No. 50981-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

97535-3

LISA STEEL, individually and as Guardian *ad litem* for J.T., a minor; DOUGLAS THOMPSON and KRISTI BARBIERI, individually and as Guardian *ad litem* for S.R.B., a minor,

Appellants/Plaintiffs,

vs.

OLYMPIA EARLY LEARNING CENTER, et al.,

Respondents/Defendants,

vs.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondents/Intervener

PETITION FOR REVIEW

Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832
Counsel for Petitioners

PFAU COCHRAN VERTETIS
AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
(253) 777-0799

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I. IDENTITY OF PETITIONERS

Petitioners Lisa Steel, *et al*, as individuals and as guardians ad litem for their minor children, ask this Court to accept review of the decision designated in Part II below.

II. THE DECISION OF THE COURT OF APPEALS

The Petitioners before this Court consist of six sets of parents and their minor children (collectively, "Petitioners"; respectively, the "Parents" and "Children") who were sexually abused by an employee of the daycare they attended, Olympia Early Learning Center ("OELC"). After the employee's arrest for child rape and child molestation at the day care, Petitioners brought negligence claims against OELC; its owner, Steve Olson; and an employee, Rose Horgdahl (collectively, the "defendants" or "insureds").

Philadelphia Indemnity Insurance Company ("Philadelphia"), OELC's liability insurer, retained defense counsel to defend its insureds. Although Philadelphia ultimately was responsible for ensuring its insureds received a vigorous defense, in the weeks leading up to trial neither Petitioners, their experts, nor any of the lay witnesses had been deposed. Unsurprisingly in light of the high potential for a ruinous jury verdict holding them liable for serious sexual abuse claims, in late September 2012 the insureds entered into covenant judgment settlement agreements with Petitioners exchanging stipulated judgments and an assignment of bad faith claims against Philadelphia for a covenant not to execute the judgments against them.

Only after Petitioners moved to have the stipulated judgment amounts declared reasonable under RCW 4.22.060 — directly placing Philadelphia's financial interests at stake by establishing the judgment amounts as the presumptive measure of damages in subsequent bad faith litigation—did Philadelphia believe vigorous discovery was necessary, moving to intervene in the reasonableness proceedings under the pretense of so-called "focused discovery." To the contrary, Philadelphia's ensuing discovery demands were all-encompassing and far in excess of ordinarily permissible discovery, resulting in production of all of Petitioners' ordinary work product, defense counsel's entire case file (including privileged communications), and the insureds' personal counsels' entire files (including privileged communications).

Even this was not enough for Philadelphia, however, as Philadelphia demanded ***seventeen*** (***17***) depositions of the Parents; the insureds; defense counsel; and the settlement guardians ad litem ("SGALs") appointed by the trial court after the settlement. Over Petitioners' objections of irrelevance, the trial court entered an order allowing these depositions on certain incredibly broad topics requested by Philadelphia, including evidence supporting liability and damages; the insureds' subjective opinions regarding their liability for the claims; defense counsel's subjective opinions regarding the merits of the case; and the post-settlement involvement of settlement guardians *ad litem* ("SGALs") with the case.

On interlocutory review, the Court of Appeals simply held without any analysis that "pre-settlement knowledge obtained after settlement" "can

be" relevant to a trial court's reasonableness determination. *Steel v. Olympic Early Learning Ctr.*, No. 50981-4-II, 2019 WL 2291306, at *7 (Wash. Ct. App. May 29, 2019) ("*Steel II*"). It further held that such discovery is permissible if it "involve[s] information known to at least one of the parties at the time of the settlement," does not seek "privileged information or information otherwise undiscoverable," and "take[s] into consideration the *Glover* factors." *Steel II*, 2019 WL 2291306, at *7. Finally, it declined to specifically address other categories of discovery fully briefed by the parties and ordered by the trial court—such as the subjective opinions of the parties and defense counsel regarding the case's merits and the settlement, as well as the SGALs' involvement with and information about the case—holding that it could not "speculate as to other discovery issues that may arise." *Id.* For the following reasons, the Court of Appeals' decision conflicts with numerous decisions of this Court and the Court of Appeals and raises multiple issues of substantial public interest, requiring review by this Court. RAP 13.4(b) (1), (b)(2), (b)(4).

III. ISSUES PRESENTED FOR REVIEW

A. Should review be granted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' holding in this case that evidence of pre-settlement information generated after a covenant judgment settlement agreement may be relevant to a trial court's reasonableness determination under RCW 4.22.060 conflicts with decisions of this Court and of the Court of Appeals that reasonableness is determined based on the posture of the case at the time of settlement?

B. Should review be granted under RAP 13.4(b)(2) because, to the extent that the Court of Appeals' holding authorizes post-settlement discovery of the subjective opinions of the parties and

their counsel in a reasonableness proceeding, that holding conflicts with decisions of the Court of Appeals that such subjective opinion evidence is irrelevant to a trial court's objective reasonableness determination?

C. Should review be granted under RAP 13.4(b)(2) because, to the extent that the Court of Appeals' holding authorizes discovery regarding settlement guardians *ad litem* who only became involved with the case after settlement, that holding conflicts with decisions of the Court of Appeals that a trial court determines reasonableness based on the facts, law, and posture of the case at the time of settlement, not on post-settlement events?

