

63148-9

63148-9

NO. 63148-9-I

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

ERNEST COULTER AND LEROSE COULTER,

Appellants,

v.

ASTENJOHNSON, INC., et al.,

Respondent.

2009 AUG 20 PM 3:17

~~FILED~~  
STATE OF WASHINGTON  
COURT OF APPEALS

---

REPLY BRIEF OF APPELLANTS COULTER

---

Philip A. Talmadge, WSBA #6973  
Sidney C. Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661

Cameron O. Carter, WSBA #33326  
Brayton Purcell, LLP  
111 SW Columbia Street, Suite 250  
Portland, OR 97201  
(503) 295-4931  
Attorneys for Appellants  
Ernest Coulter and LeRose Coulter

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii - iv
A. INTRODUCTION .....	1
B. REPLY ON STATEMENT OF THE CASE .....	2
C. SUMMARY OF ARGUMENT IN REPLY .....	2
D. ARGUMENT IN REPLY.....	3
(1) <u>As a Matter of Law, the Trial Court Was Not Empowered Under RCW 4.22.060 to Relieve Asten of Its Joint and Several Liability By Hypothesizing Future Settlements and Subtracting Those Fictitious Amounts from Judgment Against Asten</u> .....	3
(a) <u>Because the Trial Court Misinterpreted a Statute, the Standard of Review Is De Novo</u> .....	4
(b) <u>The Trial Court’s Inquiry Should Have Ended When It Evaluated the Settlement Agreements Before the Court and Chose to Offset the Judgment By the \$94, 977 Received Under Those Agreements</u> .....	6
(c) <u>The Trial Court Did Not Find the Pretrial Settlements Unreasonable Based on Its Application of the Glover Factors</u> .....	8
(d) <u>Trial Courts Have Discretion to Find the Actual Settlement Agreements Before Them Unreasonable and Increase the Offset; That Is Not What Occurred Here</u> .....	11

(e)	<u>Asten Fails to Respond to the Coulters’ Arguments Regarding Contribution</u> .....	14
(2)	<u>Whether Interest Is Characterized as Pre-judgment or Post-Judgment, It Accrues from the Date of the Original Judgment in 2005, Not From the Date of the Second Judgment Assessing Asten’s Portion of Liability</u> .....	15
E.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005).....5  
*Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 901 P.2d 297 (1995)...12, 13  
*Car Wash Enters., Inc. v. Kampanos*, 74 Wn. App. 537,  
 874 P.2d 868 (1994).....20  
*Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364,  
 798 P.2d 799 (1990).....22, 23  
*Fox v. Mahoney*, 106 Wn. App. 226, 22 P.3d 839 (2001) .....20  
*Glover v. Tacoma General Hosp.*, 98 Wn.2d 708,  
 658 P.2d 1230 (1983).....8, 9  
*Hadley v. Maxwell*, 120 Wn. App. 137, 84 P.3d 286 (2004)  
*review denied*, 152 Wn.2d 1030, 103 P.3d 200 (2004)..... *passim*  
*Hansen v. Rothaus*, 107 Wn.2d 468, 730 P.2d 662 (1986).....18  
*JACO Environmental Inc. v. AM. Int’l Specialty Lines Ins. Co.*,  
 No. 2:09-cv-0145, 2009 WL 1591340  
 (W.D. Wash., May 19, 2009).....20  
*Kiewit-Grice v. State*, 77 Wn. App. 867, 895 P.2d 6,  
*review denied*, 127 Wn.2d 1018 (1995).....16  
*Lakes v. Vondermehden*, 117 Wn. App. 212,  
 70 P.3d 154 (2003), *review denied*, 150 Wn.2d 1036 (2004)..16, 17  
*Lester N. Johnson Co. v. City of Spokane*, 22 Wn. App. 265,  
 588 P.2d 1214 (1978), *review denied*, 92 Wn.2d 1005 (1979).....17  
*Meadow Valley Owners Ass’n v. St. Paul Fire & Marine Ins. Co.*,  
 137 Wn. App. 810, 156 P.3d 240 (2007) .....11, 12  
*Prier v. Refrigeration Eng’g Co.*, 74 Wn.2d 25, 442 P.2d 621 (1968) .....16  
*Schmidt v. Cornerstone Investments*, 115 Wn.2d 148,  
 795 P.2d 1193 (1990).....7, 11, 12  
*State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) .....5  
*State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007) .....4  
*State v. Hale*, 94 Wn. App. 46, 971 P.2d 88 (1999) .....4  
*State v. Morse*, 45 Wn. App. 197, 723 P.2d 1209 (1986) .....6  
*State v. Murray*, 118 Wn. App. 518, 77 P.3d 1188 (2003) .....4  
*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) .....6

