

COURT OF APPEALS,  
DIVISION TWO  
OF THE STATE OF WASHINGTON  
No. 35322-9-II

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METROPOLITAN PROPERTY & CASUALTY CO., Appellant

v.

WILLIAM AND KARYL MARTIN, et al., Respondents

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**APPELLANT'S OPENING BRIEF**

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I. **ASSIGNMENTS OF ERROR AND ISSUES PERTAINING  
THERETO**

A. **ASSIGNMENTS OF ERROR**

Appellant Metropolitan Property & Casualty Insurance Company ("MetLife") requests that the court reverse the trial court's August 11, 2006 Order Granting Motion to Determine Settlement Reasonable. MetLife makes the following assignments of error:

1. The trial court erred in allowing a reasonableness hearing. A reasonableness hearing is appropriate in a contribution setting under RCW 4.22.060. Here, there is no possibility of contribution. Contribution rights extend only to joint tortfeasors and Mrs. Johnson was the only defendant.

2. The trial court erred in granting Plaintiff's Motion to Determine Settlement Reasonable when the Court ignored the determinative factors to make a finding of reasonableness pursuant to *Chaussee v. Maryland Casualty*, 60 Wn. App. 504, 803 P.2d 1339 (1991). The *Chaussee* factors preclude a determination of reasonableness.

B. **ISSUES PERTAINING TO ASSIGNMENTS OF  
ERROR**

1. Is a reasonableness hearing appropriate when contribution is not a possibility and there is no joint tortfeasor? (Assignment of Error 1).

2. Is a reasonableness determination warranted when there is no evidence of bad faith, liability is not clear, liability is not absolute and liability is entirely defensible? (Assignment of Error 2).

## II. STATEMENT OF THE CASE

MetLife insured H.E. Sherry Johnson from February 1, 1992 to July 2, 1996 for the residence premises located at 501 Tacoma Avenue in Tacoma, Washington. CP 91-92. Mrs. Johnson was an elderly widow, and is now deceased. She sold the property in question to Mr. and Mrs. Martin in 1996. An underground heating oil storage tank was located on the property. It had been out of service for many years. A leak occurred at some unknown time prior to July 1994.

The Martins admit that Mrs. Johnson told them she did not know whether or not an oil tank was located on the property. The house was built in 1910 and the heating system had been changed several times from the original coal furnace to oil to electric. The Martins admit that Mrs. Johnson told them she did not know

whether or not an oil tank was on the property. CP 100-104. They also admit that at the time of the purchase they received an appraisal report which discussed the existence of the oil tank, but that this “was not an important issue to us at the time of our purchase.”

In 2004, the Martins entered into a contract to sell the property to Mr. and Mrs. Barnett. The Barnetts discovered the oil tank. The Martins and Barnetts negotiated who would pay the cost to remove and remediate the tank, and that cost was submitted by the Martins to their homeowners’ insurance carrier, USAA, which paid it. A subrogation action for the benefit of USAA was instituted by the Martins against the Johnson Estate for the remediation cost plus attorneys’ fees. MetLife denied coverage for that claim. The Johnson Estate then agreed to a Stipulated Judgment for the claim and attorneys’ fees and assigned to the Martins all rights against MetLife. MetLife filed a declaratory judgment action asking the court to declare that there is no coverage for the third-party liability claims made by the Martins and USAA against the Johnson Estate.

The Complaint against the Johnson Estate was filed on December 5, 2005. CP 1-5. Plaintiff asked for relief under the Model Toxic Control Act and alleged theories of negligence for not

being informed of the oil tank. MetLife accepted the tender of defense under a reservation of rights on January 6, 2006. CP 44-47.

Just four months later, on May 11, 2006, the Johnson Estate and the Martins entered into a settlement agreement with an assignment of rights and a covenant not to execute. CP 18-23. Without communicating or receiving the consent of MetLife, the defendant stipulated to an \$81,928.63 judgment and assigned all rights it may have had to pursue an action against MetLife. In consideration for the assignment, plaintiff agreed not to execute the judgment against the Johnson Estate's assets, other than the MetLife insurance proceeds.

