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65602-3-1

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 BRIEF

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A. ASSIGNMENT OF ERROR

1. Assignment of Error

The trial Judge found the settlement between Ms. Anderson and the Dunns to be reasonable in its Order of May 24, 2010.

2. Issues Pertaining to Assignment of Error

The trial judge entered a reasonableness finding for a covenant judgment tort settlement:

1. Without segregating damages between intentionally caused injuries and negligently caused injuries to prevent jointly and severally liable negligent tortfeasors from sharing liability for intentional damages under *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003);

2. Without considering the impact of significant defenses upon the amount of the settlement;

3. In a substantial amount despite the Dunns' failure to meet their burden of proving their damages claim was reasonable; and

4. Despite the collusive nature of the settlement as evidenced by:

a. Ms. Anderson's acceptance of the first amount the Dunns offered; and

b. Her lawyer's testimony he was unable to recall whether any of her significant defenses were discussed during the negotiations less than three months before.

B. STATEMENT OF THE CASE

Mr. Anderson sexually assaulted the Dunns' 12-year old daughter. He briefly, inappropriately touched her breast under her shirt but over her bra and he touched her crotch over her pajamas. (CP 387)

The Dunns and Andersons were social friends. (CP 724) Mr. and Mrs. Dunn and their minor daughter and the daughter's friend were the Anderson's guests at their Chelan cabin. Mr. Anderson and their minor son were also present, Ms. Anderson having earlier returned home. The Dunns immediately packed up and left after the assault. (CP 387)

Mr. Anderson pled guilty and served prison time for his offenses. (CP 726) Ms. Anderson dissolved their marriage. The Dunns sued Mr. and Ms. Anderson claiming injuries to their daughter and themselves. (CP 723 - 729) Mutual of Enumclaw (MOE) defended Ms. Anderson while reserving its rights to dispute coverage. Mr. Anderson was accused of the assault as well as negligently causing emotional harm to the child's parents. (CP 727)

Ms. Anderson was, accused of negligently harming the Dunns and, improbably, of intentionally harming them, as well. (CP 728)

Claims of intentionally caused injury are almost never covered by liability insurance. However, obtaining access to insurance proceeds is a useful goal of plaintiffs in order to increase the chances of recovery and to ease settlement negotiations. The Dunns focused on the negligence claims against Ms. Anderson. The claim of intentional tort against Ms. Anderson was shoved aside. The Dunns and Ms. Anderson stated in their settlement “The gravamen of Plaintiffs’ Complaint against Ms. Anderson is that she negligently failed to prevent her ex-husband from committing the acts of sexual molestation or otherwise negligently failed to warn the plaintiffs and protect them from reasonably foreseeable harm caused by Mr. Anderson’s conduct.” (CP 344) (Emphasis added.) In addition, the Dunns stipulated in the companion coverage case Ms. Anderson neither expected nor intended any of the injuries caused by Mr. Anderson. (CP 19 and CP 11 – 14 of Clerk’s Papers in the linked case of Anderson and Dunn v. Mutual of Enumclaw, Court of Appeal’s Case No. 66337-2- I.)

The primary claim against Ms. Anderson was rooted in premises liability: the Dunn’s took the position that because the

molestation occurred at the Anderson's cabin, Ms. Anderson had an affirmative duty to warn the Dunns that Mr. Anderson had been accused of molesting his niece 15 years before. The Dunns claimed that they were business invitees of Ms. Anderson at the cabin and that she should have reasonably foreseen that he would molest their daughter, and that his conduct was a breach of her duty to the Dunns as business invitees. (CP 727 - 728)

Ms. Anderson had significant defenses to these claims. (CP 406 - 429) First, because both she and her former husband were accused of negligently injuring the Dunns and because Mr. Anderson's assault was an intentional tort, she had the right to have the intentionally caused damages segregated from the negligently caused damages to avoid joint and several liability of intentionally caused damages by the negligent tortfeasors under *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003). (CP 416)

Second, only tenuous evidence suggested any economic purpose for the Dunn's presence at the cabin, the basis for the premises liability claim. Mr. Dunn purchased some, perhaps 25%, of the supplies for his business from a company of which Mr. Anderson was a partial owner. Mr. Dunn had also been hired some

years before to work on the Anderson's Chelan cabin. (CP 252 – 253) (His work years before on the cabin.) and (CP 244) (25% of his business supplies.)

