

FILED

JUL 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

305449

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

MANUEL HIDALGO f/k/a MANUEL HIDALGO RODRIGUEZ,

Appellant,

v.

JEFFREY BARKER, individually, BARKER AND HOWARD, PS,
INC., a Washington Corporation, and EDWARD STEVENSEN,

Respondents.

BRIEF OF APPELLANT HIDALGO

Chelan County Superior Court No. 03-2-01055-8

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Attorneys for Appellant

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I. INTRODUCTION

This case arises out of plaintiff Manuel Hidalgo's wrongful conviction as part of the notorious Wenatchee sex ring. He sued his lawyer, Ed Stevensen, the law firm, and lawyer Jeff Barker, for legal malpractice.

Stevensen was insured through Intervenor Westport Insurance's policy obtained by the law firm. The policy limits decreased with defense costs. Westport hired a single lawyer to defend all three defendants, Joel Wright at Lee Smart. Other plaintiffs also sued the firm. Hidalgo made several decreasing offers to settle. Westport failed to settle the case. After the defense costs decimated the policy limits, Stevensen's lawyer withdrew, leaving Stevensen without a defense and without funds to prepare a defense.

Given Westport provided a defense with a conflict of interest, failed to settle and other potential bad faith, Stevensen negotiated a direct settlement with Hidalgo. In exchange for a covenant not to execute against him, Stevensen assigned his rights to his insurance bad faith claims to Hidalgo. The parties agreed on a settlement amount of \$3.8 million; the agreement was contingent on the court finding the settlement reasonable.

Hidalgo petitioned the court for a finding of reasonableness and stipulated to Westport's intervention in the case. Westport opposed the reasonableness finding, arguing that Hidalgo could not prevail on his legal malpractice claim. It presented no evidence to rebut Hidalgo's substantial damages. At the hearing, Judge Sperline admitted he had little experience in complex civil litigation. He orally ruled that the settlement was not reasonable and said Hidalgo had only a 10-20% chance at success in the legal malpractice action, but the reasons he gave were confusing and not well explained. Judge Sperline arrived at \$688,875 as the reasonable amount by using the mid-point of what he considered the range of Stevensen's risk.

Judge Sperline directed Westport to provide an order. After arguing over the form of the order and whether findings should be included, it unfortunately fell off the radar of both parties and no order was provided.

Because the settlement amount had not been approved, the settlement was voided by its terms, and the parties were left back in their original positions facing trial. The parties negotiated a new – and final – settlement agreement with different structural terms and for a lesser amount, \$2.9 million. Hidalgo petitioned the court and

provided substantial expert testimony about the reasonableness of the settlement, his significant chances at success in the legal malpractice action, and his likely substantial damages.

Westport moved to strike the petition on the grounds it was a belated motion for reconsideration and that the court's earlier oral ruling was binding on the new settlement. The trial court granted that motion and denied plaintiff's petition. Judge Sperline refused to conduct a reasonableness hearing as to the revised settlement and ruled Hidalgo was bound by his earlier oral finding that \$688,875 was the reasonable amount of the settlement between the parties.

After the hearing the trial court finally entered a written order denying the petition for reasonableness of the first settlement, ruling \$688,875 was the appropriate amount. The court ignored Hidalgo's request that it make findings.

Plaintiff Hidalgo now appeals and respectfully requests that this Court reverse Judge Sperline's order granting Westport's motion to strike and denying the reasonableness petition, set aside the judgment, and order that the revised settlement be considered on its merits in a reasonableness hearing. RCW 4.22.060, which governs reasonableness hearings, uses mandatory language and gives trial judges no discretion as to whether to conduct a

reasonableness hearing. In addition, the trial court's oral ruling was not binding on the court or the parties because it was not a final, written order.

Finally, because Hidalgo asks that this case be remanded for a reasonableness hearing, this Court should also hold it was an abuse of discretion to not include findings articulating the specific *Glover/Chaussee* factors and explain why and how those factors played into the court's decision. In addition, Judge Sperline also abused his discretion when he arbitrarily picked the mid-point of the liability risk and range of recovery he found reasonable. He gave no good reason for it and by doing so he arbitrarily cut off the top half of the risk that Stevensen faced and that the judge already deemed reasonable.

II. ASSIGNMENT OF ERROR

1. The Superior Court erred in granting Intervenor Westport's Motion to Strike Plaintiff's Petition for Finding New Settlement Reasonable. CP 6132.
2. The Superior Court erred when it denied Plaintiff's Petition for Finding New Settlement Reasonable and refused to conduct a reasonableness hearing on the second settlement. CP 6132, 6140, 6144.

3. The Superior Court abused its discretion when it denied Plaintiff's Petition for Finding [First] Settlement Reasonable and entered judgment for \$688,875 (plus statutory attorney fees, costs and interest). CP 5925-6023, 6024-26.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Whether Judge Sperline erred in refusing to conduct a reasonableness hearing on the second settlement of \$2.9 million pursuant to RCW 4.22.060? (Assignment of Error No. 1)

2. Whether Judge Sperline was bound by his earlier oral ruling that the reasonable value of the first settlement was \$688,875? (Assignment of Error No. 1)

3. Whether Judge Sperline abused his discretion when he chose \$688,875, the mean of the settlement range without explaining his decision how and why the specific *Glover/Chaussee* factors apply to the settlement on the record or in a written order? (Assignment of Error No. 1 and 2)

IV. STATEMENT OF THE CASE

A. Overview of the Wenatchee Sex Ring Cases

The Wenatchee sex ring investigations go back to February 1992, when D.E., one of the Everett sisters, made her first accusations of molestation against Abel Lopez. See CP 641-661.

D.E. was developmentally disabled and functioned at the level of a six and a half year old. CP 686. After undergoing numerous interviews, investigation, and therapy over a period of several months, she never mentioned any other instances of sexual abuse. CP 5117-24, 758-65, 794-812.

Following allegations of physical abuse by her father, D.E. was put into foster care and in March 1994 moved in with Detective Robert Perez, an officer of the Wenatchee Police Department. CP 919.

Detective Perez – using improper and coercive questioning – then began eliciting from D.E. new allegations of ritualistic sexual abuse against her parents, Harold and Idella Everett, CP 845-51, and many others, including her church pastor, a CPS social worker, family friends, parents of her friends, and her half-sister. CP 918-34, 936-56, 962-84. Detective Perez led the investigations for the Wenatchee Police Department, despite his obvious conflict of interest as the foster father of the accuser.

It was not until April 1995 that Manuel Hidalgo was first accused of sexual abuse by D.E.'s sister, M.E. CP 1868-72. M.E. was then moved into Detective Perez's home with D.E.

All told, 32 people were charged with the sexual abuse of D.E. and M.E. in Chelan County between January 1994 and September 1995. CP 670. Other charges were filed in Douglas County, as well. CP 671.

Beginning in early 1995, there were numerous newspaper stories reporting on the doubts about the state's investigations into the sexual abuse claims, including questions about Detective Perez's coercive questioning. CP 1023-84. Many privately-retained defense attorneys began investigating Detective Perez's and CPS's improper and coercive questioning techniques. CP 4755. A meeting was organized in June or July 1995 for all defense counsel of all the Wenatchee sex ring defendants to share information and experts about the state's improper tactics. CP 5341-43. Fourteen defense attorneys attended, including Jeff Barker, Stevensen's boss. CP 5342. Many defense attorneys who utilized the information about the state's coercive interview tactics were able to win acquittals for their clients, such as Honnah Sims, who was acquitted in July, 1995. See CP 5343. The attorneys at Howard and Barker did not utilize this information, and all defendants connected to them were convicted. CP 5605.

A big break for those convicted came in June, 2006, when M.E. ran away from Detective Perez's home. CP 713. She went to her grandparents' home where she told them she had lied about the sexual abuse. *Id.* Her recantation was videotaped by a television reporter. CP 712. Once back in custody of the state, however, M.E. reverted back to the old accusations, repudiating the recantation.

Based on M.E.'s recanting of her testimony and the growing body of evidence of coercive state tactics, several defendants filed for post-conviction relief, including the Everetts and Hidalgo. This Court referred the Everett personal restraint petitions (PRP's) to Judge Wallis Friel for a reference hearing in at the end of 1998. CP 669.

Judge Friel conducted a seven-day hearing and concluded that M.E.'s recantation of the sexual abuse allegations was believable,, while her repudiation was not, and the state used improper interview techniques when interviewing the Everett girls. CP 668, 670. In 1998, this Court granted the Everetts' PRP's. *In re PRP of Everett*, 92 Wn. App. 1027, 1998 WL 614703. The results of the Everett reference hearing were later used by other defendants to win their freedom.

By the end, this Court noted, “all charges and convictions involving those persons accused in what became known as the ‘Wenatchee sex ring’ were resolved in a manner favorable to the charged individuals.” *Roberson v. Perez*, 123 Wn. App. 320, 326, 96 P.3d 420 (2004).

B. Criminal Case Procedural History

1. Hidalgo is tried and convicted in August 1995

Hidalgo was charged with the rape and molestation of M.E. in April, 1995. CP 1875-77. On July 31, 1995 – the day before trial was to begin – the state added rape and molestation charges of D.E. CP 1951-54. On August 3, 1995, Hidalgo was convicted of molesting D.E. CP 2585. The jury deadlocked in the remaining charges of rape of D.E. and rape and molestation of M.E. *Id.* The Court of Appeals upheld his conviction on direct appeal. *State v. Rodriguez*, 86 Wn. App. 1011, 1997 WL 1110380.

2. Hidalgo receives post-conviction relief

Following M.E.’s recantation and the successful Everett reference hearing, Hidalgo filed a PRP based on newly discovered evidence and ineffective assistance of counsel. CP 3176-3233. On December 22, 1998, this Court ordered a reference hearing to determine whether the State improperly influenced the testimony of

the Everett sisters, and if so, whether the evidence was newly discovered. CP 3234-37; 4910. Judge Friel – the same judge who conducted the Everett reference hearing – conducted Hidalgo’s reference hearing. He was not tasked with making any findings about ineffective assistance of counsel. CP 4918.

Judge Friel found that the state improperly influenced the testimony of M.E. and D.E. at Hidalgo’s trial and that a substantial portion of the evidence offered in Hidalgo’s PRP was newly discovered. CP 4912.

Testimony of Richard Everett

Richard Everett, brother of M.E. and D.E., testified at the Everett reference hearing that no abuse ever took place and that he specifically told Detective Perez that. CP 81-82. Richard testified that Detective Perez was loud and demanding and argumentative in the interview with Richard. CP 681. Richard related that his sisters told them they were pressured into making the accusations. CP 4919. Stevensen never discovered what Richard would say prior to trial and therefore did not elicit any of this testimony at Hidalgo’s trial. *Id.* With respect to whether it was newly discovered, Judge Friel stated:

The evidence which Richard Everett had to offer was most certainly newly discovered. It became public at the Everett Reference hearing. Whether it could have been disclosed by due diligence prior to trial is difficult to determine on this record, particularly without the testimony of [Stevensen]. One must consider all of the circumstances, the setting in which this trial occurred, the obvious inexperience of counsel in serious felony cases, the unavailability of Richard Everett until the night before trial, and counsel's ignorance of methods used by Detective Perez and others to improperly influence the accusers and other witnesses. In view of these factors, it is fair to state that the evidence could not have been discovered before trial by the exercise of due diligence.

CP 4920-21 (emphasis added).

Expert Medical Testimony

Stevensen failed to investigate the state's medical evidence that the girls had been raped. In the later federal court civil case, Dr. Joyce Adams testified that the colposcopic slides the state claimed showed abuse actually showed no indication of trauma. CP 4922. Judge Friel found that not having

a qualified expert examine [the slides] likely fails to meet the standard of care required of defense attorneys. However, the defense attorney here must have felt he had no reason to doubt [the state's medical witness], since no one else involved had expressed doubts. His failure to seek a qualified expert under these circumstances did not necessarily amount to a lack of due diligence. If due diligence includes seeking a medical expert, then the argument of ineffective assistance of counsel must be considered.

CP 4922.

Improper and Coercive Interview Techniques

Given the overlapping issues, Judge Friel made numerous references to the Everett reference hearing at Hidalgo's hearing. At the earlier Everett reference hearing he noted, "[i]t has become obvious during this hearing that Detective Perez was able to get the women in the Everett family to say whatever he wanted them to say." CP 723. Judge Friel concluded that "[i]t will likely be found that the two daughters' allegations ... were obtained while using improper interrogation techniques." CP 724.

At Hidalgo's hearing, Judge Friel again found Detective Perez improperly influenced the testimony of D.E. and M.E. CP 4912. Judge Friel noted everyone's predisposition to believe the accusations made by the Everett sisters, and because of that, he stated that Stevensen did not demonstrate a lack of due diligence and that he expected the evidence of improper influence to be "extremely valuable to the defense at a retrial." CP 4923.

This Court granted Hidalgo's PRP in December, 1999. *In re the PRP of Rodriguez*,¹ 98 Wn. App. 1025, 1999 WL 1314781.

¹ Manuel Hidalgo used to be known as Manuel Hidalgo Rodriguez, hence why some of the older cases refer to him as Rodriguez.

C. Procedural History of This Case

1. Hidalgo sued Stevensen for legal malpractice. After initially providing him lawyers, Westport withdrew its defense when legal fees exhausted the insurance limits

In September 2003, Hidalgo sued Jeff Barker, Barker & Howard and Stevensen in Chelan County Superior Court for legal malpractice and negligence.² CP 3625-28. All of the Chelan County Superior Court judges recused themselves, so a visiting judge was appointed from Grant County, Judge Evan Sperline.

Stevensen was insured with Westport Insurance through his employment at Barker and Howard. CP 1784. The firm had aggregate liability limits of \$500,000 and the insurance policy was a “wasting” policy, meaning every time legal fees and costs were incurred, the limits were decreased. *Id.* Westport hired a single lawyer Joel Wright at Lee Smart to defend Barker, Howard and Barker, and Stevensen, despite the obvious conflicts of interest.

² Hidalgo originally sued defendants, Ed Stevensen, Jeff Barker, and Howard & Barker, for legal malpractice in the US District Court for the Eastern District of Washington federal court, along with defendants City of Wenatchee, Child Protective Services, Detective Robert Perez, other city officials and state officials for various alleged § 1983 and constitutional violations. CP 3267-90 The federal district court dismissed Stevensen, Barker, and Howard & Barker, declining to exercise supplemental jurisdiction over Hidalgo’s state law legal malpractice and negligence claims. CP 3590-99.

Both Joel Wright and Westport treated Stevensen like a less important client and subordinated his interests to those of Barker and the firm. CP 4693. Hidalgo made several decreasing offers to settle, the last of which was \$75,000. CP 591, 4694. Though the remaining insurance money was less than that, Stevensen instructed Westport to try to get the case settled for whatever insurance money was left. CP 4694. He was prepared to offer some of his own money if a reasonable amount could get the case settled. *Id.* Stevensen never heard back from Westport and the case never settled. *Id.*

After exhausting the limits of the insurance policy in defending all those defendants, Joel Wright withdrew in May 2005 before any trial. CP 13-15, 16-18. Stevensen was left without lawyers and without funds to sustain his defense.

2. With no lawyer, Stevensen made a last ditch effort to get Hidalgo's case dismissed, which failed. He then settled separately with Hidalgo.

Following Westport's withdrawal of its defense, Stevensen proceeded pro se. CP 4693. He did not hire an expert to support his defense that he did not breach the standard of care. *See id.* He made no ER 904 submissions and did not name any expert witnesses. *Id.*

Instead, Stevensen rested his entire defense on legal grounds. *Id.* He filed summary judgment motion arguing that (1) the statute of limitations had expired before Hidalgo had filed suit, (2) Hidalgo should be collaterally estopped from recovering on his negligent infliction of emotional distress claim, and (3) the Consumer Protection Act (CPA) claims should be dismissed because Stevensen had no entrepreneurial or business role in Barker & Howard. CP 21-37, 370-76, 517-21. The trial court denied the motion with respect to the statute of limitations and granted it as to the negligent infliction of emotional distress and CPA claims. CP 509-14, 539-42.

Since Westport did not settle his case and given his poor chances at trial against a better financed and better prepared opponent, Stevensen agreed to settle with Hidalgo for an agreed amount of \$3.8 million. CP 4403-06. As part of the agreement, he assigned his rights to a bad faith suit against his insurer, Westport, to Hidalgo, and Hidalgo agreed to give him a covenant not to sue. CP 4403-04. The settlement was contingent on it being approved as reasonable; otherwise it was void. CP 4403.

3. Hidalgo provided significant evidence of his likely success against Stevensen

In support of its Petition for Finding Settlement Reasonable, plaintiff offered significant evidence of Hidalgo's chances of success on the legal malpractice claim and his significant damages.

Hidalgo's legal malpractice case was primarily based on:

Stevensen's failure to investigate and challenge the state's medical evidence.

Plaintiff's medical expert, Dr. Joyce Adams, a board certified pediatrician, found that the medical evidence did not show abuse. CP 4957-61.

Professor John Strait, an expert on ethics and attorney conduct, found that failing to call a medical expert fell below the standard of care. CP 5236.

Stevensen's failure to recognize, investigate and challenge the state's improper and coercive interview techniques.

Plaintiff's expert psychologist, Phillip Esplin, found that the child interview tactics used by Detective Perez and others, including CPS employees, were so coercive and abusive that Perez and his supervisors should have known the interviews would produce false information. CP 4980-5001.

Professor Strait found that failing to call an expert on the effects of the state's improper and coercive interview techniques also fell below the standard of care. CP 5236.

The information about the state's improper and coercive interview techniques was widely known

Attorney Robert Van Siclen testified via declaration that he began investigating the state's improperly influence almost immediately after being retained by another defendant Honnah Sims. CP 4755. He testified about a meeting that was called for all defense counsel of the Wenatchee sex ring defendants, where they shared information about experts and the improper influence asserted by Detective Perez and others. CP 4755-56. Van Siclen used this information to successfully win an acquittal for Ms. Sims in July 1995. CP 4755.

Numerous newspapers articles were also submitted from as early as Feb. 1995, detailing the growing concerns about the investigations and the propriety of the tactics used by the state. CP 1023-84; 4756.

Other breaches of the standard of care

Professor Strait also found that Barker & Howard's flat fee contract with Chelan County provided the firm an economic self-

interest disincentive to perform competent legal work. CP 5227. Every dollar spent on the defense was a dollar out of the firm's pocket. *Id.*

4. Judge Sperline orally ruled that the conditional \$3.8 million agreed judgment was not reasonable

Plaintiff filed a Petition for Finding Settlement Reasonable. CP 555-589. Westport was advised of the settlement and given notice of the upcoming reasonableness hearing. CP 1195. Plaintiff stipulated to Westport's intervention and Westport was allowed to intervene to protect its interests. CP 1523. Westport was allowed additional discovery. CP 1523-24; 1741.

In support of its Petition, Hidalgo argued he had a strong case of legal malpractice and that his damages, after spending five years in prison, were significant. CP 5460-5512.

In opposing the reasonableness of the settlement, Westport argued that Stevensen had properly defended Hidalgo. CP 1788-98. It argued for the first time that Hidalgo should be collaterally estopped from arguing that his representation fell below the standard of care prior to settlement. CP 1792-93. Westport also argued that Hidalgo's claim was time-barred, but for a different reason other than Stevensen did, CP 1800-04, and Stevensen had

immunity as a public defender, CP 1804-05. Those defenses had never been actually advanced for Stevensen prior to Westport's entry to defend itself.

A hearing was held on February 2, 2009. For the first time at the hearing, Judge Sperline noted his lack of experience with complex civil litigation. 2/2/09 RP 85-86. Judge Sperline found the \$3.8 million agreed judgment not reasonable, and instead said that \$688,875 was reasonable. *Id.* at 89-90.

Judge Sperline noted that his decision "came down to a heavy emphasis on the merits of Mr. Hidalgo's liability theory and the merits of the defense theory." *Id.* at 87. He continued:

That was not to the exclusion of the other factors. I did consider the interests of Westport. I did consider any evidence, such as it is, in the nature of fraud or collusion between Hidalgo and Stevensen which does not rise to a morally repugnant level of collusion but should be expressed in terms of agreement and, I think, joint venture at this point is a fair description of it. I considered the risks and expenses of continued litigation in this setting, including recoverability of any judgment. That would be one of the risks. And I considered, of course, Mr. Hidalgo's damages.

Id. Judge Sperline concluded he was more persuaded by the merits of Stevensen's defense. *Id.* at 88.

Judge Sperline referenced “the Green opinion from Division III” and added three things he felt were particularly significant in his assessment of Hidalgo’s liability chances:

Probably the most significant was the role played by newly discovered evidence as opposed to what reasonable diligence or due diligence on Mr. Stevensen’s part would have revealed in August of ’95. The second was the somewhat theoretical nature of the plaintiff’s theory applied only to Donna as opposed to as it would apply to Donna and Melinda, and the third that was particularly persuasive to me was the fact of at the of these proceedings, the Hidalgo criminal trial, Doris Green, Harold Everett and Idella Everett had all been convicted and sentenced for abuse of these children which would make the kind of enterprise the settling parties now urge should have been followed at the time of trial an extremely difficult proposition.

I say that, by the way, counsel, because in my experience when children make allegations of these kind, jurors look for some reason other than truth of the allegations as to why they would make such an allegation so they look carefully at, well, the parties were in a divorce setting. Mom was trying to get custody. Or they look at, well, somebody coached them into testifying this way or some other reason. All of that becomes extremely difficult to do when three people have recently been convicted of molestation.

Id. at 90-91. Judge Sperline did not give any explanation for why these things mattered to Hidalgo’s case against Stevensen, particularly given that plaintiff’s main theory and evidence presented, that if Stevensen had pursued the improper coercion theory against the state, it would have given the civil jury the

explanation Stevensen missed, that Judge Sperline said the criminal jury needed.

Judge Sperline then went on to say that if Hidalgo prevailed entirely on his theory, a reasonable range would be between \$2,007,500 and \$6,600,000, with the median being \$4,592,500. *Id.* at 89. He put Hidalgo's chances of succeeding on liability at between 10% and 20%. *Id.* at 89-90. He then used arithmetical medians to say a reasonable settlement range was \$459,250 and \$918,875. *Id.* at 90. Judge Sperline then picked the median of that range, which he calculated at \$688,875. *Id.* Judge Sperline never provided any clear or supportable explanation why he put Hidalgo's chances of success at 10-20% or why he believed selecting only the median of the reasonable settlement range was appropriate.

At the conclusion of the hearing, the trial court directed Westport's attorneys to provide the Court a written order. *Id.* at 94. There was some discussion back and forth between Westport's lawyers and Hidalgo's lawyers about the proper form of the order, with plaintiff's counsel urging the order include specific findings pursuant to *Green v. Wenatchee*, and Westport argued it was sufficient to include a transcript of the hearing. CP 5851, 5854, 5855, 5856, 5857, 5859, 5860, 5862, 5865.

5. A second settlement was reached; Judge Sperline refused to conduct a reasonableness hearing

In the weeks following the February 2009 hearing, neither Stevensen nor Hidalgo really knew how Judge Sperline decided what he did. But clearly Judge Sperline did not find the settlement reasonable so by its terms the original settlement was void. CP 4403-06. Ed Stevensen faced the same problems as before – a looming trial he would probably lose, in part because he could not afford to adequately defend, where any judgment would most likely be huge, and which he firmly believed would have been avoided if Westport had acted properly. He approached Hidalgo to make a new settlement that was final, perhaps a bit more to the judge's liking and which would be more fully supported including informative expert testimony. This ultimately seemed the most expeditious approach.

A revised and final agreement was signed on May 7, 2010., which contained some different terms. CP 5350-53 The agreed judgment amount was reduced to \$2.9 million. Instead of retaining some of his emotional damages, Stevensen assigned all his damages to Hidalgo (removing what Judge Sperline called the "joint venture," CP6015) and the settlement was final regardless of the

outcome of the next reasonableness hearing. CP 4403-06, 5347-48.

