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STATE OF WASHINGTON

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DEPUTY COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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~~COURT OF APPEALS DIV I~~
~~STATE OF WASHINGTON~~

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NO. 47196-5-II

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor/Appellant

v.

ROBERT CHARLES JUSTUS; CORINNE M. TOBECK, ESTATE OF
JOSEPH "JOEY" TOBECK; VERNON A. TOBECK, and APRIL D.
NORMAN,

Plaintiffs/Respondents

v.

WILLIAM D. MORGAN and DONNA L. MORGAN,

Defendants/Respondents,

INTERVENOR STATE FARM FIRE AND CASUALTY COMPANY'S
APPELLANT'S BRIEF

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I. INTRODUCTION

This case is a stark example of how critically important it is that trial judges skeptically examine settlement agreements that involve stipulated covenant judgments before approving them as “reasonable.” The trial court below determined that a stipulated consent judgment settlement between plaintiff Robert Justus and defendants David and Donna Morgan had a reasonable settlement value of \$818,900 based on a negligence liability theory, even though the facts before the court only supported imposition of liability for intentional torts, and the intentional tort claims supported by the facts were all time barred. In the absence of a viable legal theory supporting imposition of liability, the reasonable settlement value of Mr. Justus’s claims was nowhere near \$818,900. The trial court’s settlement valuation and reasonableness determination should be reversed because it is premised on a legal theory that had no support in the facts of this case, and no support under Washington law.

II. ASSIGNMENTS OF ERROR

The trial court erred in:

- A. Entering its January 5, 2015, Order on Reasonableness of Settlement. (CP 776-807)
- B. Premising its conclusion that Mr. Justus’s claims had merit on a negligence theory, where all of the evidence before the court

established that Mr. Morgan's conduct toward Mr. Justus involved solely intentional conduct, and intentional tort claims were time barred (CP 786-788, 791-792)

C. Premising its ruling on the ground that State Farm denied indemnity coverage to the Morgans, where no facts before the court supported that conclusion. (CP 794)

III. STATEMENT OF THE CASE

A. Nature of the Case

Defendants/respondents William and Donna Morgan live toward the end of a private road in rural Roy, Washington. (CP 104-141, 426, 428) Around 10 p.m. on Wednesday June 9, 2010, Donna Morgan heard some loud noises outside. (CP 141, 427-428, 460) William Morgan grabbed a gun and went outside in the dark to investigate. (CP 429-430) He heard and then saw a loud-sounding pickup truck with no lights on parked on the road. (CP 141, 430-432) As he got closer, he saw that two individuals – Robert Justus and Joseph Tobeck – had loaded some large metal pipes into the pickup truck. (CP 141, 432) The pipes belonged to Mr. Morgan. (CP 141, 432)

Mr. Morgan confronted Mr. Justus and Mr. Tobeck, pointing his gun at them and saying “hey, you have my pipe.” (CP 71, 434, 486) Mr.

Justus and Mr. Tobeck got into the truck, and began driving away. (CP 74, 435-487)

Mr. Morgan began shooting at the moving truck. (CP 72, 338, 435) He fired a total of nine shots from his handgun. (CP 3, 11) One of the bullets struck Mr. Tobeck, who was driving, in the head. (CP 3, 11, 17, 497, 609) The truck went out of control and hit a tree. (CP 3, 11)

Mr. Justus climbed out of the passenger window after the truck hit the tree. (CP 438) Mr. Morgan confronted him, again pointing his gun at him, and ordered him to lie down in the street and spread out his arms. (CP 72, 75, 83, 95, 338-339, 438-439) Mr. Justus complied, and Mr. Morgan continued to hold Mr. Justus on the ground until the police arrived. (CP 439) Mr. Justus now claims to suffer severe post-traumatic stress disorder (PTSD) as a result of the events of June 9, 2010. (CP 103-106, 114-133)

The gun Mr. Morgan used was a semi-automatic .40 caliber Sig Sauer handgun. (CP 3, 11, 237-240) The police investigation located nine spent .40 caliber cartridges at the scene. (CP 311-313, 320) The police investigation also confirmed five bullet holes to the front windshield of the truck's passenger cab, one bullet hole in the rear window of cab, and one bullet hole on the driver's side door/window. (CP 75, 304)

