IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THERESA DUNN, individually and as guardian of A.D., a minor child, and KENDALL DUNN; and CATHERINE ANDERSON, Respondents, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, Appellant.	)	No. 65602-3-I (Linked with No. 66337-2-I) DIVISION ONE UNPUBLISHED OPINION FILED: September 17, 2012

Schindler, J. — Mutual of Enumclaw Insurance Co. (MOE) challenges the superior court's determination that the stipulated covenant judgment settlement agreement between Catherine Anderson, Kendall Dunn and Theresa Dunn, individually and as guardians of A.D., was reasonable. We affirm.

FACTS

Donald Anderson and his spouse Catherine Anderson lived in Edmonds and owned a cabin in Chelan. Donald was a co-owner of Midway Plywood in Lynnwood.[1] Kendall Dunn is a self-employed carpenter and was a regular customer of Midway

[1] We refer to the parties by their first names for purposes of clarity and mean no disrespect by doing so.

Plywood. Kendall testified that in 2004, he worked for Donald remodeling the cabin in Chelan at a reduced rate for approximately three to four weeks. In exchange, Kendall said that Donald told him he and his family could stay at the cabin.

In the summer of 2006, the Dunns made arrangements to spend a week at the cabin with their 11-year-old daughter A.D. and her friend D.J. When the Dunns arrived on July 23, Catherine was still at the cabin but said she planned to leave the next day. That night, Donald called Kendall and told him that his vehicle had broken down while he and his son were driving over the pass, and asked Kendall to drive to the pass to get them. Before Catherine left the next day, she asked the Dunns to let Donald and her son stay at the cabin for the week.

That evening, Kendall and Theresa allowed A.D. and D.J. to sleep on the porch in their sleeping bags. A.D. said that after Donald put a blanket over her head, placed her hand on his bare chest, rubbed her thigh, and fondled her breasts and vagina, she started screaming. A.D. and D.J. ran into the cabin yelling that Donald had touched their private parts. Kendall, Theresa, and the two girls immediately left.

About a week later, Catherine called Theresa to tell her that Donald had previously molested Catherine's niece K.N. In February 2007, Donald pleaded guilty to two counts of child molestation in the first degree and one count of assault in the fourth degree with sexual motivation. The court sentenced Donald to 67 months in prison. Catherine and Donald divorced in June 2007.

In July 2007, Kendall Dunn and Theresa Dunn, individually and as the guardians of A.D., filed a lawsuit against Donald and Catherine for physical and emotional

damages, and an award of attorney fees. The Dunns alleged Donald and Catherine breached the duty of care owed to a business invitee, and violated the Sexual Exploitation of Children Act, chapter 9.68A RCW. The Dunns alleged Catherine knew or should have known that Donald was a "predatory pedophile," but failed to warn or protect the Dunns and A.D. The complaint alleged, in pertinent part:

> [Catherine Anderson] knew that Donald Anderson was a predatory pedophile who sexually abused her niece on hundreds of occasions and had sexually abused his sister. She knew or should have known that he would again prey on minor children.
>
> [Catherine Anderson] knowingly allowed, permitted and encouraged Donald Anderson to abuse young girls, including Plaintiff, in one of the following ways: . . . failing to warn Theresa and Kendall Dunn that Donald W. was a sexual predator of young girls and that unsupervised contact with A.D. and A.D.'s friend would place these minor girls in danger.

Donald and Catherine Anderson were the named insureds on a personal umbrella liability policy issued by MOE for the term beginning March 2006 and ending March 2007. MOE agreed to defend Catherine under a reservation of the right to challenge coverage. MOE retained Merrick, Hofstedt, and Lindsey, PS, and Bruce Lamb to represent Catherine.

In November 2007, MOE filed a declaratory judgment action to determine whether Catherine was entitled to coverage under the terms of the umbrella policy. Catherine retained Gordon, Tilden, Thomas, and Cordell, LLP, and Mark Wilner to represent her in the coverage action.

At the request of MOE, on February 6, 2008, the parties engaged in mediation of the lawsuit filed by the Dunns. Wilner and Lamb attended the mediation. The Dunns made a demand of $175,000 to resolve all of the claims. MOE rejected the demand.