Hidalgo petitioned the trial court to find the revised, final settlement reasonable. CP 5291-5292; 5460-5512. Now realizing Judge Sperline's lack of experience, Hidalgo provided much broader and deeper educational materials including the declaration of David Mandt, a longtime insurance claims adjuster and executive at Safeco whose job it had been to evaluate risk, liability and damages, CP 5293-5336; the declaration of attorney Dennis Smith, a longtime insurance defense lawyer in Seattle and an expert in evaluating liability and damages risks in complex civil litigation, CP 5503-5512; the declaration of Lawrence Daly, a private investigator who was involved in the defense of other Wenatchee sex ring defendants and who investigated Detective Perez's improper handling of the two accusers before Hidalgo's trial, CP 5337-44; the supplemental declaration of Ed Stevensen, CP 5345-53; the declaration of Tyler Firkins, co-counsel for Hidalgo, CP 5513-5602; declaration of John A. Strait, professor at Seattle University Law School and an expert in lawyer conduct and ethics, CP 5603-12; declaration of George Ahrend, attorney in Grant County and an expert in public defender standards and ineffective assistance of

counsel, especially as it pertained to the system in Grant County, CP 5613-5726.

Westport moved to strike Plaintiff's Petition For Finding New Settlement Reasonable, arguing the actual final settlement could not be ruled on and the trial judge should not consider any new evidence. CP 5354-5363.

On October 18, 2011, the Court granted the motion to strike, CP 6132, ruling:

I think the difficulty for the parties, in presenting to a court, a series of proposed settlements, is that, because the settlement is new, there is no binding effect of the Court's previous determination, that some other settlement was unreasonable. But the parties are invariably bound by the Court's finding of what is a reasonable settlement amount.

And that hasn't changed. And, in the circumstances of this case, that doesn't change. For better or worse. Whether or not the Court, on a fresh look, would find a different amount to be reasonable, this Court found that the proposed settlement was unreasonable, and determined what amount of settlement would be reasonable.

Right or wrong, I think the parties are bound by that determination.

CP 6138-39 (emphasis added). He refused to conduct a reasonableness hearing as to the final settlement. CP 6144. The trial court did not explain how Stevensen and Hidalgo were bound.

The Court directed Westport to prepare two orders. CP 6140, 6143-44.

Plaintiff objected to Westport's proposed orders. CP 5888-90. In addition to disagreeing that the trial court's earlier oral ruling on reasonableness was correct and that the court was bound by that earlier decision, Hidalgo also objected that no written findings were to be entered about the February 2, 2009 rulings. *Id.* Hidalgo explained that the transcripts contained ambiguous statements that made it hard for them to know why the judge thought liability was so difficult and would make it hard for an appellate court to understand the reasoning for the court's order. CP 5889.

For example, the transcript was confusing because the trial court did not explain why it thought the *Green* appellate decision was important. Nor did he explain how newly discovered evidence had any bearing on his decision. Judge Sperline did not mention any specific evidence that he found could not have been discovered before by a diligent criminal defense lawyer. Nor did the court explain its sua sponte statement that the convictions of other defendants for child rape weakened the liability case against Stevensen or how the civil jury would know of the timing of other convictions. CP 5889-90.

Finally, Hidalgo also objected to the trial court's mathematical averaging approach of the range of liability success because the trial court was necessarily eliminating the upper range of reasonable risk Stevensen faced if he went to trial. CP 5890.

On December 14, 2011, the court heard oral argument on the proposed orders, as well as the amount of the judgment and whether it should include pre-judgment interest. 12/14/11 RP 2-7. Judge Sperline stated he would enter Westport's form of orders and did so on December 16, 2011. CP 5925-6023. The order stated that \$688,875 was the reasonable amount of the first settlement. CP 5926. The court included no findings, but incorporated the transcript from the February 2, 2009 hearing into its order. That order can be found in Appendix C.

On December 16th, Judge Sperline also entered the ordering granting Westport's motion to strike and denying plaintiff's petition to find the final settlement reasonable. CP 6131-6145. The court incorporated the transcript of his oral ruling into that order, too. That order can be found in Appendix A.

Finally, on December 23, 2011, Judge Sperline entered judgment for Hidalgo against Stevensen in the principal amount of

\$688,875, plus fees, costs and prejudgment interest. CP 6024-26.

That order can be found in Appendix B.

Hidalgo timely appealed. CP 6027-6145. Westport timely cross-appealed.

V. ARGUMENT

A. What Reasonableness Hearings Are

This case arises because plaintiff claims Westport would not provide Ed Stevensen a separate defense with lawyers without conflicts of interest with his employer, and would not reasonably attempt to settle the one claim against him. Where an insured believes its insurer has not acted in good faith, Washington law gives the policyholder-defendant the right to pursue a separate settlement directly with the plaintiff through use of an agreed consent judgment, assignment of its rights against the insurer in exchange for a covenant not to execute. *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). If, in a separate suit, the insurer is found in bad faith, the insurer is then liable for the amount of that settlement, if it was reasonable, regardless of whether it is above the limits of liability insurance. *Id.* The parties may choose to make such settlements contingent on a successful reasonableness hearing. If rejected as reasonable the parties may

voluntarily agree to the lower amount the judge designated, but the parties are not required to agree to that lower amount. See *Meadow Valley Owner's Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 822, 156 P.3d 240 (2007).

Washington does not blind itself to the fact that in negotiating the settlement, the defendant insured has none of the normal incentives to hold down the amount of the stipulated judgment. *Besel*, 146 Wn.2d at 737-38. Yet to force the insured to proceed through a litigated judgment imposes significant burdens that would otherwise not have occurred if not for the insurer's conduct. For example, the insured would lose time away from work and family, and face significant emotional harm from being forced through trial. In addition, the judgment could be larger than the settlement, with no guarantee a covenant not to execute would be extended by the claimant post-verdict. The state judiciary and taxpayers would also end up supporting unnecessary trials for claims that should have been settled.

To balance these competing interests, Washington provides a particularized inquiry to determine if the settlement was reasonable. To do that, the court follows RCW 4.22.060 and uses

the *Glover*³ factors. *Besel*, 146 Wn.2d at 738; *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 511-12, 803 P.2d 1339 (1991). The insurer is offered notice and the opportunity to directly intervene for the reasonableness hearing to show why it should be relieved from the stipulated judgment. See *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 263, 199 P.3d 376 (2008) (noting that an insurer will only be bound by the judgment in the later bad faith action when it has been given notice and the opportunity to intervene in the underlying action). The court uses the *Glover/Chaussee* factors to determine whether to enter the stipulated judgment. Those factors are: (1) the releasing party's damages; (2) the merits of the releasing party's liability theory; (3) the merits of the released party's defense theory; (4) the released party's relative fault; (5) the risks and expenses of continued litigation; (6) the released party's ability to pay; (7) any evidence of bad faith, collusion, or fraud; (8) the extent of the releasing party's investigation and preparation; and (9) the interests of the parties not being released. *Green v. City of Wenatchee*, 148 Wn.2d 351, 363-64, 199 P.3d 1029 (2009).

³ *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), overruled on other grounds by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

B. The Trial Court Erred In Refusing To Conduct A Reasonableness Hearing On The Revised Settlement

One of the greatest hallmarks of the American legal system is that while we have orderly rules for cases, a premium is placed on getting the merits right. See ER 102; CR 1; *State v. Evans*, 45 Wn. App. 611, 619, 726 P.2d 1009, 1013 (1986)) (“In the final analysis, the purpose of a trial is to search for the truth in order to achieve a just result”).

At some point, though, getting it right conflicts with another policy, the finality necessary for a society to function well. But we do not shift toward finality until after a verdict, a judgment or a final written order that disposes of all issues between all parties. See CR 54(b) (giving the judge the opportunity to revise a decision that is not final “at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties). Even written, signed and filed orders that do not dispose of all issues between all parties are not final – they are “subject to revision at any time” so the Court can get the matter right. *Id.*

When Stevensen/Hidalgo sought a hearing for the revised final settlement with fuller information, in light of the trial court’s admission it had little experience, instead of working to get the

merits right the trial judge refused a hearing and struck the new petition. The judge incorrectly opted to accord finality to his 2009 statements and then imbued them with preclusive affect. This was error. There was no final order from 2009 and there was no basis to preclude Stevensen/Hidalgo from a decision on the revised settlement on the merits.

1. Judge Sperline erred when he found his 2009 oral statements were final

As the Washington Supreme Court has repeatedly held, “a ruling is final only after it is signed by the trial judge in the journal entry or issued in formal court orders.” *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989).

A court’s oral opinion is not final:

Rather, the court’s oral opinion is ‘no more than a verbal expression of [its] informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.’

State v. Hescoek, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999) (alteration in original) (internal citations omitted) (emphasis added). Because Judge Sperline did not enter a final written order until long after the new petition to review the revised settlement, his informal oral opinion was not final. It was subject to revision or

abandonment at any time. No written order was presented at that time, and was not until late 2011, long after the materials were filed supporting the revised settlement. Neither a judge nor a party like Westport can pretend an order was prepared and signed when it never was.⁴

2. Judge Sperline erred when he found his 2009 oral ruling had preclusive effect on the revised settlement

Confusingly, Judge Sperline seemed to acknowledge that Stevensen/Hidalgo were not bound by the earlier determination that the first settlement was not reasonable if he considered the revised final settlement, but at the same time he stated he was bound by the amount he had earlier found to be reasonable and that couldn't be changed. CP 6138. Whatever his thinking really was, the ultimate conclusion was wrong; neither part of the oral decision was binding on anyone and certainly had no preclusive

⁴ In argument below, Westport attempted to blame plaintiff's counsel who suggested findings be made, for Westport's failure to ever present a written order. However, that argument misses the point because Judge Sperline asked Westport's counsel to provide him with a written order at the conclusion of the February 2nd hearing. 2/2/09 RP 94. After some back and forth discussion about the proper form of any order between plaintiff's counsel and Westport's counsel both sides got drawn into trials. Both sides can perhaps be blamed but it is clear that Westport was never going to agree to written findings (which is what plaintiff counsel wanted time to think suggest), and regardless, the burden was on Westport not the plaintiff to provide the court a written order.

effect regarding the revised final settlement.

To constitute collateral estoppel an earlier order must be final. *Pederson v. Potter*, 103 Wn. App. 62, 69, 11 P.3d 833 (2000); *City Of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn. App. 1, 24-25, 154 P.3d 936 (2007). Even written orders that do not consider the full range of an issue or consider all evidence are not final for purposes of collateral estoppel. *Green*, 148 Wn.2d at 363-64. Here, because there was no final order, there can be no collateral estoppel.

In addition, if Judge Sperline had considered all the record on the revised final settlement and found it reasonable, he would not have to make a determination about what a reasonable amount would be. Judge Sperline seemed to leave open the possibility that considering the fuller record on the revised settlement might well lead him to make a different decision. See CP 6138-39. By finding the revised settlement reasonable, he would have not needed to separately consider what was a reasonable amount, the part of the 2009 hearing he believed preclusively bound the Court and Stevensen/Hidalgo.

Finally, the 2009 oral ruling about the reasonableness of the first settlement should not have bound Hidalgo because he had no right to appeal that oral ruling. RAP 2.2(a) (emphasis added) allows appeals from (relevant to this case) final judgments or any "written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." Here, there was obviously no final judgment and no written decision (until after the revised final settlement was presented and after the trial court refused to consider it). Hidalgo had no appeal as of right from the oral ruling. It is not logical or just to bind a party to the results of an oral ruling when the party had no right to appellate review of that oral ruling.

3. The reasonableness statute – RCW 4.22.060 – requires the trial court to conduct a hearing

A hearing on the merits of that settlement was required under RCW 4.22.060 (emphasis added) which reads: "A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence." The use of "shall" is mandatory and the trial judge has no discretion to refuse to conduct a hearing. See *State ex rel. Nugent v. Lewis*, 93 Wn.2d 80, 82, 605 P2d 1265 (1980) (noting

that “[a]s a general rule, the use of the word ‘shall’ in a statute is imperative and operates to create a duty”).

The revised settlement was different from the first, failed settlement. The parties removed the item called a “joint venture” that may have troubled the trial judge,⁵ see CP 6122, so Stevensen no longer retained any part of his emotional distress damages. In the revised settlement the judgment amount was reduced. The revised settlement was also now a final settlement, regardless of the outcome of the reasonableness hearing.

In addition, since the trial judge had disclosed at the 2009 hearing he had little complex civil claim experience, Hidalgo supplied him several supporting declarations of expert testimony that provided substantial guidance about how settlement is actually determined in the insurance world and what a reasonable amount was under these circumstances. The materials explained why the risk of the damages award was higher than the judge had earlier thought, showed that liability in the civil case was actually quite strong, and why the settlement amount was reasonable.

⁵ Though without findings it was unclear whether Judge Sperline had reduced the reasonable settlement amount on that account or not.

Given the mandatory language in the statute governing reasonableness hearings and the new and better evidence submitted in support of the reasonableness of the revised settlement, the revised settlement should have been judged on its merits including the new information from which a trial judge could see that civil liability was in fact strong.

4. Judge Sperline erred when he required the new settlement and evidence in support of it to meet the CR 59 threshold

Westport attempted to get around the fact there never was a final written order on the first settlement by arguing that the requirements of CR 59 must be met. Because plaintiff's motion for reconsideration was not timely and failed to rise to the level of newly discovered evidence, Westport argued the petition should be denied and its motion to strike should be granted. Judge Sperline agreed that CR 59 applied and the plaintiffs did not meet the requirements that the new evidence could be considered newly discovered.

This argument missed the point that there was no written order for which reconsideration had to be requested. Further, the petition for the revised settlement was an entirely new matter – it

was for the revised and final settlement with more extensive evidence to support its reasonableness.

Even without a further settlement, the trial court should not have improperly imposed CR 59 requirements to bar the expert declarations and other new information. There was no written order, so the record remained open for supplementation to allow the judge to see better how to get the decision right. Thus, CR 59 did not even apply.

The trial judge erred in refusing to perform a second reasonableness hearing and this Court should remand for a reasonableness hearing concerning the final settlement using all evidence new or old.

C. Because Remand is Required, the Court Should Address Judge Sperline's Abuse of Discretion When He Failed to Make Written Findings About The *Glover/Chaussee* Factors to Explain His Ruling And Used A Rigid Mathematical Method to Determine A Reasonable Settlement

Because there was no hearing to determine the reasonableness of the revised final settlement and no consideration on the merits of the full materials, remand to Chelan County is the proper remedy. Moreover Westport is likely to argue that the 2011

written order for the 2009 hearing is somehow final, requiring the belated order be examined for that reason too.

That ruling was inadequate and further showed abuse of discretion. A trial court's reasonableness ruling is reviewed for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). A court abuses its discretion when its decision rests on untenable grounds or is manifestly unreasonable. *Green*, 148 Wn. App. at 368.

Trial courts are also required to explain their decisions in enough detail that a reviewing court can understand the basis of then decisions in order to determine whether the exercise of discretion was reasonable. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 136 (1997). In *Green v. City of Wenatchee* – another case involving Westport and its failure to settle legal malpractice claims arising out of a Wenatchee sex ring case – this Court remanded the written reasonableness ruling back to the trial court with explicit instructions to enter findings of the *Glover/Chaussee* facts:

We direct the trial court to enter findings of fact reflecting its consideration of each relevant *Chaussee* factor based upon the facts and law at the time of the settlement.

Green, 148 Wn.2d at 369.⁶

Judge Sperline – at Westport’s urging – refused to make explanatory written findings, simply incorporating the transcript of the oral argument into his order. But the transcript was seriously wanting; it was silent on matters that required explanation, including what he thought of Westport’s summary judgment type defenses, a key Glover factor, and several key statements were cryptic and ambiguous, and no mention was made of significant evidence about Hidalgo’s liability theories. Judge Sperline simply failed to explain why he thought plaintiff’s liability chances in the legal malpractice case were so low, given plaintiff’s theories, evidence and expert witnesses, and especially in light of the fact pro se defendant Stevensen did not have the excellent legal team to defend the civil trial that Westport marshaled to oppose reasonableness and had no experts. CP 4693.

Judge Sperline stated he did not agree with two new defenses for Stevensen that Westport raised, public defender

⁶ The *Green* reasonableness hearing opinion suggests that Hidalgo was part of Green’s settlement with Barker. That was mistaken. The lawyers for those other plaintiffs asked Hidalgo to be part of that settlement. They included his name on their agreements and asked him to sign. Hidalgo and his lawyers did not want to be part of that settlement, and he never signed any settlement. Since his name was on the documents however, the opinion picked up his name.

immunity and a new statute of limitations argument, but failed to say why. CP 6126-27. And he was silent about the third new defense – that plaintiff should be collaterally estopped from raising anything the reference hearing judge and the PRP court found was newly discovered. This silence is crucial, and leaves the parties to wonder how much, if any, that defense played a part in the judge’s decision. Did this new attack influence Judge Sperline’s eventual assessment of a number? His failure to articulate his findings as to the issue of collateral estoppel is especially important given the significant role “newly discovered evidence” played in his decision. CP 6125.

In addition, any consideration of that new collateral estoppel argument was wrong, since the settlement had to be judged at the time of the settlement, at which point neither Stevensen nor the Lee Smart lawyers had raised that argument. See CP 4720, 4771-4802. The complete omission from the trial court’s “findings” about the role of collateral estoppel, if any, is fatal.

When Judge Sperline gave the three stated reasons for his concerns that the chances of victory against Stevensen were low, CP 6125-26, he likewise did not explain what the concerns meant or how that detracted from the overall chances of a plaintiff verdict.

He did not explain what evidence he believed was “newly discovered evidence”, or how it couldn’t have been discovered. He seemed to think no one could have known about Detective Perez’ role. But that belief necessarily ignores the declaration of Robert Van Siclen, who stated evidence of Perez’ conduct was known to private defense lawyers. CP 4754-58. It also ignores the numerous newspapers articles at the time questioning the veracity of the investigations and the state’s improper influence. CP 1023-84.

Judge Sperline also made no mention of the key medical standards and medical experts that would have shown there was no medical evidence that anyone raped these girls. Did he forget it, not understand it or have some reason to diminish its importance? We do not know because there were no findings.

Nor did the trial judge explain his second reason – “the somewhat theoretical nature of the plaintiff’s theory applied only to Donna as opposed to as it would apply to Donna and Melinda.” CP 6018. This statement had no meaning to any of Hidalgo’s counsel or Stevensen. There was no explanation how whatever this was had a negative relationship to Hidalgo’s liability chances. What was theoretical about how to properly defend Donna’s allegations? Was he thinking that plaintiff would try to exclude reference to Melinda’s

allegations? Was he really referencing that every professional malpractice case must prove different conduct would have probably led to a different outcome? Is that what was theoretical? Or did he misapprehend plaintiffs' liability theories altogether? Without real findings no one can know.

The trial court gave little or no explanation about the third factor that significant influenced his opinion –that three people were convicted of child rape prior to Hidalgo. CP 6126. Again he does not explain how this had an important bearing to lower Hidalgo's chances against Stevensen. The trial judge did not explain how that information would ever get before a civil jury. Nor did he discuss how such admission would not open the door to greater power for Hidalgo because all the people mentioned by Judge Sperline had obtained relief post-conviction from the appellate courts. And unlike those defendants who had private defense counsel, all of the defendants who were connected to Barker and Howard were convicted. CP 5605.

Judge Sperline commented that juries need alternate explanations when children make these types of allegations. But that comment essentially ignores that the whole fabric of Hidalgo's legal malpractice claim was that the firm did not do its job and had

not provided the original jury with the things that would have won Hidalgo an acquittal, including an alternate explanation for the abuse allegations. Juries can't do the right thing when the lawyers don't give them the right evidence. The other convictions and relief would only reinforce the theme – the inadequate work the firm put in for any of them, including inexperienced attorneys with too little training, too little supervision, not enough investigators, etc.

Ed Stevensen should have shown how misleading and coercive interviews are against all standards because they lead to false allegations. He should have shown that Perez had violated these rules and not conducted fair interviews. Hidalgo's liability theory contained the very kind of alternative explanation that Judge Sperline says was important, and showed Stevensen never even considered it, even though questions were commonly being asked about the state's tactics in the newspapers and by other defense attorneys.

In short, Judge Sperline seems to have had no good reason to think liability was poor and he certainly never explained how his stated reasons in fact would have reduced Hidalgo's liability chances in light of Hidalgo's evidence.

Judge Sperline's discussion also ignored one key *Glover* factor, number (8): "the extent of the releasing party's investigation and preparation." At the time of settlement the parties' level of preparation were complete opposites. Hidalgo had experts⁷, had money to fund the case, and his lawyers were prepared and had submitted ER 904's for trial admissibility of documents see CP 383-92, 393-402. Conversely, Stevensen had no experts, lacked money to fund his defense, had submitted no ER 904's and further had to be his own lawyer. He was simply not going to put up a vigorous defense. The complete omission from the trial court's oral "findings" about this *Glover* factor alone would be fatal, where that factor had been shown to have played a significant role.

The parties' vastly different postures leading up to trial are crucial to assessing liability and defense chances, but was never mentioned. Was it overlooked despite an early general reference to all the factors? Was it thought not to mean much without explanation? Only findings could have told us, though it is doubtful any credible explanation can so minimize the stark reality Mr.

⁷ Legal malpractice cases usually expert testimony about the standard of care. But while it may be technically accurate that a defendant could win without putting on an expert of his own, the reality is that it would be unusual for a jury to find for the defendant when faced with a credible expert on one side claiming a breach and no expert cogently explaining the opposite.

Stevensen faced. Judge Sperline also ignored the importance of the admissions Ed Stevensen would have to make if the case had tried. Ed Stevensen is an honest man and admitted in his declaration under oath, the same thing he would have had to admit at trial under oath. See CP 4689-94, 5345-5353. Those admissions gave further significant strength to the Hidalgo's liability case. Judge Sperline ignored that if the case proceeded to trial those admissions would come in an adversarial setting in front of the jury.

Judge Sperline also abused his discretion when he arbitrarily used a rigid calculation for reasonable settlement: the median of his reasonable chances of prevailing times the median of his reasonable damage range. By his own determinations, higher amounts were in fact reasonable. His computational method just eliminated the upper half of the reasonable range. No case supports such rigid calculus and Judge Sperline offered no explanation for his choice; he just said it was "[t]he best I could do for purposes of this hearing." CP 6125.

It is true all tort claims involving general damages can only be assessed through a range. A reasonable range for settlement means if the negotiations require it, paying an amount in the higher range is still just as reasonable. A rigid calculus is not used. While

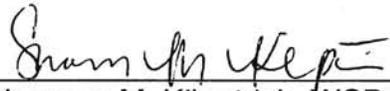
insurers often successful force settlements in the middle to lower half of the reasonable range, that is because most plaintiffs do not have the emotional stamina or financial ability to last to and through trial to obtain fair value. Here Hidalgo was armed with well-financed, motivated, and experienced contingent fee counsel. He had not succumbed and was poised to start the trial. Settlements just before trial generally land in the upper end of the reasonable range. The proper inquiry here was whether the settlement was “within the range of the evidence,” not whether a lower settlement might also have been within that range. *Martin v. Johnson*, 141 Wn. App. 611, 621, 170 P.3d 1198 (2007). Judge Sperline himself said the evidence supported a reasonable range up to \$6.6 million dollars. The industry does not just arbitrarily apply a risk percentage to that number in deciding whether to settle; but even if it did, the 20% that Judge Sperline found as reasonable would produce a \$1,320,000 settlement. Using an arbitrary formula that automatically rules out the upper half of the “range of the evidence” is an abuse of discretion.

VI. CONCLUSION

Plaintiff's respectfully request that this Court set aside Judge Sperline's three orders and judgment, remand for a reasonableness

hearing on the final settlement, and order the trial court to make specific findings as to each pertinent *Glover* factor, taking into account the posture of the parties before settlement and addressing plaintiff's evidence of negligence. If the final settlement is found not reasonable, the trial court should be directed to select the high end of the reasonable range, not the mid point, unless there is some compelling reason not to.

RESPECTFULLY SUBMITTED this 5th day of July, 2012.



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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing Brief of Appellant Hidalgo postage prepaid, via email and US Mail on July 5, 2012, to the following counsel of record at the following address:

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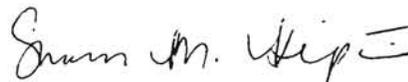
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DATED this 5th day of July, 2012, at Bellevue, Washington.