On June 27, 2012, Mr. Justus filed a lawsuit against the Morgans. *Justus v. Morgan*, Pierce County Superior Court cause no. 12-2-10340-8. (CP 21-28) This was two years and 18 days after the June 9, 2010 incident.¹

B. The Stipulated Consent Judgment Settlement and the Trial Court's Ruling on the Reasonableness of that Settlement

Mr. Justus's liability lawsuit was litigated and resolved on the eve of trial by a stipulated consent judgment settlement with the Morgans in the amount of \$1.3 million, coupled with an assignment from the Morgans to Mr. Justus of all claims the Morgans had against their insurer, State Farm Fire and Casualty Company. (CP 50-62) After the settlement was concluded, Mr. Justus filed a motion to have the trial court determine the reasonableness of the settlement. (CP 34-166)

Appellant State Farm Fire and Casualty Company intervened and participated in the reasonableness determination motion. (CP 31-33) In its memorandum addressed to the settlement reasonableness issue, State Farm noted that Mr. Justus alleged liability against the Morgans on two grounds: (1) Morgan allegedly negligently prevented Justus from rendering aid or assistance to Mr. Tobeck; and (2) Morgan allegedly detained Justus

¹ The estate of Joseph Tobeck also filed a damages lawsuit against the Morgans, Pierce County Superior Court cause number 12-2-05527-6. The Tobeck estate's claims have been resolved and are not before the Court on this appeal.

unlawfully. (CP 400) State Farm argued that the first claim had been dismissed on summary judgment, and the second claim – to the extent it was even recognized as a cause of action in Washington – was time barred. (CP 400-407) Accordingly, State Farm argued that the theories of liability plead by Mr. Justus were not viable, and thus did not provide the necessary foundation to support a reasonable settlement value anywhere close to \$1.3 million. (CP 408)

The trial court issued its oral decision on the reasonableness motion on November 7, 2014, concluding that Mr. Justus’s claims had a reasonable settlement value of \$818,900. The court’s oral decision was incorporated by reference into the trial court’s January 5, 2015 written order. (CP 776-807)

The trial court’s order on the reasonableness of the settlement characterized Mr. Morgan’s actions as “outrageous” and “beyond the bounds of human decency,” involving “callous disregard for the sanctity of human life.” (CP 787-788) The trial court also concluded that the facts of the case were “inflammatory.” (CP 788) The following passage from the trial court’s oral decision sums up the trial court’s findings regarding liability:

[I]t’s clear to the Court that William Morgan is wholly responsible for the death of Joseph Tobeck and the damages sustained by Mr. Justus. Mr. Morgan left the

safety of his home with a firearm for which he had no concealed weapons permit.

When he confronted Mr. Tobeck and Mr. Justus, the overwhelming weight of the testimony in this proceeding is that Mr. Tobeck and Mr. Justus, when confronted by an angry and aggressive, armed Mr. Morgan, apologized profusely for any intrusion Mr. Morgan felt and offered to restore the conduit pipe, which was not even located on Mr. Morgan's property, to its original location.

At that point, the police had been called and were in route, and Mr. Morgan had confirmed the specifics concerning the Tobeck/Justus vehicle. Mr. Morgan had plenty of time to view Mr. Tobeck and Mr. Justus for later identification, should that become necessary.

Instead of then retreating back to the safety of his home, he started firing his weapon at the two young men in the pickup as the pickup slowly, at a walking pace, drove away from the scene in an attempt to remove themselves from the deadly encounter.

Mr. Morgan waited, again not retreating out of the street to the safety of his home until the police returned, when he killed Joseph Tobeck. Then, in callous disregard for the sanctity of human life, he kept Mr. Justus on the ground at gunpoint and prevented Mr. Justus from attending Mr. Tobeck's mortal wounds.

Suffice it to say that William Morgan's conduct on June the 9th, 2010 was outrageous. It is beyond the bounds of human decency. Not only is the releasing parties' theory of liability sound, the facts are inflammatory.