Following the mediation, the parties engaged in discovery. In response to interrogatories, Catherine admitted that in 2003, her niece K.N. disclosed Donald molested her on numerous occasions when she was a child. Catherine also admitted that she received a copy of the August 5, 2003 psychological evaluation of Donald that was prepared by Terry F. Copeland, PhD. In the report, Donald admitted that he sexually molested K.N. more than 20 times over a two-year period beginning when she was nine-years-old. Donald also admitted that he molested his eight-year-old sister when he was a teenager. While Dr. Copeland stated Donald was a "low risk[, i]t is also true that he still seems to entertain strong sexual fantasies of minor females—an issue that I would encourage him to address in the future."

In June 2008, MOE filed a motion for summary judgment in the declaratory judgment action, arguing that it had no duty to indemnify or defend Catherine. Catherine filed a cross-motion for partial summary judgment on whether MOE had a duty to defend. The trial court denied MOE's motion for summary judgment. The court granted Catherine's motion for partial summary judgment, ruling that MOE had a duty to defend.

In September, the Dunns made a demand of $350,000 to settle the lawsuit. When MOE countered at $30,000, the Dunns reduced the demand to $320,000. MOE countered with $35,000. The Dunns rejected the offer.

On February 25, 2009, Catherine, Kendall Dunn and Theresa Dunn, individually and as the guardians of A.D., entered into a "Stipulated Judgment, Assignment of Claims, and Covenant Not to Execute." Catherine stipulated to entry of a judgment

against her for $400,000. The judgment is enforceable only against the umbrella policy, and Catherine agreed to assign the Dunns her claims against MOE. In exchange, the Dunns agreed to defend Catherine, hold her harmless in the declaratory judgment action, and not to execute or enforce the stipulated judgment against her. In November, the court granted the Dunns' motion for a voluntary nonsuit and entered an order dismissing all claims against Donald.

In March 2010, the Dunns filed a motion to determine the reasonableness of the covenant judgment settlement agreement. The motion addressed each of the factors the court must consider in determining the reasonableness of the agreement. In support of the motion, the Dunns submitted the deposition testimony of Kendall and Theresa Dunn, responses to interrogatories, records from Alderwood Counseling Associates, psychological evaluations of Theresa and A.D. prepared by Dr. Jon Conte, a psychological evaluation of Kendall Dunn prepared by psychologist Laura Brown, PhD, and Dr. Copeland's 2003 psychological evaluation of Donald following K.N.'s disclosure that he sexually molested her as a child. The Dunns also submitted a declaration from Catherine Anderson, her attorney Bruce Lamb, Kendall Dunn, and Gerald Tarutis, the litigation guardian ad litem for A.D.

In opposition, MOE argued the $400,000 settlement was unreasonable because (1) the Dunns could not establish that Catherine owed a duty to the Dunns as business invitees; (2) the agreement did not segregate damages under Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003); (3) the damages were minimal; and (4) there was evidence of collusion.

In response, the Dunns submitted additional evidence, including a letter dated February 4, 2008 from Catherine's coverage attorney Wilner to the mediator, an e-mail from Wilner to MOE dated February 7, 2008, and a letter from Wilner to MOE dated September 23, 2008.

The reasonableness hearing was held on May 7, 2010. MOE called Kendall Dunn, Theresa Dunn, and Gerald Tarutis to testify at the hearing. Kendall testified that he purchased approximately 25 percent of the materials he used as a carpenter from Midway Plywood. Kendall said that in 2004, he worked at a reduced rate to help Donald remodel the cabin in Chelan. In exchange, Donald told Kendall he and his family could use the cabin. Kendall testified that Donald asked him to stain the deck during the week he and his family planned to stay at the cabin in July 2006.

Tarutis testified that Dr. Conte's psychological evaluation of A.D. showed that her claim for damages "would definitely be significant." Tarutis also testified that the cognitive testing performed by Dr. Conte "showed significant changes [in A.D.] Also it showed changes in evidence of self-worth, blaming of self, and most recently the developments as I understand from the parents of child not -- having problems in school are fulfilling what the diagnosis indicated might happen." Tarutis stated that in his opinion, the $400,000 settlement was reasonable.

> Well, the cases that I have been involved in in the past simply involving one minor child with no parental claims were resolved in the neighborhood of [$]200 to [$]400,000. That's what I – that's what I would base this on.
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> So in this case, in my humble opinion, the damage to this child as relayed to me through the professional assessment of a psychologist seems to be more severe. So that's how I based it.