*State of Washington Dep't of Corrections v. Fluor Daniel, Inc.*,  
160 Wn.2d 786, 161 P.3d 372 (2007).....17

Statutes

RCW 4.22.040 .....14  
RCW 4.22.060 ..... *passim*  
RCW 4.56.110 .....22  
RCW 4.56.110(3).....22

A. INTRODUCTION

In their second appeal in this case, the Ernest and LeRose Coulter (the “Coulters”) seek enforcement of this Court’s prior ruling that AstenJohnson Inc. (“Asten”) is jointly and severally liable for the injuries caused by asbestos exposure.

The trial court, having been instructed by this Court to conduct a reasonableness hearing to evaluate pretrial settlement agreements, exceeded its statutory authority. Instead of simply evaluating the pretrial settlements for reasonableness, the trial court entertained “evidence” about future amounts that might be received from unnamed defendants and nonexistent asbestos trusts, and reduced Asten’s liability by those fictional amounts.

Asten’s response never addresses the central focus of the Coulters’ argument: that the statute authorizing trial courts to evaluate settlements reached does not permit the kind of detour that the trial court took here. If Asten believes that other defendants were not properly joined, or that other settlement amounts should have been obtained, then the burden was on Asten to pursue contribution. Asten, as a joint and several tortfeasor, should make the Coulters whole.

B. REPLY ON STATEMENT OF THE CASE

Upon remand, the trial court was instructed by this Court to conduct a hearing regarding the reasonableness of pretrial settlement agreements that had been reached between the Coulters and various defendants. CP 16. The Coulters provided the details of those settlements to the trial court. CP 19-29.

Asten's fact statement contains discussion about discovery on remand. Br. of Resp't at 3-4. Asten sought information regarding why the Coulters had not sought settlements from various other parties whom, in Asten's view, also should bear the burden of joint and several liability. *Id.*

Although the Coulters pointed out that Asten's inquiries were improper and irrelevant to a reasonableness hearing, CP 182-202, the trial court nonetheless compelled responses regarding these "potential setoffs," to use Asten and the trial court's term. CP 128.

C. SUMMARY OF ARGUMENT IN REPLY

The Coulters argued in their opening brief that the trial court erred in predicting potential future settlement amounts from non-settling parties, and then subtracting that fictitious amount from the amount Asten owes the Coulters. They also argued that the trial court erred in calculating interest on the judgment during this extended litigation process.

Asten's brief in response does not actually respond to the Coulters' arguments. Instead, Asten invents and responds to arguments that are nowhere in the Coulters' brief. The Coulters do not argue that the trial court was without discretion, or that it was bound to find the dollar amounts paid in pretrial settlements. The trial court was free to review the settlement agreements before it, and if the terms were unreasonable, revised any or all them upward to an amount the court did find reasonable.

Asten makes no substantive response to the Coulters' central argument: the trial court exceeded its statutory authority when it hypothesized about nonexistent settlements *not* before the court, and offset the judgment by those fictitious amounts in addition to the amounts paid under the actual agreements before it.

Asten is also incorrect when it claims the Coulters are not entitled to interest on a judgment for a damages award that has not changed one dollar since 2005. Asten did not challenge the amount of the judgment on appeal, only the amount of its own liability. The Coulters are entitled to either pre-judgment or post-judgment interest accrued since 2005.

