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STATE OF WASHINGTON

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NO. 69109-1-I

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

MWW, PLLC, a Washington corporation, *Plaintiff and Respondent*

v.

KIRABATI SEAFOOD COMPANY, LLC, and OLYMPIC PACKER, et
al, *Defendants.*

KIRABATI SEAFOOD COMPANY, LLC, and OLYMPIC PACKER, et
al, *Counterclaim-Plaintiffs*

v.

MWW, PLLC and DENNIS MORAN; et al., *Counterclaim-Defendants
and Respondents;*

MONITOR LIABILITY MANAGERS, LLC and CAROLINA
CASUALTY INSURANCE COMPANY, *Intervenors and Appellants.*

**REPLY BRIEF OF INTERVENORS AND APPELLANTS
MONITOR LIABILITY MANAGERS, LLC AND CAROLINA
CASUALTY INSURANCE COMPANY**

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ORIGINAL

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I. INTRODUCTION

Nothing in the Response brief from MWW and Moran¹ should prevent the Court of Appeals from finding that the trial court erred and vacating the trial court's order approving the settlement as reasonable. Monitor Liability Managers LLC and Carolina Casualty Insurance Company (hereinafter collectively referred to as "Monitor") assert that the trial court erred in finding the settlement agreement was reasonable under RCW 4.22.060 because the agreement itself does not fit within the parameters of the statute.

This is especially the case where MWW did not and could not meet its burden to establish the settlement was reasonable and not the product of collusion when the settlement contained a "pass through" provision where the \$550,000 to be paid by MWW's malpractice carrier to Kirabati would then be paid by Kirabati to MWW. That "pass through" arrangement unreasonably treated MWW's malpractice insurance as an asset to pay MWW's own attorney fee claim, and did not reflect an amount paid for a release of claims against MWW.

II. ARGUMENT

A. The issues on review were preserved and not waived.

¹ Hereinafter collectively referred to as "MWW" for ease of reference.

RAP 2.5 (a) provides that certain errors can be raised for the first time on appeal, but nothing in the plain language of the rule precludes this Court from considering other errors whether they were raised below or not.² As the Supreme Court recognized in *Roberson v. Perez*³, “. . . by using the term ‘may’, RAP 2.5(a) is written in discretionary, rather than mandatory terms.”⁴

MWW’s arguments to the contrary are without merit. More importantly, MWW’s position that Monitor failed to raise issues and/or invited error are inaccurate. In this case, Monitor made it clear from the beginning that the trial court should deny the motion to approve the settlement as reasonable because the \$550,000 was nothing more than a pass through payment to MWW, which evidenced collusion.⁵ In addition, Monitor argued that it was improper for the trial court to consider or otherwise address coverage issues.⁶ And, the trial court and other parties agreed.⁷

² See RAP 2.5(a).

³ 156 Wn.2d 33, 123 P.3d 844 (2005)

⁴ *Id.* at 39 (discussing the language of RAP 2.5(a) and citing *State v. Ford*, 137 Wn.2d 472, 477, 484-85, 973 P.2d 454 (1999)). See also RAP 2.5(a) (“The appellate court **may refuse** to review . . .”) (emphasis added).

⁵ See, e.g., CP 3477; RP 23.

⁶ See, e.g., CP 3478; RP 4-5; RP 12-13.

⁷ See, e.g., RP at 5-6; RP 15.

Yet, the trial court did inject coverage issues into its ruling by including its order, at paragraph 7, the objectionable finding that “Kiribati’s settlement offer of May 18 was timely + almost immediately communicated to Monitor; Monitor did not timely respond.”⁸ Monitor specifically objected to inclusion of language in paragraph 7 of the trial court’s order that went beyond the facts necessary for the court to make its ruling.⁹ Despite this objection, the trial court added that objectionable and unnecessary additional language.

Monitor did not waive this objection to that language by informing the trial court that it was excluded from the settlement talks that lead to the proposed settlement of \$550,000.¹⁰ While that information was relevant to show the collusive nature of the settlement, providing that information to the trial court could not expand the scope of the reasonableness hearing. The trial court exceeded the scope of its authority under RCW 4.22.060 by entering findings that smack of coverage issues that will necessarily be at issue in any subsequent litigation between MWW and Monitor.¹¹ This is

⁸ CP 3585.

⁹ CP 3566-68.

¹⁰ CP 3478

¹¹ *See, e.g., Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 513, 516, 413 P.2d 820 (1966) (reversing trial court’s unnecessary determination of an issue that may arise between the parties in a future proceeding.)

especially the case given the court's acknowledgment that it would not be deciding coverage issues.¹²

In addition, the allegation that Monitor only challenged one finding of fact is also incorrect. On the very first page of Monitor's opening brief, Monitor identified four specific findings that it asserts were in error. As noted above, it is Monitor's position that the majority of these flawed factual findings resulted in the trial court incorrectly finding that the settlement between MWW and Kiribati was reasonable. It cannot legitimately be claimed that Monitor has acquiesced to findings of fact that it specifically identified as error.