Richard B. Kilpatrick, WSBA #7058
Shannon M. Kilpatrick, WSBA #41495

INDEX TO APPENDICES

Case No. 305449

APPENDIX	DOCUMENT	CP
App. A	Order re: (1) Plaintiff's Petition for Finding New Settlement Reasonable and/or Motion for Reconsideration of Verbal Ruling, (2) Intervenor Westport's Motion to Strike Plaintiff's Petition for Finding New Settlement Reasonable and/or Motion for Reconsideration of Verbal Ruling, and (3) Plaintiff's Request for Recusal CP 6155-6169 dated 12/16/11	6131-6145
App. B	Judgment dated 12/23/11	6024-6026
App. C	Order Denying Plaintiff's Petition for Finding Settlement Reasonable dated 12/16/11	5925-6023

Appendix A

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Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

MANUEL HIDALGO f/k/a MANUEL
HIDALGO RODRIGUEZ

No. 03-2-01055-8

Plaintiff,

vs.

JEFFREY BARKER, individually, BARKER
AND HOWARD, PS, INC., a Washington
Corporation and EDWARD STEVENSEN,

Defendants.

**ORDER RE: (1) PLAINTIFF'S
PETITION FOR FINDING NEW
SETTLEMENT REASONABLE
AND/OR MOTION FOR
RECONSIDERATION OF VERBAL
RULING, (2) INTERVENOR
WESTPORT'S MOTION TO STRIKE
PLAINTIFF'S PETITION FOR
FINDING NEW SETTLEMENT
REASONABLE AND/OR MOTION
FOR RECONSIDERATION OF
VERBAL RULING, AND (3)
PLAINTIFF'S REQUEST FOR
RECUSAL**

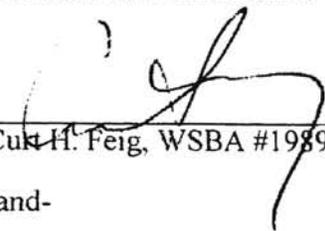
THIS MATTER having come on before the Court on (1) Plaintiff's Petition For Finding New Settlement Reasonable And/Or Motion For Reconsideration Of Verbal Ruling; (2) Intervenor Westport's Motion To Strike Plaintiff's Petition For Finding New Settlement Reasonable And/Or Motion For Reconsideration Of Verbal Ruling; and (3) Plaintiff's Request for Recusal. The Court having considered:

- 1. Plaintiff's Petition For Finding New Settlement Reasonable And/Or Motion For Reconsideration Of Verbal Ruling (dkt. 133) and supporting

ORIGINAL

1 **Presented by:**

2 NICOLL BLACK & FEIG PLLC

3
4 
5 _____
6 Curt H. Feig, WSBA #19890

7 -and-

8 WALKER WILCOX MATOUSEK LLP
9 Robert P. Conlon
10 Christopher A. Wadley
11 Attorneys for Westport Insurance Corporation
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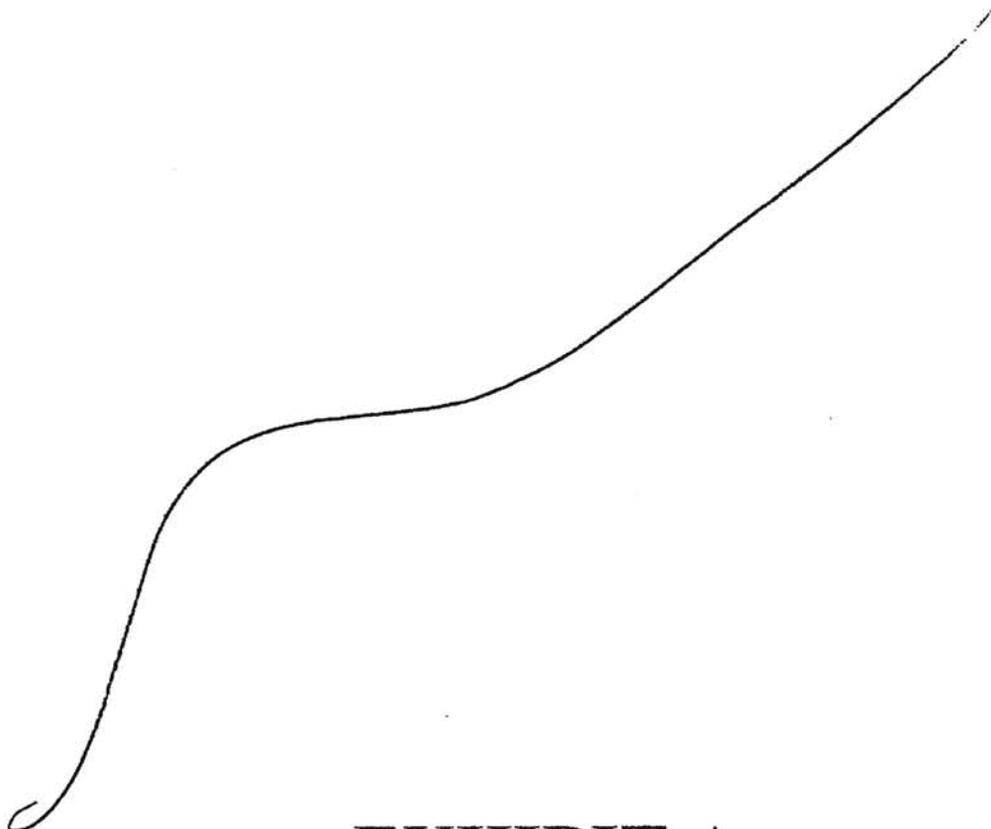
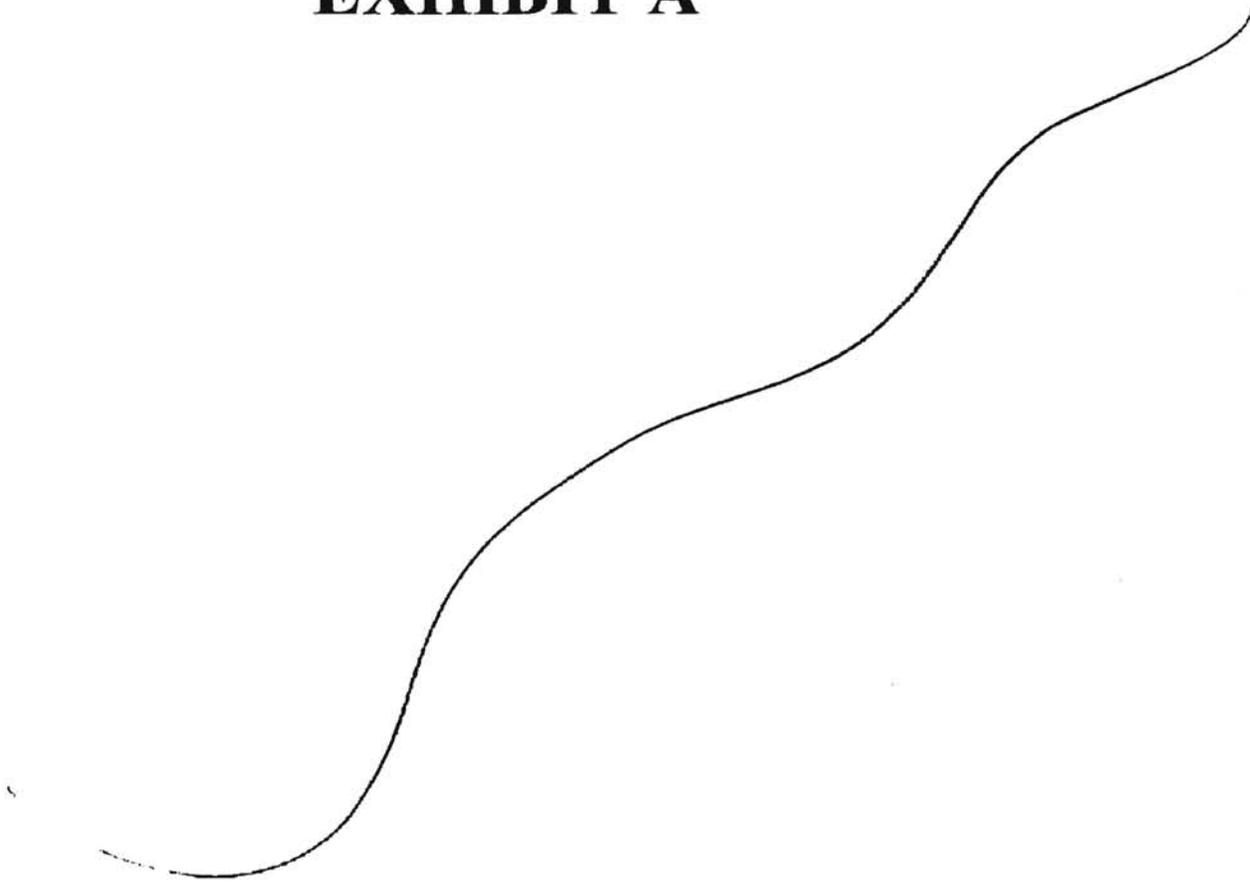


EXHIBIT A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR CHELAN COUNTY

MANUEL HIDALGO, f/k/a)	
MANUEL HIDALGO RODRIGUEZ,)	
)	
Plaintiff,)	
)	
vs.)	
)	
JEFFREY BARKER,)	Cause No. 03-2-01055-8
individually, BARKER AND)	
HOWARD, PS, INC., a)	
Washington Corporation, and)	
EDWARD STEVENSEN,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
COURT'S ORAL DECISION

BE IT REMEMBERED that the Verbatim Report of Proceedings was held in the above-entitled and numbered cause, telephonically, before the HONORABLE EVAN E. SPERLINE, Superior Court Judge, on October 18, 2011, at the Chelan County Regional Law & Justice Facility, 401 Washington Street, Wenatchee, Washington.

KAREN E. KOMOTO, CSR, OFFICIAL COURT REPORTER
P.O. Box 880, Wenatchee, WA 98807 (509) 667-6212

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A P P E A R A N C E S:

FOR THE PLAINTIFF: MR. TYLER FIRKINS (BY PHONE)
MR. RICHARD KILPATRICK (BY PHONE)
Attorneys at Law

FOR THE WESTPORT INS.: MR. CURT FEIG (BY PHONE)
MR. CHRISTOPHER WADLEY (BY PHONE)
Attorneys at Law

ALSO PRESENT: MR. EDWARD STEVENSON (BY PHONE)

REPORTED BY: KAREN E. KOMOTO, CSR
Official Court Reporter

KAREN E. KOMOTO, CSR, OFFICIAL COURT REPORTER
P.O. Box 880, Wenatchee, WA 98807 (509) 667-6212

1 settlements.

2 If we are, we are.

3 In other words, the Court's obligation is
4 statutory, and purely statutory. Otherwise, I'd have no
5 business expressing any conclusions, regarding the parties'
6 settlement or a reasonable amount of settlement, except for
7 that statutory obligation.

8 What -- where, however, the specter of repeated
9 settlement attempts, I think, breaks down, is because of the
10 statutory obligation for the Court to do -- to resolve one
11 issue; the reasonableness of the proposed settlement. And,
12 if it's found unreasonable, then, as a statutory obligation,
13 to do a second thing, which is, to decide whether -- what
14 amount would be a reasonable settlement.

15 I think the difficulty for the parties, in
16 presenting to a court, a series of proposed settlements, is
17 that, because the settlement is new, there is no binding
18 effect of the Court's previous determination, that some
19 other settlement was unreasonable. But the parties are
20 invariably bound by the Court's finding of what is a
21 reasonable settlement amount.

22 And that hasn't changed. And, in the
23 circumstances of this case, that doesn't change. For
24 better or worse. Whether or not the Court, on a fresh
25 look, would find a different amount to be reasonable, this

1 Court found that the proposed settlement was unreasonable,
2 and determined what amount of settlement would be
3 reasonable.

4 Right or wrong, I think the parties are bound by
5 that determination. Regardless of what gives rise to the
6 first question, in the form of a -- of a new or successive
7 settlement.

8 In the language that -- or in the framework of the
9 issues, as you've presented them to the Court, I do not find
10 that the Motion to Reconsider is untimely. Because both
11 parties acknowledge the potential for a motion for
12 reconsideration, long after ten days past the -- the oral
13 ruling. Or, at least, Westport was silent in the professed
14 intention of the plaintiff, to seek reconsideration.

15 However, I do agree, with Westport, that there are
16 no grounds justifying reconsideration, here, of the amount
17 that the Court found to be reasonable. The second part of
18 the formula.

19 And I say that because I have reviewed all of the
20 materials submitted, including, of course, the Declaration
21 of Mr. Mandt, Mr. Smith, Mr. Daly, Mr. Strait, and find that
22 all of that is beyond the pale of newly discovered evidence,
23 or argument that could not have been presented -- evidence
24 that could not have been presented to the Court at the time
25 of the reasonableness determination.

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1 So I don't find any ground on which to reconsider.
2 That -- that -- the Motion to Reconsider is really
3 addressed to the Court's -- not to the determination of
4 unreasonableness of the, now, foreclosed earlier
5 settlement -- but to the Court's determination of the amount
6 that would be a reasonable settlement. And I find no basis
7 upon which to reconsider that.

8 So the plaintiff's effort, here, must prevail, if
9 at all, only by virtue of the argument that the Court is
10 bound to consider each proposed settlement that comes before
11 it.

12 And the -- what concludes the matter, from my
13 perspective, is that, even were I to do so, I believe the
14 parties are bound by the Court's determination of the
15 amount of settlement that -- that is reasonable, in the
16 case.

17 So I think the -- the motion to strike or disallow
18 the petition, for a reasonableness determination, should be
19 granted. And I do grant that. And, with -- meaning no --
20 nothing pejorative, again, I request that Mr. Wadley
21 circulate an order to that effect.

22 I want to make one other quick statement, for the
23 record.

24 In reviewing the materials that you all submitted,
25 in regard to this round, I discovered that -- that I made a

1 mathematical error, during my oral ruling. And I don't
2 believe that it is of a magnitude which justifies any
3 further intervention by the Court, or any departure from the
4 Court's previous determination, as to what a reasonable
5 settlement would be.

6 The mistake that I made was, having determined a
7 low range of damages, at \$2,007,500, and an upper end of
8 \$6,600,000, I incorrectly calculated the midpoint between
9 those, for the purpose of analyzing it, from a midpoint.

10 In my oral ruling, I said the midpoint was
11 4,592,500. The midpoint between those two figures is
12 4,303,750.

13 The difference is that, I applied a liability -- a
14 probability factor of between 10 and 20 percent. I used
15 15 percent. And the number that was produced, 688,875, is
16 actually about \$43,000 high.

17 The correct figure, if the math were done
18 correctly, would have been 645,562 and 50 cents. That would
19 be the 15 percent, middle of the probability range, that the
20 Court used.

21 The figure that the Court erroneously settled on,
22 688,875, turns out to be exactly 16 percent, rather than
23 15 percent.

24 As I say, the magnitude being an error of just one
25 percent, strikes me as being unworthy of any further

1 intervention by the Court.

2 So, I will enter an order that finds the
3 \$3.8 million settlement unreasonable; that concludes, as is
4 statutorily required, that a reasonable settlement is
5 688,875.

6 And I will enter a separate order denying a
7 reasonableness hearing, in regard to the \$2.9 million
8 settlement, and denying reconsideration of the Court's
9 determination of what a reasonable settlement would be.

10 Have I left any questions, Mr. Wadley, in regard
11 to the orders to be circulated?

12 MR. WADLEY: No, you haven't. Thank you,
13 Your Honor.

14 THE COURT: Mr. Kilpatrick, any questions?

15 MR. KILPATRICK: No. Your order is clear,
16 Your Honor. I would make one point, though, so that the
17 record, on appeal, is clear.

18 The Court had expressed concerns about collusion,
19 which is one of the factors that goes into a court's
20 discretion, on what's a reasonable settlement. And,
21 clearly, that has been removed, and that has changed. And
22 there was no indication, by the Court's earlier verdict,
23 that that hadn't played a role in its decision.

24 So -- and I would suggest, further, that the --
25 that the interpretation of events, for a liability -- of --

1 of -- while the underlying facts may not have changed, the
2 interpretation of them, and the things that the Court was
3 relying on, in determining its own view of the extent of
4 liability, make a change.

5 I don't think any reconsideration was necessary,
6 at all, because I don't see how an oral ruling can be
7 binding in the State, that way, in the context we're in.

8 But -- and I'm not saying these things, to
9 reargue, at this point. I -- I -- the Court's made a
10 ruling, and it's clear. I just want the record to be clear
11 of those additional points, if they weren't well made in the
12 pleadings -- in the written pleadings.

13 THE COURT: Thank you, Counsel. The record
14 is clear. And, I think, with that, we can close this
15 hearing.

16 MR. FIRKINS: Your Honor, this is Tyler
17 Firkins. Just for clarification, because, as I was
18 listening to your oral ruling, just then, what you said, at
19 the end, in terms of drafting orders, might be an issue.
20 And, so, I address it now. Which is that -- are you
21 thinking that there should be two orders, or only one
22 order?

23 THE COURT: I'm thinking there ought to be
24 two orders, because we ought to formalize the Court's
25 December (sic) 2, 2009, ruling, in a written order. And,

1 then, an order relating to this petition.

2 MR. FIRKINS: Okay. And, in that regard, it
3 should also indicate that the Court is denying the
4 plaintiff's second settlement, as being unreasonable?

5 THE COURT: No. The Court is declining to
6 conduct a reasonableness set -- hearing, in regard to that
7 proposed settlement, or that settlement, because of the
8 preclusive effect of the Court's previous ruling, and there
9 being no grounds for reconsideration of that previous
10 ruling.

11 MR. FIRKINS: Thank you, Your Honor.

12 (End of excerpt.)

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1 REPORTER'S CERTIFICATE

2 STATE OF WASHINGTON)
3 County of Chelan) ss.

4 I, KAREN E. KOMOTO, a duly qualified certified
5 shorthand reporter and the official court reporter for
6 Chelan County Superior Court, hereby certify that I reported
7 the foregoing proceedings at the time and place first herein
8 mentioned, and that the foregoing transcript is a true and
9 accurate record of the proceedings had therein.

10 DATED this 24th day of October, 2011.

11
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14 KAREN E. KOMOTO, CSR
15 CSR # KOMOTKE402LZ
16 Official Court Reporter
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P.O. Box 880, Wenatchee, WA 98807 (509) 667-6212

Appendix B

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FILED
DEC 23 2011
Kim Morrison
Chelan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

MANUEL HIDALGO f/k/a MANUEL
HIDALGO RODRIGUEZ, individually,

Plaintiff,

vs.

JEFFREY BARKER, individually, BARKER
AND HOWARD, PS, INC., a Washington
Corporation, and EDWARD STEVENSEN,

Defendants.

No.: 03-2-01055-8

JUDGMENT

11-9 01597 1

Judgment Summary

A.	Judgment Creditor:	Manuel Hidalgo
B.	Judgment Debtor:	Edward Stevensen
C.	Principal Judgment Amount:	\$688,875
D.	Prejudgment interest to 12-23-1:	\$134,755.27
E.	Attorney Fees:	\$200
F.	Costs:	\$150

JUDGMENT
Page 1 of 3

Richard B. Kilpatrick, P.S.
1750 112th Ave. NE Suite D-155
Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9540
dick@triallawyersnw.com

- 1 G. Other Recovery Amount: \$0
- 2 H. The Judgment shall bear interest at 12% per annum, beginning the date the
3 Court signs this judgment.
- 4 I. Attorney fees, costs and other recovery amounts shall bear interest at 12% per
5 annum beginning the date the Court signs this judgment.
- 6 J. Attorneys for Judgment Creditor: Richard B. Kilpatrick, PS, and Tyler Firkins of
7 Van Siclén, Stocks & Firkins.
- 8 K. Attorney for Judgment Debtor: n/a
- 9

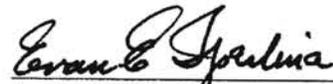
10 **Judgment**

11 Plaintiff Hidalgo and Defendant Stevensen agreed on an unconditional
12 settlement and executed the signed settlement agreement on May 7, 2010. The
13 written agreement provided that a judgment would be entered in whatever amount
14 the Court found reasonable. In 2008 and 2009, Intervener Westport Insurance
15 Company and Hidalgo had presented evidence to the Court about the
16 reasonableness of a conditional 2007 settlement between Hidalgo and defendant
17 Stevensen. This culminated in a hearing February 2, 2009. The Court found the 2007
18 settlement unreasonable and found that a reasonable settlement was \$688,875.

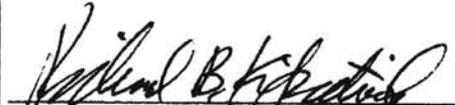
19 The Court has now entered a written order concerning the February 2, 2009,
20 hearing and entered a written order striking the attempt to have the Court consider
21 anew the reasonableness of a 2010 settlement because the Court's 2009 ruling was
22 binding on the parties from February 2009, forward. In conformity with this Court's

1 orders and the binding settlement agreement between Hidalgo and Stevensen, the
2 Court therefore enters judgment as follows: (1) for principal judgment of \$688,875;
3 (2) statutory attorney fee pursuant to RCW 4.84.080 of \$200.00; (3) taxable costs of
4 \$150 (filing fee and service of process); and (4) prejudgment interest under RCW
5 4.56.110(4) and the settlement agreement, from the date of the agreement to
6 December 23, 2011 of \$134,755.20 (or the correct amount should the judgment be
7 signed later). The per diem for each day the judgment is entered early or is entered
8 later is \$226.48.

9 SIGNED AND ENTERED this 23rd day of December, 2011.

10
11 
12 Judge Evan Sperline

13 **Presented by:**

14
15 
16 Richard B. Kilpatrick, WSBA #7058
17 Attorneys for Plaintiff

18 **Copy Received, Notice of Presentation Waived:**

19
20 
21 Curt H. Feig, WSBA #19890
22 Co-Counsel for Westport

Appendix C

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mm 99 **FILED**
DEC 16 2011
Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

MANUEL HIDALGO f/k/a MANUEL
HIDALGO RODRIGUEZ

No. 03-2-01055-8

Plaintiff,

**ORDER DENYING PLAINTIFF'S
PETITION FOR FINDING
SETTLEMENT REASONABLE**

vs.

JEFFREY BARKER, individually, BARKER
AND HOWARD, PS, INC., a Washington
Corporation and EDWARD STEVENSEN,

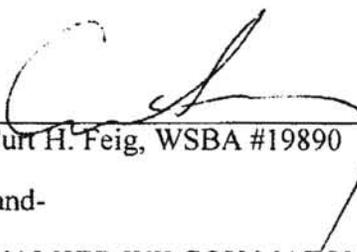
Defendants.