Third, even if Mrs. Dunn and her daughter were business invitees Ms. Anderson had the defense that Mr. Anderson's offense was unforeseeable. Although he had been accused of molesting his niece 15-years before, he had received a reassuring evaluation from a professional psychologist, including a successful polygraph examination, indicating that he was at low risk for re-offending and he had not re-offended since. (CP 143 – 144) (Although the molestation of his niece occurred 15 years before, the accusation had only arisen three years before the molestation of the Dunn's daughter.) See, (CP139) (Mr. Anderson's age when evaluated in 2003.) (CP 141) (His age at the time of the offense against his niece.)

Fourth, the Dunns failed to meet their burden of proving their damages claim was reasonable. Despite claims that each of them required ongoing therapy, none of them had made arrangements for therapy. (CP 292) Mrs. Dunn had concealed the assault from officials at her daughter's schools where she might have received help from school counselors. (CP 276 – 277) Even if the Dunns

had been able to present sufficient evidence a complicating cause interfered. The Dunns had a separate source of anguish in their lives. Their son had been convicted of a felony and had been sent to prison during this same period. (CP 261 – 264)

The negotiations between Ms. Anderson and the Dunns also provided a substantial issue for the court to consider. Ms.

Anderson's coverage lawyer testified Ms. Anderson accepted the first amount offered by the Dunns for settlement. (CP 300)

Although the negotiations occurred a bit less than three months before his testimony, he was unable to recall whether any of the defenses available to Ms. Anderson had been discussed in the negotiations. (CP 297 - 298) The parties settled for \$400,000 under a covenant judgment arrangement in which Ms. Anderson assigned the rights under the MOE policy and the Dunns agreed to satisfy the obligation only with insurance proceeds, leaving Ms.

Anderson's other assets intact. (CP 360 – 370) Although the Dunns dismissed Mr. Anderson from the case nine months later, they chose to leave him in the case at the time of settlement accused of both intentional and negligent torts. (CP 676 – 677)

The trial court conducted a Reasonableness Hearing and two weeks later issued its Memorandum Decision determining the

reasonableness of the settlement after reducing the amount from \$400,000 to \$260,000, the maximum it said a jury would award. (CP 3 – 6) Even though the Dunns left Mr. Anderson in the case at settlement the court declined to consider segregating intentionally caused damages from negligently caused damages under *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003). It did not consider the impact of Ms. Anderson's defenses or the inadequacy of the evidence of damages, and ruled there was no bad faith or collusion by the settling parties.

C. ARGUMENT

1. Standard of Review

This case involves mixed issues of fact and law requiring both an analysis of whether the court abused its discretion and a de novo analysis of the legal issues. *Kunsch, Standard of Review (State and Federal): A Primer*, 18 Sea L Rev 11, 28 (1994); *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330 (1982), but compare *Brewer v. Fibreboard*, 127 Wn.2d 512, 524 (1995) with *Mavroudis v. Pittsburgh-Corning*, 86 Wn. App. 22 at n. 34 (1997). The failure to allocate damages under *Tegman* must be considered de novo. Whether the settlement amount should have been discounted by the strength of Ms. Anderson's defenses and

whether the settlement was collusive should be reviewed for abuse of discretion.

2. The Reasonableness Determination

When an insurer defends its insured while reserving its rights to dispute coverage, the power to settle transfers from the insurance company to the insured, despite any provisions to the contrary in the insurance policy. *Tank v. State Farm*, 105 Wn.2d 381, 389 (1986). The insured's power to settle is not boundless, however. An insurer is liable for the settlement only if it is reasonable and made in good faith. *Mutual of Enumclaw v. T&G*, 165 Wn.2d 255, 267 (2008). The insured has the burden of proving the settlement was reasonable. *Chaussee v. Nodell*, 60 Wn. App. 504, 510 (1991). This burden applies to each of the nine *Chaussee/Glover* factors, even the absence of bad faith, collusion, or fraud. *Waters Edge Homeowners Ass'n v. Waters Edge Associates*, 152 Wn. App. 572, 594-595 (2009).