MetLife strongly resisted the reasonableness of the settlement. CP 68-89. The reasonableness hearing was held on August 11, 2006. The Court determined that the settlement was reasonable. CP 138-140.

### III. ARGUMENT

#### A. STANDARD OF REVIEW

In determining the reasonableness of a settlement, the trial court “must have discretion to weigh each case individually.”<sup>1</sup> A determination is reviewed for abuse of discretion.<sup>2</sup>

#### B. A REASONABLENESS HEARING IS INAPPROPRIATE IN A CASE WHERE THERE IS NO JOINT TORTFEASOR AND NO POSSIBILITY OF CONTRIBUTION.

The Tort Reform Act permits contribution among jointly and severally liable tortfeasors.<sup>3</sup> RCW 4.22.060 “creates a right of contribution between joint tortfeasors.”<sup>4</sup> As part of this contribution scheme, RCW 4.22.060 requires a “reasonableness hearing” whenever a settlement occurs between a plaintiff and one or more defendants that implicates the rights of other defendants, by either cutting off their contribution rights or exposing such other defendants to contribution.

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<sup>1</sup> *Werlinger v. Warner*, 126 Wn.App. 342, 349, 109 P.3d 22, review denied, 155 Wn.2d 1025 (2005) (quoting *Glover for Cobb v. Tacoma General Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983)).

<sup>2</sup> *Id.*

<sup>3</sup> RCW 4.22.060

<sup>4</sup> *Glover*, 98 Wn.2d at 711.

Only defendants against whom judgment is entered are jointly and severally liable and only for the sum of their proportionate share of the total damages.<sup>5</sup>

A person is not liable to the plaintiff at all, much less jointly and severally, if he or she has not been named by the plaintiff.<sup>6</sup>

Here, Mrs. Johnson's Estate was the only defendant named.

Reasonableness hearings should be conducted only in the following limited settings:

(1) to fix the amount of an unreleased, non-settling defendant's credit or (2) to set the reasonable amount that will be apportioned between a settling defendant and a released, non-settling defendant when the settling defendant's contribution claim is subsequently liquidated.<sup>7</sup>

Clearly, a reasonableness hearing does not apply to the instant facts.

The provisions for contribution in the Washington Tort Reform Act were not designed to bind insurers who were not

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<sup>5</sup> *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992); see also Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 48 (1992) (joint and several liability is preserved, but only among defendants to the action against whom judgment is entered).

<sup>6</sup> *Koste v. Chambers*, 78 Wn.App. 691, 899 P.2d 814 (1995) (quoting *Mailloux v. State Farm Mut. Auto. Ins. Co.*, 76 Wn.App. 507, 513, 887 P.2d 449 (1995)).

<sup>7</sup> *Fraser v. Beutel*, 56 Wn.App. 725, 731, 785 P.2d 470 (1990) (quoting *Harris, Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and The Reasonableness Hearing Requirement*, 20 GONZ. L. REV. 69, 113 (1984-85)).

parties to settlements. They were designed to encourage settlements, partial or full, while achieving equitable allocation of losses in multiple defendant cases governed by principles of joint and several liability.<sup>8</sup>

A reasonableness hearing was inappropriate here. It was not utilized in a manner consistent with legislative intent. The issue of reasonableness would be viable in a contribution action. Contribution rights extend only to joint tortfeasors.<sup>9</sup> With Mrs. Johnson as the only defendant, the facts of this case do not fall within the statutory scheme providing for a reasonableness hearing under RCW 4.22.060.

The claimants had no legal reason to request the hearing. Its only purpose was the claimants attempt to bind MetLife to the amount of the stipulated judgment. Thus, the hearing was not proper under RCW 4.22.060.

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<sup>8</sup> See *Wash. Laws*, Ch. 27, § 1 (1981).

<sup>9</sup> *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 555, 707 P.2d 1319 (1985) (citing *Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983); *Glover, supra*, 98 Wn.2d at 714, 658 P.2d 1230 (1983); *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 883, 652 P.2d 948 (1982)).