THIS MATTER having come on before the Court Plaintiff's Petition for Finding
Settlement Reasonable and the Court having considered:

1. Plaintiff's Petition (dkt. 57) and Declaration of Tyler K. Firkins (dkt. 58-60);
2. Westport's Response to Hidalgo's Petition for Finding Settlement Reasonable (dkt. 92) and Declaration of Christopher A. Wadley (dkt. 93-106);
3. Westport's Motion to Supplement Its Response to Hidalgo's Reasonableness Petition (dkt. 110) and Declaration of Curt H. Feig (dkt. 111);
4. Response to Westport's Motion for Supplemental Brief (dkt. 115) and

1 **Presented by:**

2 NICOLL BLACK & FEIG PLLC

3
4 
5 Curt H. Feig, WSBA #19890

6 -and-

7 WALKER WILCOX MATOUSEK LLP
8 Robert P. Conlon
9 Christopher A. Wadley
10 Attorneys for Westport Insurance Corporation

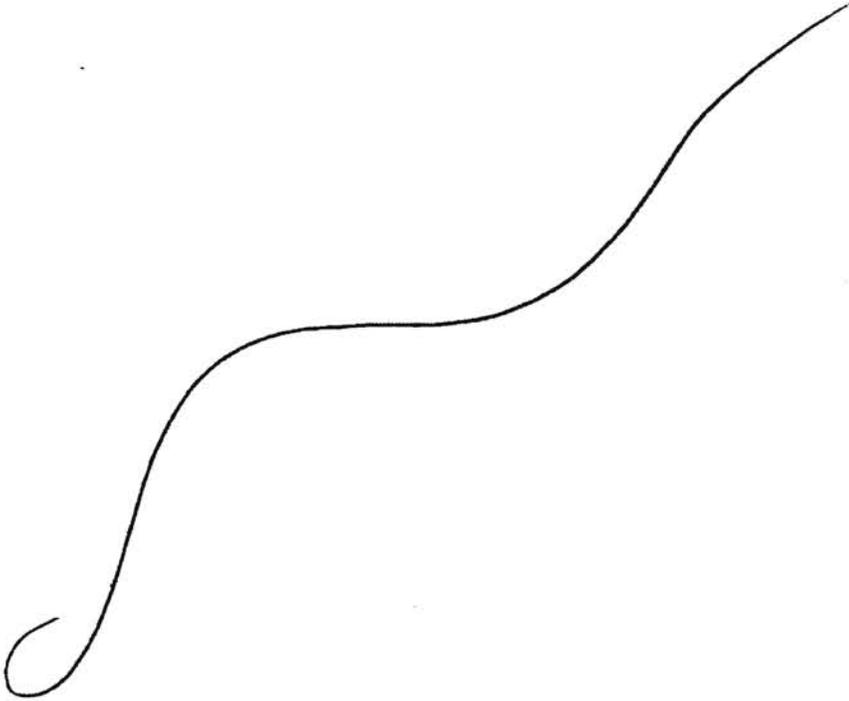
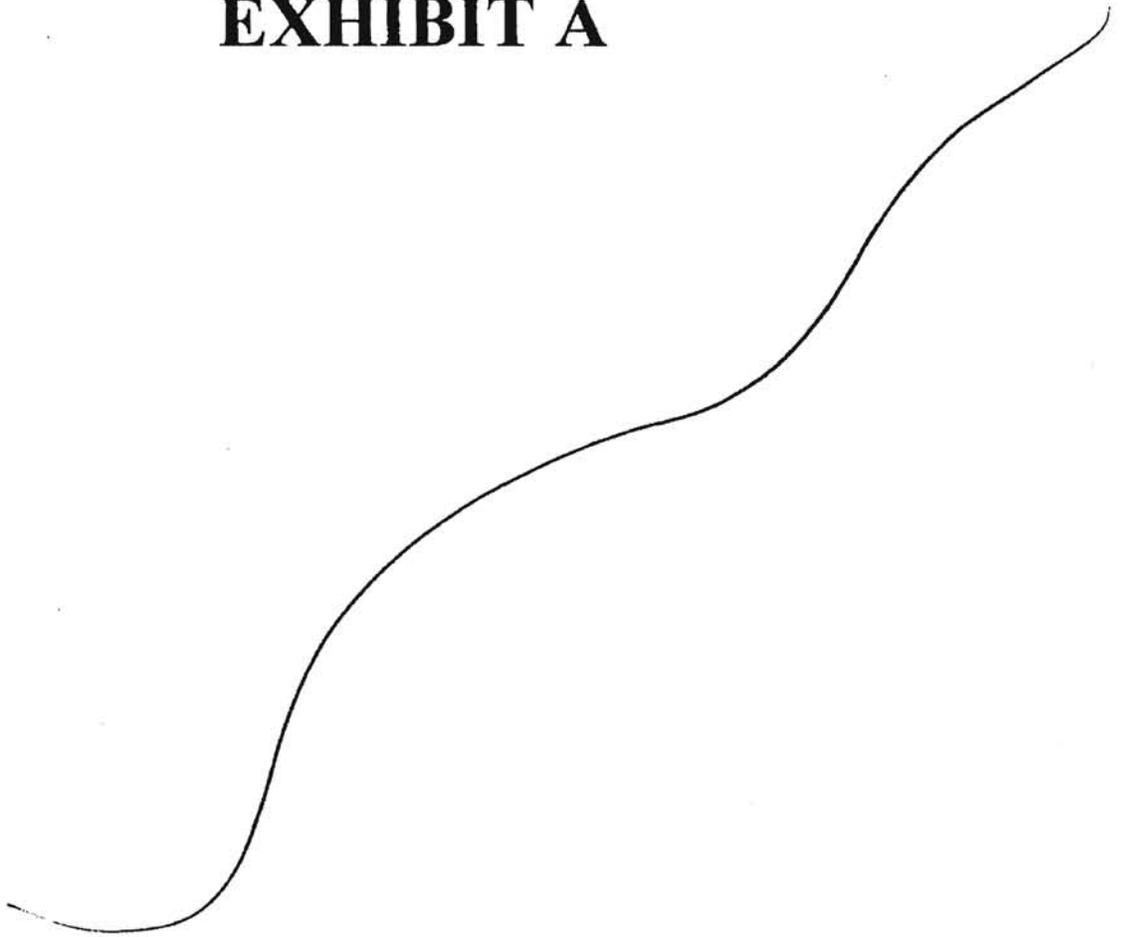


EXHIBIT A



1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF CHELAN

3 MANUEL HIDALGO f/k/a MANUEL)
 4 HIDALGO RODRIGUEZ, individually,)
 5 Plaintiff,) No. 03-2-01055-8
 6 vs.)
 7 JEFFREY BARKER, individually,)
 8 BARKER AND HOWARD, PS, INC., a)
 9 EDWARD STEVENSEN,)
 Defendants.)

10 VERBATIM REPORT OF PROCEEDINGS

11
 12 BE IT REMEMBERED that on the 2nd day of FEBRUARY, 2009
 13 the above-entitled and numbered cause came on for hearing
 14 before the HONORABLE EVAN E. SPERLINE at the Chelan County Law
 15 & Justice Building, Wenatchee, Washington.

16 APPEARANCES

17 FOR THE PLAINTIFF: Mr. Dick Kilpatrick
 18 Attorney at Law
 19 1750 - 112th Avenue NE
 20 Suite D-155
 Bellevue, WA 98004

21 Mr. Tyler Firkins
 22 Van Siclen, Stocks & Firkins
 721 45th Street NE
 Auburn, WA 98002

23 FOR INTERVENOR WESTPORT: Mr. Robert P. Conlon
 24 Mr. Christopher A. Wadley
 Walker Wilcox Matousek
 25 225 W. Washington Street
 Suite 2400
 Chicago, IL 60606-3418

COPY

LuAnne Nelson, Official Court Reporter
 P.O. Box 880, Wenatchee, WA 98807 509-667-6209

APPEARANCES

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FOR INTERVENOR WESTPORT: Mr. Curt H. Feig
 Nicoll, Black & Feig
 816 Second Avenue
 Suite 300
 Seattle, WA 98104

ALSO PRESENT: Mr. Ed Stevensen

REPORTED BY: Ms. LuAnne Nelson
 Official Court Reporter
 P.O. Box 880
 Wenatchee, WA 9880

LuAnne Nelson, Official Court Reporter
P.O. Box 880, Wenatchee, WA 98807 509-667-6209

1 THE COURT: Gentlemen, I know you all by your
2 disembodied voices so let's begin with some introductions.

3 MR. FEIG: Your Honor, I'm Curt Feig for Intervenor
4 Westport.

5 THE COURT: Pleasure to meet you, Mr. Feig.

6 MR. WADLEY: Good afternoon, Your Honor. Chris Wadley
7 for Westport.

8 THE COURT: Mr. Wadley, hello.

9 MR. CONLON: And good afternoon, Robert Conlon for
10 Westport.

11 THE COURT: Last name?

12 MR. CONLON: Conlon, C-o-n-l-o-n.

13 THE COURT: Yes, Mr. Conlon.

14 MR. FIRKINS: Tyler Firkins on behalf of the plaintiff.

15 THE COURT: Mr. Firkins, good afternoon.

16 MR. KILPATRICK: And Dick Kilpatrick, also co-counsel
17 for the plaintiff.

18 THE COURT: Hi, Mr. Kilpatrick. Thank you. Okay.
19 Gentlemen, I've had the opportunity to read all of the briefs
20 that have been filed. I have been through all of the
21 exhibits. I will not suggest to you that I have read all of
22 them. I've tried to read anything that was testimonial in
23 nature and then I've tried to familiarize myself with the
24 remaining exhibits. So at your pleasure, you're welcome to
25 proceed. Mr. Kilpatrick.

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1 MR. KILPATRICK: I will start, Your Honor. And since
2 this is a reasonableness hearing rather than some formalized
3 motion trial matter, I intend to be relatively short in the
4 opening remarks, relative being a relative term, of course. I
5 had expected, given the really consistent work the Court has
6 done over the course of the motions I was involved in,
7 starting with the summary judgment on statute of limitations
8 defense and so forth, so I knew you would have read them so I
9 wasn't intending to go through and survey matters. The Court
10 will have questions and Mr. Firkins is particularly closer to
11 the facts of many of the things than I am and also not as
12 perhaps burdened by the fact that I'm a civil lawyer. I've
13 never done a criminal case in my life so some of this -- I
14 think some of this is obviously true also for Westport's
15 lawyers so there's a certain lack of understanding and finesse
16 of discussion of some of these and I want to try to not inject
17 more of that than we need.

18 This is a civil proceeding in that sense, but what I
19 want to do is mention that I don't think anybody in this
20 courtroom doesn't have some sympathy for Ed Stevensen's
21 position. Certainly, I've come to have a great deal of
22 understanding for the box he got put in and as an individual,
23 I, you know, feel for where he was. However, he was not just
24 an individual in this setting. He was a professional and the
25 one place between Mr. Hidalgo, by our justice system, and jail

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1 and prison and so he had professional obligations to do. And
2 the very first RPC we have, RPC 1.1 says that a lawyer shall
3 provide competent representation to a client. Competent
4 representation requires the legal knowledge, skill,
5 thoroughness and preparation reasonably necessary for the
6 preparation. Excuse me, for the representation. That can be
7 satisfied -- when you don't come to it competent when you
8 start the matter, that can be satisfied by association with a
9 lawyer who is competent or, if it's possible for the type of
10 matter we're talking about, expending sufficient study to
11 become competent.

12 And the one thing that's clear, if nowhere else, from
13 Mr. Stevensen's own declaration that was submitted, he got
14 neither in this case. He got thrust into the only attorney
15 for the full workload of Chelan County when that was not
16 supposed to be the plan, and the lawyer who would have
17 associated and been first chair, Mr. Howard, was essentially
18 unavailable and acted only in a couple of very minor roles in
19 this case so Mr. Stevensen himself, without any of that
20 ability to really spend all his time on that case and with
21 someone who's knowledgeable and experienced in criminal work
22 of that caliber, was left to make mistakes. And as I say, on
23 a personal level I understand it and would, frankly, now,
24 knowing everything I know, would soften some of the tone that
25 we took in some of our pleadings. The thrust, however, is

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1 only more clearly now, by the time of this reasonable hearing,
2 evident to the Court.

3 And I think we've got a really -- when we boil it down
4 after all the darn exhibits, and I apologize to the extent we
5 helped in the proliferation of exhibit numbers, it's really a
6 relatively simple matter. You've got a strong case of
7 liability against a lawyer who didn't know what he should be
8 looking at, who didn't know that this medical evidence could
9 be challenged and might well be bogus that lent so much
10 credibility to the idea that either of these girls had ever
11 been molested, this medical evidence that was crucial and yet,
12 by all medical standards and available experts would have been
13 shown to be completely erroneous testimony to the degree that
14 many judges would have had trouble allowing the State's
15 testimony in in the first place either because the methodology
16 was not generally accepted or because the people themselves
17 weren't trained sufficient in the methodology or didn't
18 understand its limitations sufficiently, the two physicians.

19 That's an example of what Mr. Stevensen has come to
20 realize were things he didn't know and didn't investigate and
21 very well should have. We've got a case of really substantial
22 damages. When somebody gets their liberty taken away and not
23 just for a night and a day and a week, that's not, generally
24 speaking, looked on with favor by juries, and I think that's
25 true even of juries in Eastern Washington and in some ways

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1 maybe, if pitched right, more peculiarly true of jurors in
2 Eastern Washington, who many have a substantial libertarian
3 bent and really do value the freedom of movement, freedom of
4 everything, freedom to be left alone. I think that's a strong
5 vein that runs in many juries over here and that is totally
6 offended by something that happens like this where someone
7 ends up essentially part of a series of false accusations
8 which many others were relieved of when they had private
9 counsel and did these things like developing also the
10 misleading and coercive nature of the interrogators who kept
11 bringing out broader, broader and more incredible and more
12 incredible range of allegations which, when put in a time
13 line, I had heard these things said before as kind of a
14 conclusory way that -- before I ever got involved in this case
15 that these allegations had been mushroomed and things like
16 that.

17 And you hear these words and you have these ideas but
18 until it's laid out in a time line and you see each change and
19 each broadening, and particularly in a case where every time
20 they were broadened, and it was so often, it never was
21 mentioned to Mr. Hidalgo and yet, the defense here did
22 essentially next to nothing with that and didn't know how.
23 And again, I understand Ed Stevensen didn't know where to go
24 with that but -- didn't know you could go with that, but the
25 idea of misleading and coercive questioning of particularly

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1 young and impressionable witnesses with some mental
2 limitations had been around. I mean, it was around -- if
3 nothing else, in the newspapers, as Mr. Firkins put in, that
4 this had been going on and the other lawyers were all
5 developing it, the private lawyers, and were having success.

6 I was really amazed, and again I kind of attribute that
7 to maybe the civil background, to see Westport sort of suggest
8 taking on the police in this sort of coercive and whatnot
9 allegations would be a really poor strategy. While I don't do
10 any criminal defense work, I certainly know a couple of
11 lawyers who over the years -- we've never gotten into
12 particular details in their cases, but I know that's what they
13 do most of the time is attack the method of investigation,
14 attack the police. Not only is it done generally, but it was
15 done very successfully in the other private defenses in this
16 case, both before and after Mr. Hidalgo's case.

17 THE COURT: Which ones before? I'm aware --

18 MR. KILPATRICK: Help me.

19 THE COURT: I'm aware of Green and Idella and Harold
20 Everett, but I'm not aware of other matters within this
21 general -- arising from these kids' allegations.

22 MR. FIRKINS: Your Honor, in July of 2000 -- or 1995,
23 there was the Honnah Sims trial which resulted in an acquittal
24 and that took place immediately prior to the Manuel Hidalgo
25 Rodriguez trial and that was tried by my partner, Bob Van

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1 Siclen.

2 MR. KILPATRICK: And the preparation for these trials,
3 of course, was going on in the months before the cases
4 actually went to trial so the identification of these issues
5 and the development of the ability to use these issues was
6 going on, you know, before they ever hit the courtroom. So as
7 I said, when you boil it down, no one here has ever claimed
8 it's an absolute case of liability or a perfect case of
9 liability. Factually intense kind of case, a number of things
10 being thrown around at the time, some new things being thrown
11 around since Westport came in, you know, nobody claimed that
12 this was the proverbial slam dunk, although I think strong is
13 a fair characterization of the liability here. Well, having
14 said that -- so we've got strong liability.

15 We've got really massive damages. And sure, the same
16 thing with damages. No one can say for certain what any group
17 of jurors will do, and I don't say it couldn't have been less
18 than three million dollars but that would be an unlikely
19 result, you know. What we tend to do is take the middle 80
20 percent of the curve of what may happen, throw out the top 10
21 percent and throw out the bottom 10 percent, and I guess it
22 would be five percent, five and five, and you deal with what
23 almost certainly will happen, and certainly the range we've
24 mentioned from three, four is sort of the generally expected
25 floor up to six, eight, ten, fifteen. Those are all verdicts

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1 that would be within the range of the evidence and not
2 unexpected. I mean, you know, bigger ones always surprise you
3 more, in a sense, but they're still within the range of what
4 we would all think going in.

5 THE COURT: Mr. Kilpatrick, please excuse one other
6 interruption.

7 MR. KILPATRICK: Oh, no, please, that's why we're here,
8 to answer your questions.

9 THE COURT: I can't help being aware of a verdict from
10 the Eastern District last week, *Vargas v. Earl*. Is that
11 something that you all --

12 MR. KILPATRICK: We became aware of it, Your Honor, and
13 got it faxed over here and I've given a copy to counsel and I
14 assumed the Court was but if the Court wasn't, I was going to
15 hand up, and I thought we ought to include in the record, a
16 copy of that verdict.

17 THE COURT: Okay. Do you want these filed?

18 MR. KILPATRICK: I do in some form. With the Court's
19 permission, I can send it along with a declaration and say it
20 was before the Court at this time, if that would be the
21 simplest way.

22 THE COURT: That would be fine. I don't want anybody
23 to be handicapped here. The *Earl* case was similar in some
24 respects but substantially different in that the plaintiff's
25 theory in that case was that the defense attorney hadn't just

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1 misperformed but had essentially abdicated any performance,
2 hadn't interviewed any witnesses, hadn't gone to any scene,
3 hadn't researched anything, hadn't filed any motions.

4 MR. KILPATRICK: And no experts.

5 THE COURT: Right.

6 MR. KILPATRICK: And had done so to keep the money
7 available for that claim and others basically for his own
8 pocketbook. And those cases were -- so the record's -- so we
9 won't have to resort to other parts, they were brought on a
10 federal civil rights deprivation theory so punitive damages
11 was involved which isn't involved here and whatnot. I think
12 what's parallel though is the idea of having decided there's
13 liability, what is a reasonable range to expect from a jury
14 and in that case, the person had been incarcerated for seven
15 months. The plaintiff's theory, however, conceded that the
16 first two months would have happened even if the defense had
17 acted correctly so what they were really asking the jury to
18 measure for damages was five months of incarceration and the
19 jury came back on the compensatory part with \$750,000.

20 I think it's important that -- for the reliability of
21 that \$750,000 number to realize the jury had the opportunity
22 to assess punitive damages and did so. In other words, if
23 they were upset, angry, whatever word we want to put on it,
24 they had an outlet for it and they used it. They put it in
25 the punitive damages, so it's very unlikely that the 750

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1 reflects a really angry jury and is somehow an aberrational
2 number because you're never quite sure, you know, what's
3 behind the number when they only have the compensatory line
4 they can put something on, so the -- you know, the math is
5 interesting. I started doing it all and stopped when I got so
6 far but less than half a year, \$750,000. That's whatever it
7 is, 162 something maybe -- or I mean a million six twenty
8 maybe for a full year if we extrapolated it out, you know,
9 far, far more than the 3.8 we're looking at for five years of
10 incarceration plus the follow-on things that happened. They
11 were waiting for him when he got out of jail so they could
12 start the deportation proceedings and had him locked up again
13 until those were over and so forth and so on.

14 In short, you know, strong liability, horrendous
15 damages, a settlement that's not in the highest range it could
16 be, more toward the middle ground and, if anything, it may be
17 below what you could reasonably argue is the median, somewhere
18 below. Insurers really dislike these settlements for a lot of
19 reasons but one of them is they usually have the upper
20 economic hand. The plaintiff in civil cases usually has
21 difficulty with the staying power emotionally and the staying
22 power financially to actually think realistically about trial
23 and the insurers know this and so they keep their offers in
24 the lower quarter of what the risk curve is and they get a lot
25 of cases settled there because in fact -- it's really what

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1 Allstate figured out and what has gotten them in so much
2 trouble. They figured out they set the market. Whatever we
3 say, eventually the vast majority of people have to take
4 whether it's really realistic for their case or not.

5 And so -- I don't mean to say at all that Westport is
6 Allstate because that is not a kind thing to say. All I mean
7 is they get used to using economic leverage that exists and
8 they get used to saying those settlements should be here but
9 in fact they're usually looking at the bottom quarter of it
10 and that's not this Court's job to force any covenant
11 settlement into the bottom quarter of the risk curve. It is
12 in fact, as the case we've cited a couple times, is the
13 settlement within the range of the evidence given the various
14 factors that go into evaluating cases.

15 I want to comment on just a couple other things. One,
16 I don't know what I was thinking, because it was my part of
17 the brief, when I said Lee Smart did not claim the statute of
18 limitations in its summary judgment motion. We put it in
19 before the Court and it certainly did. I was probably getting
20 goofed up with maybe this anticipatory argument they did make,
21 which -- they made a new statute of limitations argument that
22 Lee Smart never made, but at any rate, our brief says they
23 didn't. That's wrong. They did and I knew that and I'm not
24 sure -- I can't -- the words that follow don't trip me to
25 anything I could have been thinking. It doesn't even look

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1 like there's just a "not" missing which is usually the way it
2 is. I have no explanation but I wanted to call that to the
3 Court's attention.

4 There are a couple of other things I want to mention.
5 The new -- the newest of the new theories Westport has come up
6 with is the immunity of a public defender and that one is a
7 matter not raised in the answer, not raised in the summary
8 judgment filed by Lee Smart, not raised in the summary
9 judgment Mr. Stevensen filed pro se, no Washington case that
10 supports it. The Washington case they cite and say we should
11 do it by analogy was a case about a prosecutor, not the
12 regular prosecutor's office but they retained outside counsel
13 to act as prosecutor in a particular case, and the Court said
14 gee, this job of charging -- prosecutorial discretion to
15 charge or not to charge and what level to charge, that's from
16 what springs the Court's concern and they did give immunity
17 there, as not unexpectedly, or actually, I didn't consider
18 that very dramatic or a leap of much from the existing law but
19 they say oh, we should draw a direct analogy to a public
20 defender who's brought in and, of course, the wellspring of
21 that for prosecutors doesn't even exist for public defenders.
22 They don't charge or anti-charge or anything that would be
23 comparable. They're not vested with that kind of discretion
24 within our public justice system, and the State -- even though
25 they're county people, they're carrying out State charging and

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1 whatnot, so I don't think, you know, on any level the chances
2 it was ever going to actually be in the case, it's certainly
3 clear it was not any of the defenses being raised.

4 And I guess that brings forth the matter of what is the
5 Court's orientation time and how did the Court think about
6 these things and that's what I thought was the only
7 significance of the flurry of supplemental authorities that
8 were put in which is the cases -- the one they put in through
9 dicta has the comments and the one we put in of the *T&G*
10 *Construction* were pretty clearly a little more than dicta and
11 they say the orientation is as of time of the settlement. And
12 in *T&G*, what happened that brought this to the fore was the
13 Court made a determination about statute of limitations at the
14 time of the reasonableness hearing and said as a matter of
15 law, this one wouldn't have applied and as a matter of law,
16 there are conflicting facts on this one. Therefore, there was
17 continued risk to the defense. Therefore, the settlement was
18 reasonable.

19 And then after the settlement was found reasonable, an
20 Appellate Court found differently on the statute of
21 limitations and says in fact, that statute the Court was
22 considering doesn't even apply but the common law would have
23 found the opposite way the Court was saying. In other words,
24 had that law existed at the time, likely the judge would have
25 said, well, no, the defense is going to win here. The defense

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1 will prevail on this summary -- this idea of statute of
2 limitations and so the insurer quick ran back after this new
3 appellate law and said, gee, you've got to change your opinion
4 and change your findings for the reasonableness hearing and
5 the trial court said, no, no, that's not right. Things happen
6 after but those things happened after. At the time of this
7 settlement, this is how it was and maintained the same
8 findings and the Court of Appeals said, yes, that was correct
9 for the trial judge even though the law might change or a new
10 opinion might come down, what they're measuring is the risk at
11 the time the settlement was entered into is what makes it
12 reasonable and, of course, the reason for that is obvious.

13 It's not just that particular statute of limitations
14 that's in flux. Every issue is conceivably in flux. Who
15 knows what the legislature will do. Who knows what the Court
16 of Appeals will do. And having been at both the Court of
17 Appeals and the Supreme Court, good heavens, who knows what
18 the Supreme Court will do. My heart is always with the trial
19 judges, frankly, as you watch these appellate judges come at
20 things from completely different ways and announce their
21 opinions on matters you wouldn't even recognize as the same
22 case you and the trial judge were dealing with when they
23 sometimes find reversals, so the system can't work any other
24 way. If the Court of Appeals were then later reversed by the
25 Supreme Court, would we come back and unredo it a second time

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1 and go back to the first position? I mean, obviously not
2 workable and those cases make that clear. That is the Court's
3 orientation.

4 I noted very little was said by either side about
5 relative fault of the plaintiff, some sort of comparative
6 negligence. You know, to the extent if they want to even
7 continue with that, that's obviously a very weak defense.
8 They were saying, well, he wasn't as cooperative as he might
9 have been with Ed Stevensen, and I've got to know this isn't
10 the first criminal defense lawyer whose non-English speaking,
11 uneducated, falsely accused client who had been locked up for
12 a substantial period of time was not the most helpful or able
13 partner in the defense.

14 I also had to note though that one of the things they
15 were commenting on was he wouldn't originally agree to a
16 continuance of his trial but did so, so the continuance idea
17 sort of goes away, but it was kind of interesting to note that
18 he did so when Mr. Howard was able to get over to the jail
19 with Mr. Stevensen, more experienced, more able to
20 communicate, probably more able to communicate a sense that
21 I'm really on your side. And when Mr. Howard was there,
22 that's when the agreement got made to continue the case, so I
23 think it sort of goes back and underscores the inexperience
24 problem.

