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No. 64614-1-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

LACEY M. FILOSA,

Plaintiff/Respondent,

v.

PAINLESS STEEL – EVERETT LLC, et al.

Defendants/Respondents,

SCOTTSDALE INSURANCE COMPANY,

Intervenor/Appellant.

BRIEF OF RESPONDENT LACEY FILOSA

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I. INTRODUCTION

Lacey Filosa incurred over \$480,000 in medical bills to treat a life-threatening infection caused by having her tongue pierced at Painless Steel – Everett, LLC, a business owned by James Lee Burns.

Ms. Filosa's Second Amended Complaint against Painless Steel, Taylor Doose (the piercer), and James Lee and Mandy Burns alleged, among other claims, failure to warn of the risk of infection. Although Ms. Filosa had her ears and navel pierced some years before the tongue piercing and knew that there was a risk of her ear piercing site getting infected if she did not keep it clean after the piercing (RP 193), she did not know anything about the much greater risks of infection associated with a tongue piercing due to what Scottsdale's infectious disease expert characterized as "the unique microbiology of the mouth." CP 2036. Ms. Filosa was given a form to read before the tongue piercing, but it did not disclose the serious risk of infection.

The infection and resulting surgeries left Ms. Filosa with permanently disfiguring scars on both sides of her neck.

The Burnses' insurer, Appellant Scottsdale Insurance Company ("Scottsdale"), repeatedly refused to defend them against Ms. Filosa's claims. Scottsdale forced the Burnses to spend their own money to defend themselves.

Wanting to avoid spending tens of thousands of dollars in litigation costs and attorney fees and protect their assets from the risk of a financially devastating judgment, the Burnses entered into a settlement agreement with Ms. Filosa under which they agreed to have judgment entered against them in the amount of \$3 million, and Ms. Filosa agreed not to execute on the judgment against their assets. The Burnses further agreed to assign to Ms. Filosa all claims that they had against Scottsdale.

The settlement agreement was contingent on the trial court entering an order finding the settlement to be reasonable. Judge Castleberry, who has considerable experience handling personal injury cases, considered extensive written evidence, heard testimony from several lay and expert witnesses and argument of counsel over the course of three days, and applied the *Chaussee/Glover* factors, and found the \$3 million covenant judgment to be reasonable. Judge Castleberry's ruling was well within his broad discretion and supported by substantial evidence. This Court should affirm.

II. RESTATEMENT OF ISSUES

Did the trial court act within its broad discretion in finding the settlement between Lacey Filosa and James Lee and Mandy Burns reasonable, where the trial court found that (a) Ms. Filosa's injuries were "horrific" and that her damages had a value far in excess of \$3,000,000,

(b) Ms. Filosa had a plausible liability theory against James Lee Burns and Painless Steel that was supported by evidence and that put Mr. Burns at risk of personal liability, (c) the Burnses' defenses were not particularly strong, (d) the Burnses were understandably motivated to settle to protect their personal assets, in light of Scottsdale's refusal to provide them with a defense, (e) there was no evidence of fraud or collusion between Ms. Filosa and the Burnses, and (f) other evidence also supported the reasonableness of the settlement?

III. STATEMENT OF FACTS

A. Lacey Filosa's tongue piercing at Painless Steel

James Lee Burns is the sole owner of Painless Steel – Everett, LLC, a tattoo and body piercing business. CP 848 at ¶ 4; CP 571.

In March 2006, Lacey Filosa went to Painless Steel to have her tongue pierced. She was given a form with questions regarding her medical history and the following warnings:

Tattoos/piercings are of a permanent nature and may possibly change over time as your body takes on drastic changes. Scarring and/or fading are also possible due to lack of proper tattoo/piercing maintenance. Also, allergies or contact sensitivity to pigments, soaps, or other substances used during the tattooing/piercing procedure. SO TAKE CARE OF YOUR TATOO/PIERCING!

CP 1178. James Lee Burns drafted the form (CP 847-848 at ¶ 2), which did not warn of any risks of infection. CP 1178. Nor did the piercer,

Taylor Doose, inform Ms. Filosa of the risk of an infection. RP 205; CP 766-767 at ¶ 2; CP 602.

The piercer, Taylor Doose, inserted a metal “labret”¹ at the site of the piercing. CP 598. Ms. Filosa was told to come back in a few days to have the labret changed for a smaller labret after the swelling subsided, which she did. CP 768 at ¶¶ 5-6; CP 513.

A few days after the second labret was placed in her mouth, Ms. Filosa went to her dentist for tooth pain. CP 514; CP 600. Soon thereafter, she saw a second dentist, who told her to go to a hospital, which she did. CP 514; 601; 654.

On March 30, 2006, Providence Everett Hospital admitted Ms. Filosa, and Dr. James Erhardt performed an emergency tracheotomy in order to save Ms. Filosa’s life. CP 1145. Dr. Erhardt diagnosed a necrotizing infection. CP 1145. Ms. Filosa underwent extensive treatment, including surgery to her neck. Her medical expenses exceed \$480,000. CP 800-805; 3046-3064; 3183-3205; 3294-3296; RP 8 (10/8/09). She is left with disfiguring scars on her neck. CP 788-792.

¹ A “labret” is an item of jewelry worn in the lips. The labret placed in Ms. Filosa’s mouth was shaped like a barbell.

B. Lawsuit filed by Lacey Filosa

Ms. Filosa filed a lawsuit against Painless Steel in June 2007. Her complaint included the following allegations:

- Lacey Filosa suffered a serious life-threatening infection of flesh-eating bacteria as a result of the tongue piercing at Painless Steel, LLC (¶ 2.3);
- Painless Steel, LLC failed to maintain and inspect its business premises to eliminate bacteria harmful to customers (¶ 2.7); and
- Painless Steel, LLC failed to warn Ms. Filosa of the risk of infection (¶ 2.10).

CP 2155-2156.

The complaint was amended in September 2007 to add James and Mandy Burns as defendants. CP 82. The allegations of the amended complaint naming James and Mandy Burns as defendants (in addition to Painless Steel) included the following:

- Lacey Filosa suffered a life-threatening infection of flesh-eating bacteria as a result of the tongue ring barbells provided by Painless Steel (¶ 2.4);
- Lacey Filosa contracted a bacterial infection from goods or services provided by Painless Steel (¶ 2.6);
- Painless Steel and James Lee Burns failed to establish and implement procedures to prevent infection with flesh-eating bacteria (¶ 2.7);
- Painless Steel and James Lee Burns failed to adequately warn Lacey Filosa of the risk of infection (¶ 2.9); and

- James Lee Burns failed to provide proper training to the piercer, Taylor Doose (¶ 2.10; ¶ 2.11).

CP 84-85.

C. Scottsdale Insurance Company refused to defend James Lee Burns under a general commercial liability policy.

James Lee Burns is a named insured under a Scottsdale general commercial liability insurance policy. CP 2176. The Burnses' attorney repeatedly tendered defense of the lawsuit to Scottsdale, but Scottsdale refused to defend or provide coverage under the policy. CP 1957-1959; 1962-1985; RP 154-155 (9/1/09); CP 296-314; 1968-1969; 1974-1975; 2357 at ¶ 5.3. The Burnses were therefore forced to hire counsel and pay out of their own pocket to defend against Ms. Filosa's claim. CP 2119.

D. Settlement agreement and assignment of rights

In the face of Scottsdale's refusal to defend the Burnses, and recognizing that their personal assets would necessarily have to pay for defense costs and would also be at risk for any judgment entered against them, the Burnses entered into a Settlement Agreement and Assignment of Rights, Judgment and Covenant with Lacey Filosa in March 2008. CP 90-96. Pursuant to this agreement, the Burnses assigned to Lacey Filosa all rights, claims and causes of action they have against Scottsdale, and in exchange, Ms. Filosa agreed not to execute on the stipulated judgment against the Burnses' assets. The Burnses thereby protected themselves

from the potential financial ruin that they faced as a result of Scottsdale's refusal to provide them with a defense under the general commercial liability policy.

E. Reasonableness hearing

The Honorable Ronald Castleberry of the Snohomish County Superior Court held a reasonableness hearing in which Scottsdale actively participated. CP 78 at ¶ 3. He considered extensive written evidence and heard two days of testimony, as well as an additional afternoon of closing arguments. CP 11; RP 7-327.

Judge Castleberry has considerable experience evaluating personal injury cases, both in private practice and as a judge:

As counsel may know, prior to coming on to the bench I had represented various insurance companies in terms of defense of PI cases. I had also represented plaintiffs in personal injury cases. And having worked on both sides of the fence, I feel that I am in a position to be able to evaluate the value of a given case.

In addition, obviously, I've been on the bench since 1992 and have been involved in numerous personal injury cases and settlement conferences, and both with my private practice and with my time on the bench have some familiarity and experience in the valuation of PI cases.

RP 4-5 (10/8/09).

For the reasons set forth below, Judge Castleberry ruled that the settlement was reasonable. CP 11-12; RP at p. 20 (10/8/09).

IV. AUTHORITY

A. **Standard of review**

A trial court's finding that a settlement is reasonable is a factual determination that will not be disturbed on appeal when supported by substantial evidence. *Howard v. Royal Spec. Underwriting Inc.*, 121 Wn. App. 372, 380, 89 P.3d 265 (2004).

Appellate courts review a trial court's reasonableness determination for an abuse of discretion. *Water's Edge Homeowners Assn. v. Water's Edge Assoc.*, 152 Wn. App. 572, 584-585, 216 P.3d 1110, 1117 (2009).

B. **Overview of the law applicable to reasonableness hearings**

When an insurer refuses to defend a claim brought against its insureds, the insureds may protect their interests by settling with the plaintiff, and assigning to the plaintiff the insureds' claims against their insurer. The settlement amount between the plaintiff and the insureds presumptively establishes the insureds' damages in a later bad faith action against the insurer, so long as the amount is reasonable and not the product of fraud or collusion. *Howard v. Royal Spec. Underwriting Inc.*, 121 Wn. App. 372, 374-375, 89 P.3d 265 (2004). "Covenant judgments" like this, whereby a plaintiff settles with a defendant and covenants not to execute

the judgment against the assets of the defendant/insured in exchange for an assignment of the defendant/insured's claims against its insurer, are recognized methods of settlement in cases where an insurer refuses to defend or settle a claim within policy limits.

As Judge Castleberry noted, a reasonableness hearing is not a trial. RP 17 (9/1/09). Washington courts have not specified any particular procedural rules that govern reasonableness hearings, other than identifying the factors that a trial court must consider. Some of the factors relate to the merits of the case, while others relate to other reasons that might motivate a party to settle.

The factors to be considered by a trial court in determining whether a settlement like this is reasonable are set forth in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 658 P.2d 1230 (1983) and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991). *Howard*, 121 Wn. App. at 380. The applicable factors are:

[1] the releasing person's damages; [2] the merits of the releasing person's liability theory; [3] the merits of the released person's defense theory; [4] the released person's relative fault; [5] the risks and expenses of continued litigation; [6] the released person's ability to pay; [7] any evidence of bad faith, collusion or fraud; [8] the extent of the releasing person's investigation and preparation of the case; and [9] the interests of the parties not being released.

Glover, 98 Wn.2d at 717; *see also Howard*, 121 Wn. App. at 380.

“No one factor controls and the trial court has the discretion to weigh each case individually.” *Howard*, 121 Wn. App. at 380; *Chaussee*, 60 Wn. App. at 512. Trial courts may combine some of the factors and may decide that some of the factors are not relevant in a particular case. *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 740, fn.2, 49 P.3d 887 (2002).

It is important to bear in mind, as Scottsdale acknowledges,² that a trial court’s evaluation of the reasonableness of a settlement must be based on the posture of the case *at the time the settlement was made*. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 26, 935 P.2d 684 (1997). The settlement in this case occurred before depositions had been taken. Some important facts were known only to one of the parties when the case settled. For example, Ms. Filosa offered evidence in the reasonableness hearing (the declaration of Jessica Ladd, CP 839)³ that Taylor Doose was not wearing gloves when he inserted Ms. Filosa’s second tongue ring (which had not been disclosed to the Burnses at the time of the settlement), and that James Lee Burns personally drafted the document that was given to Ms. Filosa before the piercing (a fact that Ms. Filosa’s counsel did not discover until after the settlement). That these

² RP 8-9 (9/1/09) (“[T]he core issue for the court is whether or not the settlement was reasonable at the time that the parties entered into it.”); *Appellant’s Opening Brief* at pp. 19, 21.

³ *See also* CP 767 at ¶ 4; CP 768.

facts may not have been discussed by the parties at the time of the settlement does not mean that the evidence did not exist at the time of the settlement. The evidence was known to at least one of the parties at the time of the settlement, even though it may not have been known to both parties or developed through depositions, which the Burnses choose not to pursue due to the expense they would have personally incurred in costs and attorney fees.

Scottsdale chose to wait until *Scottsdale* was sued to conduct discovery relating to the merits of Mr. Filosa's claims. When Scottsdale's *insureds* were sued, however, Scottsdale did nothing to assist them with defending the claims made by Ms. Filosa. Only after *Scottsdale* was at risk of having liability imposed against it after being sued in June 2008 (CP 4403), did it take depositions and retain experts to challenge the merits of Ms. Filosa's claims – claims that were settled in March of 2008. Scottsdale could have defended its insureds and done this discovery when this case was filed in 2007, but it chose not to do so. As a result, much of the evidence relied upon by Scottsdale to attack the reasonableness of the settlement did not exist and was not known to the parties at the time the settlement was entered into.

One can only speculate about how the evidence and legal theories in this case would have developed if it had been fully litigated. One can

reasonably expect that the facts and legal theories would have changed somewhat from how they were understood at the time of the settlement:

[C]ases progress and you get different facts that are discovered in the discovery process and sometimes that results in changing of theories or amending of complaints. This is obviously a fluid process that we go through up to the time of trial.

RP 106 (testimony of Paul Stritmatter); *see also* RP 146-147 (testimony of Dylan Jackson). The fact that Ms. Filosa emphasized different facts or legal theories in her original complaint as compared to her second amended complaint, or in the first reasonableness hearing as compared to the second reasonableness hearing, simply reflects the normal evolution of a personal injury case as discovery progresses.⁴ Sometimes cases get better as discovery progresses. Sometimes they get worse. RP 138-139. The parties considered that fact at the time they entered into the settlement. The Burnses' counsel testified that, when he evaluates a client's potential exposure, he concerns himself with not only probabilities but also possibilities. RP 145.

It is also important to view a settlement like the one in this case, between a plaintiff and the defendants personally, rather than between a

⁴ Key witnesses can die. A plaintiff's medical condition can get better or worse. The law can change. Doctors and other witnesses can testify differently than expected in depositions.

plaintiff and an insurance company, in the context of the parties to the agreement. As Judge Castleberry noted,

[I]n this particular case the reasonableness of the settlement is viewed . . . from the shoes of the participants in the litigation

Obviously in this case the Burnses faced personal exposure and it may be that they would be much more willing to enter into a settlement than, for instance, Scottsdale who has got the money.

RP 7 (10/8/09).

When a settlement occurs early in a case, as here, it is often based on the parties' desire to eliminate risks, some of which are known and some of which are unknown. At the time of the settlement, the parties had unequal knowledge about some of the relevant facts because depositions had not been taken. James Lee Burns knew, for example, that he personally drafted the form that was given to Ms. Filosa, but he did not volunteer that information to Ms. Filosa. At the time of the settlement, the parties knew that pursuing discovery and hiring expert witnesses could result in their claims/defenses getting stronger or weaker. Many unexpected things can happen during discovery. It was impossible for the parties to foresee the twists and turns that might have occurred. They knew for a fact that taking depositions and hiring expert witnesses would be expensive. The Burnses desired to avoid those costs and risks.

Scottsdale's efforts to limit the trial court's consideration to only the risks and facts that were more probable than not and actually known to the parties at the time of the settlement disregards the reality of settlements – that they are entered into to eliminate risks that are known and unknown.

C. *Chaussee/Glover* Factors

1. Releasing Person's Damages

a. Ms. Filosa's injuries

Scottsdale concedes that Ms. Filosa suffered a serious injury. She nearly died from the infection. RP 28 (9/1/09).

Dr. James Erhardt, an otolaryngologist, was called to Providence Hospital in Everett emergently because Lacey Filosa had presented with a rapidly expanding mass in her neck. RP 24-25 (9/1/09). Between the time Dr. Erhardt could get from his office to the hospital, Ms. Filosa's airway had cut off. She had to be intubated. RP 25 (9/1/09). Upon arriving at the hospital, Dr. Erhardt performed an emergency tracheotomy to give Ms. Filosa an airway, and he then opened up the apparently infected areas. RP 25 (9/1/09); CP 1145. Dr. Erhardt found extensive pus throughout her neck and chest. RP 25-26 (9/1/09); CP 1145. He testified that the infection in Ms. Filosa's neck was the most life-threatening and rapidly progressive bacterial infection he had ever treated in his career. RP 25 (9/1/09).

After Ms. Filosa's condition stabilized, she underwent exploratory surgery by an oral surgeon. He could not find dental etiology. CP 1145; RP 27 (9/1/09).

On April 2, 2006, Ms. Filosa underwent exploratory surgery of her left neck. CP 1146. On April 3, 2006, a thoracic surgeon operated on Ms. Filosa for thoracoscopy and chest tube placement. CP 1146; RP 27 (9/1/09).

On April 6, 2006, Ms. Filosa was brought back to the operating room where she again had an incision and drainage performed on her right neck. CP 1146. There were areas of prominent lymphatic congestion, prominent necrosis, and multiple abscesses. CP 1146.

Because Ms. Filosa continued to re-accumulate infectious pockets in her neck, her physicians ordered hyperbaric oxygen therapy. Virginia Mason, which has a hyperbaric chamber (CP 1146), agreed to accept Ms. Filosa as a patient. CP 1146; *see also* CP 2472-2476.

Ms. Filosa was hospitalized for approximately six weeks to treat the infection. RP 184. She incurred over \$480,000 in medical expenses. CP 800-805; 3046-3064; 3183-3205; 3294-3296; RP 8 (10/8/09).

After she was released from the hospital, Ms. Filosa had to be on a special diet to gain weight. She lost approximately 30 pounds as a result of the infection. RP 186. She testified that she "looked like a skeleton."

RP 187. She had to work on strengthening her muscles because she had been in bed for so long. RP 185. She was told not to go down stairs because she was so weak that she could fall. RP 187. She was unable to work when she left the hospital, and it was several months before she could drive again. RP 187. She required assistance from her mother for about three months to get up and down stairs, get dressed, prepare meals, and other home care. RP 188.

Ms. Filosa has permanent scarring to her neck as a result of the infection. CP 1147. The scars “itch like crazy” when the weather is hot or cold. RP 191. The scarring to Ms. Filosa’s neck is dramatic and disturbing. CP 788-792. Ms. Filosa is 22 years old and will live the rest of her life with disfiguring scars that are readily apparent to people looking at her. CP 939; 1147. She is self-conscious about the scars. RP 188. People stare at her scars. RP 189. She has anxiety about meeting people because of her appearance. RP 190.

b. Testimony of attorney expert witnesses at the reasonableness hearing supported the \$3 million settlement as being within the reasonable range of Ms. Filosa’s damages.

Paul Stritmatter, a former president of the Washington State Trial Lawyers Association who has been practicing exclusively in the area of plaintiff’s personal injury law for 30 years and has been repeatedly

recognized for his abilities as a plaintiff's personal injury trial lawyer (RP 92-94 (9/1/09)), reviewed materials relating to Ms. Filosa's claim and concluded that \$3 million was a reasonable settlement amount under all of the circumstances. RP 95 (9/1/09). Mr. Stritmatter testified that, based on his review of the case, his experience handling cases involving facial scarring, and his review of articles relating to how scarring affects people, especially women, the verdict range for Ms. Filosa's damages would be between \$2.5 to \$4 million. RP 95-96 (9/1/09).

Attorney Keith Kubik, who has been practicing for 20 years, primarily as an insurance defense lawyer, stated that, based on his review of the case and his experience, \$3,000,000 was an appropriate settlement amount. CP 820-822.

Judge Castleberry found that the testimony of attorney expert witnesses Paul Stritmatter, Keith Kubik, and Phil Talmadge (Scottsdale's expert) tended to support \$3 million as being within the range of a reasonable settlement given the facts of this case. RP 18-19 (10/8/09). While Mr. Talmadge testified that the total value of Ms. Filosa's damages was in the range of \$1.5 to \$2.0 million (RP 248) and that a reasonable settlement value for Ms. Filosa's case was \$500,000 to \$750,000 after factoring in liability issues (RP 252), Mr. Talmadge used a formulaic method of evaluating damages – multiplying the economic losses by two

or three (RP 248) – which Mr. Stritmatter testified was a “totally inappropriate” way to evaluate a personal injury case (RP 109 (9/1/09)),⁵ and even Scottsdale’s counsel admitted was not something that would be used in court. RP 306. Additionally, Mr. Talmadge’s practice emphasizes appellate law (RP 241, 244-245), whereas Mr. Stritmatter and Mr. Kubik’s practices emphasize personal injury law.

c. Judge Castleberry found that Ms. Filosa’s damages were “horrific” and “far exceeded \$3 million.”

Based on the evidence presented at the reasonableness hearing and his own observations of Ms. Filosa’s scars, Judge Castleberry found that Ms. Filosa’s damages were “horrific”:

. . . I thought that the injuries to the plaintiff were horrific. Obviously you have the . . . the medical expenses of about \$486,000. . . . But one of the advantages of having the hearing . . . was actually hearing from the treating physician, Dr. Erhardt. And having listened to him, I am

⁵ The Burnses’ personal counsel, Dylan Jackson, testified that he initially evaluated Ms. Filosa’s damages to be \$1 million, but he conceded that he is conservative in evaluating cases. RP 153 (9/1/09). Mr. Jackson further testified that, at the time he arrived at his initial evaluation, he had “very poor” quality photographs of Ms. Filosa’s scarring, and that Ms. Filosa’s medical expenses were actually \$125,000 higher than what he believed at the time. RP 153-154 (9/1/09). After seeing the actual scarring on Ms. Filosa’s neck, Mr. Jackson testified that it was the worst he had seen, and that the photographic images he had at the time of his initial evaluation did not show how bad the scarring was. RP 154 (9/1/09). Mr. Jackson also testified that the inclusion of Brad Moore and the Stritmatter Kessler law firm as counsel for Ms. Filosa, which occurred after his initial evaluation, concerned him and was a factor that tended to increase the value of the case. CP 615 (pp. 39-41).

reinforced in my belief that had this gone to a jury and he testified, the jury would be very sympathetic to the plaintiff. The doctor was a very strong, forceful witness. Seldom have I seen a doctor who puts in such graphic terms the injuries of a plaintiff. Oftentimes you will find the treating physician to be reluctant and/or so scientific that it almost comes across as blase in terms of even the most serious injuries.

Quite the contrary with this doctor. He painted a very dramatic, disturbing picture in terms of describing the initial presentation of the plaintiff as being in dire straits, graphically describing how she was literally choking to death, and that it was only through heroic efforts that her life was saved, graphically describing how he made the incision and pus literally flowed out of her neck, and then when he pressed on the chest more pus came out. In this court's opinion, most of the jurors who would hear that would be struck with the severity of the injury.

When he described that she was near death several times, I think he used the term she was on the edge of death several times, and he even called her his own Chia Pet because she had so many drains in her. And then of course being . . . put into the [hyperbaric oxygen] chamber and the induced coma.

I mean, literally I came away from that testimony not only reinforced in terms of the exposure of the damages, but coming away with the fact that maybe this is even potentially a higher jury verdict than I originally had when all I had before me was the declaration of the doctor. And I came away with the concept that if he testified that strongly in front of the jury and the plaintiff was also a very strong witness in terms of the permanency of the scarring, in terms of the effect on her, I didn't place a dollar amount, but it far exceeded \$3-million in terms of exposure.

* * *

. . . This case went way beyond scarring. I mean, when you have a doctor that's talking about pus coming out of somebody's neck when he presses on the chest and more pus comes out and the person is put in a state of coma for I think it was six weeks, this goes beyond just, you know, the person having some scarring that is going to affect them for the rest of their lives.

RP 8-10; 19 (10/8/09); *see also* RP 25-29 (9/1/09) (testimony of Dr. Erhardt).

- d. The fact that Ms. Filosa's counsel offered to settle her claim for Scottsdale's policy limit is irrelevant to the actual value of her damages.**

Scottsdale claims that the fact that Ms. Filosa's counsel offered to settle for Scottsdale's policy limit of \$1,000,000 indicates that he valued her damages at less than \$3,000,000. As Judge Castleberry noted, however, plaintiffs often settle for policy limits, even when the amount is far less than their actual damages, for a variety of reasons:

[A]n injured party might settle for insurance policy limits even if the value of the case far exceeded the policy limits. And this could be done for any variety of reasons. Sometimes because they did not hold personal animosity against the individual defendant that was involved and they were willing to settle for insurance limits. Sometimes because of the difficulty of trying to collect on that judgment. Sometimes because, quite frankly, early on in the case it's easier to get an insurance policy limit settlement than it is subsequently as the case may wear on. There could be any variety of reasons why a person would . . . settle for policy limits. That doesn't necessarily set a value of the case. There are all sorts of other reasons for policy limit settlements.

RP 6 (10/8/09); *see also* RP 142 (9/1/09) (testimony of Paul Stritmatter).

Additionally, after the time that Ms. Filosa's original counsel, David Huss, made a demand for \$2,000,000 or policy limits, Brad Moore associated with Mr. Huss as counsel for Ms. Filosa. Mr. Moore's evaluation of Ms. Filosa's damages was higher than \$2,000,000. It is not uncommon for lawyers to evaluate cases differently. RP 144 (9/1/09).

e. *Werlinger v. Warner* is irrelevant.

Scottsdale's reliance on *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) is misplaced. In *Werlinger*, the trial court found a settlement agreement/assignment of rights in the amount of \$5 million to be unreasonable because the defendant/insured had filed bankruptcy and had a complete defense to liability as a result of the bankruptcy order. *Werlinger*, 126 Wn. App. at 344, 351. Here, in contrast, the trial court did not find that the Burnses and Painless Steel had a complete defense to liability. To the contrary, as explained below, Judge Castleberry found that the Burnses and Painless Steel faced potential liability and exposure to a significant judgment being entered against them, given the nature of Ms. Filosa's damages.

In addition, the *Werlinger* court emphasized that the insurer in that case did not abandon its insured, as Scottsdale did here. *Werlinger*, 126 Wn. App. at 351. Unlike Scottsdale, the insurer in *Werlinger* defended its

insured. *Id.* In fact, the Court of Appeals noted that, when an insurer wrongfully refuses to defend its insured, a settlement agreement/assignment of rights can be reasonable per se – without any analysis of the *Glover* factors at all – as long as the agreement is not the product of fraud or collusion. *Werlinger*, 126 Wn. App. at 350. Here, there is a claim that Scottsdale wrongfully failed to defend the Burnses, which is the subject of litigation in federal court.

Given the significant differences between the facts and circumstances of this case and *Werlinger*, *Werlinger* is irrelevant.

2. Merits of the Releasing Person’s Liability Theory

a. Judge Castleberry found that Ms. Filosa had a strong theory of liability.

While Judge Castleberry found that one of Ms. Filosa’s liability theories – that the source of her infection was bacteria on the jewelry placed in her tongue – was weakened by Dr. Erhardt’s deposition testimony (taken on February 9, 2009, almost one year after the settlement was entered into (CP 96, 106)), he found that her liability theory based on the lack of warnings about the serious risk of infection from the tongue piercing procedure had been strengthened. RP 11-13, 20 (10/8/09). Ms. Filosa testified that no one told her she could get a life-threatening

infection as a result of having her tongue pierced, and that she would not have done it if she had been told that. RP 183-184.

Scottsdale's claims that Ms. Filosa was fully aware of the risks of infection are greatly exaggerated. Ms. Filosa testified that, when she had her ears pierced at age 13,⁶ she was told that her ears could get infected if she did not clean them after the piercing, which she understood to mean that her ears might get infected and the holes would close up if she did not clean them, but not that she could develop a bad infection. RP 196-197; 200.

The evidence presented at the reasonableness hearing was that the risk of infection from a tongue piercing is quite different from the risk of infection from an ear piercing. Scottsdale's infectious disease expert, Sharon Nachman, M.D., testified that the types of infections people can get from tongue piercing are different from the types of infections people can get from having an ear pierced. RP 229-230. In fact, Dr. Nachman testified that the bacteria that were found in Ms. Filosa's mouth do not even exist on skin; they require a wet, warm, somewhat oxygen-poor environment. RP 220-221. Dr. Nachman agreed that most ear infections

⁶ Ms. Filosa testified that, at age 13, she did not understand the risk of infection associated with getting her ears pierced. RP 198.

get red for a couple of days and then go away. RP 230. Dr. Nachman stated that tongue piercings present specific, unique risks of infection:

[I]t is the unique microbiology of the mouth, the environment of the mouth and the access that these bacteria have via the hole in the tongue that leads to the infection. . . . The teaching point of these many cases was, let the patient beware, a tongue piercing can get infected, even months later, and it's the host that is at the root cause of the infection, not the piercer or the technique. In essence, oral bacteria double at a rate of 20-40 minutes and access to a rich blood supply (in the tongue) and a mixed oxygen environment set up a perfect storm leading to acute presentation of infection.

CP 2036.⁷ Ms. Filosa specifically testified that she did not know about the risk of infection associated with tongue piercings, and that if she had been told that there was a one in ten chance of developing a serious infection, she would not have proceeded with the tongue piercing. RP 201, 205-207.

Ms. Filosa's liability theory based on the failure of the form to advise her of the unique risks of infection associated with tongue piercing exposed James Lee Burns to *personal* liability because he drafted the form. CP 847-848 at ¶ 2. RCW 25.15.125(2) provides that a "member . . . of a limited liability company is personally liable for his or her own

⁷ See also CP 855 (Declaration of Dr. James Erhardt) ("In my medical opinion, . . . infection is a known risk of tongue jewelry procedures because it creates an open wound in the tongue that exposes the skin to bacteria. In my opinion the risks of infection should have been discussed in the written form to warn her and to advise her of the risks of infection.").

torts.” *See also Chadwick Farms Owners Assn. v. FHC LLC*, 166 Wn.2d 178, 200, 207 P.3d 1251 (2009).

James Lee Burns personally drafted the form that Lacey Filosa was given before her tongue was pierced. CP 847-848 at ¶ 2. He had a duty to exercise reasonable care in drafting the form because it was foreseeable that the document would be read and relied upon by customers. *Restatement (Third) of Torts: Liab. Physical Harm*, §§ 3, 6, 7, 18 & cmt. a (“The range of defendant conduct that can give rise to the obligation to warn is so broad as to make clear that the failure to warn is a basic form of negligence.”); *Borden v. City of Olympia*, 113 Wn. App. 359, 369, 53 P.3d 1020 (2002) (“one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance”); *see also Passovoy v. Nordstrom*, 52 Wn. App. 166, 172-173, 758 P.2d 524 (1988) (discussing business’ duty to warn under other circumstances). As discussed above, the medical evidence presented at the reasonableness hearing was that tongue piercing presents a significant risk of serious infection due to the unique microbiology of the mouth. It is well-established that, as the danger becomes greater, the actor is required to exercise caution commensurate with it. *Ulve v. City of Raymond*, 51 Wn.2d 241, 245-246, 317 P.2d 908 (1957). The document drafted by Mr. Burns did not warn of any risk of infection from a tongue

piercing. CP 1178. Judge Castleberry specifically found that Mr. Burns had potential personal liability for his failure to provide adequate warnings of the risk of infection to customers in the document that he drafted:

[I]f I were evaluating the case from either a defense standpoint or a plaintiff standpoint, I'd also be left with the proposition that it was the [tongue piercing] procedure that caused the subsequent infection, in the sense that it was the bacteria in the plaintiff's own mouth that was the cause of the subsequent infection. And I would also be struck with the concept that this is a risk that either is known to or should be known to the piercer and/or the owner of the piercing facility.

I'd also be struck with the fact that those people seeking this procedure probably don't know anything about this in terms of the doctor saying that everybody carries around 8,000 different types of bacteria in their mouth and they can be introduced at any point in time, et cetera.⁸

It seems to me that the average person on the street wouldn't know what sort of danger there is from your own mouth, rather I would think the person would think, well, the real risk is that you're going to get the bacteria from somebody else either because of dirty instruments or unclean hands or whatever.

But it seems to this court where the real exposure comes is just doing the procedure. Then, of course, you look and say, well, was the plaintiff informed of that risk or did she waive that liability?

* * *

⁸ Dr. Erhardt testified that there are many millions of bacteria in any person's mouth at any given time. RP 34 (9/1/09). Scottsdale's expert, Dr. Nachman, also testified that there are millions of different bacteria in a person's mouth, and that a tongue piercing is an access point for bacteria in the mouth to invade and cause an infection. RP 220, 222.

The other factor that's involved is of course in terms of evaluating the reasonableness, not only is there the motivation, but is there a real possibility that the LLC could in fact be pierced.

In this case there certainly is that distinct possibility. . . . [I]n this particular case it was Mr. Burns acting in an individual capacity that is writing this release that fails to inform the plaintiff of the risk that she is exposed to undergoing the procedure, and it may very well be that on that basis he would be faced with individual exposure as opposed to exposure simply for the LLC.

RP 11-12; 15 (10/8/09). Judge Castleberry also found that proximate cause was strong based on Scottsdale's acknowledgement that the tongue piercing was the proximate cause of the introduction of bacteria into Ms. Filosa's bloodstream, and his finding that Ms. Filosa was not warned of the serious risk associated with the tongue piercing. RP 13 (10/8/09). Overall, despite the fact that some of the evidence and liability theories had changed from the time of the first reasonableness hearing, Judge Castleberry found that Ms. Filosa's case was "as strong or maybe even stronger than it was at the first hearing." RP 20 (10/8/09).

b. Judicial estoppel does not apply.

Scottsdale claims that Ms. Filosa should be precluded from claiming that James Lee Burns had personal liability because of a statement made by her counsel in a motion to amend the complaint seeking to add Mr. Burns as a defendant, to the effect that he and his wife

were being added as defendants “as the sole owners of Painless Steel Everett, LLC, not as individuals subject to personal liability.” CP 859. Scottsdale ignores the fact that the same motion stated that the amended complaint included new theories of liability, including “failure to adequately warn plaintiff of the risk of infection of goods and services provided, both in writing and verbally.” CP 859. The allegations of the amended complaint clearly demonstrated Ms. Filosa’s intent to pursue a claim for failure to warn of the risk of infection. Her attorney simply did not know, at the time of the motion to amend the complaint, that Mr. Burns personally drafted the document she was given. RP 288.

Scottsdale’s claim that Ms. Filosa is barred by judicial estoppel from claiming liability on the part of James Lee Burns personally is baseless, because her Second Amended Complaint included allegations that the defendants named in the complaint, which included Mr. Burns, failed to warn her of the risk of infection involved in tongue piercing, as well as allegations that Mr. Burns failed to implement proper procedures to prevent contamination of the tongue jewelry with bacteria and failed to provide proper training to the piercer. CP 84-85 at ¶ 2.9, ¶ 2.10, and ¶ 2.11. There is no inconsistency between the allegations of the Second Amended Complaint and Ms. Filosa’s counsel’s argument at the reasonableness hearing that Mr. Burns faced potential personal liability for

his failure to provide adequate warnings of the risk of infection in the form he drafted.

Application of the doctrine of judicial estoppel “may be inappropriate ‘when a party’s prior position was based on inadvertence or mistake.’” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007). Inadvertence is present when someone lacks knowledge of the underlying facts at issue. *McFarling v. Evaniski*, 141 Wn. App. 400, 404-405, 171 P.3d 497 (2007). “The gravamen of judicial estoppel is the **intentional** assertion of an inconsistent position that erodes respect for the judicial process and the courts.” *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 950, 205 P.3d 111 (2009) (emphasis added). To the extent the Court finds any inconsistency between the statements by Ms. Filosa’s counsel in the motion to amend the complaint and the liability arguments presented at the reasonableness hearing, that inconsistency is solely attributable to the fact that Ms. Filosa’s counsel did not know that Mr. Burns personally drafted the form at the time of the motion to amend the complaint. RP 288. Under these circumstances, application of judicial estoppel is inappropriate. Ms. Filosa’s counsel did not intentionally assert inconsistent positions that threaten the integrity of the judicial process.

Had the case continued to be litigated, Ms. Filosa would have discovered that Mr. Burns personally drafted the form and would have

been able to pursue a claim against him personally. Such a claim was already within the scope of the allegations of the second amended complaint, even though Ms. Filosa's counsel did not yet possess all of the facts that supported that claim. It does not give Ms. Filosa any unfair advantage to allow her to argue a theory of liability at the reasonableness hearing that was supported by facts known to Mr. Burns at the time of the settlement, even though discovery in the case had not progressed far enough for those facts to be known by Ms. Filosa.

James Lee Burns knew that, after the complaint was amended to name him as a defendant and to include a claim of negligence for failure to warn, he was exposed to even greater risk of liability because he wrote the document that should have provided adequate warning of the risk of infection. CP 850 at ¶ 8. Mr. Burns' attorney testified that he was concerned about the possibility that Ms. Filosa could pierce the corporate veil and put the Burnses' personal assets at risk. RP 150, 181 (9/1/09). Mr. Burns' risk of personal liability under the liability theories set forth in the amended complaint was something that he was obviously aware of in entering into the settlement, even if Ms. Filosa was not fully aware at that time how strong the failure to warn claim against Mr. Burns was. The strength of that claim would have been revealed through further discovery, had the Burnses not decided to settle the case to protect themselves against

the risk that Scottsdale had exposed them to. The fact that Ms. Filosa may not have known that Mr. Burns personally wrote the document at the time she moved to amend the complaint to add Mr. Burns as a defendant would not preclude her from pursuing such a claim when the facts supporting it came to light.

- c. **The Burnses' personal counsel believed at the time of the settlement that Ms. Filosa could prove one or more of the theories pleaded in the complaint.**

Dylan Jackson, the Burnses' personal counsel, testified that, at the time of the settlement agreement, he believed that Ms. Filosa could prove one or more of the theories pleaded in her complaint, which would result in an adverse verdict against his clients personally and Painless Steel. RP 158-159 (9/1/09). Mr. Jackson also believed that Mandy Burns, although not an owner of Painless Steel, faced potential liability for her community property interest in assets she and her husband owned. RP 180 (9/1/09). Mr. Jackson presumably advised his clients of these risks in their discussions about the proposed settlement agreement. RP 155-156, 178; CP 2126-2127.

- d. **The declarations of Jessica Ladd and Lacey Filosa also supported liability based on the piercer failing to wear gloves.**

Lacey Filosa and Jessica Ladd both submitted declarations stating that the piercer failed to wear gloves. CP 839; CP 767-768. Scottsdale

complains that Ms. Filosa did not identify Jessica Ladd, who was with her at Painless Steel when the second labret was placed in her tongue, in interrogatory answers. But there was no case scheduling order that established a witness disclosure deadline. While Ms. Filosa forgot to identify Ms. Ladd as a witness in her answers to interrogatories, she would have been able to supplement her answers to disclose additional witnesses. Ms. Filosa could have easily supplemented her answers if the case had progressed through discovery and the importance of Ms. Ladd's testimony became apparent as the facts and legal theories coalesced.

The Declaration of Jessica Ladd sets forth evidence -- her observations of the piercer failing to wear gloves -- that was known to at least Ms. Filosa at the time of the settlement. CP 839; CP 767-768. Ms. Filosa was obviously present at the time Ms. Ladd's observations were made and was aware of what Ms. Ladd observed. CP 767-768. This evidence existed and was known to Ms. Filosa at the time of the settlement, and would have been discovered by the Burnses if additional discovery had occurred.

The purpose of a reasonableness hearing is to assess the reasonableness of the settlement. Parties can consider evidence that may not have been formally disclosed in deciding whether to enter into a settlement. Asymmetry of information is often a reason why cases settle.

Dr. Erhardt testified that the organisms that caused Ms. Filosa's infection were consistent with those found in saliva. RP 39 (9/1/09). While he could not say on a more probable than not basis that the organisms came from her own mouth as opposed to the piercer's hands, he testified that both were possible, depending on how recently the piercer had his fingers in another person's mouth. RP 39-40 (9/1/09). The fact that Dr. Erhardt could not testify on a more probable than not basis as to the source of the organisms that caused Ms. Filosa's infection, other than that they were related to the tongue piercing, does not detract from the fact that the Burnses and Painless Steel faced very real risks of liability at the time of the settlement agreement.

Scottsdale can speculate about what Dr. Erhardt's testimony might have been if, at the time of the settlement, Dr. Erhardt had been privy to the information he now has and Scottsdale had defended this case and deposed Dr. Erhardt prior to the settlement. But Scottsdale chose not to defend its insured. Had Ms. Filosa and the Burnses proceeded with discovery rather than settling, there were risks to both of them as to how the evidence might develop. Rather than running those risks and incurring the expenses that would have been necessary to do the discovery, the Burnses decided to limit their risk and settle the lawsuit. CP 850. That decision was entirely reasonable given the position that Scottsdale's

conduct put them in. Even when the risk of an adverse verdict is relatively small, defendants often decide to settle to avoid a catastrophic loss. RP 106-107 (9/1/09). There is always the risk that a jury might evaluate a case differently than a defendant and even higher than a plaintiff's settlement offer. RP 107-108 (9/1/09) (testimony of Paul Stritmatter); RP 151 (9/1/09) (testimony of Dylan Jackson).

3. Merits of the Released Person's Defense Theory

Due to the fact that they were paying litigation costs and attorney fees out of their own pocket, the Burnses did not aggressively pursue hiring expert witnesses and conducting discovery to develop potential defenses.⁹ RP 149 (9/1/09) (testimony of Dylan Jackson) ("A lot of this was a cost benefit analysis from our perspective as defense counsel."). The case did not progress to the point that the Burnses developed clear defenses that were asserted to Ms. Filosa.

Scottsdale's argument that the Burnses had a good defense based on what Scottsdale calls the "hold harmless agreement" was rejected by Judge Castleberry. Exculpatory clauses in pre-injury releases are strictly construed and must be clear if the exemption from liability is to be

⁹ Before entering into the settlement agreement, the Burnses' counsel, Mr. Jackson, explored the possibility that Ms. Filosa's infection could have come from a dental abscess. RP 151-152 (9/1/09). Mr. Jackson eliminated that possibility through his investigation. RP 152-153 (9/1/09).

enforced. *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996); *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339-340, 35 P.3d 383 (2001) (“Exculpatory clauses are strictly construed under Washington law and are enforceable only if their language is sufficiently clear. A court determines the sufficiency of the language as a matter of law.”); *Eelbode v. Chec Medical Center*, 97 Wn. App. 462, 469, 984 P.2d 436 (1999). As contracts, exculpatory releases are to be strictly construed against the drafter. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992); *Johnson v. NEW, Inc.*, 89 Wn. App. 309, 312, 948 P.2d 877 (1997) (“An express assumption of risk applies only to risks actually assumed by a plaintiff. . . . The release is to be strictly construed.”); *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993) (“Exculpatory clauses are strictly construed and must be clear if the release from liability is to be enforced.”); *Universal/Land Construction Co. v. City of Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987) (contract language is construed against the party that drafted the contract).

The alleged “hold harmless agreement” that Scottsdale relies upon does not clearly release Painless Steel – Everett, LLC from liability for injuries arising out of infections from a tongue piercing. The document does not say anything about the risk of infection. In addition, the document states that it applies to “Painless Steel Tattooing & Body

Piercing,”¹⁰ not Painless Steel – Everett, LLC or James Lee Burns, the defendants in this case. Further, while Scottsdale argues that the document releases the piercer, Taylor Doose, of liability and therefore also releases the principal, Painless Steel, Taylor Doose testified that he was not an employee (agent) of Painless Steel but rather an independent contractor. CP 589; CP 227 fn.4. Releasing an independent contractor would not release James Lee Burns, as the drafter of the form, of liability for his failure to provide warnings of the serious risks of tongue piercing. As noted above, any ambiguity in an alleged release of liability document such as this is construed against the drafter, which in this case was James Lee Burns.

Judge Castleberry found that the Burnses did not have a good defense based on the form:

The defense theory that this release or this waiver [or] hold harmless is effective, quite frankly, I don't think is very strong. In terms of how it's worded, it doesn't refer to this type of risk. In terms of who is released, I don't think it releases these named defendants. In terms of how it was presented, at least the plaintiff comes across as a very credible individual in the sense that the piercer never really explained anything to her.

Now, it may be that the piercer will come across as a strong witness, but at least in terms of this court's

¹⁰ It appears that Mr. Burns modified a form that he prepared for one of his other businesses that had a different name.

evaluation, the plaintiff appeared to be a very credible, strong witness, and of course you have the affidavit of her friend who was right next to her at the time that directly contradicted the piercer's affidavit.

RP 13-14 (10/8/09); *see also* RP 20 (10/8/09) ("It also seems to me that the hold harmless agreement is weaker than was originally presented to me at the first hearing.").¹¹ The Burnses' personal counsel also had concerns about the enforceability of the "hold harmless agreement." RP 148-149 (9/1/09).

Even accepting Scottsdale's arguments that Ms. Filosa's liability theories were not certain to prevail or that the Burnses and Painless Steel may have had viable defenses if additional discovery and consulting with expert witnesses had been done, those factors must be weighed against the trial court's finding that Ms. Filosa's damages "far exceeded \$3-million in terms of exposure." RP 8-10 (10/8/09). Even weighing the potential liability risks argued by Scottsdale, \$3 million is still a reasonable settlement amount because the Burnses' potential exposure was far in excess of \$3 million due to the horrific nature of Ms. Filosa's injuries.

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¹¹ Ms. Filosa's expert witness Paul Stritmatter also did not believe the "hold harmless agreement" accomplished a release of Ms. Filosa's claims. RP 100-102 (9/1/09).

4. Released Person's Relative Fault

Consistent with the absence of evidence of fault on the part of Ms. Filosa, Judge Castleberry found that "there is very little relative fault on the part of the plaintiff." RP 13 (10/8/09).¹²

Scottsdale argues that Ms. Filosa's claim was barred by implied primary assumption of risk. First, the affirmative defense of assumption of risk was not litigated by the Burnses because, as a result of Scottsdale's refusal to provide them with defense counsel, it would have required them to pay their attorney out of their own funds to conduct discovery and motions practice with uncertain results, expenses that they wanted to avoid. Second, Judge Castleberry found that the assumption of risk defense was weak on the merits:

It may be argued that an 18, 19-year-old should know any time you have tattooing and/or body piercing you could have an infection, but I don't think that the average juror would buy that in the sense that the type of infection, the danger of this particular infection. It may be that they would say, well, you're going to get some sort of infection, but I don't think they realize how life-threatening this bacteria can be. That's probably why it made the front page of the paper.¹³ So in terms of the relative fault, I don't see very much on the part of the plaintiff.

¹² Ms. Filosa's expert Paul Stritmatter testified that he believed it was possible that a jury could find some fault on Ms. Filosa but that it was not a substantial risk, and that if there were a finding of comparative negligence, it would be minimal. RP 102 (9/1/09).

¹³ CP 992-996.

RP 13 (10/8/09).

Our courts have warned that the defense of assumption of risk must be “boxed in.” *Dorr v. Big Creek Wood Products*, 84 Wn. App. 420, 425-426, 927 P.2d 1148 (1996); *see also Lascheid v. City of Kennewick*, 137 Wn. App. 633, 641, 154 P.3d 307 (2007) (“We construe the doctrine narrowly.”). The elements of implied primary assumption of risk are set forth in the Washington Pattern Jury Instructions as follows:

A person impliedly assumes a risk of harm, if that person knows of the specific risk associated with [*a course of conduct*] [*an activity*], understands its nature, voluntarily chooses to accept the risk by engaging in that [*conduct*] [*activity*], and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

WPI 13.03.

The defense of assumption of risk does not preclude recovery for injuries from risks not specifically assumed. Our courts have emphasized that the scope of the plaintiff’s assumption of risk must be carefully defined:

The defendant here, the City of Kennewick, must show that Officer Lascheid knew of the precise hazard when he made the decision to accept the risk. . . . The standard is subjective. It is specific to the particular plaintiff and the particular facts. . . . It was not enough for the City to show that Officer Lascheid could have or should have foreseen that high-speed vehicle obstacle course training would be

mandatory. It had to show that he actually knew the specific risks and accepted them. . . .

And assuming the risk of hazards inherent in an activity does not mean assuming the risk of unknown hazards created by future negligence.

Lascheid v. City of Kennewick, 137 Wn. App. at 642-643.

Whether a plaintiff chooses *knowingly* to encounter a risk is a subjective determination that turns on “whether he or she, at the time of the decision, *actually and subjectively* knew all facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider.” *Egan v. Cauble*, 92 Wn. App. 372, 378, 966 P.2d 362 (1998); *Home v. North Kitsap School Dist.*, 92 Wn. App. 709, 720, 965 P.2d 1112 (1998); *Erie v. White*, 92 Wn. App. 297, 304, 966 P.2d 342 (1998). There must be evidence that the plaintiff knew and appreciated the specific hazard that caused the injury, not just the generalized hazard of his or her activities. *Shorter v. Drury*, 103 Wn.2d 645, 657, 695 P.2d 116 (1985); *Martin v. Kidwiler*, 71 Wn.2d 47, 50, 426, P.2d 489 (1967); *Egan* at 378; *Home* at 720; *Erie* at 303-304. Here, Ms. Filosa had never had a tongue piercing and had no knowledge of the risk of infection associated with a tongue piercing. CP 767 at ¶ 3. She did not know about the millions of dangerous bacteria present in her mouth that

could enter her blood stream due to her tongue being punctured. RP 229-230; CP 2036; CP 855. She had had five ear piercings and a navel piercing before the tongue piercing (CP 595-596) and never had any problems with infections. She had no reason to know that having her tongue pierced put her at risk of a serious infection. Judge Castleberry was well within his discretion in finding that the affirmative defense of assumption of risk was weak under the facts of this case.

5. Risks and Expenses of Continued Litigation

Scottsdale made the choice not to defend the Burnses. As a result, the Burnses were forced to retain counsel using their own funds. The Burnses' attorney estimated that it would cost them \$60,000+ to litigate the case and take it through trial. CP 2119-2120. It is not surprising that the Burnses did not want to spend tens of thousands of dollars on attorney fees and costs to conduct discovery and motions practice, or to hire experts to evaluate the issues in the case. Instead, the Burnses made the rational choice to settle Ms. Filosa's claim in exchange for an assignment of their rights against Scottsdale, to protect themselves against personal liability and avoid having to pay more money out of their own pocket to defend the case. CP 2124-2125. Given the predicament that Scottsdale's refusal to defend placed them in, the Burnses' decision was entirely reasonable.

Had the case proceeded toward trial, the Burnses and Ms. Filosa would each have had to hire experts and incur costs in pursuing discovery. These costs would have been significant. CP 608 (“[I]t was going to cost them a great deal of money just even in the discovery process.”) (testimony of Dylan Jackson). Indeed, Scottsdale paid one medical expert, Sharon Nachman, M.D., \$8,000 to review the case and testify at the reasonableness hearing. RP 232-233. Judge Castleberry found that the costs of litigation would have been significant for both parties, and that this was a motivating factor to settle. RP 16 (10/8/09); *see also* RP 103 (testimony of Paul Stritmatter).

Given the horrific nature of Ms. Filosa’s injuries and the extent of her economic and noneconomic damages, a large verdict was also a significant risk. The Burnses’ personal assets, property, credit and reputation were all at risk. Evidence presented at the reasonableness hearing reflected the Burnses’ and their attorney’s concern about their personal financial exposure. RP 150, 156-157; CP 850-857.

6. Released Person’s Ability to Pay

Neither the Burnses nor Painless Steel could afford to pay a judgment in the millions of dollars. The assets of Painless Steel were estimated to be approximately \$75,000 (CP 570), and the Burnses’ assets were estimated by their lawyer to be approximately \$800,000. CP 618.

Judge Castleberry found that the Burnses were at risk that the limited liability company, Painless Steel, could be pierced, putting their personal assets at risk. RP 14-15 (10/8/09). He further found that, given the fact that the Burnses' assets of \$800,000 would have been wiped out by a multi-million dollar judgment, protecting their personal assets would have been a significant motivation for them to settle. RP 16-17 (10/8/09).

The record supports the Burnses' belief that a verdict for Ms. Filosa would likely have forced them into bankruptcy. CP 850-851. In order to protect the assets that they had worked years to obtain, the Burnses entered into the settlement agreement with Ms. Filosa. Washington law does not support Scottsdale's claim that a covenant judgment is unreasonable if it exceeds the amount of the defendant/insured's assets.

7. Evidence of Bad Faith, Collusion or Fraud

The settlement agreement was not the product of bad faith, collusion, or fraud. RP 158 (9/1/09) (testimony of Dylan Jackson). The Burnses were represented by Dylan Jackson, an insurance¹⁴ defense lawyer with over 10 years' experience. RP 145, 162 (9/1/09). Mr. Jackson worked on the case for several months and investigated the facts,

¹⁴ Mr. Jackson primarily does insurance defense work but was being paid by the Burnses personally rather than an insurance company in this case.

including interviewing the piercer, before entering into the settlement. RP 147 (9/1/09). Before he recommended the settlement agreement to his clients, Mr. Jackson consulted with other attorneys at his firm and discussed the pros and cons. CP 2125-2127. The settlement agreement was exchanged between counsel three or four times. RP 178 (9/2/09); CP 610; 2126-2127. Mr. Jackson testified that the Burnses resisted entering into the settlement agreement, and that it took two or three phone calls and the Burnses consulting with another lawyer before they agreed. RP 155-156 (9/1/09). While Scottsdale complains that the settlement amount itself was not negotiated, the testimony of Paul Stritmatter was that it is not uncommon that negotiations over the settlement amount do not occur in this context, as long as the amount proposed is within a reasonable range. Mr. Stritmatter testified that the process of arriving at a settlement agreement and covenant judgment “is more sitting down and attempting to evaluate what would be a reasonable value within a reasonable range,” rather than a negotiation with settlement offers and demands like in a mediation.¹⁵ RP 105 (9/1/09). Scottsdale’s counsel conceded at the reasonableness hearing that a covenant judgment like the one at issue here is different than the context of a typical settlement negotiation between a

¹⁵ Mr. Stritmatter testified that, if the plaintiff’s proposed judgment amount is too high, he has had defendants object and negotiate a lesser amount. RP 136-137 (9/1/09).

plaintiff and an insurance company, and that that difference needs to be taken into account. RP 303. Mr. Jackson testified that he did not propose a different number because he thought \$3 million was within the range of possible jury verdicts, and he wanted to eliminate his clients' possible financial exposure. RP 158 (9/1/09); CP 2128.

The misrepresentation to the trial court that resulted in the order approving the settlement after the first reasonableness hearing being vacated has no relevance to this factor. The focus of this factor is on whether there was fraud or collusion between the settling parties, not in counsel's presentation of the facts. Judge Castleberry found that there was no evidence of fraud or collusion between the settling parties:

[A]lthough I found there was fraud and misrepresentation at the original reasonableness hearing in terms of the source of the bacteria, I don't find that there was any sort of collusion going on between the settling parties. It seems to me in this particular case, that was an arm's length settlement.

Mr. Jackson I think forcefully represented his clients, and as I say, took into account what their exposure was, what the value of the case was, and determined that it was reasonable in fact to settle for the \$3-million not simply because, well, we don't care what the number is, but because in fact it was a reasonable amount and at the same time could accomplish his end and that is the protection of his clients.

And as contrary to the *Water's Edge* case where in fact the litigants had essentially taken counsel out of the loop in terms of settlement, in this particular case

everybody kept trying to get [Scottsdale] into the case and [Scottsdale] wouldn't come in. So it's significantly different than the *Water's Edge* case.

Again, I can't find that there was collusion between the two to do anything untoward in terms of . . . arriving at the settlement. As I said, there was certainly misrepresentation to the court that justified vacation of the judgment, but in terms of reaching the settlement that's a different matter.

RP 17 (10/8/09).

In agreeing to accept Ms. Filosa's proposed settlement of \$3 million, it is reasonable to assume that the Burnses were concerned not just with what might be the most likely sum that a jury might award to Ms. Filosa, but that they wanted to avoid any risk of a verdict, even if the chance of a verdict against them was only one in ten, given the fact that their insurance company was refusing to defend or indemnify them. CP 850-851; RP 99 (9/1/09) (testimony of Paul Stritmatter); RP 157 (9/1/09) (testimony of Dylan Jackson) (“[T]hey realized they were . . . at grave risk of a judgment in this case and they would essentially be financially wrecked. They have some property and some assets, and they would have had to essentially start over again, and they worked for many years to build up their companies.”).

Scottsdale's claim that there was evidence of collusion because the Burnses reserved to themselves claims for their personal attorney fees and

other personal damages that might arise from the assigned causes of action also fails. A similar type of provision in which the insureds/assignors reserved to themselves the right to assert their personal claims against an insurance company appeared in a settlement agreement/assignment of rights in *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 406, 161 P.3d 406 (2007), and the appellate court did not find it to be evidence of collusion.

Scottsdale's reliance on *Water's Edge*, 152 Wn. App. 572, is misplaced. The trial court in *Water's Edge* found evidence of collusion in arriving at the settlement agreement. Here, Judge Castleberry found no evidence of fraud or collusion in arriving at the settlement agreement.

The facts supporting the trial court's finding of collusion in *Water's Edge* included (a) an abrupt shift in the case from adversarial litigation to collaboration, including plaintiff's counsel ghost writing a letter for personal counsel for the insured to send to the insurer, and plaintiff's counsel referring personal counsel for the insured to lawyers who could help them to squeeze "every possible nickel" out of the insurance company, (b) coverage counsel's efforts to undermine the insurance defense counsel's efforts to reduce the insured's exposure by withdrawing the insurance defense counsel's pending motion for summary judgment, (c) a "kickback" scheme whereby some of the proceeds from

any recovery from the insurer would go to the insureds/defendants, and (d) coverage counsel's insistence that the settlement be binding regardless of the trial court's reasonableness determination. These facts bear no resemblance whatsoever to the circumstances of the settlement agreement in this case. Although the Burnses reserved their right to pursue their personal claims for attorney fees and any other personal damages against Scottsdale, Ms. Filosa did not promise to give the Burnses a single penny from any recovery that she obtains against Scottsdale. CP 93; RP 158. Additionally, there was no coordination between Ms. Filosa's counsel and Mr. Jackson as to what Mr. Jackson's testimony would be at the reasonableness hearing. CP 618.

8. Extent of the Releasing Person's Investigation and Preparation of the Case

Ms. Filosa's counsel prepared this case with regard to both liability and damages to the extent that was reasonable given Scottsdale's denial of coverage and the Burnses' reluctance to engage in formal discovery due to the fact that they were paying attorney fees and litigation costs out of their own pocket. Ms. Filosa's attorneys answered interrogatories (CP 914-947), issued interrogatories (CP 406-409), interviewed Dr. Erhardt and obtained a declaration from him (CP 1143-1147), and reviewed Ms. Filosa's medical records.

When the settlement was reached, neither party had done depositions or disclosed expert witnesses for the very reason that the Burnses wanted to limit their expenses and financial risk rather than continue to pay a lawyer out of their own pocket to conduct discovery, and it made no sense for Ms. Filosa to incur tens of thousands of dollars in litigation costs to pursue discovery and expert witness evaluations when Scottsdale was denying coverage for her injuries.

9. Interests of the Parties Not Being Released

Scottsdale was given multiple opportunities to defend the Burnses. It repeatedly declined to do so. It cannot now be heard to complain about how the Burnses litigated this case.

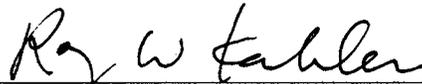
Scottsdale had a full and fair opportunity to participate in the reasonableness hearing. Its interests were fully represented in the reasonableness hearing.

V. CONCLUSION

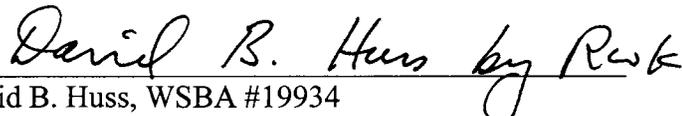
Judge Castleberry, who has been a trial court judge for over 15 years and handled personal injury cases for both plaintiffs and defendants when he was in private practice, examined the *Chaussee/Glover* factors and found that the settlement was reasonable. He specifically found that there was no fraud or collusion involved in entering into the settlement. A considerable amount of documentary evidence was submitted in support

of the reasonableness of the settlement and considered by Judge Castleberry, as well as testimonial evidence from lay and expert witnesses and argument of counsel over the course of three days. Scottsdale had a full and fair opportunity to present evidence and argument in opposition to the reasonableness of the settlement. Judge Castleberry examined the evidence and the credibility of the witnesses who testified and had an opportunity to personally observe Ms. Filosa's scarring. Judge Castleberry's finding that the settlement was reasonable is amply supported by the evidence. This Court should affirm Judge Castleberry's order finding the settlement to be reasonable.

RESPECTFULLY SUBMITTED this 20th day of April, 2010.



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CERTIFICATION

I hereby certify that on April 20, 2010, I provided a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

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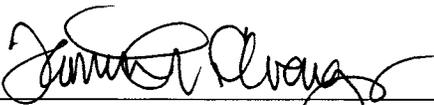
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