**C. A REASONABLENESS DETERMINATION IS WARRANTED ONLY WHEN THERE IS EVIDENCE OF BAD FAITH AND LIABILITY IS CLEAR, ABSOLUTE, AND INDEFENSIBLE.**

**1. There is no evidence of bad faith.**

An insured may independently negotiate a settlement if the insurer refuses in bad faith to settle a claim. In such a case, the insurer is liable for the settlement to the extent the settlement is reasonable and paid in good faith.<sup>10</sup> The plaintiff has the burden of proof on the issue of reasonableness of the settlement.<sup>11</sup>

Since no claims against “MetLife” were pled in the Complaint in this lawsuit, and since no evidence was presented against MetLife, the plaintiffs obviously did not meet their burden of proof. This claim may be pled in the pending declaratory judgment action. However, this is a separate case. The reasonableness hearing in this case was held without allowing any discovery by MetLife and without any evidence being presented. It was not the proper forum for any determination of reasonableness that would bind “MetLife”.

**2. Liability in this case is not clear, not absolute, and entirely defensible.**

It is clear that Washington law requires that the courts use the factors use the factors provided in *Chaussee v. Maryland*

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<sup>10</sup> *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002).

<sup>11</sup> *Chaussee*, 60 Wn.App. at 510.

*Casualty Co., supra*, to determine the reasonableness of any settlement agreement.

A review of the case law demonstrates that courts that have made reasonableness determinations have done so only after making a make a specific finding that the defendant's liability is clear. In *Chaussee*, the Court held that a trial court can reliably determine the reasonableness of a settlement in the context of a covenant judgment by using the following factors:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.<sup>12</sup>

The *Chaussee* criteria have been consistently applied in Washington.

In *Besel, supra*, the insurance carrier refused in bad faith to settle a claim. The insured, while under the influence of alcohol and attempting to elude the police, crashed his truck and caused injury to the plaintiff/passenger. The insurer failed to respond to numerous attempts by the claimant to settle. The insured settled

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<sup>12</sup> *Chaussee*, 60 Wn. App. at 512 (citing *Glover*, 98 Wn.2d at 708).

his own claim and entered a covenant not to execute against the insured. Instead, the claimant sued the insurance company as the assignee of the insured. The settlement was contingent on a finding by the trial court that the agreement was reasonable.

At the reasonableness hearing, the trial court specifically addressed the criteria outlined in *Chaussee v. Maryland Casualty Co.* before making a determination of reasonableness. The court found:

Besel could likely prove the accident caused him severe injuries; 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.<sup>13</sup>

Under the *Chaussee* criteria, the *Besel* court found the settlement reasonable.

Along the same lines, in *Howard v. Royal Spec. Underwriting*<sup>14</sup>, the appellate court reviewed the trial court's finding that the settlement between an injured construction worker and defendant general contractor Alia was reasonable. The appellate court reviewed the information before the Court when making its

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<sup>13</sup> *Besel*, 146 Wn.2d at 739.

<sup>14</sup> 121 Wn.App. 372, 383, 89 P.3d (2004).

determination, and applied the *Chaussee* factors. In determining the settlement was reasonable, the Court stated:

[G]iven the extent of Howard's injuries, Alia's clear liability, Alia's financial situation, and the anticipated costs of future litigation, the trial court did not abuse its discretion.<sup>15</sup>

In these cases, the reasonableness determinations were made because the *Chaussee* factors were met. This case is in stark contrast. Here, the trial court received no evidence of the *Chaussee* factors and entered its finding without considering those factors. If they had been considered, it is clear this stipulated judgment and covenant agreement was not a "reasonable" settlement.

a. Damages to the Martins

The first factor is the releasing persons' damages. The cost incurred by USAA, plaintiff's insurer, to remove the oil tank and remediate the property was \$61,415.63. However, the defendant has added attorneys' fees for a total judgment of \$81,928.63 judgment. Thus, the defendant, without any discovery, conceded full liability and attorneys' fees to the plaintiff, where no attorneys' fees would be awarded by law.