In a memorandum decision the court found that the $400,000 settlement was not reasonable. Based on "the factors in Glover,"[2] the court determined that a settlement of $260,000 would be reasonable.

[2] Glover v. Tacoma Gen. Hosp., 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988).

ANALYSIS

MOE challenges the court's determination that a settlement of $260,000 is reasonable. MOE asserts (1) the court did not consider the merits of Catherine's defense theories, (2) the court did not segregate damages under Tegman, (3) the evidence did not support an award of damages to Kendall Dunn and Theresa Dunn, and (4) the evidence supports finding collusion.

In Besel v. Viking Insurance Co. of Wisconsin, 146 Wn.2d 730, 738, 49 P.3d 887 (2002), the Washington Supreme Court agreed with our approach in Chaussee v. Maryland Casualty Co., 60 Wn. App. 504, 803 P.2d 1339 (1991), to apply the factors in Glover v. Tacoma General Hospital, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), overruled on other grounds by Crown Controls, Inc. v. Smiley, 110 Wn.2d 695, 756 P.2d 717 (1988), to determine the reasonableness of a stipulated judgment and covenant not to execute.

Under Glover, the court must consider the following factors in making a reasonableness determination: (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 faults; (5) the risks and expense 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; and (9) the interests of the parties not being released. Glover, 98 Wn.2d at 717. While the court must consider the Glover factors, no one factor controls and the court has the discretion to decide each case individually. Chaussee, 60 Wn. App.

at 512.

We review the trial court's determination of reasonableness for abuse of discretion. Werlinger v. Warner, 126 Wn. App. 342, 349, 109 P.3d 22 (2005).[3] A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The question of reasonableness necessarily involves factual determinations which will not be disturbed on appeal if supported by substantial evidence. Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 158, 795 P.2d 1143 (1990) (citing Glover, 98 Wn.2d at 718). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise." Schmidt, 115 Wn.2d at 158.

MOE first contends the court erred in failing to consider the merits of Catherine's defense theories. Specifically, MOE argues there was no evidence the Dunns were business invitees; and even if the Dunns could establish Catherine owed a duty to them as business invitees or as licensees, there was no evidence that Donald's molestation of A.D. was foreseeable. Because substantial evidence supports the court's determination that Catherine Anderson owed a duty to the Dunns and the molestation was foreseeable, we reject MOE's argument.

Kendall Dunn testified that he purchased about 25 to 30 percent of his lumber and materials from Midway Plywood. Kendall said that as compensation for the work he did on the cabin, Donald offered him the opportunity to stay at the cabin with his

[3] We reject MOE's argument that a de novo standard of review applies to our review of a reasonableness hearing. See Water's Edge Homeowner's Ass'n v. Water's Edge Assocs., 152 Wn. App. 572, 584-85, 216 P.3d 1110 (2009).

family.

> Q . . . Did you pay anything to Don or the Andersons for using the cabin?
> A No.
> Q In your mind, was your use of the cabin compensation for something you had done for them?
> A I think they let us use it because I gave them, you know, a good deal on the remodel.
> Q Okay. Can you tell me a couple more sentences about that? How good a deal did you give them compared to other jobs, and in what way was it different?
> A Well, for being away from the house, you know, and my family for a week at a time, it was a good deal.
> Q Did you charge less than you normally charge?
> A I would say so.

Kendall also testified that at Donald's request, he planned to work on the deck during his stay the week of July 23, 2006.

With respect to foreseeability, the court found that Catherine knew Donald posed a risk to young girls. The memorandum decision states, in pertinent part:

> [Catherine Anderson] knew of her husband's sexual deviancy and the risk of A.D. and her friend. She did not warn them and she left knowing that he would be at the cabin with the two young girls without the presence of any adult who was aware of his risk.

There is no dispute that Catherine knew that Donald repeatedly molested her niece K.N. when she was a child, and that Catherine received a copy of Dr. Copeland's 2003 psychological evaluation of Donald. Catherine testified that "[i]n May 2003, my adult niece K.N. disclosed that Donald Anderson had molested her many years before when she was a minor," and in 2003, "Don told me he had molested his sister." In the 2003 evaluation, Dr. Copeland states that Donald admitted molesting "his niece [K.N.] perhaps 20 times over a two year period." The evaluation also states Donald "reported

that his current sexual fantasies are roughly 50% to thoughts of adult women and 50% to thoughts of minor females," and he "still seems to entertain strong sexual fantasies of minor females—an issue that I would encourage him to address in the future."

