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No. 33379-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JAMES and DEBORAH SHARBONO, individually and the marital  
community composed thereof; CASSANDRA SHARBONO,

Respondents/Cross-Appellants

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY; a foreign  
insurer;

Appellant/Cross-respondent

and

LEN VAN DE WEGE and "JANE DOE" VAN DE WEGE, husband and  
wife and the marital community composed thereof,

Cross-Respondents.

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RESPONDENTS/CROSS APPELLANT'S SUPPLEMENTAL BRIEF  
RE: REASONABLENESS OF SETTLEMENT

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## ARGUMENT

### **The Trial Court Correctly Ruled the Settlement Between the Tomyns and the Sharbonos Was Reasonable.**

In a pretrial order, the trial court ruled that “the settlement agreement entered into between the Tomyns and the Sharbonos is reasonable as the measure of Sharbono’s [*sic*] legal liability to the Tomyns as a result of the auto accident underlying this litigation.” (CP 778-79) Universal contends that the settlement was unreasonable because, in its estimation, the trial court did not weigh all of the necessary factors for determining reasonableness. *Brief of Appellant at page 45.*

Preliminarily, the court should note two points. First, Universal relies on improper evidence in support of its argument. The trial court decided whether the Sharbonos settlement with the Tomyns was reasonable by motion presented well before trial. (CP 778-79) However, in its discussion of whether this decision was correct, Universal cites to testimony and materials and information that became part of the record long after the trial court’s

decision, including trial testimony.<sup>1</sup> Review of this issue should be limited to the evidence and material submitted pertaining to the motion. Those materials appear between (CP 452 and CP 779)

Second, the Sharbonos motion to approve the settlement occurred within its suit against Universal. Compare Howard v. Royal Specialty Underwriting, Inc., 121 Wash.App. 372, 380, 89 P.3d 265 (2004)(Insurer objects to reasonableness determination being made in context of personal injury case.) The Sharbonos' brought their motion in February, 2003 (CP 452), over two years after the settlement and over two years after the start of this action. Universal had full opportunity to develop evidence in opposition.

Universal did not identify the standard of review for challenges to a trial court's determination regarding the reasonableness of settlement. In determining the reasonableness of a settlement, the trial court "must have discretion to weigh each case individually." Glover v. Tacoma General Hosp., 98 Wash.2d 708, 718, 658 P.2d 1230 (1983). Appellate courts review

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<sup>1</sup> At pages 45, 46, and 48 of its brief Universal cites to trial testimony. At page 47 it cites to trial exhibits 211-12 regarding the Sharbonos financial condition. Universal did not submit any of this information to the court at the time of the motion.

the determination for abuse of discretion. Werlinger v. Warner, 126 Wash.App. 342, 349, 109 P.3d 22 (2005). "A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence." Howard v. Royal Specialty Underwriting, Inc., 121 Wash.App. 372, 380, 89 P.3d 265 (2004)(quoting Brewer v. Fibreboard, 127 Wash.2d 512, 524, 901 P.2d 297 (1995)). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." Green Thumb, Inc. v. Tiegs, 45 Wn. App. 672, 676, 726 P.2d 1024 (1986).

To determine a settlement's reasonableness in the context of a consent judgment and covenant not to execute, the court must apply the standards used to determine reasonableness of settlements under Washington's contribution statute, RCW 4.22.060, as set forth in Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 658 P.2d 1230 (1983), *overruled on other grounds in* Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988). *Id.*; *see also* Besel v. Viking Ins. Co., 146 Wn.2d 730, 738-740, 49 P.3d 887 (2002); Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 764-65, 58 P.3d 276 (2002). The trial court should consider:

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

Howard v. Royal Specialty Underwriting, Inc., 121 Wash.App. at 380 (quoting Chaussee v. Maryland Cas. Co., 60 Wash.App. 504, 512, 803 P.2d 1339 (1991) (quoting Glover v. Tacoma Gen. Hosp., 98 Wash.2d 708, 717, 658 P.2d 1230 (1983))). "No one factor controls and the trial court has the discretion to weigh each case individually." Chaussee, 60 Wash.App. at 512, 803 P.2d 1339. Using these factors to determine whether a settlement is reasonable protects insurers from liability for excessive judgments. Besel v. Viking Ins. Co., *supra*, 146 Wash.2d at 738. The application of the factors was illustrated in Besel, where the court explained:

At the reasonableness hearing, the trial court specifically addressed the Chaussee criteria. The court found [plaintiff] Besel could likely prove the accident caused him severe injuries; [tortfeasor] Ralston's liability was clear, absolute, and indefensible; the risk and expense to Ralston of continued litigation was extreme and Ralston could not pay any judgment against him; Besel had thoroughly investigated and prepared his case; the settlement was reached through arm's length negotiations; and there were no other parties to the

litigation whose interests were affected. Once the court determined the covenant judgment was reasonable, the burden shifted to Viking to show the settlement was the product of fraud or collusion.