B. This settlement should not have been approved as reasonable.

Monitor has thoroughly briefed and identified to this Court how the settlement agreement in this matter does not fall within the confines of RCW 4.22.060. As discussed in the opening brief: 1) this case falls far outside the accepted and time-honored category of settlements subject to a covenant judgment reasonableness hearing such that a reasonableness hearing could not set the amount of MWW's liability; and 2) the plain language of RCW 4.22.060 precludes its application to this settlement as

¹² RP 15, lines 16-18 (the court states: "Well I'm prepared to include language in my order that I stated before, that nothing in this order addresses coverage issues...")

the “pass through” provision here is not an agreement on an amount to be paid in exchange for the release of Kirabati’s claims against MWW but instead a mechanism to have MWW’s own malpractice carrier fund payment of MWW’s attorney fee claims against Kirabati.¹³

RCW 4.22.060’s plain language states that reasonableness hearings are to be held “on the reasonableness of the amount to be paid[.]”¹⁴

Despite MWW’s arguments to the contrary, nothing in its response or the settlement agreement evidences that it is paying anything as part of the settlement agreement because it is not. MWW cannot legitimately claim that promising to pay Kirabati \$550,000 in exchange for Kirabati returning that same \$550,000 amount to MWW in any way reflects “an amount paid for a release” by MWW.¹⁵

Further, even if, as MWW would have this Court believe, it was proper to apply RCW 4.22.060 to this agreement, Monitor is correct in its assertion that the Court erred in finding that the settlement was reasonable because the “pass through” payment evidences collusion and clearly reflects an inflation of the settlement amount.

¹³ See opening brief at pages 13-21.

¹⁴ See opening brief at page 21. See also RCW 4.22.060(1)

¹⁵ See RCW 4.22.060(3) (discussing the effect of a court’s determination of “the amount paid for a release.”).

C. MWW did have an incentive to inflate the settlement agreement.

Under RCW 4.22.060, MWW bore the burden of proving that the settlement was reasonable, which included the burden of proving that the settlement was not the product of fraud or collusion.¹⁶

In its opposition, MWW claims that it did not have incentive to inflate the settlement amount because the trial court found good faith and noted how contentious the parties were. Whether the parties were contentious is irrelevant. Even once contentious parties can collude to shift responsibility for payment from each other to another entity in order to avoid personal liability. For example, a review of the facts in *Water's Edge Homeowners Ass'n. v. Water's Edge Assocs.*,¹⁷ indicates that the parties engaged in substantial litigation including summary judgment motions before finally colluding to reach a settlement agreement.¹⁸

Here, MWW and Kiribati undisputedly engaged in heated litigation and negotiations. But, they also undisputedly reached an agreement where Kiribati recovered nothing, the parties agreed to mutually release one another, and they agreed to arrange it so that MWW

¹⁶ See RCW 4.22.060(1); *Water's Edge Homeowners Ass'n. v. Water's Edge Assocs.*, 152 Wn. App. 572, 585, 216 P.3d 1110 (2009) (citing and quoting *Chausee v. Maryland Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991)).

¹⁷ 152 Wn. App. 572, 216 P.3d 1110 (2009).

¹⁸ See *Id.* at 577-599.

would receive \$550,000 from its insurer to purportedly pay Kiribati, who would in turn hand that exact amount back over to MWW.¹⁹

III. CONCLUSION

The trial court misconstrued the terms of the settlement agreement by concluding that there was any type of payment being made to Kiribati instead of just a “pass through” payment directly to MWW/Moran. Because neither MWW nor Moran paid (whether through an insurer or otherwise) anything for the release of claims against them, this settlement agreement was outside the scope of RCW 4.22.060. The trial court erred in finding otherwise, and it erred in making the unnecessary finding that “Kiribati’s settlement offer of May 18 was timely + almost immediately communicated to Monitor; Monitor did not timely respond.”

Monitor therefore continues to request that the Court of Appeals vacate the trial court’s order approving the settlement as reasonable.

Respectfully submitted this ___ day of April, 2013.

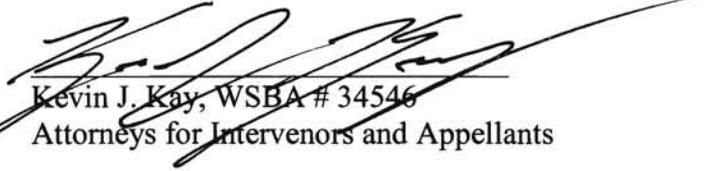
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¹⁹ It should also be noted that the record reflects that counsel and Mr. Moran were exchanging e-mails discussing Mr. Moran’s ability to put pressure on his insurer in light of diminishing covered claims, referencing suit against his insurer, and suggesting that Mr. Moran and/or his counsel write letters to the insurer. *See* CP at 3403-05.

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CERTIFICATE OF SERVICE

I, Christine Baughn, declare as follows:

1. I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Lewis Brisbois Bisgaard & Smith LLP, 2101 Fourth Avenue, Suite 700, Seattle, Washington, 98121.

2. On April 10th 2013, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Reply Brief of Intervenors and Appellants
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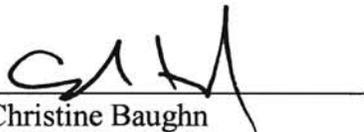
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I declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED this 10th day of April, 2013.


Christine Baughn