Rather than explore all nine of *Chaussee/Glover* factors, the three factors that have the most significant impact on this case will be considered.

a. The Released Person's Relative Fault

Determining whether a settlement is reasonable with fewer than all of the defendants in a case usually requires an examination of the "fault" of the released defendant with the "fault" of the remaining defendants. RCW 4.22.060(2); *Glover v. Tacoma General Hospital*, 98 Wn.2d 708 (1983) over-ruled on other grounds, *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695 (1988). "Fault" is defined to include negligent but exclude intentional acts. RCW 4.22.015 and *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 109 (2003). Since the Dunns are free of "fault" and "fault" does not include intentionally caused injury no apportionment is required. RCW 4.22.070(1)(b); *Tegman*, 150 Wn.2d at 109. More significantly, intentionally caused damages must be segregated from the negligently caused damages in order to shield negligent defendants from sharing joint and several liability for intentionally caused damages. *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003). The trial court did not segregate intentional from negligent damages.

1. Segregation of Damages

Even if Ms. Anderson had a duty to warn or to protect the Dunns, Mr. Anderson's intentionally caused damages must be

segregated from any negligently caused damages. *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102 (2003). Under *Tegman* damages caused by intentional tortious conduct must be segregated from damage caused by negligence to shield the negligent tortfeasors from being jointly and severally liable for the intentionally caused damages, even when the negligent tortfeasor has a duty to prevent the intentional tort. *Id.* at 128-129, (dissent) and *Doe v. L.D.S.*, 141 Wn. App. 407, 439 (2007). The Dunns could have avoided this issue by dismissing Mr. Anderson and his intentional torts from the case before settlement, but they chose to keep him in the case.

At the reasonableness hearing the Dunns argued that a King County case carved out an exception to the *Tegman* case. *Rollins v. King County Metro Transit*, 148 Wn. App. 370 (2009). In that case Metro was sued for negligently contributing to the injuries of passengers who were criminally assaulted on a bus. The assaulters were never apprehended or identified. Only Metro was sued. That being the case there was no need to segregate damages since only the negligently caused damages were at issue. (*Id.* at 379) The Dunn's case is analogous to *Tegman*, not *Rollins*. Because the Dunns chose to keep Mr. Anderson in the case until

later both the intentional tortfeasor, Mr. Anderson, and the negligent tortfeasors, Mr. and Ms. Anderson, were in the case at the time of settlement. Although Mr. Anderson's assault is obviously an intentional tort, he was also accused of negligently damaging the parents by assaulting their child. (CP 727) Ms. Anderson was accused of negligently failing to warn or protect the Dunns. (CP 727 – 728) As a result, both intentional torts and multiple negligent tortfeasors were in the case. It was necessary to segregate the intentionally caused damages from the negligently caused damages in order to meet the *Tegman* requirement. Without that segregation Ms. Anderson's settlement was inflated by an undetermined amount of intentional damages caused by Mr. Anderson.

2. Allocating Responsibility

Mr. Anderson intentionally caused injury by his assault, even though the claim against him is couched in terms of negligence. *Rodriguez v. Williams*, 107 Wn.2d 381 (1986). In addition to this intentional tort he was accused of negligently injuring his victim's parents by his assault. (CP 727) Ms. Anderson was also accused of negligently injuring the Dunns. (CP 727 – 728)

Mr. Anderson's indisputably intentional act has the greater responsibility for causing injury even if his assault should have been foreseen by Ms. Anderson. However, Ms. Anderson had no reason to believe that Mr. Anderson posed a threat. Although he had recently been accused of molesting his niece some 15 years before, after this came to light a reassuring evaluation had been done by a professional psychologist, Terry F. Copeland, Ph.D., that involved extensive psychological testing and a successful polygraph examination. (CP 142 – 144) Dr. Copeland concluded, "Mr. Anderson presents a low risk for future offenses." (CP 144) There is no evidence that Mr. Anderson had offended after the alleged molestation of his niece, a conclusion supported by the polygraph examination. (CP 143 – 144) As a result, it was unforeseeable that Mr. Anderson would assault the Dunns' child. *Youngblood v. Schireman*, 53 Wn. App. 95, 105 (1988). The *Youngblood* case held that parents of a young man had no basis to foresee his drunken assault on his girlfriend in their home, despite an earlier history of drunken violent behavior. Because their son's behavior was unforeseeable they had no duty to protect the licensee girlfriend. The risk of Mr. Anderson's assault was even more remote. Gary Schireman was 21 when he assaulted his

girlfriend. His previous alcohol induced violence occurred when he was in high school, probably three to seven years before. Mr. Anderson's bad behavior was at least twice as remote in time and his future risk had been discounted by the psychologist's report. Ms. Anderson did not have any basis to foresee his assault. As a result Mr. Anderson was solely liable for the consequences of his intentional conduct, the assault.