#### D. ARGUMENT IN REPLY

- (1) As a Matter of Law, the Trial Court Was Not Empowered Under RCW 4.22.060 to Relieve Asten of Its Joint and Several Liability By Hypothesizing Future Settlements and Subtracting Those Fictitious Amounts from Judgment Against Asten

(a) Because the Trial Court Misinterpreted a Statute, the Standard of Review Is *De Novo*

The Coulters explained in their opening brief that the standard of review here is *de novo* because the trial court interpreted RCW 4.22.060 as permitting it to assign value to hypothetical future settlements, rather than a review of existing settlement amounts for their reasonableness. Br. of Appellants at 9.

Asten responds that a “determination of reasonableness is reviewed for abuse of discretion.” Br. of Resp’t at 8. Asten also questions whether the Coulters’ argument is really about statutory interpretation, because they assigned error to the trial court’s factual findings. Br. of Resp’t at 9.

A trial court does not have discretion to determine its own statutory authority. *State v. Hale*, 94 Wn. App. 46, 54, 971 P.2d 88 (1999). When a statute provides a trial court with certain powers, and a party challenges whether the trial court’s action exceeded those powers, the standard of review is *de novo*. *Id.*; *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). In *Armendariz*, a trial court imposed a no-contact order against an assault defendant for a term equal to the statutory maximum sentence for the offense. *Id.* at 109. There was no question that the trial court had discretion to impose crime-related prohibitions against

the defendant. *Id.* at 110. The defendant appealed, arguing that the trial court did not have statutory authority to impose the no-contact order for that length of time. Our Supreme Court held that when a party questions the trial court's statutory authority to take a particular action, the correct standard of review is *de novo*:

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). However, the key question in this case is not whether the trial court abused its discretion in exercising admittedly existing authority, but rather whether the trial court had any authority under the SRA to impose the no-contact order at issue. Because this case hinges on a matter of statutory interpretation, *de novo* is the appropriate standard of review.

*Id.* Therefore, even if a trial court has general discretion over a particular proceeding, a challenge to the court's statutory authority to take a particular action within that proceeding is reviewed by this Court *de novo*.

*Id.*

Here, the Coulters challenge the trial court's authority – within the context of an RCW 4.22.060 hearing – to review evidence or make findings regarding hypothetical future settlements with non-settling defendants or unnamed parties. Again, this question of statutory interpretation is reviewed *de novo*. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

Asten's suggestion that *de novo* review is inappropriate because the Coulters have challenged factual findings mischaracterizes the nature of the Coulters' argument. The Coulters are *not* challenging the trial court's factual findings regarding hypothetical future settlements based on what is in the evidentiary record. They argue that the findings were made and entered *without statutory authority*. Br. of Appellants at 9. RCW 4.22.060 does not permit such an inquiry as a matter of law.

Because the issue raised here is whether the trial court exceeded its statutory authority when it entered findings of fact regarding hypothetical future amounts from non-settling defendants, the correct standard of review is *de novo*.<sup>1</sup>

(b) The Trial Court's Inquiry Should Have Ended When It Evaluated the Settlement Agreements Before the Court and Chose to Offset the Judgment By the \$94, 977 Received Under Those Agreements

In their opening brief, the Coulters explained that RCW 4.22.060 allows a trial court to review pretrial settlements and offset the judgment against a joint and several tortfeasor by an amount the court deems reasonable. Br. of Appellants at 9-12. However, the Coulters maintained, the plain language of the statute does not permit the trial court to

---

<sup>1</sup> Even if Asten is correct and the standard of review is abuse of discretion, the Coulters still prevail. When a trial court acts in excess of its statutory authority, it is a "clear abuse of discretion." *State v. Morse*, 45 Wn. App. 197, 723 P.2d 1209 (1986), citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

hypothesize about nonexistent additional settlements, and offset the judgment by those fictitious amounts. *Id.*

Asten responds by first asserting a somewhat conclusory argument regarding “discretion.” Br. of Resp’t at 10-11. After reciting the trial court’s finding that the Coulters should have reached settlements with more defendants, Asten claims, “The trial court acted well within its statutory discretion to offset the judgment in this manner....” *Id.* at 11. It then goes on to cite the language of the statute and some of its legislative history, claiming that the trial court’s ruling effectuated the Legislature’s “goals” in enacting RCW 4.22.060. *Id.* at 11-14.