(CP 787-789)

The trial court's ruling included inconsistent and irreconcilable statements regarding what legal theory actually supported imposition of

liability on Mr. Morgan. The trial court initially stated that it was not making findings as to whether Mr. Morgan's actions were intentional or negligent. (CP 786) However, when addressing Intervenor's argument that any intentional tort claims were time barred because Mr. Justus did not file his lawsuit until over two years after the incident, the court concluded that, given the statutory time bar, the legal theory supporting liability was a negligence theory. The court stated:

Finally, Intervenor State Farm alleges that the claims are time barred because this action was filed two years and 18 days following the occurrence referenced in Plaintiffs' complaint. This is true for intentional torts. However, negligence-based causes of action have a three-year statute of limitations and are not time barred here.

The Court finds, in terms of relative fault, that Plaintiffs were not comparatively negligent in causing their injury, nor time barred for any negligence-based claim that is later found to have arisen out of the events of June the 9th, 2010.

(CP 791-792).

IV. ARGUMENT

A. Standard of Review.

A trial court's finding of reasonableness is a factual determination that will not be disturbed on appeal when supported by substantial evidence. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 922, 169 P.3d 1 (2007), citing *Brewer v. Fibreboard Corp.*,

127 Wn.2d 512, 524, 901 P.2d 297 (1995) (citing *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 718, 658 P.2d 1230).

A *de novo* standard applies when there are no factual disputes, and the basis of the trial court's decision is purely a question of law. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); *Deatherage v. State Examining Bd. of Psychology*, 134 Wn.2d 131, 948 P.2d 828 (1997).

B. The Nature and Purpose of the Court's Ruling on Settlement Reasonableness

The purpose of the trial court's reasonableness determination was to establish the damages that State Farm will be required to pay if the bad faith claim that the Morgans assigned to Mr. Justus as part of their stipulated consent judgment settlement is successful. The amount the trial court declared reasonable will be treated as the presumptive damages on the bad faith claim. *Besel v. Viking Ins. Co.*, 146 Wn.2nd 730, 738, 49 P.3d 887 (2002); *Werlinger v. Warner*, 126 Wn.App. 342, 350-351, 109 P.3d 22 (2005).

Washington courts have repeatedly held that stipulated consent judgment settlements are inherently suspect:

We are aware that an insured's incentive to minimize the amount of a judgment will vary depending on whether the insured is personally liable for the amount. Because a covenant not to execute raises the specter of collusive or

fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important.

Besel v. Viking Ins. Co., 146 Wn.2d 730, 737, 49 P.3d 887 (2002). As one Washington court has warned:

[A]n insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement. We share this concern about consent judgments coupled with a covenant not to execute.

Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 510-11, 803 P.2d 1339 (1991). *See also, Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) (reasonableness is questionable where the insured has no incentive to minimize the amount).

Given this concern, *Chaussee* held that courts should apply nine criteria to assess whether a settlement is reasonable. *Id.* at 509-10. This approach was endorsed by the Washington Supreme Court in *Besel v. Viking Ins. Co.*, *supra*, 146 Wn.2d at 738-40. Under this approach, the governing criteria are:

1. The releasing person's damages;
2. The merits of the releasing person's liability theory;
3. The merits of the released person's defense theory;
4. The released person's relative faults;
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;
9. The interests of the parties not being released.

Id. at 738. Not all nine factors are necessarily relevant in all cases. *Besel v. Viking Ins. Co.*, *supra*, 146 Wn.2d at 739, n.2. Application of the factors is addressed on a case by case basis.

Mr. Justus – not State Farm – bore the burden of proving that his settlement with the Morgans was reasonable. *See Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wn. App. 572, 595, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010). The Washington Supreme Court has directed trial courts to consider all applicable *Chaussee* factors in weighing whether a settling party has met his burden of proof. *Besel v. Viking Ins. Co.*, *supra*, 146 Wn.2d 739.

C. The Trial Court Erred in Determining that Mr. Justus Had a Meritorious Liability Theory that was not Time Barred

Appellant's challenge to the trial court's reasonableness determination focuses on the trial court's misapplication of two of the nine criteria: the merits of the releasing person's liability theory, and the merits of the released person's defense theory. These factors are particularly critical to a settlement reasonableness determination because, absent a

meritorious claim, there is no objective basis to find a significant settlement value.

To be clear, Appellant is not challenging the trial court's factual conclusions. Rather, Appellant's challenge is focused on the trial court's irreconcilable conclusion that the facts supported imposition of liability on a negligence theory.