At the reasonableness hearing the Court failed to segregate the intentionally caused damages from those caused negligently as required by *Tegman*. As a result the amount was inflated.

b. The Comparative Strength of the Dunns' and Ms. Anderson's Cases

The Dunns' claim against Ms. Anderson was based on the theory that the Dunns were business invitees at the Andersons' cabin. They argued their presence at the cabin was economic in nature because Mr. Dunn purchased some of the supplies for his business from a company partly owned by Mr. Anderson and because Mr. Dunn had been hired to do some work on the Chelan cabin some years before. Washington has adopted the restatement second of torts approach to land owner liability.

Younce v. Ferguson, 106 Wn.2d 658, 667-668 (1986). A business

invitee, one who has come upon land not open to the public for a purpose connected with business dealings with the owner, is owed a duty of ordinary care. Absent a special relationship, such as that between an innkeeper and a guest or a tavern owner and a patron, there is no duty to protect another from injury caused by a third party. See, *Peterson v. State*, 100 Wn.2d 421, 426 (1983) (Special relationship between patient and psychiatrist.)

In the case of a licensee, a social guest, there is a duty of reasonable care to protect the guest from known conditions, however there is no duty to protect the guest from the criminal acts of another. See, *Peterson*. There is no special relationship arising to protect the social guest, even if the guest and host have a rocky romantic relationship that results in the guest's suicide. *Webstad v. Stortini*, 83 Wn. App. 857, 871 (1996). As a result, Ms. Anderson would have had a duty to the Dunns only if the Dunns were business invitees, there had been a special relationship, and only if she could have reasonably foreseen the peril posed by her husband. It was not foreseeable. *Youngblood v. Schireman*, 53 Wn. App. 95, 103-107 (1988). See, page 12 above. This defense would have had a significant impact at trial, but was not considered at the reasonableness hearing.

c. The Dunns Presented Little Evidence of Damage

Typically, the cost of therapy is the only concrete or special damages available to meet the burden of proving the magnitude of emotional damage. The Dunns did not even attempt to do this, primarily because they have not engaged in therapy. Mr. Dunn testified that he had not been in therapy, Mrs. Dunn had discontinued her therapy, and their daughter had not been in therapy. (CP 292) In addition, Mrs. Dunn testified that she concealed the assault from her daughter's schools preventing any possibility for help from school counselors. (CP 276 – 277)

Complicating the damage issue the Dunns had a separate source of anguish in their lives. Mrs. Dunn testified that their son had been convicted of a felony and served prison time during this period requiring a differentiation of damage for these separate causes. (CP 261 – 266) Despite recommendations that they obtain treatment the Dunns have declined to do so. As a result, their claims lack the evidence needed to support their burden of proving the amount is reasonable. At trial Ms. Anderson could have used this evidentiary void to good effect, but it was not considered in the reasonableness hearing.

d. Evidence of Collusion

Ms. Anderson's coverage lawyer's remarkable admission that she accepted the first amount offered to settle the Dunns' claim coupled with his apparent inability to recall whether any of her significant defenses had been discussed in the negotiation demonstrates collusion and the resulting unreasonableness of the settlement.

The Dunn-Anderson settlement demonstrates why courts are concerned about the covenant judgment settlement process. There was nothing adversarial about this negotiation. Ms. Anderson had no concern about an inflated recovery for the Dunns since her assets would be immune and the Dunns were looking solely to the insurance rights to recover. The Dunns, of course, were solely motivated to maximize their recovery.

Ms. Anderson had the burden of proving the settlement is reasonable, including the absence of collusion, bad faith, or fraud. *Waters Edge Homeowners Ass'n v. Waters Edge Associates*, 152 Wn. App, 572, 594-595 (2009). The evidence here, like the evidence in the *Waters Edge* case, demonstrates that the settlement was unreasonable.