On the contrary, the history and case law Asten cites confirms that a trial court is only authorized to review settlement agreements actually before it:

The bill does not establish any standards for determining whether the amount paid for *the release* was reasonable or not. ...The reasonableness of *the release* will depend on various factors.... [T]he section requires that the amount paid for *the release* must be reasonable at the time the release was entered into.

*Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 157-58, 795 P.2d 1193 (1990) (citing the Senate Select Committee on Tort and Product Liability Reform final report) (emphasis added). Repeated use of the term “the release” emphasizes the Legislature’s intent that a trial court has

discretion when reviewing an individual settlement release actually before the court. Nothing in this language suggests a grant of authority for a trial court to hypothesize about potential future releases.

Yet hypothesizing about future releases not before the court is exactly what occurred here. The trial court did not determine the settlement amounts in the releases before it to be unreasonable. In fact, it entered an offset for the exact amount of those settlements: \$94,977. CP 130. Then the trial court went an unauthorized step further, and entered “findings” about possible settlements not before the court, and then reduced the judgment by another \$57,215 based on those unauthorized “findings.” CP 127-29, 131.

It is not surprising that Asten endorses the trial court’s unauthorized approach in reducing Asten’s joint and several liability based hypothetical settlements not before the court. However, that is not what the law permits a trial court to do. The trial court here should have concluded the reasonableness hearing after it reviewed the reasonableness of the settlements before it. The court’s detour into hypothetical future settlements was unauthorized by RCW 4.22.060.

- (c) The Trial Court Did *Not* Find the Pretrial Settlements Unreasonable Based on Its Application of the *Glover* Factors

In their opening brief, the Coulters noted that the trial court here addressed part of the test in *Glover v. Tacoma General Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983). Br. of Appellants at 10. The court *did not* conclude that the settlement amounts received were unreasonable based on *Glover*, and in fact *did not* increase those amounts when it entered the final judgment: “Asten is entitled to an initial setoff of \$94,977 for the settlement amounts currently received by Plaintiffs....” CP 130. However the trial court made no *Glover* findings to support its additional offset based on hypothetical future settlements. CP 129.

Asten concedes, as it did below, that the \$94,977 in settlement funds received were reasonable. Br. of Resp’t at 17. Nevertheless, Asten argues that the trial court was unable to make sufficient findings based on the evidence before it, and since the burden purportedly was on the Coulters to adduce sufficient evidence, the trial court’s ruling should stand. Br. of Resp’t at 17-18.

First, suggesting that the trial court properly made findings based on hypothetical future settlements because the Coulters failed to meet their evidentiary burden puts the cart before the horse. The Coulters did not have an evidentiary burden to disprove a finding that the trial court had no authority to make. RCW 4.22.060.

Second, lack of evidence was apparently not the problem when it came to evaluating the settlements actually before the court. Despite the fact that the parties did not dispute that the \$94,977 in settlements was reasonable, the trial court apparently had enough information to make such detailed conclusions as “even a nuisance settlement of a claim against a defendant not in bankruptcy should not fall below \$3000.” CP 129. Yet the court *did not increase the amount of the offset awarded under the settlement releases at issue.* CP 130. The court awarded Asten an offset the exact amount of those settlements: \$94,977. *Id.*

The trial court based its decision to increase the offset based on hypothetical future amounts not on lack of evidence, but on the Coulters’ perceived lack of “incentive” to pursue other defendants. CP 127.<sup>2</sup> However, as Asten concedes, the trial court did *not* find that the Coulters acted in bad faith, or that any of the settlements they reached were collusive or fraudulently low. CP 127-28; Br. of Resp’t at 16.

The Coulters met their evidentiary burden to prove that the amount of pretrial settlement funds received was reasonable, and the trial court did not find reason to increase the amount of the offset based on those settlements, setting it at \$94,977.

---

<sup>2</sup> Asten was not without ability to bring other defendants into court. It could have filed a CR 14 third party action, bringing other possible defendants into the case.