Besel, at 739 (footnote omitted).

At the trial court, Universal did not dispute that Ms. Tomyn was 33 years old at the time of her death. She was the mother of three boys, Aaron (age 14 at the time of Ms. Tomyn's death), Nathan (age 12), and Christian (age seven). She had been married to her husband, Clinton, for 15 years. They had been together their whole adult life, having met in high school. There was no evidence of family or marital difficulties. The family was close-knit. Ms. Tomyn was actively involved in her children and their education. The Tomyns were expected to offer testimony not only from family members, but from friends and neighbors who knew her. She was active in the community, volunteering at her children's elementary and high schools.

In support of its motion, the Sharbonos submitted, among other information:

- an report prepared by economist Prof. Richard Parks showing economic loss to the Tomyns of \$1,050,228. (CP 541-49) Universal presented no contrary evaluation, offering instead

only its attorneys criticism of the report. (CP 632)

- The accident investigation and the citation issued to Cassandra following the accident. (CP 467-81, 551)
- Descriptions of the Tomyns' home, personal and financial life, and the appearance of witnesses who would testify to the substantial personal losses caused to her family by Cynthia Tomyn's death. (CR 530-32, 536, 758, 760)
- Evaluations of the three Tomyn children's loss prepared by independent Guardians Ad Litem (CP 505-28, 762-77)
- A pre-settlement evaluation of the Sharbonos' potential liability prepared by counsel appointed for them by State Farm Insurance Company, expressing (a) confidence that the Sharbonos will be found liable for the accident and (b) describing potential defenses as "very questionable." (CP 565-66) The Sharbonos' liability had, in fact, been determined on motion for summary judgment. (CP 535, ln. 22)
- A bankruptcy analysis of the Sharbonos' financial condition showing the risk they faced if they proceeded to trial and a jury awarded more than the admitted insurance limits of \$1.25 million. (CP 582-86)
- Correspondence between counsel for the Sharbonos and Tomyn's evidencing the arms length negotiation of the settlement. (CP 588 - 625)
- Representative jury verdicts ranging from \$450,000 to a \$4.742 million loss to a 32 year old mother of two, to a then-recent \$22.5 million verdict in a case involving the death by

auto accident of a married mother of two young children.<sup>2</sup>  
(CP 460, 568-80, 730-56)

- Pre-settlement articulations of the Tomyn's liability theories.  
(CP 534-39, 553-63)
- A letter from Universal authorizing the Sharbonos to contribute to settlement above the admitted limits of the liability insurance "if they feel their exposure in excess of the available insurance." (CP 502-03)

Universal's response was token. It submitted parts of the accident investigation (CP 659-77), representative jury verdicts showing value ranges between \$0 and \$4.72 million (CP 636-38, 679-707), a copy of the Tomyns' June 6, 2000, \$4.525 million settlement demand, and a copy of an August, 1999 letter to Universal from the Sharbonos attorney Maureen Falecki.

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<sup>2</sup> Universal correctly points out that judgment in *Joyce v. Dept. of Corrections*, was overturned. 155 Wn.2d 306, 199 P.3d 825 (2005). It then contends that this makes clear "the fact that the trial court misread the extent of the Sharbonos risk. Brief of Appellant at 47. The contention is wrong. First, *Joyce* was reversed on liability issues unrelated to the measure of damages. As evidence of the measure of damages for similar loss, it remains as valid now as it was then. Second, there is no evidence the court actually considered the jury verdicts either side submitted, so there is no evidence *Joyce* or any other verdict influenced the court's assessment of the Sharbonos' risk. Third, the reasonableness of the settlement is determined at the time the settlement occurred, not in light of subsequent events. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash.App. 22, 38, 935 P.2d 684 (1997).

Universal conducted no discovery, it presented no authority that the Sharbonos had defenses to liability (CP 634, Ins. 4-14), it presented no financial information regarding either the Sharbonos or the Tomyns, it provided no legal analysis of the Sharbonos potential liability or defenses, and it admitted that “Universal acknowledges that a large verdict potentially could have been entered . . .” though “it was statistically unlikely.” (CP 638, Ins 12-13, 20)

Against this backdrop, the court acted well within its discretion in finding the settlement reasonable. On the record,<sup>3</sup> the court reviewed each of the *Glover* factors. The Sharbonos were liable. There was no credible basis for the court to conclude that the Sharbonos had any substantial likelihood of sharing liability with anyone else because every other vehicle that came upon the accident scene prior to Cassandra had successfully stopped without causing an accident. The Tomyns could support economic loss alone of over \$1 million. General damages were highly uncertain and unpredictable, and similar losses had resulted in verdicts substantially greater than the amount

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<sup>3</sup> Universal has not provided the Report of Proceedings for this motion.

of the settlement. The court was justified in finding that the threat of financial devastation from a verdict in excess of policy limits was a legitimate concern for the Sharbonos. As it was, the Sharbonos undertook substantial personal obligations, not the least of which was the obligation to prosecute this action. (CP 492-93) The correspondence showed that settlement discussions were often heated and clearly arms length. In all, the settlement was well within the range of reason under the circumstances. While Universal second-guesses the decision, it has not shown that the trial court abused its discretion in any way.

Once the trial court found the settlement reasonable, the burden shifted to Universal to show that it was the product of fraud or collusion. On this, Universal admits that it does not have any evidence of fraud. Nevertheless, it contends that a “collusive air” surrounds the settlement because counsel for the Tomyns and the Sharbonos worked together to ensure the best settlement for their respective clients. *Brief of Appellant at page 48.* Universal’s bare allegation is insufficient meet its burden on appeal.

In reality, the settlement negotiations between counsel were neither collusive nor cordial. The negotiations resulted in a significant amount of

correspondence between counsel regarding the terms and conditions of settlement. (CP 588-625) One letter documents the Tomyns' animosity toward the Sharbonos:

I cannot, however, address the possible punitive reasons for the Tomyns' current position. If they desire to exact a pound of flesh – to make the Sharbonos suffer personally as compensation for the Tomyns' tragic loss – I can only ask that they consider both sides of the issue. . . . What happened here was an accident, admittedly tragic. Under the circumstances, neither punishment nor resentment . . . should be considered when trying to bring this matter to a close.

(CP 602) Another letter documents how the Tomyns used the threat of bankruptcy to exhort the Sharbonos into accepting their terms:

Finally, you indicated that you would discuss this [most recent] proposal and modification of settlement terms with the Sharbonos and get back to use within one week. If the Sharbonos sincerely wish to resolve the third-party action, then this will be their final opportunity. Otherwise, we will simply proceed through trial, [and] obtain what we believe will be a significant verdict causing the Sharbonos to lose their assets through bankruptcy[.]

(CP 614) An earlier internal correspondence between the Sharbonos and their counsel shows that the Sharbonos took this threat seriously:

You have decided to reject plaintiffs' latest offer . . . We will leave the door open for plaintiffs to accept the settlement proposal we set forth in our June 9, 2000 letter to Mr. Barcus.  
. . . .

We discussed the various possible consequences of this decision. It is possible that plaintiffs may reject our settlement proposal and proceed to trial. As we have discussed many times before, if the plaintiffs proceed to trial, the risk is substantial that a judgment will be entered against you in excess of the presently undisputed insurance limits, \$1.25 million.

(CP 604)

In sum, the trial court's finding that the Tomyn-Sharbono settlement was reasonable is supported by substantial evidence. The Tomyns suffered significant economic and emotional damages as a result of Cynthia Tomyn's death. Indeed, Universal concedes in this appeal that Ms. Tomyn's estate, her husband, and her surviving children "certainly experienced significant damages[.]" *Brief of Appellant at page 45*. Ms. Tomyn was fault free, and only Cassandra and the Sharbonos were liable for the accident. The Sharbonos had no defenses to the Tomyns' claims and faced great personal and financial risk if the litigation continued. There is no evidence that the settlement was the result of fraud, bad faith, or collusion. The trial court's

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order of reasonableness should be affirmed.<sup>4</sup>

DATED: September 29, 2006.

BURGESS FITZER, P.S.



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Attorneys for Respondents/Cross-Appellants

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<sup>4</sup> An alternate ground exists to affirm the trial court. In Washington, a covenant judgment can be reasonable per se in a cases where an insurer breaches its duty to defend “or otherwise wrongfully exposes its insured to business failure and bankruptcy.” *Werlinger v. Warner*, 126 Wash.App. 342, 350-51, 109 P.3d 22 (2005)(quoting *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002). In the present case, the jury determined that Universal’s wrongful conduct was a proximate cause of the Sharbonos’ loss of two businesses before their settlement with the Sharbonos occurred. The settlement thus is reasonable per se.