This case has much in common with the *Waters Edge* case: Ms. Anderson had strong legal arguments that were not used to create a proper settlement; the Dunn's covenant not to execute a judgment against Ms. Anderson was not dependant upon the trial court's finding of reasonableness; Ms. Anderson demonstrated no interest in avoiding an inflated settlement amount by accepting the first amount offered; and finally, the Dunns and Ms. Anderson aligned their interests not only to recover the liability amount from the insurance company, but to obtain *Olympic Steamship* attorneys fees for Ms. Anderson as well.

The extraordinary level of Ms. Anderson's indifference to anything other than skating away from an obligation to the Dunns is illustrated by her lawyer's inability to remember any details of the very recent negotiation, a bit less than three months before his testimony. He could not recall Ms. Anderson's defenses. (CP 297) He could not recall how he assessed the risk in the case. (CP 297 -298) He could not recall whether he discussed problems the Dunns faced with their foreseeability argument. (CP 298) He could not recall whether he discussed the segregation of damages issues with the Dunns. (CP 298) He could not recall whether any of the plaintiffs had obtained any psychological treatment. (CP 298 -299)

He could not recall whether any of the plaintiffs even had any symptoms. (CP 298) He could not recall who suggested a covenant judgment settlement. (CP 299) He could not recall whether he discussed allocation of the judgment among the three plaintiffs. (CP 298) He could not recall whether he proposed a lower amount for the settlement prior to the plaintiffs' initial offer of \$400,000. (CP 300) His deposition makes clear what the rest of the record suggests: Ms. Anderson had no interest in the size of the settlement so long as her personal assets were not at stake. On her behalf her lawyer had no interest in the merits of her defenses or the scope of the plaintiffs' damages.

Like the court in the *Waters Edge* case we should be "bothered by the over all structure of the settlement here; that of a joint effort to create, in a non-adversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to [the insurance company] as intervenor." *Waters Edge*, 152 Wn. App. at 595.

e. The Court's Reasonableness Determination

When deciding a reasonableness issue trial judges are told in order "to aid in appellate review. . . enunciate those factors which lead them to conclude that a settlement is reasonable." *Glover*, 98 Wn.2d at 718. In its written opinion the court examined the

settlement from the standpoint of the intentional nature of the assault and what a Snohomish County jury would have done. “In considering the nature and extent of the incident and knowing the Snohomish County juries”, the Court concluded that \$260,000 was the maximum that would be awarded to the Dunns. (CP 5) (emphasis added) The court’s conclusion that the maximum Snohomish County jury award was a reasonable settlement, however, is flawed.

First, acknowledging “there may be certain legal arguments under *Tegman* and *Rollins*. . .” it nevertheless failed to segregate intentionally caused damages from negligently caused damages as required by the *Tegman* case. (CP 3) This significantly inflated the amount because Mr. Anderson’s intentional assault must be considered as causing the primary injury. Second, even if one concludes that Ms. Anderson should have foreseen the assault and was negligent in not warning the Dunns, (a conclusion reached without comment in the opinion) her responsibility for the injury seems minimal in comparison. Third, the Dunns’ landowner liability theory was paper-thin and not mentioned in the opinion. Fourth, The Dunns presented slight evidence of damages, failing to meet their burden of proof.

The Judge concluded: “there is no bad faith or collusion in this case. But obviously the defendant is desirous of settling the matter with no expense to herself.” (CP 5) The court made no comment on the complete failure of the parties to haggle over the price of the settlement or their apparent failure to discuss the merits of potential defenses. It is a rare dispute indeed that should be settled by the first offer without any discussion of the merits. The level of Ms. Anderson’s indifference is strong evidence of collusion, but it was rejected by the Court without analysis.

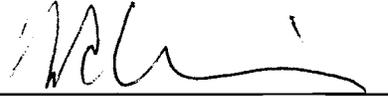
D. CONCLUSION

MOE asks the case be returned to the trial court with instructions to:

1. Segregate the intentionally caused damages from the negligently caused damages and determine the amount for which the negligent tortfeasors are jointly and severally liable;
 2. Determine the impact of Ms. Anderson’s defenses;
 3. Determine the impact of the settling parties’ collusion;
- and
4. Make the resulting adjustments to the reasonableness finding.

Dated this 11th day of March 2011.

HACKETT, BEECHER & HART



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I certify and declare under penalty of perjury of the laws of the State of Washington, that on March 11, 2011, I sent for delivery a true and correct copy of: Mutual of Enumclaw's Brief by ABC Legal Services to:

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FILED
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