(d) Trial Courts Have Discretion to Find the Actual Settlement Agreements Before Them Unreasonable and Increase the Offset; That Is Not What Occurred Here

The Coulters contended in their opening brief that the trial court's duty was to review the settlements before it, determine whether they were reasonable, and if not, adjust the offset to Asten accordingly. Br. of Appellants at 15.

In response, Asten again mischaracterizes' the Coulters' position, claiming they argue the trial court had no discretion to increase the undisputed \$94,977 in settlement funds received. Br. of Resp't at 18.

In support of the trial court's conclusion here, Asten cites *Schmidt, supra*, and *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007). In those cases, the trial courts each concluded that the amounts contained in the settlement agreements before them were unreasonably low, based on the evidence, and increased the offset accordingly. *Schmidt*, 115 Wn.2d at 159; *Meadow Valley*, 137 Wn. App. at 819. Additionally, in *Schmidt*, the plaintiffs accepted the \$50,000 settlement figure from one defendant *after* the trial court had already ruled that an offset of \$150,000 was more appropriate. *Schmidt*, 115 Wn.2d at 156.

*Schmidt* and *Meadow Valley* are examples of textbook RCW 4.22.060 reasonableness hearings: the trial courts reviewed the settlement agreements actually before them. The Coulters grant that the trial court had discretion to conclude that the \$94,977 in settlement funds received was unreasonable, and increase it. That is precisely what RCW 4.22.060 allows.

However, neither case supports the proposition that a trial court may entertain speculation about possible other tortfeasors and questionable future settlement proposals, and offset a judgment according to those highly speculative amounts. What the trial court did here is unprecedented in any Washington case law, and is not authorized by RCW 4.22.060. The court did not conclude that the \$94,977 in settlement funds received was unreasonably low and increase the offset value of those agreements. Instead, the court entered an offset of \$94,977, then took evidence and made findings regarding hypothetical future settlements that were not before the court, and increased the liability offset by those fictitious amounts. CP 126-30.

Asten also misstates the Coulters' arguments regarding *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 901 P.2d 297 (1995). The Coulters argued that even when a trial court properly reviews a settlement agreement before it – which is not what occurred here regarding the

hypothetical settlements – it is an abuse of discretion for a trial court to offset a judgment by amounts unlikely ever to be received. Br. of Appellants at 15.

Asten recasts the Coulters’ argument as “[*Brewer*] removes the trial court’s discretion to offset a judgment by any amount other than that actually paid by the plaintiff.” Br. of Resp’t at 21. Asten suggests in a footnote that the situation here is “exactly the opposite” of *Brewer*. Br. of Resp’t at 21 n.7.

Once again, the Coulters do not argue that the trial court was bound to find the settlement amounts before it reasonable, and Asten is disingenuous to suggest otherwise.

The Coulters do argue that *Brewer* instructs trial courts evaluating settlement agreements for reasonableness and offsetting judgments to take into account the likelihood that funds due under those agreements will actually be received. *Brewer*, 127 Wn.2d at 532.

Here, unlike the trial court in *Brewer*, the trial court did not find the settlements before it unreasonable and increase the amount of offset based on those agreements. The trial court offset according to the settlement figures, and then detoured into what other settlements the Coulters might be able to obtain in the future from nonexistent bankruptcy trusts whose funding and reliability are notoriously evanescent. CP 131.

(e) Asten Fails to Respond to the Coulter's Arguments Regarding Contribution

The Coulter argued in their opening brief that if Asten believes other non-settling tortfeasors should share the burden of the judgment, then the law provides for a right of contribution. Br. of Appellants at 19-20.

Asten makes no response whatsoever to this argument, and apparently concedes the point.

To remind the Court of the Coulter's contention, under the doctrine of joint and several liability, a plaintiff may seek full compensation from any tortfeasor. *Kottler*, 136 Wn.2d at 442. A contribution action places the burden of pursuing and seeking a fair distribution of damages on the tortfeasor, not the plaintiff. RCW 4.22.040.

The proper method for Asten to seek contribution is under RCW 4.22.040, not by offsetting the judgment, as the trial court did here. The trial court and Asten would have Coulter bear the risk and burden that those contributions may never be paid.

