985.

On December 10, 2010, the Superior Court conducted a reasonableness hearing pursuant to RCW 4.16.020. Having considered extensive materials (CP 3391-3394), the Court ruled as follows:

As for the issue left before me, that is the reasonableness of the settlement reached, I find that the amount of the settlement was affected by the fact that the settling parties did not have any direct interest in the amount. In other words, it was not directly affected by the amount that would have been paid, and that it did not affect the nature of the negotiations of the amount. I find it an unreasonable amount.

Verbatim Report of Proceedings, December 10, 2010, RP 36-37.

Following the reasonableness hearing, the Superior Court signed an Order dated December 14, 2010 Order stating the following:

it is now, hereby,

**ORDERED** that the settlement reached in this matter and identified in the CR2A Agreement dated July 22, 2010 is UNREASONABLE as a matter of law.

CP 3391-3394 (emphasis original).

The Superior Court exercised its discretion, and reduced the reasonable settlement by almost half to \$4,461,592.00, plus costs and fees that the Court had previously awarded in separate orders. With those fees and costs, the Court ruled that the final judgment in the underlying matter would be \$5,121,009.75. CP 3391-3394.

After the Court issued its Order, Esplanade presented a proposed “Stipulated Judgment” to the Court, seeking entry of judgment in the amount of \$5,121,009.75. CP 3395-3400. Travelers objected to entry of the Stipulated Judgment as proposed due to the fact that the Judgment included an award of post-judgment interest at a rate of 12% per annum. CP 3477-3577. Travelers’ argued that the Superior Court should have awarded a post-judgment interest rate of not more than 5.25% pursuant to RCW 4.56.110 and *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009). *Id.*

In response to Travelers’ objection, Esplanade argued that the 12% post-judgment interest rate was appropriate because it was incorporated

into the settlement agreement of the parties. CP 3578-3580. The trial court entered the final judgment on November 16, 2011. CP 3729-3732.

Travelers timely filed a Motion for Reconsideration arguing that the Superior Court had made an error of law in allowing the Judgment to be entered with a post-judgment interest rate of 12%. CP 3733-3745. The Superior Court denied the Motion for Reconsideration, interlineating in the proposed order the following:

The interest rate was indicated in the Attachments to the Settlement Agreement.

CP 3755.

This is the sole basis set forth in the Court's Order for denial of Travelers' motion and entry of a post-judgment interest rate of 12%.

Travelers timely appealed the Superior Court's orders solely on the post-judgment interest component of the final judgment. 3756-3766.

#### **IV. STANDARD OF REVIEW**

The issue in this case is one of statutory interpretation of Washington's post-judgment interest statute, RCW 4.56.110. This Court reviews issues of statutory interpretation and errors of law *de novo*. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 145 173 P.3d 977 (2007). *See also Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165,

208 P.3d 557 (2009); *Meadow Valley Owners Ass'n v. Meadow Valley, LLC*, 137 Wn. App.810, 816, 156 P.3d 240 (2007).

The Court considered Superior Court rulings on Motions for Reconsideration for abuse of discretion. *Byerly v. Madsen*, 41 Wn. App. 495, 499, 704 P.2d 1236 (1985).

A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons.

*Wagner Dev. v. Fidelity & Deposit*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

## V. ARGUMENT

### A. **The Appropriate Post-Judgment Interest Rate for the Subject Judgment is the Tort Rate Set Forth in RCW 4.56.110(3)(b).**

#### I. *Washington Law Regarding Post-Judgment Interest*

The appropriate rate for interest on judgment is controlled by Washington statute. RCW 4.56.110 set forth the following:

Interest on judgments shall accrue as follows:

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

...

(3)(a) . . .

(b) Except as provided in (a) of this subsection, *judgments founded on the*

***tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate***, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.

RCW 4.56.110 (1), (3)(b), and (4)(emphasis added).

RCW 4.56.110 sets forth the interest rate for four categories of judgments: (1) breach of contract where an interest rate is specified; (2) child support; (3) tort claims; and (4) all other claims. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009).