In his complaint against the Morgans, Mr. Justus asserted that Mr. Morgan was "negligent" in operating and shooting his handgun, causing the automobile accident, failing to render aid, and wrongfully detaining Mr. Justus. His claim that Mr. Morgan negligently prevented Mr. Justus from rendering aid or assistance to Mr. Tobeck was dismissed on summary judgment prior to settlement. (CP 652-653). The only claims remaining to Mr. Justus at the time of settlement were his claims that Mr. Morgan had acted "negligently" and had wrongfully detained him. (CP 21-26).

The viability of the wrongful detention claim required that Mr. Justus establish both that a claim for unlawful detention presents a recognized cause of action in Washington, and that such claim was not time-barred. As discussed below, to the extent such a claim exists in Washington, it is an intentional tort subject to a two-year statute of limitations, not a negligence claim subject to a three year statute of

limitations. Because Mr. Justus did not file his lawsuit against the Morgans until over two years after his claim accrued, his claim was time barred.

Likewise, the facts presented to the trial court established that Mr. Morgan's conduct was in all respects intentional and deliberate, not negligent. Because Mr. Justus had no viable negligence cause of action against the Morgans at the time of settlement, the trial court clearly erred when it premised its determination that an \$818,900 settlement was reasonable on the conclusion that Mr. Justus's liability theory (i.e., negligence) was sound.

1. Washington does not Recognize the Tort of Unlawful Detention, but Such a Claim is Substantially Equivalent to the Recognized Torts of False Arrest or False Imprisonment.

Washington has never recognized a cause of action for the wrongful or unlawful detention of a person. In Washington, the phrase "wrongful detention" is used only in connection with the unlawful withholding of another's property and can give rise to a cause of action under the replevin statute. *See Hensrude v. Sloss*, 150 Wn. App. 853, 862-63, 209 P.3d 543 (2009).

This court may look to case law from other jurisdictions to discern the elements of a cause of action not yet adopted in Washington but

recognized elsewhere. *Grange Ins. Co. v. Roberts*, 179 Wn.App. 739, 762-766, 320 P.3d 77 (2013) (holding that, although Washington has not yet recognized a cause of action for tortious interference with expected inheritance, other jurisdictions recognizing this tort require an intentional act). Courts elsewhere have recognized that unlawful or wrongful detention, when applied to a person, refers to torts that are substantially equivalent, if not identical, to the torts of false arrest and/or imprisonment. *E.g., Cowdrey v. City of Eastborough*, 730 F.2d 1376, 1380 (10th Cir. 1984) (noting that “under Kansas law false arrest and wrongful detention are legally indistinguishable from false imprisonment”); *Cornish v. Papis*, 962 F.Supp. 1103, 1109 (C.D. Ill. 1997) (in order to state a cause of action for a wrongful detention or false imprisonment, a plaintiff must prove the same essential elements necessary to maintain a claim of wrongful arrest); *Singleton v. Townsend*, 339 So 2d 543, 544 (La. App. 1976) (an action in tort characterized as “wrongful detention” sought damages for fear of life, embarrassment, humiliation, and false imprisonment, resulting from a high-speed automobile chase, shooting, and subsequent arrest for theft). *See generally*, 22 Am.Jur. Proof of Facts 2nd 445, §1 “Aggravated Wrongful Detention—Malice Sufficient to Support Award of Punitive Damages” (stating that “wrongful detention” is a term of art intended to include primarily the tort of false imprisonment and, secondarily, the tort

of false arrest, to the extent that the latter interrelates with the former to constitute the total wrong complained of; stated otherwise, the gist of false imprisonment and false arrest is a wrongful or unlawful detention).

Thus, a civil claim for wrongful or unlawful detention of a person is the legal equivalent to the Washington tort of false imprisonment. And although no Washington case has addressed false imprisonment at gunpoint or other similar fact pattern, courts elsewhere have done so. *See Brabham v. State*, 240 Ga. App. 506, 524 S.E.2d 1, 2 (1999) (defendant guilty of false imprisonment during a robbery when he forced the victim at gunpoint to sit on the floor and remain there).

The gist of Mr. Justus's claim against the Morgans is consistent with the legal elements of a claim for false imprisonment or false arrest under Washington law. A party asserting false imprisonment must establish that his liberty of movement or freedom to remain in a place of lawful choice has been restrained by physical force or threat of force. *Moore v. Pay 'N Save Corp.*, 20 Wn. App. 482, 486, 581 P.2d 159 (1978); *Dang v. Ehredt*, 95 Wn. App. 670, 685-689, 977 P.2d 29 (1999). *See also, Turngren v. King County*, 104 Wn.2d 293, 303, 705 P.2d 258 (1985) ("The gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal liberty or the restraint of a person without legal authority.") A false arrest occurs when a person

with actual or pretended legal authority to make an arrest unlawfully restrains or imprisons another person. *Jacques v. Sharp*, 83 Wn. App. 532, 536, 922 P.2d 145 (1996). As the court in *Moore v. Pay 'N Save Corp.*, *supra*, elaborated:

A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

20 Wn. App. at 486 (citing W. Prosser, Law of Torts §11). Additionally, “if the words and conduct are such as to induce a reasonable apprehension of force and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty....” *Kilcup v. McManus*, 64 Wn.2d 771, 778, 394 P.2d 375 (1964).

The facts presented to the trial court satisfied the legal elements of a claim for false arrest or imprisonment. When Mr. Morgan restrained Mr. Justus at gunpoint, the threat of force impaired Mr. Justus’s liberty of movement. Mr. Justus’s claim of unlawful detention is the equivalent of a claim for false arrest or false imprisonment under Washington law, and the trial court erred when it declined to recognize this.

2. Mr. Justus had no Viable Claim of False Arrest or False Imprisonment Because These Claims were Time Barred.

Both false arrest and false imprisonment are intentional torts.

Wilson v. Walla Walla, 12 Wn. App. 152, 154, 528 P.2d 1006 (1974) (false arrest); *New York Underwriters v. Doty*, 58 Wn. App. 546, 549, 794 P.2d 521 (1990) (false imprisonment). *See generally, Vergeson v. Kitsap County*, 145 Wn.App. 526, 543-544, 186 P.3d 1140 (2008) (false arrest and false imprisonment are intentional torts, which are to be distinguished from negligence claims). Under RCW 4.16.100(1), a claim for false imprisonment is subject to a two-year statute of limitations. A claim for false arrest, because it is essentially the same as false imprisonment, is also subject to the two-year limitations period imposed by RCW 4.16.100(1), even though false arrest is not specifically listed in RCW 4.16.100(1). *Heckart v. Yakima*, 42 Wn. App. 38, 39, 708 P.2d 407 (1985) (“even though false arrest and false imprisonment have different elements, their gist is essentially the same, i.e., the unlawful violation of a person’s right of personal liberty”).

By concluding that Mr. Justus’s liability theory was “sound” and not barred by the statute of limitations, the trial court necessarily concluded that Mr. Justus’s liability theory sounded in negligence. Indeed, the trial court essentially conceded this, when it acknowledged that

intentional torts would be time barred, but negligence-based causes of action would not be. (CP 791-792) The trial court's conclusion that Mr. Justus had a meritorious negligence claim is also evident from the trial court's discussion of principles of comparative fault (CP 792), as fault is immaterial to an intentional tort claim. *Tegman v. Accident and Med. Investigations, Inc.*, 150 Wn.2d 102, 109-110, 75 P.3d 497 (2003).

By basing its reasonableness determination on the premise that Mr. Justus had a viable negligence claim, the trial court erroneously ignored the rule set forth in *Boyles v. Kennewick*, 62 Wn. App. 174, 813 P.2d 178 (1991). The *Boyles* court held that the applicable statute of limitation depends on the essential nature of the claim, and a party is not free to recharacterize a claim in order to obtain the benefit of a longer limitation period. The *Boyles* court reasoned:

Th[e] factual allegations determine the applicable statute of limitation. *See Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986), which held "[when] a given set of facts gives rise to a defamation cause of action, it cannot be recharacterized as a false light invasion of privacy cause of action for statute of limitations purposes." Similarly, in *Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943), it was held the limitation period applying to assault and battery cannot be avoided by disguising the real cause of action in a different form. *Heckart v. Yakima*, 42 Wn. App. 38, 708 P.2d 407, *review denied*, 105 Wn.2d 1003 (1985) held that although the elements of a false arrest claim are different than the elements of a false imprisonment claim, their gist is essentially the same; both are controlled by the 2-year statute of limitation for false imprisonment.

62 Wn.App. at 177. The Washington Supreme Court has likewise stated that, “[w]here a given set of facts gives rise” to a particular cause of action, “it cannot be recharacterized as a [different] cause of action for statute of limitations purposes.” *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986) (refusing to allow a plaintiff to recharacterize a defamation cause of action as a false light invasion of privacy cause of action in order to avoid statute of limitations).²

The trial court should have rejected Mr. Justus’s efforts to recharacterize his false imprisonment/false arrest claim as a negligence claim. By approving this sleight of hand, the trial court improperly

² *See also, Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) (“In drafting the second amended complaint, we note appellant endeavored to conceal the real cause of action and make it one for conspiracy. Appellant cannot evade the statute of limitations by disguising her real cause of action by the form of her complaint.”). Other courts have also so held under facts more closely akin to those at issue here. *E.g., Snow–Erlin v. United States*, 470 F.3d 804, 808–09 (9th Cir. 2006) (affirming the district court’s dismissal of plaintiff’s action, which alleged that her late husband was wrongly incarcerated due to “negligent miscalculation” of his release date, and holding that the plaintiff could not evade the Federal Tort Claims Act’s exclusion of false imprisonment claims “by suing for the damage of false imprisonment under the label of negligence”); *Cline v. City of Seattle*, 2007 WL 2671019, at *5 (W.D.Wash. Sept. 7, 2007) (holding that, “to the extent Plaintiff’s complaint can be construed as asserting state-law negligence claims, such claims would appear to be false arrest claims couched in negligence terms and would be subject to the two-year statute of limitations for a false arrest claim”); *Kinegak v. State of Alaska, Dep’t of Corrs.*, 129 P.3d 887, 888 (Alaska 2006) (holding that prisoner could not overcome state’s immunity from false imprisonment claim by pleading that state department of corrections had “negligently failed to correctly compute plaintiff’s release date”).

allowed Mr. Justus to avoid the statutory limitations bar and set up a meritorious liability claim to support a significant settlement value.

3. The Facts do not Support Imposition of Liability Based on a Negligence Theory.

In his complaint, Mr. Justus alleged that Mr. Morgan acted negligently in several respects. (CP 25) However, Washington courts have properly recognized that the inclusion of the term “negligence” in a complaint does not transform otherwise intentional torts into negligence claims. *E.g., St. Michelle v. Robinson*, 52 Wn. App. 309, 315-316, 759 P.2d 467, 471 (1988) (holding that a plaintiff had no claim for negligent infliction of emotional distress where the facts showed defendant’s actions were intentional). Likewise, allegations of negligence in connection with an act do not necessarily create a cause of action. *Id. at 316* (declining to recognize a specific cause of action for child abuse where existing tort law can redress the wrongs suffered by the victims). *See also, Fondren v. Klickitat County*, 79 Wn. App. 850, 853, 863, 905 P.2d 928 (1995) (declining to recognize a cause of action for “negligent murder investigation”); *Dever v. Fowler*, 63 Wn. App. 35, 38, 45, 816 P.2d 1237, 824 P.2d 1237 (1991) (declining to recognize a cause of action for “negligent investigation of arson and manslaughter”).

The facts before the trial court do not support the conclusion that Mr. Justus had a viable negligence claim against Mr. Morgan. Indeed, the trial court's discussion of the evidence makes this crystal clear. For example:

- The trial court found that Mr. Morgan was “angry and aggressive” when he confronted Mr. Justus (CP 787)
- The trial court found that, “Instead of then retreating back to the safety of his home, he [Mr. Morgan] started firing his weapon at the two young men [Mr. Justus and Mr. Tobeck].” (CP 787).
- The trial court found that “in callous disregard for the sanctity of human life, [Mr. Morgan] kept Mr. Justus on the ground at gunpoint and prevented Mr. Justus from attending Mr. Tobeck’s mortal wounds.” (CP 787).
- The trial court twice stated that Mr. Morgan’s conduct on June 9, 2010 was “outrageous.” (CP 788, 792)
- The trial court stated that the facts were “inflammatory.” (CP 788)
- The trial court found that “Morgan’s conduct was that of the aggressor, vitiating any possibility he can claim self-defense.” (CP 789)

In summary, the trial court's factual determinations support only one conclusion: that Mr. Morgan's liability was based on commission of one or more intentional torts. Anomalously, however, the court's decision that the settlement had a reasonable settlement value of \$818,900 was based on the court's determination that Mr. Justus had a meritorious negligence claim against Mr. Morgan. In effect, the trial court's recharacterization of Mr. Morgan's deliberate and intentional conduct as negligent was an artifice designed to support the trial court's determination that a substantial damages settlement was reasonable.

Negligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention. *Rodriguez v. City of Moses Lake*, 158 Wn.App. 724, 243 P.3d 552 (2010); *Adkisson v. City of Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461 (1953). *See also, Liebhart v. Calahan*, 72 Wn.2d 620, 434 P.2d 605 (1967) (wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative). Accordingly, Washington courts recognize a clear distinction between conduct based on negligence, and conduct based on intent. For example, in *Tegman v. Accident and Med. Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003), the Supreme Court held that damages resulting from negligence must be segregated from those resulting from intentional acts. Accordingly, negligent

defendants are jointly and severally liable only for the damages resulting from their negligence, but not jointly and severally liable for damages caused by intentional acts of others.

No evidence was submitted to the trial court supporting the conclusion that Mr. Morgan's conduct was neglectful or inadvertent. To the contrary, the evidence was undisputed that every action taken by Mr. Morgan on the night of June 9, 2010 was deliberate and intentional. The trial court abused its discretion when it ignored Washington law and the evidence before it to conclude that Mr. Justus's claim had a substantial settlement value based on a factually and legally unsupported negligence theory.

D. The Trial Court Erred in Determining that State Farm Denied Indemnity Coverage

In its ruling on the reasonableness determination, the trial court concluded there was no fraud, collusion or bad faith because State Farm denied indemnity coverage to the Morgans, thus leaving them to "sift for themselves through the perilous sands of personal liability." (CP 794) This conclusion by the trial court is not only factually unsupported, it is dead wrong.

State Farm never denied indemnity coverage -- it defended the Morgans under reservation and filed a declaratory judgment action

requesting that a court declare its coverage obligations. (CP 156-166, 244-254, 626, 638) This is exactly what the Washington Supreme Court has instructed insurers to do when they are unsure of their coverage obligations. *Truck Ins. Exch. v. VanPort Homes*, 147 Wn.2d 751, 58 P.3d 276 (2002) (if there is any question whether the insurer must defend, it should defend under reservation and file a declaratory judgment action). No evidence that State Farm ever denied indemnity was submitted to the trial court. The trial court erred to the extent its reasonableness order was premised on this unsupported factual conclusion.

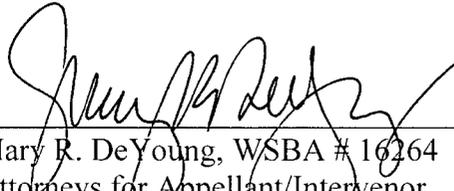
V. CONCLUSION

The trial court's determination that Mr. Justus's settlement with the Morgans had a reasonable settlement value of \$818,900 rests on a clearly erroneous legal premise and requires reversal. The evidence before the trial court established that only deliberate, intentional conduct by Mr. Morgan was at issue. "Negligent unlawful detention" is not a recognized theory of recovery in this state in any event, and no facts presented supported the conclusion that negligence principles supported imposition of liability. Mr. Morgan's conduct was clearly deliberate and intentional, not inadvertent or neglectful. Any liability premised on intentional conduct was time barred. This Court should reverse and remand for reconsideration of the reasonableness determination in light of the clear

absence of factual or legal support for Mr. Justus's legal liability theory against the Morgans.

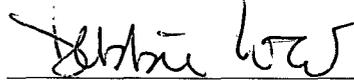
DATED this 29th day of June, 2015.

SOHA & LANG, P.S.

By: 
Mary R. DeYoung, WSBA # 16264
Attorneys for Appellant/Intervenor
State Farm Fire and Casualty
Company

Executed on this 29th day of June, 2015, at Seattle, Washington.

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



Debbie Low Secretary to
Mary R. DeYoung