In short, nothing in Asten's response supports the trial court's actions in the reasonableness hearing. No case law, no legislative history, and no logic can support the position that a trial court, tasked with evaluating the reasonableness of particular settlement agreements, can

then also decide that hypothetical settlements involving parties not before the court are also at issue.

The rule Asten would have this Court adopt rewrites the rules of a reasonableness hearing and allows asbestos defendants to escape joint and several liability after they have risked trial and lost. It would put the burden and risk of loss on plaintiffs who have prevailed, and permit defendants to use reasonableness hearings not as an opportunity to have a court evaluate existing settlements, but as a mini-trial on whether the plaintiffs should have sued or settled with additional defendants. It would allow defendants to use reasonableness hearings to discount their liability based on speculation about missing, insolvent, or intransigent defendants.

A better rule restricts reasonableness hearings to their proscribed use: as a chance for the trial court to evaluate actual, existing settlements to make sure they are appropriate and fair.

(2) Whether Interest Is Characterized as Pre-judgment or Post-Judgment, It Accrues from the Date of the Original Judgment in 2005, Not From the Date of the Second Judgment Assessing Asten's Portion of Liability

The Coulters argued in their opening brief that either pre- or post-judgment interest applies to that portion of the judgment for which Asten is held responsible on remand because Asten did not challenge the amount of the judgment damages on appeal. Br. of Appellants at 23. The

Coulters relied principally on *Hadley v. Maxwell*, 120 Wn. App. 137, 84 P.3d 286 (2004), *review denied*, 152 Wn.2d 1030, 103 P.3d 200 (2004).  
*Id.*

As a threshold matter, Asten is wrong when it claims that “the Coulters do not assign error” to the ruling that they are not entitled to prejudgment interest. Br. of Resp’t at 24. The Coulters’ assignment of error number 20, addressed Finding of Fact 31 (CP 131), where the trial court claimed that the Coulters were not entitled to prejudgment interest and that their claims were not liquidated. Br. of Appellants at 2.

As explained in the Coulter’s opening brief, the prevailing party in a lawsuit is generally entitled to prejudgment interest on liquidated damages. *Lakes v. Vondermehden*, 117 Wn. App. 212, 214, 70 P.3d 154 (2003), *review denied*, 150 Wn.2d 1036 (2004) (citing *Kiewit-Grice v. State*, 77 Wn. App. 867, 872, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995)). Prejudgment interest “is awardable (1) when the amount claimed is liquidated, or (2) when the amount claimed is unliquidated but is determinable by computation with reference to a fixed standard in a contract.” *Lakes*, 117 Wn. App. at 217, 70 P.3d 154 (citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968)); *Kiewit-Grice*, 77 Wn. App. at 872. A claim is liquidated if the record makes it possible to compute the amount with exactness, without reliance on

opinion or discretion. *Lakes*, 117 Wn. App. at 217, 70 P.3d 154 (citing *Lester N. Johnson Co. v. City of Spokane*, 22 Wn. App. 265, 277, 588 P.2d 1214 (1978), *review denied*, 92 Wn.2d 1005 (1979)).

Asten responds that the judgment amount was never liquidated because (1) tort damages are always unliquidated even after judgment is entered, and (2) Asten challenged its portion of liability for the judgment amount. Br. of Resp't at 24-27. Asten relies primarily on *State of Washington Dep't of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007). *Id.*

It is unclear how *Fluor* applies here. *Fluor* involved a dispute over whether prejudgment interest accrued from the date of entry of an arbitration award and the date of entry of the trial court judgment enforcing that award. 160 Wn.2d at 791. Our Supreme Court held that an arbitration award, much like entry of a jury's verdict, is subject to substantial prejudgment modification, and thus is not liquidated until the final judgment is entered by the court. *Id.* at 792-93. *Fluor* did not contain any discussion of the impact of a second proceeding upon remand for an evaluation of a defendant's proportional liability. Nor did it address the interplay of pre- and post-judgment interest when two judgments are involved.

Asten's apparent confusion may stem from the fact that, as often happens in remanded cases, there are two judgments at issue here. The Coulters concede that prejudgment interest does not apply to the time period before entry of the 2005 judgment because, as Asten notes, the tort damages were unliquidated until that date. However, since entry of the 2005 judgment, the amount of the Coulters' damages has been liquidated and undisputed. That amount was reaffirmed in the 2009 second judgment. Asten, a joint and several tortfeasor, has had the "use value" of the Coulters' money since 2005. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986).

The time period between entry of the 2005 judgment and entry of the 2009 judgment therefore has a dual nature. It is post-judgment, in the sense that came after entry of the 2005 judgment. But it is also pre-judgment, in the sense that it precedes entry of the 2009 judgment. However, it is indisputable that ever since the 2005 judgment, the Coulters damages have been known, liquidated, and mathematically certain.

This question of interest calculation when two judgments are at issue was thoroughly addressed in *Hadley*, discussed in depth in the Coulter's opening brief. Br. of Appellants at 21-23. In *Hadley*, personal injury defendants appealed from the judgment against them, but only as to liability. *Id.* at 142. The defendants did not challenge the jury's

computation of damages. *Id.* Our Supreme Court ultimately reversed the trial court's judgment and remanded for a new trial on liability only. *Id.* at 140. After the new liability trial, the jury again found the defendants liable. *Id.* In the new hearing to ascertain the amount of the judgment, the plaintiff moved for prejudgment interest on the amount of the verdict from the original date of entry. Division III of this Court awarded the prejudgment interest, holding that during the time between entry of the first judgment and the second judgment, the amount of damages was liquidated because no challenge to the amount was made. *Hadley*, 120 Wn. App. at 143-44 (citations omitted).

Asten vaguely attempts to distinguish *Hadley* based on the fact that *Hadley* involved a second full trial on liability. Br. of Resp't at 26.

However, the fact that *Hadley* involved a remand trial on liability only strengthens its applicability to this case. The reasonableness hearing was, in essence, a remand for an evaluation of Asten's liability. The trial court at the reasonableness hearing did not take new evidence on the amount of damages the Coulters accrued. Much like a liability-only trial, the sole issue was how much of the 2005 judgment Asten had to pay.

Asten next argues that the amount of the 2005 judgment was not liquidated because it was "subject to further modification by the court through the reasonableness hearing process." Br. of Resp't at 26. In

support, Asten cites *JACO Environmental Inc. v. AM. Int'l Specialty Lines Ins. Co.*, No. 2:09-cv-0145, 2009 WL 1591340 (W.D. Wash., May 19, 2009), *Fox v. Mahoney*, 106 Wn. App. 226, 230, 22 P.3d 839 (2001), and *Car Wash Enters., Inc. v. Kampanos*, 74 Wn. App. 537, 874 P.2d 868 (1994).

The unifying principle of these three cases – and what distinguishes them from the Coulters' situation – is that the amount of “the claim” is fluid until the reasonableness hearing is held. In *JACO*, the judge was empowered to fix attorney fees based on a standard of reasonableness. 2009 WL 1591340 at \*8. Until the judge determined what fees were reasonable, the amount of the claim for fees was fluid, therefore, prejudgment interest was not appropriate. *Id.* at \*9. In *Fox*, the jury in a tort claim was empowered to determine whether the medical expenses claimed by the plaintiff were reasonable. 106 Wn. App. at 230. Again, the amount of that claim did not become liquidated until the jury fixed the amount. *Id.* Finally, *Car Wash* addressed a property owner's claim for clean-up cost contribution from a previous property owner under the Model Toxics Control Act (MTCA). 74 Wn. App. at 549. Under that statute, a plaintiff's claim for damages in the form of contribution is not known until the trial court considers equitable factors. *Id.* This Court

concluded that this exercise of discretion prevented the claim from becoming liquidated at the time the plaintiffs incurred clean-up costs. *Id.*

Also, none of the cases cited by Asten involve the interplay of two judgments, one before and one after an appeal. Only *Hadley* is factually analogous on this basis.

Here, the amount of damages was fixed and certain at the time of entry of the 2005 judgment until the time of entry of the 2009 judgment. Here, as in *Hadley*, the only issue during that time was the amount of Asten's liability. A mathematical calculation was possible as to what Asten owed the Coulters: \$242,500 - \$4,850 (Coulter's 2% fault) - \$94,977 (settlement amounts) = \$142,673. CP 116. Under *Hadley*, prejudgment interest applies to that time period.

When a defendant appeals a judgment based not on the amount of damages, but only on the amount of the defendant's liability for those damages, the amount of damages is liquidated. *Hadley*, 120 Wn. App. at 144. If the plaintiff prevails on appeal and remand, the second judgment should award prejudgment interest from the date of the first judgment. *Id.*

Here, Asten only challenged its amount of liability, not the amount of damages the Coulters incurred. Therefore prejudgment interest should apply from the date of entry of the 2005 judgment to the date of entry of the 2009 judgment.

In the alternative, if prejudgment interest on the full amount of damages owed by Asten is not available under the common law, postjudgment interest from the date of judgment on the verdict is still applicable.

A prevailing party in a civil trial is generally entitled to postjudgment interest. RCW 4.56.110. Postjudgment interest ordinarily accrues from the date judgment is entered. RCW 4.56.110(3). If the judgment is challenged on appeal, the statute still preserves postjudgment interest from the date of the original judgment if it is wholly or partly affirmed on review:

*In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict is rendered.*

RCW 4.56.110(3) (emphasis added).

In *Hadley*, the defendants argued (as does Asten, Br. of Resp't at 28) that under *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990) postjudgment interest was inappropriate because the Supreme Court had "reversed" the original judgment on appeal and ordered a new trial on liability. *Hadley*, 120 Wn. App. at 145.

This Court disagreed, holding that because the defendants had not challenged the amount of the verdict, but only its liability, postjudgment interest applied. *Id.* at 146. This Court also noted that the *Fisher Properties* rule only applied as to a partial award of damages that had been reversed:

Accordingly, the Supreme Court [in *Fischer Properties*] held interest could not run “on the portions of the judgment reversed by this court from the date of the original judgment.” *Id.* at 374-75, 798 P.2d 799. Implicitly, the Supreme Court did not disturb interest on the *affirmed* claims accruing from the date of the original judgment.

*Id.* (emphasis in original).

To avoid the application of post-judgment interest, Asten tries to recast the \$12,125 assessed to Asten in 2005 as the Coulters’ original “damage award.” Br. of Resp’t at 28. Of course, that was not the “damage award,” it was the trial court’s assessment of Asten’s liability.

Whether pre or postjudgment interest applies, it applies to the total award of damages for which Asten is and has been responsible as a joint and several tortfeasor since May 2005.

#### E. CONCLUSION

The trial court erred as a matter of law in conducting the reasonableness hearing. The sole function of the trial court was to evaluate amounts paid pursuant to existing settlement agreements, and to

offset the judgment by that amount. It was undisputed in the reasonableness hearing that the \$94,977 in settlement funds received was reasonable.

This Court should reverse and remand for entry of judgment in the amount of \$142,673, plus interest at the applicable rate.

DATED this 20<sup>th</sup> day of August, 2009.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Sidney C. Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661

Cameron O. Carter, WSBA #33326  
Brayton Purcell, LLP  
111 SW Columbia Street, Suite 250  
Portland, OR 97201  
(503) 295-4931

Attorneys for Appellants  
Ernest and LeRose Coulter

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief of Appellants Coulter in Court of Appeals Cause No. 63148-9-I to the following parties:

Cameron O. Carter  
Brayton Purcell, LLP  
111 SW Columbia Street, Suite 250  
Portland, OR 97201

G. William Shaw  
Kevin A. Rosenfeld  
Kirkpatrick & Lockhart Preston Gates Ellis, LLP  
925 4<sup>th</sup> Avenue Suite 2900  
Seattle, WA 98104-1158

Original sent by ABC Legal Messengers for filing with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 9801-1176

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 AUG 20 PM 3:17

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

DATED: August 20, 2009, at Tukwila, Washington.



Paula Chapler  
Talmadge/Fitzpatrick