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<sup>15</sup> *Id.* at 383.

As discussed in more detail below, the claims for violation of the Model Toxic Control Act (MTCA) and negligence are entirely defensible. In reviewing the Act, it is clear that it does not apply to this set of facts. In fact, there is a good possibility the MTCA claim would have been dismissed on summary judgment. Recovery under the MTCA is limited as follows:

A person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under 70.105D.040 for the recovery of remediation action costs . . . . Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter.<sup>16</sup>

Before the trial court could make a finding of reasonableness, a finding was required that the remedial action costs “are the substantial equivalent of a department-conducted or department supervised remedial action.”<sup>17</sup> There is insufficient information for the Court to make this necessary determination. Therefore, it is not possible to assess whether the damages claimed are within the permissible limitations of the MTCA.

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<sup>16</sup> RCW 70.105D.080.

<sup>17</sup> *Id.*

Further, as detailed below, significant evidence exists with regard to the plaintiff's failure to undertake duties allocated between the parties in their Real Estate Contract. The evidence demonstrates that plaintiff's negligence in performing these duties, at the very least, contributed to the damage to the property. Based on this evidence, the stipulation to the full amount of liability in this case is unreasonable.

b. Liability is Entirely Defensible.

i. **The Plaintiff's MTCA Claim is Subject To Summary Judgment Dismissal.**

The MTCA imposes joint and several liability for all natural resource damage and remediation costs.<sup>18</sup> Liability under both CERCLA and the MTCA extends to current owners and operators of a "facility," persons who owned or operated a "facility" at the time hazardous substances were disposed or released, and any other person who caused the disposal or release of the hazardous substance at any "facility."<sup>19</sup>

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<sup>18</sup> RCW 70.105D.040(2).

<sup>19</sup> RCW 70.105D.040(1); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 661, 15 P.3d 115 (2000).

The Act addresses the municipal and business use and storage of hazardous materials.<sup>20</sup> According to the statute, “facility” is defined as follows:

(a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.<sup>21</sup>

The plain language of the statute provides that a hazardous substance that constitutes a consumer product in consumer use does not qualify as a “facility.” The hazardous substance in this case is heating oil, a consumer product purchased and used for consumer use. Therefore, the defendant is not a person who owned or operated a “facility” at the time hazardous substances were disposed or released and, accordingly, is not liable under the MTCA.

Indeed, a thorough review of Washington case law concerning enforcement actions under the MTCA supports this plain interpretation of the statute. Based on the existing case law,

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<sup>20</sup> RCW 70.105 *et seq.*

<sup>21</sup> RCW 70.105D.020(4).

not once has a consumer owner of a hazardous substance been held liable under the MTCA for a consumer product for consumer use.

The declaration of the policy behind the MTCA further supports a plain interpretation of the term “facility.” RCW 70.105D.010(2) references municipal landfills as “current or potential hazardous waste sites” that present serious threats to human health and environment. RCW 70.105D.010(3) references “many farmers and small business owners” who have followed the law with respect to their uses of pesticides and other chemicals who nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their neighbors. Here, a claim based on the MTCA is entirely defensible and likely to be dismissed on summary judgment.

**ii. The Claim for Negligence is Defensible.**

The Martins claim that Mrs. Johnson negligently abandoned and concealed an underground storage tank. However, they have not presented evidence that Mrs. Johnson knew or had reason to know of the tank or that it had leaked at some unknown point in the

past. As is evident in the Real Property Transfer Disclosure Statement, PSMLA Form 17, Mrs. Johnson did not make any misrepresentation related to the oil tank. Plaintiff was put on notice of the potential problem.

Mrs. Johnson checked "Don't Know" when the form asked if she knew of "any substances, materials, or products that may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the subject property?" She also checked "Don't Know" in answer to the question "Are there any tanks or underground storage tanks (e.g., chemical, fuel, etc.) on the property?"

The Buyer's Acknowledgement was express and clear. The form stated:

#### BUYER'S ACKNOWLEDGEMENT

A. Buyer acknowledges the duty to pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.

Moreover, the Real Estate Purchase and Sale Agreement shows that the parties allocated the duty of inspection for hazardous materials to the plaintiff. The Residential Purchase and

Sale Agreement states that “This Agreement: is conditioned on a professional hazardous materials inspection of the property.” A diligent investigation of the property would have revealed the existence of the oil tank. In fact, its existence was discussed in the real estate appraisal report which concluded there was no evidence of leaking at that time. The claimants received a copy of this report.

Based on the contractual terms, the burden shifted to the Buyer to inspect for hazardous substances which the Buyer undertook. The Buyer inspected the property, had the opportunity to require a cleanup, and accepted the property.

In addition, the Hazardous Materials Inspection Addendum to Purchase and Sale Agreement states:

\* NOTE TO BUYER: You should carefully note Paragraphs 2 and 4 above. Unless you give Agent these notices, you will be obligated to purchase the property without the Seller having corrected the conditions in the inspection report. Your failure to give either of these notices means that you accept the property without correction or repair of any conditions shown in the inspection report.

CP 93. There is no other admissible evidence regarding Mrs. Johnson’s knowledge of the oil. The only evidence is Form 17, which states that Mrs. Johnson did not know of the condition. She did not conceal the condition; she gave notice of the potential

problem. Based on the contractual duties allocated in the REPSA, the claim for negligence is entirely defensible.

c. The Released Person's Relative Faults

Mrs. Johnson is deceased and the Dead Man's statute applies to this case.<sup>22</sup> The Dead Man's statute provides:

[I]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by such deceased . . . .

Therefore, the only admissible evidence related to the deceased defendant is the REPSA and Form 17. Pursuant to the Dead Man's statute, parties of interest are prohibited from testifying regarding the transaction involving the deceased. Similarly, parties of interest are prohibited from testifying as to any statements made by the deceased. To the extent that any evidence would be submitted based on conversations with the deceased, they are inadmissible.

d. The Risks and Expenses of Continued Litigation and the Released Person's Ability to Pay.

The size of the Johnson Estate is unknown and has not been admitted into evidence. There were no debilitating out-of-

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<sup>22</sup> RCW 5.60.030.

pocket expenses incurred that forced the settlement. In fact, MetLife was providing a defense of the lawsuit.

e. Evidence of Bad Faith, Collusion, Fraud.

While there is no evidence of bad faith, collusion, or fraud in this case, it is worth drawing the Court's attention to the relatively short period of time between the filing of the complaint, and the signed covenant not to execute. Neither party completed written discovery, nor conducted any depositions. No expert was hired to challenge the plaintiff's highly speculative assertion that the tank leaked while in Mrs. Johnson's possession. In exchange for an agreement not to execute against any assets of the Johnson Estate, other than the insurance proceeds, an agreement was entered into to pay for the full cost of remediation, despite the Martins' contributory fault.

f. The Interests of the Parties Not Being Released.

The objective of the claimants was to make MetLife responsible for paying the stipulated judgment. Thus, MetLife has an interest in this lawsuit. Given the significant number of factual and legal questions, it was improper for the Court to rule at all that the stipulated judgment was reasonable. That determination

should be left for the declaratory judgment action where the court will require the claimant to plead and prove that the stipulated judgment meets all the requirements under Washington law for it to be binding on "MetLife".

#### IV. CONCLUSION

For the foregoing reasons, MetLife Insurance Company requests the Court reverse the Court's August 11, 2006 Order Granting Motion to Determine Settlement Reasonable.

RESPECTFULLY SUBMITTED this <sup>th</sup> 25 day of January, 2007.

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FURTHER YOUR AFFIANT SAYETH NOT.

DATED this 25<sup>th</sup> day of January, 2007, at Seattle, Washington.

Sheila Romoff  
Sheila Romoff, Affiant

SIGNED AND ATTESTED TO this 25<sup>th</sup> day of January, 2007.



Marie N. Aronsen  
SIGNATURE

Marie N. Aronsen  
PRINT NAME

Notary Public in and for the State of  
Washington, residing at: Seattle  
My commission expires: 12-10-08