Next, MOE argues the court erred in determining that $260,000 is reasonable because it did not segregate damages under Tegman. In Tegman, the court held that under RCW 4.22.070, "damages resulting from negligence must be segregated from those resulting from intentional acts." Tegman, 150 Wn.2d at 105.

The Dunns contend Rollins v. King County Metro Transit, 148 Wn. App. 370, 199 P.3d 499 (2009), controls. In Rollins, the court held that where there is no issue of joint and several liability at trial, and "plaintiffs seek damages only for injuries caused by a single defendant's negligence, there is no need to instruct the jury to segregate damages caused by intentional conduct." Rollins, 148 Wn. App. at 372.[4]

Contrary to MOE's argument, the record shows that the court took into account both Tegman and Rollins and did not abuse its discretion in determining that $260,000 rather than $400,000 was reasonable as to Catherine. In the memorandum decision, the court expressly recognized that "although there may be certain legal arguments under Tegman and Rollins, nevertheless, for settlement purposes, [Catherine Anderson] has substantial exposure and risk."

Substantial evidence also supports the court's finding of damages. The record shows that in October 2006, Theresa and A.D met with a counselor at Alderwood Counseling Associates, and from October to January 2007, Theresa met with the counselor at least four more times. While neither A.D. nor Kendall had engaged in

[4] The parties also made these arguments during oral argument at the reasonableness hearing.

counseling by the time of the hearing, the psychological evaluations describe the impact of the molestation and state that counseling would be necessary.

> The court has not seen or heard directly from A.D. The only professional who has expressed an opinion is Dr. Conte, who saw her for forensic purposes. She has not been in counseling, although Dr. Conte opines that such would be necessary.
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> Both Mr. and Mrs. Dunn testified consistent with Dr. Conte's opinion that A.D. has been severely impacted by the incident. According to their testimony, because of this incident she has changed schools, no longer trusts adult men, has flashbacks of the incident, and in the last three months has had six or seven dreams about this.
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> Both Mr. and Mrs. Dunn testified that the incident has taken a toll on their marriage and their personal life. Mrs. Dunn has engaged in several counseling sessions; Mr. Dunn has not been in counseling.
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> . . . .
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> [I]n considering the nature and extent of the incident and knowing the Snohomish County juries, it seems that $150,000 - $200,000 would be the upper range of any verdict for damages to A.D. As to the Dunn's [sic], Mrs. Dunn appears to be more emotionally affected by the incident and the court would conclude that $35,000 - $50,000 is on the upper range if any verdict. As to Mr. Dunn, a verdict in the range of $5,000 - $10,000 would seem likely. Therefore, the combined damages would be approximately $190,000 - $260,000.

Last, MOE argues substantial evidence does not support finding there was no collusion between Catherine and the Dunns. In the memorandum decision, the court expressly considered and rejected MOE's argument of collusion. "The real question is whether this is a 'deal' reached between [Catherine Anderson] and the [Dunns] at the expense of the insurance company. The answer is 'no'." The court also concluded that "Mutual of Enumclaw was at all times aware of the course of the negotiations." In reaching that conclusion, the court cites to the undisputed course of settlement negotiations described in the stipulated covenant judgment settlement agreement. The memorandum decision states, in pertinent part:

> The first demand to Mutual of Enumclaw was $175,000. [The Dunns]

> then demanded $350,000 which was reduced to $320,000. When negotiation broke off with Mutual of Enumclaw, [the Dunns] entered into this stipulated judgment for $400,000.

Substantial evidence supports the court's finding that there was no collusion or fraud. Wilner testified that he and the Dunns' attorney "negotiated the stipulated judgment with a covenant not to execute . . . at arm's length, and the negotiation process was free from collusion or fraud." The attorney for the Dunns also testified that she "debated extensively about matters pertaining to liability" with Lamb, the attorney appointed by MOE to represent Catherine in the lawsuit. "Eventually, Mr. Lamb conceded that there was a significant risk of a Plaintiffs' verdict and expressed an interest in resolving the case through mediation."

We affirm the court's determination of reasonableness.

WE CONCUR: