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No. 65602-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant,

v.

DUNN and ANDERSON, et al.,

Respondents.

MUTUAL OF ENUMCLAW'S REPLY BRIEF

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A. MUTUAL OF ENUMCLAW DOES NOT CONCEDE THE STANDARD OF REVIEW

The Dunns say on page 1 of their brief, Mutual of Enumclaw “concedes that this court reviews solely for abuse of discretion” in this case. That is incorrect. This case involves mixed issues of fact and law requiring both an analysis of whether the court abused its discretion for factual issues and a *de novo* analysis of the legal issues. See, *Kunsch, Standard of Review (State and Federal): A Primer*, 18 Sea L Rev 11, 28 (1994); and page 7 of Mutual of Enumclaw’s Brief. Whether a trial court has correctly interpreted and applied law is always considered a question of law to be reviewed *de novo*. *Kunsch*, 18 Sea L Rev at 27. Issues of whether damages must be segregated under *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003) or whether a landowner has a duty to protect a visitor from crimes committed by a third-party are legal issues which must be considered *de novo*. Eg., *Faulkner v. Racquet Wood Village Condominium Assn.*, 106 Wn. App. 483, 486 (2001). In *Faulkner*, a case premised on the question whether a landlord had a special relationship requiring protection of a tenant, the court said:

In a negligence action, the plaintiff must prove four basic elements: (1) the existence of a

duty, (2) breach of that duty, 3) resulting injury, and (4) proximate cause. Whether a duty exists is a question of law, which we review de novo. (Emphasis added)

Id. at 486

Review of a legal issue necessarily has a factual context.

The facts and the application of legal principles may be tightly intertwined. When both the inferences drawn from the raw facts and the meaning of the applicable legal test are drawn into question, as they are here, the court has inherent power to review the issues *de novo*. *Franklin Co. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330 (1982).

In addition to the necessity of reviewing *de novo* the issues raised by *Tegman* and whether Ms. Anderson had a duty, the tightly related factual and legal *Glover/Chaussee* issues may require a *de novo* review. *Mauroudes v. Pittsburgh-Coming*, 86 Wn. App. 22 at n. 34 (1997).

A determination of reasonableness involves two steps: first, determining the historical facts giving rise to the settlement, and, second, deciding whether these historical facts make the settlement reasonable considering the relevant factors outlined in *Glover*. The second inquiry may be a mixed question of law and fact and should perhaps be reviewed *de novo*. We need not resolve that question in this case,

in that we decline to review the challenge to the sufficiency of the evidence.

Ibid. (Citations omitted)

The trial court viewed Ms. Anderson's acceptance of the inflated first settlement offer and her coverage lawyer's apparent unconcern over her defenses as only evidence of eagerness to protect her assets. However, the failure to negotiate price, acceptance of the inflated first offer, and indifference to defenses should merit an automatic finding of collusion, a conspiratorial cooperation to pass the inflated cost to the insurer. It is hard to imagine a more cooperative adversary. See, Mutual of Enumclaw's Brief, pp 16-18.

The questions whether Ms. Anderson had a duty to protect the Dunns and the application of the *Tegman* rule are legal issues to be resolved *de novo*. The interrelationship of the facts with the Glover/Chausee factors also merit a *de novo* review of the reasonableness conclusion.

B. THE DUNNS HAVE FAILED TO MEET THEIR BURDEN TO PROVE THE GLOVER/CHAUSEE FACTORS

At the Reasonableness Hearing the insured has the burden to prove each of the *Glover/Chauss* factors, including the absence of evidence of fraud or collusion. *Waters Edge Homeowners*

Association v. Waters Edge Associates, 152 Wn. App. 572, 594-595 (2009) and RCW 4.22.060. The failure to prove a single factor could imperil the reasonableness of a settlement.

As the Dunns themselves point out “no single criteria controls and all nine are not necessarily relevant in all cases.” Dunns’ Response Brief, p. 18, citing, *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739 n. 2 (2002). It would be most unusual if a failure of all nine factors was required to make a settlement reasonable. In any event our cases make clear that a settlement may be reasonable when fewer than all factors are deficient. *Werlinger v. Warner*, 126 Wn. App. 342 (2005). (Insufficient showing of the releasing party’s ability to pay; and resulting unfairness of a bloated settlement to insurer). Mutual of Enumclaw has shown the Dunns’ settlement was unreasonable because of the failure to segregate intentional from negligent damages, the failure of the court to consider the absence of a duty by Ms. Anderson to protect the Dunns from a third-party’s crime, the failure of the Dunns to meet their burden to establish their damages, and the failure to take into account significant evidence of collusion. Any one of these factors would render the settlement unreasonable.

1. The *Tegman* case required the segregation of intentional damages from negligent damages.

The *Tegman* case provides a simple formula for preventing negligent tortfeasors from sharing joint and several liability for intentional torts. *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 115 (2003). When negligent and intentional tortfeasors are both responsible for damages the intentionally caused damages must be segregated from the negligently caused damages before allocation of the negligently caused damages. *Id.* at 115. The formula must be applied to segregate the intentional injuries Mr. Anderson caused from the negligently caused injuries the Dunns say both Mr. and Ms. Anderson caused. Since no injury segregation occurred the recovery against Ms. Anderson was inflated by the intentional injuries.

The Dunns say this formula does not apply to this case because the impact of *Tegman* would only be felt at trial and, after all, they say, some nine months after the settlement they had Mr. Anderson dismissed from the case. CP 676-677. They would have us believe that at the time of the settlement Mr. Anderson's presence in the case was unimportant because he would not be in the case at the time of trial. This argument fails for two reasons.

First, Mr. Anderson was still a target of the Dunns at the time of settlement. Second, the Tort Reform Act necessarily has a substantial impact on settlement negotiations.

Mr. Anderson's presence in the case at the time of settlement was not a mere formality or an unimportant vestigial remain of the complaint. The settlement document itself shows that the Dunns extracted an agreement from Ms. Anderson to cooperate with them "in any claims against Mr. Anderson's separate property." CP 364. The Dunns not only considered Mr. Anderson part of the case, they were looking to him to pay damages.

Even though the Dunns were looking to Mr. Anderson to pay at the time of settlement they say the *Tegman* rule would only apply at the time of trial. This interesting argument is based on their decision to obtain Mr. Anderson's dismissal nine months after the settlement negotiations when both Mr. Anderson and the claims of intentional injury were in the case. (In fact the \$400,000 settlement amount only makes sense with Mr. Anderson's intentional injury claims in the case.) To say the impact of *Tegman* could only be felt at trial and settlement negotiations would not be influenced by it is like saying, contrary to both logic and the design of the *Glover/Chausee* factors, trial issues have no impact on negotiations

which somehow play out in isolation from the facts of the case and the legal rules which affect them.

The Tort Reform Act and the *Tegman* interpretation of it, have an influence far beyond the drafting of jury instructions at trial. Any negotiation of mixed negligent and intentional tort claims must take the *Tegman* rule into account. To ignore the rule would ignore the reality of damages distribution. Our case law has recognized this principle. See, *Clark v. Pacific Corp.*, 118 Wn.2d 167, 191-192 (1991) (Apportionment under RCW 4.22.070 serves as a basis for negotiation).

Mr. Anderson's presence in the case was not a mere formality at the time of settlement. To correctly calculate damages for which Ms. Anderson might have been responsible it was essential to take the Tort Reform Act and the *Tegman* interpretation into account. The failure to do this inflated the Dunns' recovery.

2. The Thin Evidence of Damage

The Dunns were unable to support their claim for damages because they had not incurred costs for therapy, in part perhaps, because their daughter was evaluated as not needing therapy. CP 164. The Dunn's daughter had seen Roz Bornstein, MSW a few months after the event. CP 164. Just above her signature at the

bottom of her report Ms. Bornstein checked the box indicating “no” to the question whether “continued treatment is medically necessary and client is expected to benefit.” *Ibid.* The reports from Dr. Brown and Dr. Conte used at the reasonableness hearing were obtained later to prop up the settlement, which had occurred about six months before. CP 109-114, 116-119, Conte Report, Ex. 1, Supp. CP 1-7, and CP 366-370. These later evaluations by doctors Brown and Conte had no influence on the settlement itself. At the time of the reasonableness hearing none of the Dunns had engaged in a significant course of therapy. CP 292.

Obtaining evidence after the settlement deal is struck is backwards. Finding such a settlement reasonable encourages accidental reasonableness, a reasonableness finding of a settlement made in the dark that just happens to be the right amount. An intelligent settlement requires evidence of damages to be examined and analyzed by the parties in negotiation. When it is provided only later, it places the entire burden of setting the amount on the trial court and encourages inflated settlements in the hope an overworked court will agree. This backwards procedure demands special scrutiny.

3. Collusion

In an attempt to avoid the impact of the *Waters Edge* case the Dunns argue that they used fewer than all of the questionable tactics present in *Waters Edge*. However, tactics selection is not the issue. The central point of *Waters Edge* was the prejudicial settlement produced by the collaborative, non-adversarial atmosphere in which the “negotiation” proceeded. *Waters Edge*, 152 Wn. App. at 595. This is precisely the type of settlement produced by the Dunns, a large amount readily agreed to in which Ms. Anderson’s assets are immunized from the judgment regardless of whether the Court approved the settlement as reasonable.

The parties’ failure to negotiate price and the absence of evidence of damages is strong evidence of collusion. It shows a shared eagerness and design to pass the inflated amount to the insurance company, the very definition of collusion. Even if the parties refrained from directly saying to each other, “Let’s pass this inflated settlement to Mutual of Enumclaw,” the evidence of tacit collusion is overwhelming.

The Dunns argue the \$8,700,000 *Waters Edge* settlement in the face of evidence of only \$500,000 actual damages

demonstrates reasonableness when compared with their \$400,000 settlement for three plaintiffs. This is a hollow numbers game completely devoid of any substantive basis for analyzing the value of their damages. Mutual of Enumclaw might as well argue their recovery should be reduced to 1/17 (the *Waters Edge* damages to settlement ratio) of \$400,000, an equally useless point.

4. The comparative strength of the Dunns' and Ms. Anderson's cases – there was no duty

Washington law requires a special relationship before any duty arises to protect the Dunns from the crimes of a third-party. At the reasonableness hearing courts should “enunciate those factors which lead them to conclude that a settlement is reasonable.” *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 718 (1983). However, the reasonableness opinion is completely silent on what duty Ms. Anderson might have had despite the parties' arguments on that point. This issue alone requires the return of this case to the trial court.

There is no case in Washington imposing liability upon a landholder for the crime of a third-party against a visitor, whether the visitor is a social guest or business invitee, unless there was a special relationship which created the duty. Washington has

adopted the restatement rule on special relationships creating liability in limited circumstances for the crimes of third-parties. *Peterson v. State*, 100 Wn.2d 421, 426; Restatement 2nd of Torts § 315. For there to be a duty there must be both a special relationship and foreseeability of the injury causing event. *Craig v. Washington Trust Bank*, 94 Wn. App. 820, 827-828 (1999). The special relationship rule applies to and modifies the rules for premises liability. *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192 (1997). See, *Faulkner v. Racket Wood Village Condo. Assn.*, 106 Wn. App. 483, 486-487 (2001) (No duty despite special relationship) and *Griffin v. West RS, Inc.*, 97 Wn. App. 557 (1999) (Special relationship), reversed 143 Wn.2d 81 (2001) (The Supreme Court reversed because the landlord did not proximately cause the plaintiff's injuries).

A special relationship can arise where a person has a duty to control the criminal's behavior to protect third parties.¹ *Peterson*, 100 Wn.2d at 426; and *Hertog ex. rel. S.A.H. v. Seattle*, 138 Wn.2d 265 (1999). In other instances a person may have a special

¹ There is no Washington case in which a special relationship between spouses required one to control the other nor is there ever likely to be. Cf. *Lauritsen v. Lauritsen*, 74 Wn. App. 432 (1994) (There was no special relationship to obligate the husband – driver to protect wife – passenger from the criminal act of another – based on their status as driver and passenger).

relationship with an especially vulnerable person requiring protection of that person. *Peterson*, 100 Wn.2d at 426; and *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997). In *Niece*, the court held that the Group Home, which had been entrusted with the care of a severely disabled person, had a special relationship requiring it to protect its vulnerable ward from the crimes of third parties. *Id.* at 45-50. The Dunns have not argued they were entrusted into the care of Ms. Anderson, nor is there any evidence to suggest such an entrustment. See, *Lauritzen*, 74 Wn. App. at 439-440. In addition to the lack of a special relationship creating a duty by Ms. Anderson to protect the Dunns, the second required element is missing. Mr. Anderson's crime was not reasonably foreseeable because of the extended time gap since his previous offenses and the reassuring, polygraph-supported evaluation from Dr. Copeland. See, Mutual of Enumclaw Brief at 12. As a result even if there had been the required special relationship Ms. Anderson would not be liable for Mr. Anderson's crime.

The Dunns cite the *Niece* case for the proposition that there is no reason to differentiate between hazards posed by visitors, physical conditions, or staff. That holding was only possible because the court found there was a special relationship between

the group home and its completely disabled ward requiring the home to protect the helpless ward. Without finding a special relationship, the ruling could not extend to the criminal acts of third-parties.

The Dunns conclude their argument on this issue by saying “there is certainly a jury question on this matter.” Dunns’ Response Brief at p. 29. That is incorrect. The question of whether a duty exists is a question for the court. E.g., *Faulkner v. Racket Wood Village Condo. Assn.*, 106 Wn. App. 483, 486 (2001). Without a special relationship there is no premises liability for the crimes of third-parties.

C. THE INFLATED SETTLEMENT DEMONSTRATES THE INDEPENDENCE OF MS. ANDERSON AND HER APPOINTED LAWYER

Without a hint of supporting evidence, the Dunns’ accuse Mutual of Enumclaw of dictating Ms. Anderson’s defense tactics through her appointed defense lawyer. In the final section of their brief they accuse Mutual of Enumclaw of compelling Ms. Anderson to stake her defense on a settlement strategy saying Mutual of Enumclaw acted solely to prosecute its coverage position in the declaratory judgment action while failing to vigorously defend her. Dunns’ Response Brief pp. 35 - 37. In their summary of argument

on pages 1 - 3 of their Response Brief, the Dunns suggest impropriety by Mutual of Enumclaw for attempting to resolve coverage issues in a declaratory judgment action, the procedure specifically approved by our Supreme Court. These claims are a baseless distraction.

When an insured is threatened by a liability action and doubtful insurance coverage our Supreme Court has instructed insurers to provide a defense while reserving rights to resolve the coverage issues, and to resolve those coverage issues in a separate declaratory judgment action. *Truck Insurance Exchange v. Vanpoort Homes, Inc.*, 147 Wn.2d 751, 761 (2002) (Citations omitted). This is precisely what Mutual of Enumclaw has done.

Sprinkled throughout the brief are references to Mr. Lamb, the lawyer who defended Ms. Anderson, as “the MOE lawyer” or “MOE’s appointed lawyer” as part of an innuendo campaign to suggest Ms. Anderson’s lawyer also represented Mutual of Enumclaw and to obscure the real issues in the case. This meritless accusation ignores the facts.

Under Washington law, lawyers appointed by insurers to defend their insureds are accountable only to their client, the insured. This is compelled by case law and by court rule. *Tank v.*



State Farm, 105 Wn.2d 381, 388 (1986) and *RPC 5.4 (c)*. The resolution of Ms. Anderson's case demonstrates the complete independence of her and her lawyer. They agreed to a settlement that can only be viewed as substantially inflated under both the facts of the case and the significant reduction at the Reasonableness Hearing. The settlement agreement, not being contingent upon court approval, freed Ms. Anderson of any obligation leaving Mutual of Enumclaw to face the threat of a very large payment with only the reasonableness hearing to protect it. RCW 4.22.060(3) (not contingent). The suggestion that this result was dictated by Mutual of Enumclaw not only accuses Mutual of Enumclaw of great impropriety without supporting evidence but suggests it was eager to pay an inflated settlement.

The Dunns cite several facts to accuse the lawyer who defended Ms. Anderson of failing to properly represent her. They say that he had not filed a summary judgment motion, he had not retained any defense experts, he had not conducted any CR 35 examinations, and he had not deposed any of the plaintiffs' damage experts. The reason for these alleged "lapses" is obvious. There were no plaintiffs' damage experts until after the settlement. CP 109-114, CP 116-119, Conte Report, Ex. 1 Supp. CP 1-7, and CP

366-370. There was no reason to retain defense experts or conduct CR 35 examinations of the plaintiffs until they had produced some evidence of actual injury. The Dunns argue as if it is a defense burden to prove an absence of injury.

D. CONCLUSION

This case requires a second Reasonableness Hearing. The Dunns have failed to establish whether Ms. Anderson had a duty to protect them, and the settlement was bloated by the failure to segregate intentionally caused damages from those negligently caused, insufficient evidence of damages, and collusion of the parties.

Respectively submitted this 10th day of August, 2011.

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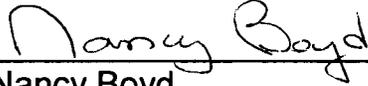
CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the state of Washington, that I sent for delivery a true and correct copy of: Mutual of Enumclaw's Reply Brief by ABC Legal Services to:

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Signed in Seattle, Washington this 11th day of August, 2011.



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