25 The other thing they talked about was, well, he didn't

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1 fully explain his alibi on all details and I've got to think
2 again, he's not the first one that somebody had to go to the
3 friends and family to find out exactly where people were when
4 and use investigators to find out exactly where people were
5 when and develop things. You don't expect the client to hand
6 it to you fully made and so I just don't see any of that as
7 much we should spend a lot of time on.

8 You know, I should have a thicker skin after this many
9 years in the deal but the idea that -- the suggestion that
10 there was bad faith and collusion between us and Mr. Stevensen
11 on this did -- you know, it did offend me and I think we well
12 showed -- probably spent too many pages doing it. I think we
13 well showed there's no such thing as anything remotely like
14 fraud or collusion by any real standard. All they have shown
15 is that Mr. Stevensen no longer had full adversity on doing
16 this settlement or the amount of the settlement and we've
17 never disputed that or hidden that or disagreed with that at
18 all. It's that diversity, the adversariness that has the
19 Court then normally allowing judgments once they're entered,
20 they're self-executing.

21 Nobody then asks the Court to determine reasonableness
22 or puts any screening device on it because we sort of believe
23 the forces of the marketplace, whether it be the jury or a
24 settlement or whatever, will have put it within a relatively
25 reasonable range. Here, the forces of the -- what I term the

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1 marketplace aren't at work, that's right, they aren't. And
2 that's exactly why we have this reasonableness hearing. It
3 isn't because reaching a settlement when there's little or no
4 incentive on the defendant to fight on this issue or hold the
5 amount down, it isn't because of that that makes it fraud or
6 collusion. It is because of it, we then impose this -- this
7 system whereby the Court gets to look at it and say is it in
8 the range of the evidence or not or did these people go crazy
9 because the defendant had no good reason to hold it down. He
10 could care whether it was 3.8 or 33.8 million.

11 That's why we're having the reasonableness hearing and
12 that exactly takes care of everything they point to that they
13 sort of say is fraud or collusion. Well, he doesn't, you
14 know, have an incentive and he's got -- another thing that was
15 kind of offensive. They point to the fact that Ed Stevensen
16 gets half of his own emotional distress damages if this case
17 goes forward as some sort of terrible thing and I think they
18 even called it a payment or whatever. I've forgotten the
19 exact words. Damages are not payment. Damages are something
20 he has lost. I mean, we will go forward with the case. It's
21 assigned to our client but it's Ed Stevensen's rights. It's
22 Ed Stevensen's case that will go forward. If there's any
23 aggravation and distress that these people put him through
24 will be Ed Stevensen's aggravation and distress. And if a
25 jury determines it's X, he won't even get what his damages

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1 are, what he was put through. He'd get half. That is fraud
2 or collusion? I mean, goodness gracious. That is not
3 payment. It's not any suggestion he lie, nor having come to
4 know Ed in the course of this, would such a suggestion go far
5 with Ed.

6 THE COURT: No, but it does raise a question, Mr.
7 Kilpatrick --

8 MR. KILPATRICK: Sure.

9 THE COURT: -- whether we put a label on it such as
10 fraud or collusion or just look at the settlement agreement
11 for what it is, and the question that it raises for me is,
12 suppose the agreement was exactly as it is except that
13 provision wasn't in there, that what Mr. Stevensen gets is a
14 covenant not to execute and that's all. And all other factors
15 in the case being identical, would the Court come to precisely
16 the same reasonableness ruling or would the Court say no, that
17 did have an effect on the amount of the settlement that is to
18 be considered in determining whether it's reasonable.

19 MR. KILPATRICK: I don't rule anything out from being
20 considered. My point would be is, if exaggerated ten times
21 what it is, all it did was give him an incentive to reach this
22 settlement without close negotiation or close examination.
23 Keeping in mind aggravation and distress is nothing from what
24 will be in the judgment, okay. This judgment amount that the
25 Court is looking at is not for aggravation and distress

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1 damages. Those are separate and will come anew in the bad
2 faith case so whether he gets all, part, three times, ten
3 times his aggravation and distress does not affect whether
4 this 3.8 million dollars is reasonable based on the liability
5 issues and whatnot. It really doesn't. What it can do, if
6 you started to get big enough, would be to suggest that it
7 undermines his credibility in anything he said here, that he
8 now has a positive payment reason to lie essentially, like the
9 one case I put in where there was some evidence the person had
10 agreed to lie about the value of the damages in that case.

11 Now, Ed hasn't even commented on the damages in this
12 case, nor would I have asked him to. So that whole, you know,
13 theory is parsed out of here, and I have had some agreements
14 early on, you know, to heck with you. We're taking
15 everything, you know, you get nothing. At the same time, if
16 you note, the agreement requires that he appear and testify
17 and, you know, agree to reasonably help prepare and all that
18 kind of stuff which imposes additional risk, time and cost on
19 the person, so it's come clear to me both for sort of fairness
20 reasons and also for sort of an incentive to cooperate
21 reasons. If we're going to trial, I want that person actually
22 showing up when they say they're going to show up, to be
23 prepared, actually showing up when they say they're going to
24 show up to testify and that's just a little nugget to maybe
25 help do that, but I don't see it as playing any substantial

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1 role where we are in a case like this, and particularly in the
2 facts of this case.

3 I mean, I know the Court may have looked at those
4 before when we were going around on motions to do discovery
5 and I put in the things about what had actually gone on in the
6 settlement of this case, or I meant to. Maybe they didn't
7 actually get attached to the declaration. If the Court, when
8 we end up here today, has any qualms about that, this idea of
9 a little -- of getting half of his own damages, I would ask
10 the Court to review in detail the e-mail and letter
11 negotiations in this case and you will find that in fact
12 despite the fact there was no significant financial motive to
13 resist what we wanted, they did resist it and this has been my
14 experience. There's no financial motive -- and some people
15 don't care. I mean, that's not -- you know, but the vast
16 majority have an emotional stake in this some way or another.

17 They just can't believe -- they can't accept that the
18 other side is either right or was that right or was that
19 wrong. For their own purposes, they need to believe it was a
20 smaller matter and whatnot and so I have had cases, and this
21 is one of them, where I could not get them to the number I
22 wanted to get to and then I end up beating myself over the
23 head because, of course, I didn't -- knowing where we were, I
24 didn't negotiate it in the same way. I didn't play hard ball,
25 you know, I moved too fast toward the number I really want and

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1 then if somebody is actually ardoered in, isn't just going to
2 come around, now I've goofed up the negotiations because you
3 sort of take this idea that the normal adversary is gone but
4 there's still a personal adversary that's gone and Dan
5 Huntington in Spokane was not about to put his name on too big
6 a deal, I can tell you that, so I had my irritations in it and
7 I'm not going to tell you it was, you know, like I've had in
8 some cases and I'm not going to tell you it was necessarily
9 the same degree but if you look, I think you will end up
10 making a finding that there was a substantial degree of
11 adverse negotiation in this case and it's not just a couple of
12 them put up for show.

13 I mean, this is how it really went and, in fact, Mr.
14 Firkins and I had a strong disagreement when Mr. Stevensen
15 wanted to file his pro se motions on statute of limitations
16 which, you know, we were right where we should have been to
17 finish the negotiations in this case when that came up and,
18 you know, I mean, I was of two minds. My first was to hell
19 with these people, you know, they're in trouble. We got 'em.
20 Negotiations are essentially over. We get to my number or
21 let's just go to trial, you know, that side of my personality.
22 The other side -- and I forget where Mr. Firkins was when we
23 started but we had some initial debate on this.

24 The other side was, now that I'm here, of course, I'm
25 glad, give them all the rope in the world, you know, go ahead,

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1 you know, he wants to bring that motion, we'll beat it, okay,
2 and once we beat it, we're in a much stronger position in a
3 reasonableness hearing than when they had the risk we could
4 beat it in advance, which was the *Water's Edge* kind of
5 setting, that one trial court opinion they gave you from
6 Vancouver where they canceled the defense -- the insurer paid
7 for a defense lawyer and he was madly going along thinking he
8 might beat the whole claim and had filed a summary judgment to
9 accomplish that and then comes new personal counsel at the
10 eleventh hour and they demand that he cancel the hearing and
11 so it's never heard and only weeks and weeks and weeks later
12 do they enter some reasonableness hearing.

13 Well, I can understand the judge being a little
14 concerned about that. I certainly would, you know, were I up
15 there. I don't know where I'd get with it because I don't
16 know all the underlying facts that would have come out when I
17 started probing on that but this one is the opposite, you
18 know, the opposite. You wanna do it? Fine. Take your best
19 shot. And he took his best shot and the Court gave it, you
20 know, minute and intense scrutiny and, you know, they lost and
21 they lost for good reason.

22 That's again why it sort of ruffles my feathers that an
23 insurer can come in, hire the A team from Chicago when they
24 didn't hire the A team, you know, for the underlying defendant
25 and develop all sorts of new things which weren't part of the

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1 defense and which weren't argued and which weren't going to be
2 argued and so all of those, I suggest, should have little or
3 no impact on the Court. I don't want to say none. I mean,
4 they're here. The suggestions are made. I think the Court
5 ought to give it some thought and I wouldn't want them
6 excluded in any of those theories, in any findings or whatnot,
7 but I think they get -- you know, I think they should get
8 little or no weight because the chances they were ever part of
9 the actual defense going on at the time of the settlement are
10 slim and none, and I've forgotten where you started me. I've
11 segued and I apologize.

12 THE COURT: That's all right. I think you've spoken to
13 my concern.

14 MR. KILPATRICK: Okay. And I guess that gets us to one
15 other point. I think even assuming every issue that Lee Smart
16 had raised, including their expert, and so far -- even
17 assuming they were going to be in the trial of this case, I
18 think it's a completely reasonable settlement given those
19 risks and the high damages, but in fact it's real clear had
20 this case proceeded to trial, only one side had done their ER
21 904 documents. That was the plaintiff's side. Only one side
22 had an expert ready to go. That was the plaintiff's side.
23 Only one side was really actually going to put on any kind of
24 trial at all and that was the plaintiff's side and I, again,
25 don't blame Mr. Stevensen at all that he wasn't able to put

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1 together and finance a defense on his own, but I think that
2 should additionally factor into the Court's thinking. Not the
3 world's biggest thing necessarily but it's certainly a factor
4 there that as strong as anything in the abstract might be, it
5 wasn't going to be that strong a trial because it just wasn't
6 going to be put on and it wasn't going to appear to any jury
7 that way, so I think Mr. Stevensen, you know, did an
8 appropriate thing. I think the number is well within the
9 range of the evidence and -- well, we've put the Court through
10 a whole lot and undoubtedly, we're not through with that
11 today. I think in the end the Court will feel comfortable
12 saying this settlement is reasonable.

13 THE COURT: Thank you, Mr. Kilpatrick. I do have this
14 one additional followup for you. I recognize the nature of
15 your practice is civil but one thing that is consistent in
16 both the civil and criminal procedure is the discretion of the
17 trial judge or trial court in regard to continuance and the
18 question that I sort of continually come back to as I consider
19 this case and a question on which I'd be very interested in
20 hearing counsel's thoughts is this; is what is expected of a
21 competent criminal public defender the same regardless of the
22 rulings of the Court?

23 And let me just put an extreme example before you. The
24 trial judge says today the defendant entered his plea and I
25 know we've got 60 days but, by God, we're starting this case

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1 next Monday, to which the defense lawyer or anyone thinking
2 would say, my gosh, Judge, there's absolutely no way I can be
3 prepared. I can't do all the things I have to do and the
4 judge says, I don't care. We're going to trial next Monday.
5 What do you think the role, even if it doesn't -- even if we
6 don't talk about immunity of public defenders as a general
7 proposition, what is the role of the rulings of the Court and
8 specifically in this case, Mr. Stevensen asked for a trial
9 continuance at the time of amendment to add the Donna Everett
10 claims which was denied, at least that's my recollection --

11 MR. KILPATRICK: That's true.

12 THE COURT: -- and then there was this mid-trial
13 proposal to retain private counsel and Mr. Stevensen asked for
14 that and it was denied by the Court. In this setting, should
15 we engage in speculation about how the preparation might have
16 differed had those motions been granted? Should we factor it
17 in to a weighing of the lawyer's performance under the *Glover*
18 factor for the strength of the plaintiff's liability theory or
19 should we ignore it? What do you think? And, Mr. Firkins, I
20 know we should limit each side to one lawyer arguing but I'd
21 also be interested in your thoughts on this as well.

22 MR. KILPATRICK: I'm not -- as I say, this is sort of a
23 different proceeding so I'm not -- if they both want to argue
24 at different times, that's fine with me as long as we don't
25 give one side too much undue clock time.

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1 THE COURT: Okay.

2 MR. KILPATRICK: But I think the Court wants to know --
3 and if somebody else has a different way to say it or a better
4 way to say it, that's fine with me, on the defense side and
5 certainly, I'll call on Tyler. The answer is, I think, that
6 the lawyer is not responsible for the judge's -- for any
7 judge's erroneous rulings but they are responsible for having
8 anticipated they may not get a continuance. In other words,
9 if a lawyer is relying on a continuance saying, oh, I'll just
10 get the continuance and then I'll do my preparation, there's a
11 serious problem with lawyer prep and thinking.

12 Secondly, we would look at the lawyer's performance
13 relative to what they did about correctly challenging the
14 ruling and correctly preserving the bases for appeal from that
15 ruling so no, the lawyer isn't sort of responsible for that
16 but it's not -- this is not a case where I think that enters
17 much. I mean, yes, these things kind of happened and yes, Mr.
18 Stevensen did ask for a continuance, but the point -- the
19 bigger point about the continuance when he asked for it is
20 what he should have been doing was challenging and trying to
21 dismiss the charges entirely rather than saying, give me some
22 time to get ready for the new person you're charging about.
23 It should have been, wait a minute. You don't have any of the
24 appropriate documents to charge. This is so late in the game,
25 if we're going to do anything, we should sever. It shouldn't

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1 be part of this trial, continued or not.

2 There are other things I hear Mr. Firkins tell me that
3 don't stick as well so there's little point here but the one
4 thing we wouldn't do, I don't think, under any scenario --
5 well, no, that's not true. That's not true. If a plaintiff,
6 a civil plaintiff, were saying if you'd done this right, you'd
7 have gotten your continuance, then the causation element of
8 the civil claim would require that plaintiff to go ahead and
9 prove, and my case would have come out different if you had,
10 so you'd have to play out the alternate universe if a
11 continuance was granted, but when the plaintiff isn't claiming
12 that, that you were substandard in not getting a continuance,
13 then you don't play that out in some sort of speculative way
14 because then it's not a part of the causation requirement.

15 The Court has to -- you know, the jury, the Court, the
16 plaintiff in a legal mal case has to say if the lawyer had
17 acted up to the standards that are being suggested, can we
18 show the case would have come out differently. And in some
19 cases and maybe some elements, some of the things that were
20 being claimed here, they were prepared to go ahead and try the
21 case and have the jury determine that they were not guilty and
22 were actually innocent which takes care of many of the kind of
23 causation elements if you go try the case within a case idea,
24 retry that criminal case when there's missing evidence and
25 missing experts and missing that kind of stuff, but I didn't

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1 see -- and maybe I've missed it. I'll give it some more
2 thought over the first break. I didn't see anything here that
3 required us to -- whether it be causation or anything else to
4 actually go ahead and play out those -- a continuance by that
5 judge. Others may have a different thought.

6 MR. FIRKINS: Let me address that a little bit, Your
7 Honor. I think one of the issues that comes up a lot in
8 criminal practice is you, as a judge, when you're receiving
9 information, you base your rulings on the information that's
10 presented to you at the time, and what a good defense lawyer
11 has to do is limit your avenues of denying their motion and
12 that is predicated on the work that comes before you request
13 the continuance, so to simply make an oral motion that "I'm
14 not ready" at the time of the motion leaves you in a situation
15 where you, as a trial judge, have very little information on
16 which to deal with that information and so it could go either
17 way.

18 Competent criminal defense attorneys are going to try
19 and box you in and create a situation where, as a trial judge,
20 you're going to be going, well, if I don't grant this
21 continuance, this is going to get reversed and this is just
22 going to be a complete waste of time, and that's what didn't
23 happen in this case. As an example, there were a whole host
24 of motions that should have occurred prior to this, including
25 objecting to the amendment that took place on the day before

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1 trial which actually resulted in a reversal on another case,
2 Ralph Gausvik's case. None of that happened. It was just
3 simply a request for a continuance.

4 So what we look at is not so much you've got an adverse
5 ruling from the judge, that's too bad. It's what did you do
6 to try and make sure that adverse ruling didn't happen, and
7 that's what didn't happen and that's what Professor Strait
8 pointed out in this particular case what didn't happen and why
9 the judge probably ruled the way they did. And that's --
10 those are the key considerations that we look at, not just
11 hey, you got a bad ruling, too bad, you know, so that's the
12 defense lawyer's task. And in this particular case, I think
13 you can probably see from what was there, which were some
14 criminal minutes which means that there were no pleadings
15 filed in the case, it was an oral motion made at the last
16 second which you've probably dealt with a number of times and
17 you know from your experience that later on, they're going to
18 come back in 15 days and they're going to be no more prepared
19 than they are now and so what's the difference. Whereas, if
20 you put in the work, you know that there is going to be
21 something that's going to happen and that makes all the
22 difference and that's what didn't happen.

23 THE COURT: Okay. I follow the reasoning. In other
24 words, if I do follow it, Mr. Firkins, in this case had Mr.
25 Stevensen's motion been in terms of, you know, it's just come

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1 to my attention that there may have been abusive and coercive
2 investigatory techniques and I need a month to look into that,
3 it's recently come to my attention that this medical testimony
4 is suspect and may not even be admissible, I need to look into
5 that and, Judge, there's no way to competently do it without
6 another month or two, that's what you're suggesting?

7 MR. FIRKINS: That's right. Interestingly enough, Mr.
8 Stevensen added in his declaration exactly that, which is had
9 he had more experience, he would have recognized that doing
10 more than simply requesting a continuance -- now he's a very
11 seasoned prosecuting attorney and he recognizes now looking
12 back with 20/20 hindsight, you know, here's how I should have
13 approached that and I didn't, and that's nothing more than
14 what Professor Strait said in this particular case and would
15 have testified to and so yeah, I mean, that's the response.

16 THE COURT: Okay. Thank you.

17 MR. KILPATRICK: And there is one additional thing. If
18 one gets into speculating about, okay, let's just say the
19 judge, you know, gives more time, the new counsel request came
20 mid-trial as it was. I mean, if there had been more time,
21 then the new counsel request comes, it almost certainly would
22 have been private defense counsel, one who had already gone
23 through a trial before then and had this stuff available so I
24 think, you know, if we need to speculate at all, I think the
25 prime speculation ends us up with then we would have probably

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1 had somebody who already knew all this stuff in here. I think
2 that's part of the import of this is that, unfortunately, by
3 the time anybody in Mr. Hidalgo's circle finds out these other
4 lawyers are out there and contacts one who's willing to come,
5 it's mid-trial and I understand the judge's reluctance to do
6 that.

7 THE COURT: Yeah.

8 MR. KILPATRICK: So had it been pretrial, I think
9 things would have been different.

10 THE COURT: Okay. Well, the plaintiff has had 45
11 minutes. Let's just in place give the reporter a chance to
12 shake out her fingers a minute -- there's been wall-to-wall
13 talk -- and then we'll hear from you.

14 (Brief pause in the proceedings)

15 MR. WADLEY: Good afternoon again, Your Honor, my name
16 is Chris Wadley on behalf of Westport. Your Honor, I think
17 the record viewed as a whole demonstrates that this proposed
18 consent judgment is not only unreasonable based on the merits
19 of the case, but it's also unfair and collusive because in
20 this case, as Your Honor pointed out, Mr. Hidalgo and Mr.
21 Stevensen didn't just enter into an agreement in which Mr.
22 Stevensen was able to essentially walk away from the case
23 without incurring any personal liability but they've joined
24 forces now and seek to profit from Westport. They've jointly
25 filed a lawsuit against Westport. They're represented by the

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1 same counsel in that lawsuit and they both stand to profit
2 from it and, you know, I know of no case that would approve of
3 such a settlement like that in which not only is the covenant
4 not to execute given but -- and an assignment of the bad faith
5 rights but there's also an agreement that at the end of the
6 day, hey, you might make a profit on this whole deal, which is
7 just something that I've never heard of and it just -- it's
8 collusive on its face, so on those two points I'd like to now
9 first address the -- kind of the purpose of a reasonableness
10 hearing.

11 And the purpose of the reasonableness hearing is not to
12 protect Mr. Stevensen or Mr. Hidalgo. The purpose of the
13 reasonableness hearing is to protect third parties who are not
14 a party to the settlement agreement, which in this case is
15 Westport. It's to insure that the settlement is objectively
16 reasonable based on the merits of the case and because, as
17 this Court is aware, Westport is going to be bound by that
18 decision in the lawsuit that is currently pending right now in
19 Seattle in which Mr. Stevensen and Mr. Hidalgo have sued
20 Westport.

21 THE COURT: You know, I have to confess to you that
22 I've taken your word on that, both sides. I don't know
23 anything about that sort of bad faith litigation and don't,
24 frankly, know in detail what it means to say it's the
25 presumptive damages, so I accept your representations without

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1 any expertise.

2 MR. WADLEY: What it means essentially is that in most
3 jurisdictions in the subsequent coverage action, the insurance
4 company can come in and say we shouldn't have to pay that
5 amount even if we were in bad faith because the settlement was
6 unreasonable. In Washington they've set it up where the trial
7 judge in the underlying case passes on the reasonableness of
8 the settlement amount and then that sets the amount of damages
9 in the bad faith lawsuit. The insurance company can't
10 relitigate the issue there. They can show if there's new
11 evidence of collusion or fraud or anything like that but
12 generally speaking, they're just talking about liability in
13 the bad faith lawsuit and the damages are set.

14 MR. KILPATRICK: And if the Court will recall, when you
15 continued this reasonableness hearing to grant some discovery,
16 I got nervous about the statute of limitations and said I was
17 going to have to file that action. The Court --

18 THE COURT: Right.

19 MR. KILPATRICK: -- was hoping to find a way to impose
20 a moratorium on them, but I was concerned whether a court can
21 do that to a party and they weren't chiming up saying we
22 stipulate, so I did file it and it's just sitting there.

23 THE COURT: I recall. Go ahead, Mr. Wadley.

24 MR. WADLEY: So the Court must objectively evaluate the
25 merits of the case to insure that the settlement amount is

1 reasonable. And that includes, as Division III has recently
2 opined in the Green opinion, it has to look at the merits of
3 the case, the merits of the defenses and all the other factors
4 that bear on relevance. The Court also has to guard against
5 collusion which is one of the elements of the factors that the
6 Court has to look to. Another important point is that it's
7 the settling parties' burden to prove that the settlement
8 amount is reasonable. It's not Westport's burden to come in
9 and prove that it's unreasonable. And then finally, I just
10 want to emphasize that the Court in this case in this
11 proceeding is not evaluating Westport's conduct with respect
12 to the defense of the case. We're going to fight over that
13 elsewhere.

14 For purposes of this hearing, the Court is looking at
15 the merits of the case, the terms of the settlement agreement
16 and determining whether that's reasonable in light of all of
17 the facts and the law. So first, I'd like to turn to the
18 issue of whether Mr. Stevensen satisfied the standard of care.
19 We believe that he did satisfy the standard of care which, as
20 the Court knows, doesn't mean that Mr. Hidalgo was entitled to
21 perfect representation, not ideal representation, not a
22 representation that has unlimited resources. It's
23 representation that is reasonable under the circumstances.
24 That is the negligence -- that is your basic negligence
25 standard. And in this case, I think the record shows that Mr.

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1 Stevensen performed a reasonable pretrial investigation under
2 the circumstances. He read through the police reports. He
3 interviewed ten of the witnesses, all of the witnesses
4 disclosed by the State and certain witnesses for the defense
5 side. He met with Mr. Hidalgo on a number of occasions in
6 order to evaluate Mr. Hidalgo's defenses and to go over their
7 position.