The contract rate applies where the interest rate is specifically enumerated in a written contract, while the tort rate applies to “judgments founded on the tortious conduct of individuals”. The default rate applies in situations where neither of the other rates apply. Before the default rate

is applied, the Court must consider whether any of the other enumerated rates in the statute apply.

In determining the appropriate post-judgment interest rate, a court should examine the component parts of the judgment, determine whether the judgment is based in contract or tort, and apply the appropriate subsection to RCW 4.56.110. *Woo*, 150 Wn. App. at 173.

When an underlying tort claim results in a judgment founded on tortious conduct rather than a settlement agreement, RCW 4.56.110(3)'s tort rate applies. The crux of the analysis is not whether the judgment is for a cause of action *sounding* in tort, but whether the judgment is founded on the "tortious conduct of individuals". *See Woo*, 150 Wn. App. at 161. So long as the judgment is founded on the tortious conduct, the tort rate should apply. *Id.*

Even where a case presents a "mixed judgment" of contract and tort claims, Courts hold that the statute contemplates application of a single rate. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 161, 208 P.3d 557 (2009). Accordingly, the Court of Appeals in *Woo* rejected the argument that the "catch-all" interest rate RCW 4.56.110(4) applies when a "mixed-judgment" is at issue. *Woo*, 150 Wn. App. at 167. In *Woo*, the Court of Appeals held:

As we have explained, the legislature made clear by its 2004 amendment that judgments based on tortious conduct would be subject to the base index plus two percent. It left in place the new subsection (4) that makes other types of judgments subject to the higher 12 percent or the base index plus 4 percent. Dr. Woo's interpretation would render subsections (1) through (3) meaningless if any kind of "mixed" judgment, flowing from multiple types of claims, is automatically subject to subsection (4). This makes no sense.

*Woo*, 150 Wn. App. at 174.

Where underlying claims involve a combination of contract and tort claims, the Court should apply the rate that corresponds to the predominant type of claim involved. In *Woo*, the Court of Appeals reviewed the actual claims that formed the basis of the judgment to determine whether it was founded on tortious conduct. Because the statute did not provide for a definition, the Court defined the statute's "founded on" language as "having as a basis" and/or "to serve as a basis for" for purposes of its inquiry. *Woo*, 150 Wn. App. at 168.

The *Woo* Court employed a two-pronged test to determine whether the underlying claims at issue in that case were based in tort or contract. First, the Court characterized each underlying claim as either being based in tort or contract. Then, the Court identified the predominant claim involved with each claim. At step one, the Court characterized three

claims based in tort, and two in contract. Because the quantity of tort claims outnumbered the contract claims, the Court “conclude[d] that the rate specified in RCW 4.56.110(3), that for ‘[j]udgments founded on the tortious conduct of individuals or other entities,’ controls.” *Woo*, 150 Wn. App. at 173.

Here, all of the causes of action in the underlying action arise from the tort of deceit: alleged intentional omissions by Defendants to prospective homeowners of serious defects and repair costs related to the complex, upon which homeowners relied to their detriment. As a result, not only were many of the actual causes of action alleged by Esplanade based in tort, but *all* of the causes of action were based on allegations of tortious conduct.

## ***2. Esplanade’s Allegations Sounded Solely in Tort***

The entire factual and evidentiary basis for Esplanade’s claims against Travelers’ insureds was that Spinnaker and AF Evans misrepresented and fraudulently concealed the condition of the property in the pre-sale materials. Esplanade’s causes of action for fraudulent concealment, breach of fiduciary duty, and other causes of action based on the Public Offering Statement were grounded in tort.

Regardless of how Esplanade identified its causes of action, it consistently admitted that the factual basis for those claims was alleged tortious conduct on the part of Travelers' insureds.

tort claims at issue here [include] fraudulent concealment, CPA violations, and violations of specific statutory duties (here WCA duties to prepare an accurate POS (RCW 64.34.405) and to act as fiduciaries of the unit purchasers (RCW 64.34.308)".

CP 712.

Esplanade's briefing on various motions further confirms its position. *See, e.g.*, CP 1022.

Also, under clear Washington law, a breach of fiduciary duty claim in a condominium conversion lawsuit "sound[s] in tort". *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 216 P.3d 1110 (2009). In fact, conceded this point in its briefing on dispositive motions in the Superior Court. "Finally, the argument that the contractual relationship between declarants and unit purchasers bars any tort claim for breach of fiduciary duty, would simply eviscerate the statute requiring declarant-appointed directors to exercise fiduciary duties." CP 710-713.

Regardless, the factual record is clear that Esplanade's claims against Travelers' insureds were either (1) pure tort causes of action, or (2)

based on the allegedly tortious conduct of Travelers' insureds and their principles.

As a result, the appropriate post-judgment interest rate for the Judgment entered against Travelers' insureds is the tort rate set forth in RCW 4.56.110(b)(3).

**B. The Superior Court Erred In Denying Travelers' Motion for Reconsideration on the Basis that the Post-Judgment Interest Rate Was Incorporated Into the Settlement Agreement**

Esplanade argues that regardless of what the appropriate post-judgment rate may have been had it taken the tort claims to jury, the 12% rate is appropriate under the contract rate set forth in RCW 4.56.110 because the 12% rate was included in the settlement agreement. CP 3578-3580. The trial court abused its discretion in accepting this argument for several reasons.

The settlement agreement between Esplanade and Travelers' insureds was ruled unreasonable as a matter of law. The Washington Courts have held that the interest component is integral in the Court's reasonableness determination.

But it would be a strained interpretation of RCW 4.22.060 to hold that the "amount to be paid" includes only the principal amount of the settlement, and not the interest to be paid on the outstanding balance. Both

principal and interest are components of the settlement.

*Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146, 142 173 P.3d 977 (2007).

Thus, while parties can agree to interest rates as part of a settlement agreement, the interest component of that agreement is also incorporated into the Court's determination of reasonableness.

"Settlement agreements are contracts." *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). The same remains true of settlement agreements for purposes of calculating the appropriate post-judgment interest rate. *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 142 173 P.3d 977 (2007). But, the settlement agreement at issue was unreasonable as a matter of law.

Even if, however, the settlement agreement had been reasonable, that agreement did not contain an interest rate upon which to base the post-judgment interest rate. CP 3616-3630. Although Esplanade argues that the 12% interest rate was somehow negotiated (CP 3578-3580), there is no evidence supporting that argument.

Moreover, this case is inapposite to *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007), wherein the parties there agreed to a covenant judgment in a tort case and the insurer intervened to contest the reasonableness of the settlement. *Id.* In that case,

the underlying claims were based in tort, but the parties entered into a covenant judgment agreement wherein they specified a 12% interest rate in the settlement documents. *Id.* The Court approved the settlement as reasonable. The insurer contested the interest rate on a motion for reconsideration and argued that the tort rate should apply.

Thus, because the parties had agreed to a specified rate in the settlement agreement, the Court applied subsection (1) of the statute to the judgment.

The case at bar differs from *Fenix* in two material respects: 1) the parties here did not agree to an interest rate in the settlement agreement, and 2) the settlement here was deemed “unreasonable” as a matter of law by the Superior Court.

As a result, the Judgment entered against Travelers’ insureds should not have included a contract rate and the Superior Court erred when it accepted the argument that the rate was appropriate because it was included in an unreasonable settlement that was the product of collusion and a lack of arm’s-length negotiations.

## VI. CONCLUSION

Based on the foregoing, Travelers asks that this Court reverse the rulings of the Superior Court as they pertain to the post-judgment interest component of the Final Judgment.

DATED this 1<sup>st</sup> day of August, 2012

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

**[X] Via Email**

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

Executed on this 1<sup>st</sup> day of ~~July~~ <sup>August</sup>, 2012, at Seattle, Washington.



Michael J. Maddux