8 And I understand that Mr. Stevensen might now be
9 telling a different story than he did previously in this case,
10 but I'd like to just read from the affidavit that he signed in
11 2006. He says: Mr. Rodriguez was not a communicative client
12 and was not helpful in preparing his defense. He offered very
13 little by way of explanation for why the girls would accuse
14 him of molesting them and little meaningful detail about the
15 circumstances surrounding the charges brought against him.
16 While he always maintained his innocence, he was a very poor
17 historian, unable to provide much more than vague details
18 about his recent living and working history. As a result,
19 when attempting to discuss facts, dates or events, he
20 routinely referred me to his wife, Donna Hidalgo, and merely
21 denied the allegations against him.

22 So Mr. Stevensen made a reasonable effort to consult
23 with his client to find out the facts and what defenses were
24 available to him but Mr. Hidalgo was simply uncooperative with
25 him. And that's Exhibit 52 to my declaration, Your Honor.

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1 And then as the Court also pointed out, Mr. Stevensen sought
2 continuances both from his client and from the Court because
3 he felt that in light of the complex factual scenario
4 presented that he needed more time to investigate the facts.

5 Again, I will quote from -- this is from paragraph 14
6 of Mr. Stevensen's declaration: On July 24th, 1995, at a
7 trial setting hearing attended by a colleague, Mr. Rodriguez
8 demanded that his case go to trial immediately. I later
9 advised Mr. Rodriguez that he would be better served if I had
10 several additional weeks to prepare for trial. However, Mr.
11 Rodriguez preferred instead to proceed immediately. On July
12 31st, the State amended its Information and added two counts
13 involving Donna Everett. I sought again to continue the trial
14 date within speedy trial limitations to permit additional time
15 to interview witnesses but the motion was denied.

16 So he first sought to get his client's agreement for
17 the continuance. Mr. Hidalgo said no, I want to go to trial
18 immediately. He then went to the Court and said, look, I need
19 additional time, because by that time Mr. Hidalgo had waived
20 his speedy -- his speedy trial rights and there was still some
21 time left where he could have had some additional weeks but
22 the Court refused to give him those additional weeks. And
23 contrary to what counsel stated, it wasn't just a pro forma
24 I'm not ready, I need a continuance. He also mentioned, and I
25 think the minute entry reflects this, that he made the point

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1 to the Court that several of the Everett children hadn't been
2 made available to him to interview, most notably Richard
3 Everett which is one of the witnesses they now claim that he
4 was negligent in not, you know, eliciting additional
5 testimony. That was the eldest Everett sibling who
6 emphatically denied abuse throughout the entire ordeal. He
7 wasn't made available to Mr. Stevensen until in the middle of
8 the trial and that's one of the reasons why he sought a
9 continuance, but again, it was not within his control to force
10 the Court to give him the continuance. The Court denied it so
11 he had to proceed as best he could under those circumstances.

12 Mr. Stevensen also created a reasonable theory of the
13 case of the defense. His theory was to target the credibility
14 of the two young accusers, Melinda and Donna Everett, and Mr.
15 Filbeck, a convicted child molester who was testifying against
16 Mr. Hidalgo, rather than to impugn the motives of the public
17 servants that had investigated the case. This was a tactical
18 decision not to attack the motives of the police and the child
19 services workers and just to try and pick out the weakest
20 point of the prosecution's case and try to create reasonable
21 doubt. That's what defense attorneys do every day. Now,
22 again, Mr. Stevensen has signed an affidavit in connection
23 with this reasonableness hearing in which he claims that,
24 well, there was no tactic involved. He just kind of stumbled
25 into the defense that he ended up presenting.

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1 That's contradicted by the affidavit he signed and
2 presented to this Court in 2006. He says: Prior to trial,
3 several of those adults, including the girls' parents, had
4 been convicted or had pled guilty to such offenses. Because
5 of that, I sought to exclude the testimony of the State's
6 examining doctors as irrelevant, since they could not testify
7 as to who committed the abuse. The motion was denied. As a
8 tactical matter, given the girls' disclosures, their parents'
9 guilty pleas, and convictions obtained against others believed
10 to have offended against them, there appeared to me to be more
11 risk associated with attacking the State's medical evidence
12 than conceding its presence but arguing that other
13 perpetrators were responsible for the findings and that it was
14 impossible to link such findings to Mr. Rodriguez.

15 So when Mr. Stevensen is defending the merits of the
16 case, he says this was my tactical decision. I decided not to
17 attack the State's evidence in that regard and simply to say
18 that look, there were six or eight people that had admitted
19 molesting these girls. Several of them had gone to jail
20 already so I'm just going to point out that look, this medical
21 evidence is irrelevant because it doesn't identify who the
22 perpetrator was. Mr. Hidalgo wasn't named as a perpetrator
23 until way late in the game and there's no corroborating
24 evidence linking him to any abuse except for Mr. Filbeck who
25 is completely unreliable and untrustworthy as a witness, and

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1 that was his theory of the case and that's the case he
2 presented to the jury. And, in fact, that case was largely --
3 that theory was largely successful. Five of the six counts
4 were dismissed after the jury was unable to reach a decision.
5 One count, unfortunately for Mr. Hidalgo, stuck and the jury
6 convicted on the child molestation involving Donna Everett.

7 Now, you know, in hindsight, this malpractice case is
8 based on the theory that Mr. Stevensen should have mounted an
9 all-out assault on the entire police and child services
10 establishment to say that there was some complex conspiracy
11 here to generate false accusations of child abuse against a
12 number of different individuals. I think that theory likely
13 would have backfired and they've tried several cases now in
14 the civil context with all of the evidence that they have
15 today against these police authorities, against Perez, and as
16 far as I know, they've lost most, if not all, of them. Pastor
17 Roberson's case was tried against Perez twice. Hidalgo tried
18 his case against Perez. He lost.

19 One case that won was the Honnah Sims case and that
20 verdict was completely reversed and wiped out in the Supreme
21 Court so I don't know that they've had any success with this
22 theory as far as impugning the integrity of the State
23 infrastructure that was involved in this case. Now I want to
24 talk briefly about the effect of this -- so that's generally
25 the case as far as the prima facie case as far as whether Mr.

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1 Stevensen satisfied the standard of care. If you read the
2 trial transcript, I think it's clear that he did. He did a
3 reasonable job and he provided competent assistance of counsel
4 at trial.

5 Now I want to talk briefly about the effect of some of
6 these post-trial proceedings which resulted in the sentence
7 being vacated and the convictions vacated. That's a personal
8 restraint petition. As we've argued in our briefs, Mr.
9 Hidalgo succeeded on his post-trial briefs by convincing
10 the -- Judge Friel in the first instance and then the
11 Appellate Court which adopted Judge Friel's findings that he
12 presented newly discovered evidence that showed that there was
13 improper police investigation, among other things. And Judge
14 Friel accepted that and found as a matter of fact that a
15 number of different pieces of evidence were in fact newly
16 discovered, meaning that that evidence could not have been
17 discovered with the exercise of reasonable care prior to Mr.
18 Hidalgo's criminal trial.

19 Obviously, the most important point there was Melinda
20 Everett recanted in 1996. That obviously wasn't available to
21 Mr. Stevensen at the time of trial. And that's what really
22 got the ball rolling as far as all of these accusations of
23 improper police questioning and things like that. Then Judge
24 Friel turned to Richard Everett. Well, why wasn't Richard
25 Everett's testimony more -- why wasn't more testimony elicited

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1 from him at trial? Judge Friel listed a number of factors,
2 said: In view of these factors, it is fair to state that the
3 evidence could not have been discovered before trial by the
4 exercise of due diligence. Then there was the issue of Dr.
5 Milnes, a doctor who had performed an examination on Donna and
6 Melinda, actually coincidentally on the third day of Mr.
7 Hidalgo's trial, and Dr. Milnes later testified that he --
8 based on his examination, it would be surprising to him if the
9 accusations that Melinda had made were true based on his
10 examination. Judge Friel said -- and he says: He, Stevensen,
11 could not have discovered this by the exercise of due care.

12 Then he turns to the medical evidence. Now, he does
13 have some qualms, it's clear, about the medical evidence.
14 Nevertheless -- about whether these slides of Melinda that
15 were made available should have been evaluated by a defense
16 expert. Nevertheless, Judge Friel concludes: His, meaning
17 Mr. Stevensen's, failure to seek a qualified expert under
18 these circumstances did not necessarily amount to a lack of
19 due diligence. And then finally and perhaps most importantly,
20 the Court goes on to discuss whether evidence of improper
21 interviewing techniques was newly discovered and I'll read
22 from this paragraph.

23 Judge Friel states: This Court, at the Everett
24 Reference Hearing, had the benefit of seven days of testimony
25 on the improper and coercive methods used on ME and DE by

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1 Detective Perez, counselors, and caseworkers. Defense counsel
2 here did not have that information. To obtain such
3 information would have required a lengthy and expensive
4 investigation which, without the full cooperation of law
5 enforcement, the prosecution, and DSHS, as well as other
6 counselors, would likely not have disclosed as much as did the
7 evidence at the Everett Reference Hearing. Mr. Stevensen did
8 not demonstrate a lack of due diligence in failing to discover
9 what is now known, but which was apparently not even
10 considered a possibility at Mr. Hidalgo's trial.

11 Mr. Hidalgo, having obtained his freedom by convincing
12 Judge Friel and the Court of Appeals that all of this evidence
13 was newly discovered and could not have been discovered in the
14 exercise of due diligence prior to his trial, cannot now
15 reverse course and say, you know what, I get millions of
16 dollars because, Mr. Stevensen, you know what, you actually
17 should have found that evidence. That was out there for you
18 to go and get. He litigated those factual issues to their
19 conclusion before Judge Friel. He won on them and those are
20 findings that he cannot now say, no, I take those back. Mr.
21 Stevensen should have found those things.

22 Now, again, I want to talk about the medical evidence
23 just a little bit more. In the event -- because Judge Friel
24 did have some comments there about well, maybe Mr. Stevensen
25 should have had a medical expert take a look at these things.

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1 First of all, as Mr. Stevensen's affidavit -- his first
2 affidavit demonstrates, he did consider it a trial strategy
3 decision to basically assume that the medical evidence was
4 correct that these girls had been abused. A number of people
5 had confessed to the abuse and had gone to prison and just to
6 say there was no corroborating evidence linking Mr. Hidalgo,
7 so that trial decision can't be second-guessed in a civil
8 malpractice case. Nevertheless, attacking the medical
9 evidence likely would not have proved successful on the most
10 important point, which is the evidence regarding Donna
11 Everett, and this is a part where the Court should recall that
12 all the charges involving Melinda were dropped. It was Donna
13 Everett that Mr. Hidalgo was convicted of molesting.

14 Now, Dr. Milnes, while he testified that when he
15 examined Melinda Everett he would have found her accusations
16 surprising, he reached the complete opposite conclusion with
17 respect to Donna, and on this I would direct the Court's
18 attention to Exhibit 26, first at page 30, and this is in
19 trial testimony during, I believe it's the Roberson trial or
20 Roberson, I apologize if I mispronounce it.

21 THE COURT: I show it in *Rodriguez versus Perez*.

22 MR. WADLEY: Right. I think those were consolidated
23 cases?

24 MR. FIRKINS: That's Donna Rodriguez, Your Honor, for
25 clarification.

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1 THE COURT: Oh, okay.

2 MR. WADLEY: The ex-wife, right?

3 MR. FIRKINS: Yeah.

4 THE COURT: Thank you.

5 MR. WADLEY: And Exhibit 26 on page 30 says -- this is
6 Dr. Milnes: It was remarkable no difficulty passing vaginal
7 speculum on Marlene. Marlene was Donna's actual birth name.
8 I don't know why people have so many different names in this
9 case but Donna is also -- her birth name is Marlene. He said:
10 It was an unusual exam. Question: Is having the greater ease
11 of passing the speculum with the younger child more consistent
12 than with the allegations of the history of the abuse you had
13 been provided with? Answer: Yes. Now turning to page 47 Dr.
14 Milnes says: It would surprise me if the degree of vaginal
15 relaxation that I observed was the result of one penetration.
16 So his examination of Donna revealed evidence that was
17 consistent with multiple sexual penetrations involving Donna.

18 Now, there is absolutely no evidence in the record that
19 contradicts Dr. Milnes' findings with respect to Donna or Dr.
20 Eisert's findings, and Dr. Eisert is the doctor -- the State
21 doctor that evaluated her back in 1992 after she first
22 disclosed abuse involving Abel Lopez. And on this point I
23 have to point out what appears to be an inadvertent
24 misrepresentation on the part of Mr. Hidalgo in his reply
25 brief. In Mr. Hidalgo's reply brief first on page 18 and then

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1 on page 24, he quotes from Dr. Joyce Adams' testimony in that
2 same trial and he says: "In addition, Dr. Joyce Adams, a
3 national pediatric sexual abuse expert available to testify at
4 that time, later testified Dr. Eisert's conclusions were
5 wrong," and then he quotes a portion from Dr. Adams'
6 testimony. That's at the top of page 18. And then moving on
7 to page 24 at the bottom: "Next the Insurer argues that the
8 physical evidence strongly supports Donna's prior disclosures
9 of abuse. The Insurer points again to the testimony of Dr.
10 Eisert for support," and then there's another quote from Dr.
11 Adams purportedly refuting Dr. Eisert's conclusions and, for
12 that matter, Dr. Milnes' conclusions regarding Donna Hidalgo.

13 What they don't tell you is that Dr. Adams isn't
14 talking about Donna or -- isn't talking about Donna Hidalgo
15 here. The quote on page 18, Dr. Adams is testifying regarding
16 the findings that she made after looking at the colposcopy
17 slides of Melinda Everett so again, it has nothing to do with
18 Donna Everett. The quote on page 24 is a girl named Anita
19 Miller, she's talking about there, so that testimony has
20 nothing at all to do with Donna Everett. And if Mr. Hidalgo
21 can point to some evidence in the record refuting the medical
22 findings with respect to Donna Everett, I would invite them to
23 do that here and present that to the Court but those quotes
24 don't do it. And also from a tactical standpoint, I think Dr.
25 Adams' testimony also shows that it had the huge potential to

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1 backfire.

2 Dr. Adams testified that even if there is no medical
3 evidence of abuse, she still can't disclaim the existence of
4 abuse. She says the majority of abused children do not
5 exhibit any physical evidence of abuse and she said, in fact,
6 the history given by the child is the, quote, most important
7 aspect of diagnosing child abuse. Well, all that would have
8 done in the trial is highlight the histories that Donna and
9 Melinda had given at the trial, so far from discrediting the
10 State's evidence, it would have highlighted the State's
11 evidence. Well, you need to look at what the kids say
12 happened. Well, that's what the kids say happened.

13 Moving on, they suggest that Mr. Stevensen should have
14 called a child suggestibility expert. Again, this is -- the
15 decision of whether to call a witness at trial is a tactical
16 decision. Secondly, it certainly wouldn't have been the
17 be-all end-all of this case had Mr. Stevensen decided to do
18 that. Mr. Hidalgo's child suggestibility expert in his civil
19 trial against Detective Perez was a Dr. Esplin, and Dr. Esplin
20 testified consistent with the State's theory in this case that
21 it's normal for a child to delay a long time to disclose child
22 abuse until that child feels that he or she is in a safe
23 environment, entirely consistent with the State's theory that
24 these children did not disclose their abuse until they were
25 placed with Detective Perez and that they felt safe and

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1 comfortable with him, which is actually what the children
2 testified to in various proceedings.

3 Dr. Esplin also testified that when you have multiple
4 perpetrators of child sex abuse, it's not unusual for children
5 to disclose those perpetrators over time. Again, entirely
6 consistent with the State's theory that well, she initially
7 disclosed the first round of perpetrators, her parents. Then
8 that kept, as in Mr. Kilpatrick's words, mushrooming. Again,
9 that would have been consistent with the State's theory. And
10 then finally, I believe it was Dr. Adams testified that it's
11 not surprising for teenage boys to emphatically deny that
12 they've been abused, particularly by other males, and she
13 attributed that to a fear of being labeled as a homosexual in
14 high school and wherever. Again consistent with the State's
15 theory that Richard Everett, being the eldest teenage boy in
16 the Everett house, would emphatically deny that he had been
17 abused by anyone, particularly another male like Mr. Hidalgo
18 so, you know, again when it comes down to it, you know, would
19 calling a child suggestibility expert have done anything in
20 this case? I doubt it.

21 Another thing to keep in mind is that when Donna and
22 Melinda disclosed Mr. Hidalgo's abuse, Mr. Perez was nowhere
23 around. The first -- Melinda was the first one to accuse Mr.
24 Hidalgo of abusing her. She did that in a defense witness
25 interview with Mr. Phil Safar and Mr. Safar testified -- this

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1 is Exhibit 44 to my declaration -- in Mr. Hidalgo's civil
2 trial against Mr. Perez. "Question: And Melinda made that
3 disclosure in answers to questions by Mr. Safar? Answer: By
4 Mr. Safar. And it was a friendly interview. It was just --
5 it was just a friendly circumstance. He just asked questions,
6 and she was just trying to answer them." And that is Douglas
7 Shae who's testifying there and I believe he may be another
8 attorney but again -- so the first disclosure of abuse by Mr.
9 -- against Mr. Hidalgo didn't come in any coercive
10 circumstance or any coercive environment. It was an interview
11 by a defense attorney.

12 THE COURT: That was by Donna?

13 MR. WADLEY: That was Melinda. Melinda was the first
14 to disclose alleged abuse by Mr. Hidalgo. Once Melinda
15 disclosed, then that was reported to the authorities and Mike
16 Magnotti, who was another police officer, and Katie Carrow
17 went out to interview her and she disclosed abuse again to
18 Officer Magnotti and Ms. Carrow. Now -- so you might say
19 well, maybe that was a coercive environment. Maybe Officer
20 Magnotti was bullying her at that point to confirm that Mr.
21 Hidalgo had abused her. I have Melinda Everett's 2003
22 deposition in the civil case. She's asked the question: "Do
23 you have any complaints about Sergeant Magnotti in the way he
24 interacted with you? Answer: No." Now, this is Exhibit 38
25 on page 59. So she says Mr. Magnotti never mistreated me, yet

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1 she still disclosed abuse to him.

2 Finally, Donna disclosed abuse by Mr. Hidalgo while she
3 was being interviewed by Mr. Stevensen. I doubt there's an
4 allegation that Mr. Stevensen bullied her into accusing Mr.
5 Hidalgo but at any rate, that's when she disclosed abuse by
6 Mr. Hidalgo, and it was in response to that interview that the
7 State advised Mr. Stevensen that it was going to be amending
8 the charges to add another two counts against him involving
9 the alleged abuse of Donna. So again, even with the child
10 suggestibility expert, he doesn't have much to work with in
11 this particular case because Donna and Melinda didn't disclose
12 abuse involving Mr. Hidalgo in any coercive settings.

13 I'd like to turn briefly to the issue of alibi. I
14 think if the Court reads the actual trial transcript, that's
15 really a nonstarter. I mean, Mr. Stevensen put in unrebutted
16 evidence that Mr. Hidalgo hadn't met the girls' older sister
17 until April of '92 and that he was gone between October '92
18 and June of '94. That was unrebutted evidence in the trial
19 record. And in his closing argument, he pointed out that Dr.
20 Eisert's exam which happened in February of '92 was therefore
21 irrelevant because Mr. Hidalgo wasn't in the picture by that
22 point. He pointed out that Donna had accused Mr. Hidalgo of
23 abuse while she was in the third grade which happened in 1993
24 which is when Mr. Hidalgo wasn't even in the area, and he
25 pointed out that Melinda had accused him of abuse in 1995

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1 which was after Melinda had been taken out of the Everett home
2 which he argued to the jury, look, it's impossible that Mr.
3 Hidalgo had molested these children during these times.
4 Nevertheless, the jury decided to believe that, well, maybe
5 the kids had their dates screwed up a little bit, but the
6 bottom line is he did present the alibi evidence to the jury.
7 The problem for Mr. Hidalgo is that he didn't have an absolute
8 alibi. He admittedly was there at some points during the time
9 when the abuse allegedly occurred.

10 And then the closing statement I think Mr. Hidalgo has
11 taken entirely out of context when Mr. Stevensen said that the
12 State made the best investigation that they could. If you
13 read that in context, what he's telling the jury there is,
14 look, this whole situation got out of control with the number
15 of accusations, the number of adults involved, the number of
16 kids involved and all the police could do -- all the police
17 could do was to essentially take the girls' statements. They
18 didn't have the resources to do the investigation that was
19 necessary so again, consistent with his theory that he wasn't
20 going to say, look, all these accusations came because the
21 cops were just out to get these people. They wanted these
22 kids to accuse as many people as they could. No, that wasn't
23 his theory. His theory was just that, look, for whatever
24 reason, these girls were lashing out, they were naming
25 everybody that they knew and the police simply didn't have the

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1 resources to follow up on all this and there's no
2 corroborating evidence showing that Mr. Hidalgo was involved
3 in any of that.

4 With respect to the other witness, Mr. Filbeck, you
5 know, I'm not sure what else Mr. Stevensen could have done
6 with Mr. Filbeck on the stand. If you read the trial
7 transcript, Mr. Filbeck on cross-examination admitted that he
8 perjured himself and lied to the jury during the time that he
9 was being questioned. He admitted that he made various
10 contradictory statements about what abuse occurred, who was
11 involved, when it happened. He was completely discredited on
12 cross-examination. Nevertheless, the jury apparently decided
13 to believe him that Donna had been abused by Mr. Hidalgo but,
14 you know, that's beyond Mr. Stevensen's control at that point.
15 He did his best and did a reasonable job of discrediting Mr.
16 Filbeck on cross-examination. So that's really the liability
17 -- that's the standard of care case.

18 As the Court is also aware, Mr. Hidalgo would have to
19 prove actual innocence to recover any damages which, you know,
20 is a hard thing to prove. It's hard to prove a negative in
21 general and, you know, it's hard to prove that you're --
22 especially in a case like this to prove you're actually
23 innocent. The unfortunate thing about this situation is, I'm
24 not sure anyone knows exactly what happened during this entire
25 ordeal and that's part of the problem. Nevertheless, here's

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1 what we have. We have Donna Everett consistently saying that
2 she was molested by Mr. Hidalgo all the way up until 2003 when
3 she suddenly recants in the context of this lawsuit after she
4 realizes that, I think, three or four of her family members
5 were suing -- represented by Mr. Firkins' firm were suing Mr.
6 Perez and the authorities for millions of dollars. She too
7 admits that she's considering filing such a lawsuit as well.

8 Nevertheless, if you read her deposition testimony in
9 this case, she exhibited a striking lack of recollection about
10 anything. She couldn't recall testifying against Mr. Hidalgo.
11 She couldn't recall who forced her to testify against Mr.
12 Hidalgo. She couldn't recall anything. She said "I don't
13 know" -- and I had a paralegal in the office count it. She
14 said "I don't know" or some variation thereof more than 175
15 times during her discovery deposition. That is not
16 persuasive. What is persuasive is that in 1996 when her
17 sister recanted on video, she was with Connie Saracino in a
18 car. She turned to Connie. She said, "Connie, it did happen.
19 I don't know what my sister's talking about." In the Roberson
20 trial and at the reference hearing she said it did happen and
21 that's in 1998. As late as 2000, she was writing the Perezes
22 letters telling them that she loved them and that she was
23 sorry about what happened with her sister. I assume what she
24 meant by that is she's sorry that her sister recanted and
25 started saying all these nasty things about the Perezes, so

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1 that's, you know, point number one about Donna Everett and
2 she's, frankly, the most important one here because she's the
3 one that Mr. Hidalgo was convicted of molesting.

4 Melinda went back and forth. In 1996 she recanted in a
5 videotaped session apparently arranged by Mr. Van Siclen who
6 was there when it happened. In 1998 she repudiated her
7 recantation. She said that Mr. Roberson threatened to kill
8 her if she didn't recant on video. That was in '98, both in
9 the civil lawsuit as well as in the reference hearing. And
10 then she recanted again for the second time while at the same
11 time she had her own lawsuit against Detective Perez in which
12 she was seeking monetary compensation. So again, if this case
13 were to go to trial, there seems to be plenty of ammunition on
14 both sides to cross-examine her with respect to prior
15 inconsistent statements. Again, the medical evidence, there's
16 nothing in the record that refutes the medical evidence
17 pertaining to Donna Everett, which is the most important one
18 here.

19 And then, you know, Scharlann Filbeck is worth noting.
20 I know they say that well, you know, nobody -- she's not
21 believable. It's interesting though that in their original
22 petition for reasonableness, they said that Mr. Stevensen was
23 negligent because he didn't call Scharlann to testify about
24 how Mr. Perez was such a bully and how he bullied Scharlann
25 into accusing others and whatnot of abusing these kids. On

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1 that same videotape where she's saying, you know what, Mr.
2 Perez was a real jerk and I felt threatened by him and
3 everything, she nevertheless said yeah, but you know what, I
4 did see Mr. Hidalgo in a compromising position with Donna
5 Everett and that was specifically -- she said she was passing
6 by a bedroom in the Everett house and she saw Donna on the bed
7 with no underwear on and her dress up and Mr. Hidalgo's
8 genitalia was exposed.

9 So even when she's giving a videotape statement saying
10 I was pressured into saying all these things, none of these
11 things are true, but you know what, that thing I said about
12 Hidalgo, that actually was true. And again, she gave a sworn
13 statement in the civil case which she said, you know what,
14 that did happen. So again, maybe she's not a credible witness
15 like they claim. Nevertheless, she's actually been consistent
16 throughout about what she saw with respect to Mr. Hidalgo. So
17 that's actual innocence.

18 I think the remaining liability issues I should be able
19 to go through fairly quickly. Statute of limitations.
20 Westport, of course, realizes that this Court issued an
21 opinion on that, but the point is there's this other rule out
22 there that I don't think either party's brought to the Court's
23 attention at that time and I think about eight states have
24 adopted it, the so-called two-track approach under which the
25 statute of limitations starts as soon as the conviction

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1 happens and basically what the defendant does then is files
2 the malpractice lawsuit while also seeking post-conviction
3 relief and then the judge can stay that malpractice lawsuit to
4 see whether post-conviction relief is obtained. Mr. Hidalgo
5 says that that's a minority rule. I don't think that's
6 accurate. I think there's probably about equal numbers of
7 states on both sides of that if you look at that Mallen &
8 Smith treatise. I think they cite the same number of cases on
9 both sides of the rule so -- and if you look at some of the
10 Washington cases, Washington actually is pretty strict with
11 respect to the statute of limitations.

12 I know, for example, most states in legal malpractice
13 cases say, well, the statute of limitations tolls until you're
14 no longer represented by that attorney. Washington's a little
15 bit stricter than that. Washington says no, it's the matter
16 in which that attorney represents you. Once that matter
17 concludes, the limitations period starts running even if that
18 same attorney still represents you in other matters so, you
19 know, again this is getting back to Mr. Kilpatrick's point. I
20 agree with him that the Court is evaluating this settlement
21 based on the status of the facts and the law as they existed
22 at the time of the settlement. For example, if the Supreme
23 Court today were to come out with an opinion saying, you know
24 what, it's the two-track approach we're going with.
25 Limitations starts as soon as conviction. That doesn't mean,

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1 you know, that this Court should necessarily say okay, well,
2 then any settlement's unreasonable. No, I mean the Court
3 still has to look, well, it was an uncertain issue at the time
4 of the settlement but you know what, it's a good argument.

5 Certainly some -- you know, a lot of Supreme Courts in
6 other -- in California, for example, have said, you know what,
7 that's the best way to do it and there's a good chance that,
8 you know, even if Mr. Hidalgo were to get his big verdict in
9 this case, you know, there's a decent chance it would all get
10 wiped out on the statute of limitations defense so, you know,
11 that's -- the point is that I'm not saying it's a clearcut
12 issue. I'm saying it's an argument that's out there and that
13 was available to Mr. Stevensen.

14 Likewise with the immunity defense. You know, it's
15 available. It's out there. It's -- you know, a handful of
16 jurisdictions have adopted it on the grounds that, you know,
17 public defenders don't get to select their clients. It's not
18 like a normal attorney who can say, you know what, this case
19 looks a little too risky. I don't want to deal with this.
20 Public defenders don't have that option. There's also,
21 unfortunately, you know, a problem of getting attorneys to
22 want to do public defense work so these states that have
23 looked at this issue say, look, we're not going to add this
24 additional Monday morning quarterbacking, the potential
25 exposure to liability in case, you know, one of their clients

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1 goes to jail.

2 And as Mr. Kilpatrick points out, a lot of these
3 clients aren't very helpful on the front end but, you know,
4 they sure won't hesitate to sue on the back end if they can.
5 So, you know, in this case where you have Mr. Hidalgo
6 completely unhelpful to his attorney in trying to set up his
7 defense, gets out later and now he wants to sue his defense
8 attorney for malpractice. And some of the states that have
9 looked at this have said, you know, we're not going to allow
10 that. We're going to -- you know, you can raise ineffective
11 assistance as a defense to your conviction, but we're not
12 going to also put public defenders out there, you know,
13 looking at their wallets all the time, every time they're
14 representing someone who's not being particularly helpful.

15 And then with respect to damages, you know, there's no
16 doubt that, you know, the loss of liberty here is significant;
17 five and a half years in prison. You can't look at that in a
18 vacuum obviously though without looking at these liability
19 defenses. Sure, 3.8 million dollars might be within the range
20 of the evidence, assuming liability, but you don't settle a
21 case for what the verdict value is, you know, you look at
22 look, we've got some serious liability problems. Maybe we get
23 a jury on our side; maybe we don't, so you have to look at
24 what the range of the evidence shows as far as a verdict value
25 and then reduce that for the liability defenses and all those

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1 other things that go into it.

2 And another point with respect to the verdicts, and I
3 think the Court pointed this out -- and I apologize, I'm not
4 familiar with this *Vargas v. Earl* case so I can't really
5 comment on that, but just looking at the cases that Mr.
6 Hidalgo cited for their verdict value, I know one of them was
7 a case where the plaintiff proved an FBI conspiracy in which a
8 number of individuals were sent to prison and in fact put on
9 death row for a while until, you know, the death penalty was
10 ruled unconstitutional. I think they spent, I don't know,
11 decades in prison. Some of them died while they were in
12 prison and then it turned out that it was all an FBI
13 conspiracy.

14 The other one was where the police broke into a man's
15 house while he was naked, didn't tell him why they were there,
16 ransacked his house. By the time it was all over, he had been
17 arrested on a charge that he was illegally possessing a
18 firearm which he proved to a jury that the police had planted
19 there so, you know, obviously these are cases where the jury
20 is not going to think twice about exacting a financial penalty
21 on the defendant involved in this case and even if a jury were
22 to conclude in this case that Mr. Stevensen could have done
23 something better and perhaps fell below the standard of care,
24 there's not going to be the type of financial punishment
25 levied upon him that you would see in these other cases, and I

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1 think all of the cases that were cited were intentional police
2 misconduct cases, police frameups and things like that. And,
3 of course, Mr. Hidalgo did have his civil day in court against
4 Mr. Perez and he lost that trial.

5 Now, with respect to the collusion, I talked about that
6 earlier and there isn't, I agree, a lot of case law discussing
7 exactly what is fraud or collusion in the context of these
8 settlements. The two cases that I found applying Washington
9 law I've submitted to the Court and that's the one Federal
10 District opinion and also the *Water's Edge* opinion. And if
11 you look at all the factors identified by the Federal District
12 Court, they're all in play here. The amount is unreasonable.
13 The negotiating parties didn't bother to tell Westport what
14 they were doing. Westport wasn't invited, to say hey, why
15 don't you come in and this is what we're planning on doing if
16 you want to take part. Maybe Westport wouldn't have wanted to
17 take part. Maybe they would have said, do whatever you guys
18 want to do, but the fact that Westport wasn't told what was
19 going on is a factor of collusion. That's one identified by
20 the Court.

21 In their settlement agreement they state that they have
22 common interests against Westport and that those interests
23 will be enhanced once they reach their settlement agreement,
24 and it's noteworthy that this same contractual provision in
25 their agreement appears in the *Green* opinion and -- in the

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1 Green settlement agreement and the Appellate Court in the case
2 that we just got finished arguing up there thought that
3 provision was significant enough that they quoted it in the
4 opinion which we submitted to the Court as additional
5 authority. And then again, most egregiously is the fact that
6 Mr. Stevensen not only bought his peace with this settlement
7 agreement, but he also potentially is looking to profit down
8 the road, which is unheard of as far as I know of.

9 And again, I know of no case law that says you cannot
10 only do that but hey, you can set yourself up for a nice pay
11 day at the end of the road too. As the *Water's Edge* court, I
12 think, correctly identified, when the two parties join in
13 pursuit of a common objective, which is to get money from the
14 insurance company, there's no longer an adversity there.
15 That's a joint venture that they've now entered into. It's a
16 joint venture that Mr. Hidalgo and Mr. Stevensen have now
17 entered into against Westport and that's evidenced by not only
18 their agreement but by the fact they've jointly sued Westport
19 as plaintiffs represented by the same counsel.

20 So that gets us to the amount; what is a reasonable
21 settlement amount in this case. And I think if the Court
22 looks at what settlements have been reached in this and
23 similar types of litigations arising out of this particular
24 set of circumstances, you get an idea of what a reasonable
25 settlement is in a case like this. Mr. Hidalgo settled his

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1 claims against the County for \$100,000. He litigated -- he
2 lost his claims against the City on summary judgment. He lost
3 his claims against Perez after a civil trial. Doris Green who
4 was represented by an attorney named -- and I apologize, I
5 forget his first name, but Bohr, B-o-h-r, was her trial
6 attorney. He had a million dollars in insurance coverage. He
7 settled Ms. Green's claim against him for \$46,000. Ralph
8 Gausvik also sued Barker & Howard and in fact, as the
9 Appellate Court pointed out in the Green opinion it recently
10 issued, that was the case that Mr. Barker was most concerned
11 with. He felt the most exposure from his involvement in that
12 case. That case was settled for \$35,000. Henry Cunningham
13 sued Rebecca Carroll who was, like Mr. Stevensen, an associate
14 at Barker & Howard's law firm. Ms. Carroll represented Mr.
15 Cunningham. He settled his claim against her for \$18,000.

16 In 2003, consistent with the same ballpark as these
17 numbers, Mr. Hidalgo was willing to accept \$75,000 from Mr.
18 Stevensen which would have required some contribution from Mr.
19 Stevensen because there just wasn't that much money left in
20 the policy limit by that point. Mr. Stevensen was unwilling
21 to pay that so that settlement was never reached but,
22 nevertheless, Mr. Hidalgo obviously believed that was a
23 reasonable amount to accept for this case. Mr. Stevensen
24 didn't believe it was a reasonable amount to pay, at least not
25 when he was the one that was going to have to pay it. But

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1 given the fact that it was acceptable to Mr. Hidalgo, it was
2 not acceptable to Mr. Stevensen, we would suggest that \$75,000
3 or in that range, and given the other settlements that are
4 similar in these other cases, that that is a reasonable
5 settlement value for a case like this. Thank you.

6 THE COURT: Thank you, Mr. Wadley. Let's pause for a
7 bit before hearing your reply. I do want to just have Mr.
8 Wadley comment briefly on one aspect of this. What I'm
9 interested in is the correct role in the conceptual approach
10 to reasonableness of having arrived at mistrial on five out of
11 six claims, and I don't know how you'd want to address that,
12 but I tried to think of it as two identical cases side by
13 side, one in which there was one charge that was a molestation
14 of Donna on which the defendant was convicted and the other in
15 which there's six, four against Melinda, two against Donna,
16 five of them mistrial, one conviction against Donna, so that
17 was my framework for thinking about it. You might have a
18 different one. What is the -- what should the Court do with
19 that?

20 MR. WADLEY: Well, you know, I think the Court should
21 look at it -- I think there are a couple of things to take
22 from that. I think, number one, is that Mr. Stevensen
23 successfully avoided a conviction on what were actually the
24 more serious charges involved and those were the child rape
25 charges which would have potentially provided a life sentence

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1 for Mr. Hidalgo. Instead, there was one count of child
2 molestation that -- which was the lesser of the two with
3 respect to Donna. And then I suppose the other point
4 conceptually is that -- I tried to make this clear is that you
5 can't just mix and match the medical evidence and things like
6 that as far as, well, there were perhaps some problems with
7 respect to the medical evidence involving Melinda Everett, but
8 it seems to me after reviewing the record that there was some
9 consistent testimony there that at some point in time Donna
10 had been molested by somebody, you know, that was Mr.
11 Stevensen's whole point was, well, we don't know who.

12 Dr. Eisert investigated her back in -- before Mr.
13 Hidalgo was even in the picture but, you know, it seems like
14 one of the big things is that, well, you know, Mr. Stevensen
15 should have had some independent expert look at the slides
16 that were made available. Well, the problem is there were no
17 slides involving Donna. That's the whole point here. The
18 only slides that were available were the ones involving
19 Melinda, and he wasn't convicted of molesting Melinda, so I
20 think from that perspective, you have to look at, well, what
21 did Mr. Stevensen do or fail to do that resulted in the charge
22 that was ultimately -- a conviction was reached on. Okay.
23 Maybe he could have done something else with respect to the
24 Melinda Everett slides or whatnot but, you know, he got a
25 dismissal of those charges after a hung jury. It was the

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1 Donna one that was the most troubling and, frankly, looking at
2 the evidence, I think that's probably right. I think that the
3 accusation made by Donna is the most troubling. I mean, she
4 was the one that had this medical evidence. She was the one
5 that, you know, was the original girl to make the accusations
6 of abuse.

7 It seemed like maybe Melinda just kind of fell in line
8 at some point and maybe that was a result of some police, you
9 know, pressure since Donna had disclosed. Well, you know,
10 Melinda, something must have happened to you too. But, you
11 know, again, you know, I think that -- just my personal
12 opinion looking at the evidence, I think, you know, there
13 probably was something to that as far as the -- Donna's
14 accusations. They probably didn't -- it probably didn't
15 involve 42 individuals so I think Mr. Stevensen was probably
16 right there to say at some point she just started naming names
17 and perhaps that was as a result of police pressure but, you
18 know, that also goes to the actual innocence point is that,
19 unfortunately, the way this was ultimately concluded, you
20 know, we're never going to know who did what and what exactly
21 happened, but in the civil trial it would have been Mr.
22 Hidalgo's burden to prove that he did not molest Donna. And
23 given the evidence, I think that would have been a pretty tall
24 burden.

25 I'm not -- again, you know, they say it's offensive

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1 that we might suggest that. I'm not saying he actually did
2 anything. I'm just saying he would have to prove that he
3 didn't do something in a civil trial which seemed to be
4 difficult in light of all the conflicting evidence and, you
5 know, Donna said this then and, you know, back and forth with
6 Melinda and Scharlann and all that. It seems like a tall
7 order since he would have the burden on that issue in this
8 case, so I kind of went off there at the end but I think
9 that's how I would look at the different charges.

10 THE COURT: Okay. Thank you. Let's recess for 15
11 minutes.

12 (Brief recess taken)

13 THE COURT: So I have one of those new Smart cars and I
14 want you to know that it was a challenge to get all of these
15 notebooks in that car to get up here today so I'm a little
16 disappointed that I haven't had to rely on them. You can send
17 me to exhibit number whatever.

18 MR. KILPATRICK: So what we all need to know is that at
19 Exhibit Number 45, we're done with the Smart car.

20 THE COURT: Yeah, something almost had to go but I did
21 get it here. Great fun to drive. Okay. I think what
22 probably is most appropriate is that I give each side ten
23 minutes for summation, if you will, and then I'll give you the
24 Court's decision.

25 MR. KILPATRICK: To correct the record, I do not

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1 represent Ed Stevensen. I've never represented Ed Stevensen.
2 When the statute of limitations issue arose because of the
3 continuance, I got -- I obtained specific permission to file
4 that lawsuit in Ed's name from him, not as his counsel. Ed
5 Stevensen did not change his story with the declaration. If
6 you look what they do sort of consistently across -- and they
7 did it here. Ed basically says with the world of the database
8 of information that I had, this was a tactical decision that I
9 made, and I don't doubt that he made many tactical decisions,
10 but the problem is the negligence was in not having more to
11 put into the database for consideration, so if I'm a trial
12 lawyer, whether it's -- which I am most of the time, whether
13 it's civil or criminal, if I have two experts on an important
14 issue and I decide to call this one, not that one, or I've got
15 two issues which are inconsistent for me to present and I've
16 fully developed them and at least sufficiently developed them
17 and I have experts on each one and I decide I'm going to go
18 with this one, not that one, that's a tactical decision.

19 And I agree that, depending, it may well be protected
20 if I'm sued or any other lawyer is sued, but what we have here
21 is the lawyer didn't have the issue developed. He didn't
22 realize the medical information in fact was bogus, that
23 medically you could not say this shows abuse, this shows
24 repeated abuse, so he didn't have that in his database to
25 consider and balance. And all the cases say to invoke

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1 judgmental immunity, which is what all this tactical talk
2 falls under, you must have adequately researched the matter,
3 both legal and factual, which is why everybody, including
4 Judge Friel said, man, not having those experts on those
5 issues, really important.

6 Going back to the Court's last question and then tying
7 this in a little bit, so when Ed said what he said based on
8 the narrow grounds he was talking about, that's absolutely
9 accurate, but when you expand it to, you know, knowing what a
10 reasonably prudent practitioner, you know, with sufficient
11 experience with Class A felonies would know, yeah, I now
12 realize that medical evidence was attackable and I should
13 have. I just assumed the medical evidence was accurate and
14 that's when I made my tactical decision with a false
15 assumption. That's negligence, not tactical, you know, under
16 the umbrella of tactical immunity.

17 All these other settlements are essentially -- the
18 settlement amounts, including the one that Tyler was willing
19 to do, have nothing to do with the Court's job today. Lawyers
20 will reduce their demands if the liability turns crummy, if
21 their evidence on damages turns crummy or, and as is most
22 prominent in cases like this, if collectability of any
23 judgment appears seriously impaired. It doesn't do your
24 client any good to go get a 22 million dollar judgment if all
25 you're ever going to collect is \$25,000 from the defendant and

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1 that's where all these people were suing Barker and Stevensen
2 and whatnot while there was suspicion Barker was hiding
3 assets. No one ever found any. So you get down to the --
4 except there's one here where Tyler early on got a hundred K
5 from the County which could finance the lawsuit to get to
6 others. Totally understandable. That's no reflection
7 whatsoever on liability or damages. It's a reflection on
8 okay, now we've got the money to actually fund a good shot at
9 what's a pretty good claim for damages.

10 In Doris Green and Gausvik and all those, they're being
11 told there's almost no insurance left. The 500,000 has
12 eroded. Lee Smart and Westport took the position we can never
13 settle any individual claim because it's under one policy for
14 all these different people and we basically favor the named
15 insured over the other people and they had them all
16 represented by one defense lawyer and it's a mess and we'll
17 get into it in the other case. They were saying we couldn't
18 settle these others. Well, the fact is they darn well could
19 and they finally did when the others started to say, man,
20 there's not going to be anything left. We'll take a little
21 even though our claim is worth a lot, so these just aren't
22 reflective of the issues the Court talks about should be
23 looked at which is if they proceeded to trial based on the
24 liability, based on the damages theories, the actual theories,
25 not the new theories, you know, is this within the range of

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1 the evidence that a jury -- would a verdict of this nature
2 coming from a jury be within the range of the evidence.

3 And I want to point out they seem to imply by the
4 argument that we did not discount for liability. We did
5 discount for liability. If we were going to say -- if we had
6 already had a summary judgment of liability, I can tell you
7 3.8 wouldn't be the number we'd be focused on. It would be
8 more in the seven to ten range, maybe twelve, somewhere near
9 the actual midpoint, you know, or higher midpoint, the upper
10 quartile of potential results, so we discounted significantly
11 for the various kind of risks that are inherent in this kind
12 of trial. I've tried complex cases. I haven't lost any that
13 I know of, but you know how difficult they are, you know. So
14 we did discount.

15 The medical evidence I want to talk about a little bit
16 and then I'll lob quickly to Tyler on this idea that these
17 recantations somehow mean nobody can win anything. The
18 medical evidence from the experts was about whether
19 measurements within, you know, the length of here to here are
20 indicative of abuse or not. It doesn't matter what particular
21 young woman they're talking about, that it came from this
22 trial or that trial. The medicine is the same for Donna
23 Everett and so they play this game of because nobody actually
24 called them in a case of Donna Everett, the expert never used
25 Donna Everett's name as if she wouldn't have said the same --

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1 the medicine's the same for Donna Everett, so the people the
2 State had were claiming this dimension shows there must be
3 abuse and this expert says that dimension not only doesn't
4 show abuse, it's actually within the range of normal and if a
5 young girl had repeated abuse like these people say, we'd see
6 evidence of tearing on another structure I keep forgetting the
7 name of because I don't do these cases, but it's in there and
8 that's the type of testimony he was pointing at as somehow a
9 misrepresentation by us and whatnot. That's exactly -- you
10 know, medicine is medicine regardless of who they're accusing
11 -- they're saying was abused and so that's the very kind of
12 stuff that Judge Friel said would probably have resulted in an
13 acquittal if we'd had these two things developed, the coercive
14 nature of the investigation and the medical evidence.

15 And to go back to the Court's question of knocking out
16 the four by mistrial and whatnot, to me -- I mean, you'll
17 probably correct me if I'm wrong because you've been involved
18 in way more of these criminal things than I have, but it
19 indicates to me a shaky case all the way across, that just not
20 much more work on that last one and it would have gone too. I
21 just don't see it as somehow standing alone as a very
22 different thing. I mean, it did come late so there was even
23 less chance to focus on it because of what happened, which is
24 part of the problem, not stamping up and down and saying, I'm
25 not going to appear at trial and claim to be competent in a

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1 criminal case that late in the game. We need to sever or to
2 give time to prepare for that kind of thing, so to me it was
3 indicative that more work almost certainly would have helped,
4 just as Judge Friel said in his findings.

5 The coercive nature -- and they're trying to say oh,
6 yeah, but that's not very good for Donna Everett. The
7 groundwork and the true coercion kind of all happened before
8 this. I mean, this is going on over a repeated period over
9 which the kids -- there actually was some allegation of
10 physical abuse by Mr. Perez. And remember, the early
11 allegations, they said nobody's abused anybody, both girls.
12 And that wasn't good and it became clear after a while what
13 Mr. Perez wanted and it became clear what the State wanted and
14 it became clear what was going to happen to these girls and so
15 they're already set up. It doesn't matter if they're actually
16 physically with Mr. Perez at the time. It's already set up.

17 And if Tyler gets his chance, which I'm robbing him of
18 from the way the Court gave us the time, he will tell you that
19 the only time they went back to any suggestion that there was
20 abuse was when they were within the custody of the State.
21 Every time they were out of the State's grasp -- and remember,
22 the State was a defendant in cases at this point. Every time
23 they were out of the State's grasp, they said no abuse. When
24 they got retaken by the State -- and in fact, as I understand
25 it, they were transported to and from interviews in the civil

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1 case by Mr. Perez for the State while they had them under
2 State control.

3 There was another really important thing I was going to
4 say. Actual innocence. Sure, it's our burden of proof as a
5 plaintiff. We do that all the time. Fortunately, the burden
6 of proof in this case is more probably than not. If we had to
7 convince people that there certainly was no abuse, you know,
8 I'd be saying whoa, tough, tough call. More probably than
9 not, I don't have any question that yeah, there's always going
10 to be the ups and downs and whatnot but the chances people are
11 going to think this happened, repeated, repeated abuse with
12 all the facts here, very slim. I don't think there was going
13 to be a big problem in proving that under the civil standard.
14 If the Court has areas of particular concern, I want one of us
15 to address them and if the Court's concerned about the actual
16 details of the recantation and then resuming or -- and then
17 re-recanting and all that stuff, Tyler has chapter and verse.

18 The one additional thing to say about other cases is
19 the standard which the other parties had to overcome in the
20 cases against the State and Mr. Perez was intentional
21 fabrication of evidence on behalf of the defendant under the
22 civil rights standard, the way the judge instructed the jury.
23 Oh, my goodness. I mean, there's a tough standard. Negligent
24 and ill-intentioned and everything else that Mr. Perez could
25 have been, that's the case where what Westport is saying had

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1 to be done. You had to prove some sort of true conscious
2 conspiracy. Well, that's not -- that's -- you know, that's
3 why they lost. It has nothing to do with recantation and all
4 that kind of stuff. Very tough standard. Not the standard in
5 the criminal case. You didn't have to prove some overarching
6 conspiracy like they keep saying Mr. Stevensen would have had
7 to do. All he had to prove was they did it wrong, they
8 screwed it up, they didn't know what they were doing or didn't
9 care in doing all the suggestive stuff, which is the same for
10 this medical history. They say, well, if you call this
11 expert, they're going to help and aid the prosecution because
12 they say the history is very important. They don't mean the
13 history of what the cops got. They mean the medical history
14 from physicians. And if you follow with the rest of the
15 testimony, it's the medical history taken without suggestion
16 by the medical practitioner who's had at least a hundred of
17 these so the medical practitioners themselves aren't
18 suggestive and there was none of that here. The expert would
19 have been completely critical of this idea that anybody
20 developed appropriate history. All right.

21 THE COURT: I'll have to ask you to conclude.

22 MR. KILPATRICK: Thank you, Your Honor.

23 THE COURT: Thank you. Mr. Firkins, if there's
24 something burning in your conscience, I'd be happy to hear it.
25 I don't mean conscience that way.

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1 MR. FIRKINS: Real quick, Your Honor. They mentioned
2 the fact that -- on the issue of the child expert. The reason
3 I think that's so important for the Court to understand is
4 that Mr. Stevensen, by not obtaining an expert to even consult
5 with him as to the importance and the ever-expanding
6 allegations of these girls, was not able to explain to the
7 jury why the confabulations as they increased were less
8 believable. In other words, a jury doesn't have that
9 understanding. In the Carol Doggett case, the Court reversed
10 because the Court denied funds for such an expert in that
11 particular case, so there was no context. He created a trial
12 strategy that said, look at these kids. They're making all
13 these allegations, but the jury had no context to understand
14 why that was a problem.

15 They didn't have any of the scientific literature to
16 say, well, if kids get interviewed in this coercive method,
17 then what happens is they increase their allegations and they
18 begin to make ever more wild allegations, just like what
19 happened in this case to the point that the kids were saying
20 that CPS caseworkers were having group sex with them at
21 churches and at CPS offices and that there were people wearing
22 clown outfits and riding up in helium balloons wearing bells
23 on their toes, so that's how ridiculous the allegations got,
24 but there was no context to any of that. And indeed, Mr.
25 Stevensen didn't bring out any of the most absurd allegations

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1 that were made by these girls, including that in 1995 when
2 Melinda Everett's living with Perez, Hidalgo is actually
3 physically abusing her at that time.

4 That allegation was made by her in some of the reports
5 and it wasn't brought out in the trial and that's why the
6 expert is so critical to that fact is so they can give context
7 to the jury so they have an understanding of why are you
8 asking them all these questions? Why are you asking them
9 about all these alleged abusers? Why is that significant?
10 They didn't know and they convicted based on the fact that
11 they didn't have an understanding of that and that's why it
12 was so important for him not only to get somebody to consult
13 with him to point him to scientific literature so even if the
14 Court did say, I'm not going to allow you to call that expert,
15 he could still bring out a learned treatise and say, hey, you
16 know, Detective Perez, what do you think about this?

17 Instead, what he did is, I don't have any questions for
18 Detective Perez about this, so that's where he let this -- the
19 most important part of any criminal case is the investigation
20 itself. He let that stand and he not only said that --
21 remember, his trial strategy, according to them, is to attack
22 the credibility of Donna and Melinda Everett, but he never
23 did. He never attacked their credibility by saying this
24 medical evidence shows that they're liars. He never attacked
25 their credibility by showing that the police in the way they

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1 questioned them showed that they were liars. He never brought
2 up the fact that in their histories given to the doctors, that
3 that showed that they were liars.

4 He never attacked their credibility and that, they say,
5 is the big issue, that that was his trial strategy but there
6 was no context to it and that's why Professor Straight said
7 that's why you breached the standard of care and that in fact
8 is the standard here, not reasonable. We don't assess
9 liability in legal malpractice cases whether somebody is
10 reasonable or not reasonable like we do when somebody's
11 driving behind somebody in an automobile. We look at how a
12 professional deals with the situation and we determine whether
13 they breached the standard of care, so by them jumbling the
14 ineffective assistance of counsel cases into that, they have
15 jumbled it and made it a morass of legal standards that aren't
16 applicable and so I would ask the Court to think about that in
17 that regard as well. Thank you.

18 THE COURT: Thank you. Mr. Wadley.

19 MR. WADLEY: Thank you, Your Honor. Just to kind of go
20 in reverse order, first with respect to Mr. Firkins' testimony
21 -- statement regarding about how an expert would have been
22 able to put into context why these girls were disclosing more
23 and more people over time and things like that, this is
24 Exhibit 45 to my declaration, testimony of Mr. Hidalgo's
25 expert in the civil trial against Detective Perez. And the

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1 question is: "And if a child has been sexually abused by more
2 than one perpetrator, Dr. Esplin, that child may disclose the
3 various perpetrators at a different rate. In other words,
4 that child may not sit down at an initial interview and say
5 I've been abused, hypothetically, by six adults, and at that
6 initial interview say I've been abused by six adults. It may
7 take time over a period of time before they disclose. Can we
8 agree on that? Answer: The larger the number -- if the
9 number -- you know -- got up to a fairly good size, it would
10 be unlikely that a child would list them all at a particular
11 point. But -- you know -- if it was one or two, that's a
12 different issue."

13 So is that the context that they're suggesting that
14 their expert should have injected into the criminal trial,
15 that if a girl is claiming to have been abused by a number of
16 different individuals, that she's likely to disclose those
17 names over a period of time, because that's exactly what
18 happened, so that corroborates the State's evidence in this
19 case. With respect to the other expert that should have been
20 called, I had here a moment ago the expert disclosure of Dr.
21 Adams that Mr. Hidalgo produced pursuant to Rule 26 and that's
22 Exhibit 40 to Mr. Firkins' declaration. Not one word about
23 Donna. It is entirely about Melinda, not a single word about
24 the medical evidence pertaining to Donna. And again, they may
25 say, oh, it's broad, general principles; the medicine applies

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1 to every girl.

2 Nevertheless, it's their burden to prove this case. It
3 was their burden to present the medical evidence that they
4 claim Mr. Stevensen should have gone out and produced to rebut
5 the medical evidence that was presented at the underlying
6 criminal trial. All they did pursuant to Federal Rule 26 was
7 produce medical evidence regarding Melinda Everett. They
8 would have been precluded from introducing any testimony
9 regarding medical evidence that was not in this report and
10 there's nothing in this report concerning the medical evidence
11 regarding Donna.

12 With respect to the issue of disclosure, Mr. Kilpatrick
13 said, well, there was evidence presented in these cases in the
14 testimony that the girls had been physically abused by Mr.
15 Perez when they made these disclosures. Well, again, don't
16 forget, Melinda was the first to disclose Mr. Hidalgo's name.
17 Melinda was not living in Perez's house when she made that
18 disclosure. It was only Donna that was living in his house.
19 Melinda was moved into Perez's house subsequently but at the
20 time she made that initial disclosure to Phil Safar, which he
21 was questioning her in a defense interview, she was not being
22 -- she was not in Perez's home. There was no allegation that
23 she was being abused at that time by Mr. Perez so, you know,
24 that just doesn't hold water to say that it was Detective
25 Perez that was physically abusing her to accuse Mr. Hidalgo.

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1 Melinda wasn't in his house at that point in time.

2 With respect to the recantations and the changes in
3 testimony, you know, it cuts both ways. They say that, well,
4 each time that these girls said that they had been abused by
5 somebody, they were under, quote, unquote, State control, you
6 know, first it's Perez's control. Perez is the one that's
7 abusing them. Then it's just even if Perez isn't in the
8 picture, it's State control. They're under State control so
9 they're accusing everybody. Well, look at every time they
10 made a recantation. They were being represented by the Van
11 Siclen law firm. In 1996 when the first recantation came out,
12 it was Mr. Van Siclen with his TV crew and Mr. Roberson there
13 when the first recantation came out.

14 In 1998 when Melinda went back and said, no, it really
15 did happen, okay, she was back in State control. All right.
16 Then as soon as she got out, Mr. Van Siclen comes back in the
17 picture and all of a sudden she's got a different tune, this
18 time with financial motive. She's suing for millions of
19 dollars. Her sister Donna finds out, hey, all these people
20 are suing too. My mom and dad are suing. My sister, my
21 brother, they're suing. I might sue too. So up until 2000,
22 she continues to communicate with the Perezes. She sends the
23 Perezes letters, says "I love you," says "You guys were great
24 to me. I'm sorry about what's happened." Now all of a sudden
25 they were the worst people in the world. Yet, in deposition

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1 when she's asked, well, what did they do to you to make you
2 say these things? I don't remember. Who made you accuse Mr.
3 Hidalgo? I don't remember. Do you remember testifying
4 against Mr. Hidalgo? I don't remember. I invite the Court to
5 look at those two depositions and read them and say that yeah,
6 those would be persuasive witnesses in a civil case when they
7 can't remember a darn thing about anything.

8 And then I guess just -- well, one other point about
9 the civil lawsuit. I think Mr. Kilpatrick was incorrect when
10 he said they had to prove that Mr. Perez intentionally
11 fabricated evidence. I don't think that was the standard that
12 was applied and if you look at Exhibit 42 to my declaration,
13 which was the summary judgment order in the Federal Court's
14 opinion, the reason why the Court didn't grant summary
15 judgment is, it says: The Court finds that genuine issues of
16 material fact remain whether defendant Perez used
17 investigative techniques that were so coercive and abusive
18 that he knew or should have known those techniques would yield
19 false information regarding plaintiff. They didn't have to
20 prove that he intentionally fabricated. They had to prove
21 that the techniques he used were so bad that, you know, he
22 knew or should have known that he was going to create false
23 evidence. He didn't have to intentionally create false
24 evidence, so that's the standard that they were dealing with
25 and that's the standard that they failed upon.

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1 And then finally with respect to those settlements, you
2 know, those are the amounts that these plaintiffs accepted to
3 resolve their claims. And then particularly with respect to
4 Doris Green, Doris Green -- her settlement -- and again, I
5 know each case is judged on its facts but at least these are
6 the most similar facts because we're all dealing with the same
7 set of circumstances here. Doris Green, represented by
8 attorney Bohr, he had his own million dollar policy. We're
9 not talking about the 500,000 eroding limits policy. He
10 settled that claim for \$46,000 so that's not the same type of
11 concern that they're talking about in that case so, you know,
12 frankly, I don't know -- the Court doesn't have anything else
13 to look at to say, well, what's a comparable settlement,
14 what's a fair settlement in this case.

15 You know, the first thing you would look at would be,
16 well, what have similar cases settled for. Well, you don't
17 get any more similar cases than -- you know, because there
18 were, unfortunately, a number of cases that arose out of these
19 same circumstances, you don't get much more similar than this
20 and these are the amounts that these cases were settling for
21 so that's, you know -- and again, it's their burden to prove
22 that some other amount is reasonable and I don't think they've
23 satisfied that burden on this record. Thank you.

24 THE COURT: Thank you, counsel.

25 MR. KILPATRICK: Your Honor, I am reminded by Mr.

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1 Wadley -- we do have the burden. Could I have 45 seconds on
2 something I neglected to tell the Court?

3 THE COURT: Go ahead.

4 MR. KILPATRICK: As to this last -- the case Mr. Bohr
5 represented. This was not an incarceration case. It was a
6 dependency representation, loss of children, rights relative
7 to children in what was not the world's greatest home to begin
8 with so hardly anything to do with this. I want to talk about
9 this half of the emotional distress which they again referred
10 to as profit for Mr. Stevensen. I have never in any other
11 case heard a person's damages, something lost they've already
12 incurred, referred to as profit. Parties who come to court
13 and want their damages recompensed are not seeking profit.
14 Those are damages.

15 Now, let's go past the Court's hypothetical of two
16 cases otherwise similar. Let's go to this case. This
17 reasonableness hearing is conditioned on the Court finding the
18 judgment reasonable. If the Court were to say to us because
19 of that clause in this settlement agreement, I'm not going to
20 approve this because it takes on some elements of collusion
21 that I don't like -- I don't think the Court should say that
22 because that has nothing to do with the amount of the judgment
23 that's being sought here and the judgment the jury would
24 likely have entered against them, but if it were, then there's
25 no settlement in this case because it's contingent. It's the

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1 Court's job to say then what would be a reasonable settlement.

2 And if I understand the isolation of the issue the way
3 they have done it, the Court would say, well, a 3.8 million
4 judgment is reasonable, it just has to not have that clause,
5 at which point we'd talk and presumably the two sides would
6 then agree to accept the settlement on the Court's terms;
7 meaning what the job we're here to do is the amount of the
8 judgment which the jury didn't determine and the person had no
9 economic incentive to hold down. That's the reason we're here
10 is the amount of the judgment. If that's reasonable, then the
11 Court's going to say three eight anyway. I just don't
12 understand why this element of him keeping part of his own
13 damages would even enter the picture.

14 THE COURT: All right. Thank you, counsel.

15 MR. WADLEY: Your Honor, may I? I need to correct one
16 thing, presumably inadvertent. Mr. Bohr was Ms. Green's
17 criminal trial attorney. She was represented in her
18 dependency proceedings by a Barker & Howard attorney but Mr.
19 Bohr was the criminal trial attorney and that's in -- I
20 believe the Green opinion makes that clear and I can submit
21 evidence to that effect but that just is a fact.

22 THE COURT: Okay. Well, let me just make a couple of
23 general observations. I spend most of my time in criminal
24 court because that has become the nature of rural state court
25 work and most of the complex civil litigation happens other

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1 than in rural state courts. One of the things that that does
2 is gives me a filter through which to look at the allegations
3 in this case, and I mean to impugn no one when I suggest that
4 the quality of legal representation of parties is probably
5 greatly superior, as a general proposition, in civil
6 litigation than it is in relatively routine criminal
7 litigation. It's just a fact that over a period of time
8 becomes regrettable but undeniable. This case is a pretty
9 good example because the quality of the representation that
10 the parties have had in this case is just superb.

11 One of the ways I can tell that or measure that is
12 getting to an argument of two hours or two and a half and not
13 hearing anything that's a surprise because it's all been laid
14 out before the Court in a very professional and concise way
15 with all the documentation needed to back up the
16 representations, for the most part, that the lawyers make, so
17 I just want to make sure that I'm clear in saying that on both
18 sides of this case, I just couldn't have asked for a more
19 engaging system to go about considering these issues. It's
20 also become pretty clear to me that there is room for lots of
21 reasonable disagreement in this case until it comes to the
22 single judicial officer required to make a determination in
23 regard to reasonableness and then, you know, you have to be --
24 you have to settle to a position that is of one mind, and your
25 arguments on both sides have -- sincerely have assisted the

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1 Court in doing that.

2 For the record, I have considered the *Glover* factors
3 and did that by breaking down the evidence that you presented
4 in the form of all these exhibits in two ways. The first way
5 was to sit at my home computer and reorganize the exhibits
6 into a chronological flow so that -- I'm sure you folks have
7 all done that as well, so that I could get a picture of Mr.
8 Stevensen's representation of Mr. Hidalgo as it happened in
9 time and try to distinguish between what was then known or
10 capable of being known and what only came later. The other
11 way was to try to deal with individual allegations, if you
12 will, or assertions within the framework of the *Glover*
13 factors, and what I found was that ultimately, it came down to
14 a heavy emphasis on the merits of Mr. Hidalgo's liability
15 theory and the merits of the defense theory.

16 That was not to the exclusion of the other factors. I
17 did consider the interests of Westport. I did consider any
18 evidence, such as it is, in the nature of fraud or collusion
19 between Hidalgo and Stevensen which does not rise to a morally
20 repugnant level of collusion but should be expressed in terms
21 of agreement and, I think, joint venture at this point is a
22 fair description of it. I considered the risks and expenses
23 of continued litigation in this setting, including
24 recoverability of any judgment. That would be one of the
25 risks. And I considered, of course, Mr. Hidalgo's damages.

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1 And what I found was that the plaintiffs in this case
2 have -- the settling parties have a way of looking at the
3 relative merits of the liability theory and the defense theory
4 which is unique to them and evidence-based and strongly leans
5 on the Hidalgo liability theory. Westport, as is, of course,
6 natural, weighs those two factors entirely differently and
7 strongly leans upon those things that will be meritorious --
8 or would be meritorious in Mr. Stevensen's defense of the
9 claim. I can tell you that my conclusion, after considering
10 your arguments and this abundance of evidence, is more in
11 line, frankly, with Westport's view of the likelihood of Mr.
12 Hidalgo prevailing on his theory that Mr. Stevensen fell below
13 the appropriate standard of care. I come to that conclusion,
14 I think, in an intellectually honest way and not by any
15 predisposition.

16 I have, as a lot of people have in the legal community,
17 had to look at some of these criminal malpractice judgment
18 amounts and kind of gulp, and I'll bet if Mr. Stevensen and I
19 had a chance to talk about it, he would say that going through
20 this experience colors the way he makes a charging decision
21 because, frankly, in many legal cultures folks get charged
22 with a felony as though it's, oh, well, it's just a criminal
23 charge, but when you start talking about millions of dollars
24 for people being wrongfully incarcerated, that's got to affect
25 that decision and tell us how truly important it is when

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1 somebody gets charged with a crime and when a court makes a
2 finding of probable cause, so it has taken some adjustment in
3 the way that I think about these cases in order to come to a
4 conclusion in regard to reasonableness.

5 And having told you those preliminaries, let me tell
6 you what my ultimate analysis is. As best I've been able to
7 determine, a fair range for damages in this kind of a case
8 with prison incarceration would be somewhere between \$1,000 a
9 day, which would be \$365,000 a year, and \$100,000 a month
10 which would be 1.2 million a year. I think that's basically
11 the range in which these cases tend to operate. If we apply
12 those ranges to Mr. Hidalgo's roughly five and a half years of
13 incarceration, we get on the low end of that scale 2,007,500
14 and at the upper end of the scale we get 6.6 million. A
15 median figure between those two, which is unsophisticated but
16 the best way I have to wrestle with them, is just about 4.6
17 million. It's actually 4,592,500. And so I believe that that
18 is a fair figure of damages if Mr. Hidalgo prevailed entirely
19 on his liability theory.

20 And then the question becomes, in weighing those
21 theories, what is the likelihood of success. Without boring
22 you with any more detail, I will tell you that ultimately,
23 after a great deal of thought, I decided that the liability
24 chances are not very good, that I assessed them between 10
25 percent and 20 percent of prevailing in what would have been a

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1 trial setting involving Mr. Hidalgo's claim against Mr.
2 Stevensen. Well, 10 percent of that median damages figure is
3 459,250 and 20 percent is, of course, twice that number or
4 918,500. The best I could do for the purposes of this hearing
5 was to settle on a median between those two figures, which is
6 \$688,875, and that will be the Court's conclusion as to what
7 would be a reasonable settlement in this case. Incumbent in
8 that conclusion is the Court's supporting conclusion that a
9 settlement in this context of 3.8 million dollars is not
10 reasonable.

11 Having read the *Green* opinion from Division III, I
12 think I should also touch on just a couple of things that I
13 thought were particularly significant in assessing liability.
14 Probably the most significant was the role played by newly
15 discovered evidence as opposed to what reasonable diligence or
16 due diligence on Mr. Stevensen's part would have revealed in
17 August of '95. The second one was the somewhat theoretical
18 nature of the plaintiff's theory applied only to Donna as
19 opposed to as it would apply to Donna and Melinda, and the
20 third that was particularly persuasive to me was the fact of
21 at the time of these proceedings, the Hidalgo criminal trial,
22 Doris Green, Harold Everett and Idella Everett had all been
23 convicted and sentenced for abuse of these children which
24 would make the kind of enterprise that the settling parties
25 now urge should have been followed at the time of trial an

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1 extremely difficult proposition.

2 I say that, by the way, counsel, because in my
3 experience when children make allegations of these kind,
4 jurors look for some reason other than truth of the
5 allegations as to why they would make such an allegation so
6 they look carefully at, well, the parties were in a divorce
7 setting. Mom was trying to get custody. Or they look at,
8 well, somebody coached them into testifying this way or some
9 other reason. All of that becomes extremely difficult to do
10 when three people have recently been convicted of molestation.
11 That just becomes a real challenge for the criminal defense
12 lawyer and, to me, that one was significant as well. Of
13 somewhat lesser significance was the fact that Mr. Stevensen's
14 performance, such as it was, was one juror vote away from no
15 convictions at all in the case and his efforts to obtain a
16 continuance to get a better grasp of the case.

17 I think that's all I want to say except again to
18 sincerely thank you gentlemen for the hard work on both sides,
19 on all sides in this matter. I really have this judge's
20 disease where the most boring things can strike me as
21 evocative and interesting and engaging and this was. I should
22 actually catch myself and say one other thing just for the
23 record. I was not persuaded by the theory of public defender
24 immunity. I read an ALR article that gave a national
25 perspective on this. I read some of the cases in that -- in

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1 fact, I think I read all the cases cited in that treatise and
2 decided that I came to the conclusion kind of anecdotally that
3 finding that public defenders are immune would be outside of
4 the expectations that I would have of the Appellate Courts in
5 this state.

6 And secondly, I was not persuaded, despite competent
7 argument, in regard to the statute of limitations issue. I
8 did consider the two-track approach and I decided it was the
9 insurance company financial collapse approach because
10 everybody who got convicted would appeal and the attorneys --
11 the insurance companies would have to crank up a defense at
12 that point regardless of what the ultimate outcome of the
13 appeal was. I was not attracted to the wisdom of that
14 approach, and I went back and read the Court's memorandum
15 opinion on the summary judgment on Mr. Stevensen's motion on
16 the statute of limitations, adhere to the reasoning at that
17 point and think that that would not be likely a successful
18 theory. I was reminded in doing that that I made the mention
19 in that decision about reviving -- by changing the law,
20 reviving a claim that has lapsed in terms of the then-existing
21 statute of limitations. I don't know that we ever really
22 wrestled with that and there may still be some light to that
23 theory but I didn't do anything further on it. With that,
24 gentlemen, thank you. We'll be in recess.

25 MR. FIRKINS: Before we depart, it's my understanding

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1 now that there is no settlement and that means we need to get
2 back on track for a trial date. How do we do that?

3 THE COURT: Well, I think that would be preliminary to
4 conclude that there is no settlement. I think, first, the
5 parties have to determine whether or not they want to settle
6 -- want to accept the Court's reasonableness figure or not.
7 You're sending me a strong signal that from your side, you do
8 not but maybe Mr. Stevensen will persuade you. I don't know.
9 If you do, then I don't know very much about Chelan County
10 trial setting procedure so I would refer you to the clerk or
11 court administrator here to get that done.

12 MR. FIRKINS: Okay. Thank you.

13 MR. KILPATRICK: And as a big loser, Your Honor, let me
14 say even though I'm not happy with the ultimate conclusion the
15 Court reached, it's hard to find fault with everything you've
16 done and I appreciate that you got into it for whatever
17 reason. I think they're all fascinating. A lot of people
18 don't and I'm with you and I appreciate all the effort. Let
19 me do say, I don't think it changes because the numbers are so
20 low to sort of start with but the idea of mediating may be
21 contrary to what the Court's supposed to do and with the upper
22 range of potential with the jury, that means other numbers
23 closer to that range may well -- because you've got to start
24 with a full verdict and then discount. Anyway, maybe I'll
25 give you something. Maybe I won't. We'll obviously talk but

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1 the numbers are pretty hard to make work even if I convince
2 you of a slightly different methodology.

3 THE COURT: Mr. Wadley, will you circulate an order?

4 MR. WADLEY: I will, Your Honor.

5 THE COURT: Thank you.

6 (End of proceedings)

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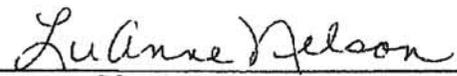
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1 STATE OF WASHINGTON)
2 County of Chelan) : ss

3 I, LuAnne Nelson, a Certified Shorthand Reporter, and
4 official reporter for Chelan County Superior Court, do hereby
5 certify:

6 That the foregoing Verbatim Report of Proceedings was
7 reported at the time and place therein stated and thereafter
8 transcribed under my direction and that such transcription is
9 a true, complete and correct record of the proceedings.

10 I further certify that I am not interested in the
11 outcome of said action, nor connected with, nor related to any
12 of the parties in said action or their respective counsel.

13
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15 Official Court Reporter
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