D. Should review be granted under RAP 13.4(b)(4) because the Court of Appeals' decision undermines Washington policy incentivizing insurers to provide a vigorous defense to their insureds in litigation, undermines Washington policy strongly favoring settlement, and affects all Washington insureds and tort litigants?

IV. STATEMENT OF THE CASE

After the 2011 arrest and conviction of an OELC employee, Eli Tabor, for child rape and child molestation at the day care, Petitioners brought negligence claims against the insureds.[1] Philadelphia, OELC's liability insurer, retained defense counsel to defend its insureds.[2]

As the Court of Appeals observed in the first interlocutory appeal in this case, "[a]lthough trial was set for October 16 [2012], as of September 5, defense counsel hired by Philadelphia had conducted little discovery."[3] Specifically, Petitioners had not been deposed, none of Petitioners' experts had been deposed, and none of the lay witnesses had been deposed.[4]

[1] *Steel v. Philadelphia Indem. Ins. Co.*, 195 Wn. App. 811, 817, 381 P.3d 111 (2016) ("*Steel I*"); Clerk's Papers ("CP") 107.

[2] *Steel I*, 195 Wn. App. at 817; CP 1197.

[3] *Steel I*, 195 Wn. App. at 817.

[4] CP 1218, 1228.

Moreover, despite retaining defense counsel, Philadelphia admitted that it was ultimately responsible for managing defense preparations and for directing defense counsel to "make changes" if the prepared defense was inadequate.[5] Indeed, Philadelphia's claims notes state, "Need to contact . . . perhaps an expert to see what if anything else ***we need to be doing*** to protect our insureds in this matter."[6] Yet, despite the severity of the claims against the defendants and defense counsel's dire warnings, Philadelphia did nothing to ensure discovery was being obtained regarding Tabor's actions, the defendants' liability, or Petitioners' damages.[7]

Despite failing to ensure its insureds received basic formal discovery, however, prior to settlement, Philadelphia regularly received information regarding the case, including liability and damages evaluations, from defense counsel. For example, on June 23, 2011, defense counsel sent correspondence to Philadelphia enclosing a new Court of Appeals opinion and stating, "Frankly, I did not think we had a chance on summary judgment in the case before, but this case law makes the prospect even dimmer."[8] On February 21, 2012, defense counsel sent a status report to Philadelphia discussing each Petitioner's allegations, defense counsel's view of the supporting and contradicting evidence, and defense counsel's liability and damages evaluations.[9] On August 2, 2012, defense counsel sent to

[5] CP 1217-18, 1510.

[6] CP 2043 (emphasis added).

[7] CP 1207-08, 1218-21, 1228.

[8] CP 7670.

[9] CP 7610-19.

Philadelphia—at Philadelphia's request—a "Summary of Allegations" for each Petitioner, including his defense theories based on available evidence.[10] And on September 18, 2012, defense counsel sent a letter to Philadelphia with recommended allocations of the $1,000,000 policy limits claimed by Philadelphia to each Petitioner.[11] The letter proceeded to discuss the liability and damages evidence underlying Petitioners' claims and the allocations.[12]

In late September 2012, the insureds entered into covenant judgment settlement agreements with Petitioners.[13] After the settlement, the trial court appointed six SGALs to recommend approval of the Children's settlements under SPR 98.16W.[14]

After Petitioners moved for entry of the stipulated judgments, in October 2012 "Philadelphia moved to intervene to conduct 'focused discovery' . . . and to participate in any reasonableness hearing."[15] However, Philadelphia subsequently attempted through a series of motions to "expand the scope of discovery," resulting in Petitioners producing over

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[10] CP 7621-23.

[11] CP 2320-22.

[12] *Id*.

[13] *Steel I*, 195 Wn. App. at 817,819, 837; CP 1229-30.

[14] CP 19-24, 3496, 3514, 3525, 3539, 3549, 3558, 7873-78, 7946-51, 8006-11, 8066-71, 8124-29. SPR 98.16W(a) provides in pertinent part: "In every settlement of a claim . . . involving the beneficial interest of an unemancipated minor or a person determined to be disabled or incapacitated under RCW 11.88, the court shall determine the adequacy of the proposed settlement on behalf of such affected person and reject or approve it."

In turn, SPR 98.16W(c)(1) requires the trial court to appoint a SGAL to "assist the court in determining the adequacy of the proposed settlement" through an "investigation" and "written report . . . with a recommendation regarding approval . . . ."

[15] *Steel I*, 195 Wn. App. at 746-747.

200,000 pages of materials, including: defense counsel's entire file; Petitioners' non-mental impression and non-opinion work product consisting of "all of the nonprivileged documents generated, maintained, or obtained in this case including medical records, public records request responses, witness communications, expert communications, subpoenas, pleadings, and documents received in discovery"; all other attorneys' work product; and all communications among Petitioners' counsel, coverage counsel, and defense counsel up to the point of the settlements.[16]

Philadelphia, however, pressed for further discovery, resulting in a trial court order requiring Petitioners to produce their attorney-client privileged materials and mental impression and opinion work product and certifying appellate review under RAP 2.3(b)(4).[17]

In the first interlocutory review in this case, the Court of Appeals held that Appellants had not waived protection of their attorney mental impression and opinion work product, reasoning:

> The *Glover/Chaussee* factors include damages, the merits of their liability theory, the merits of the insureds' defense theory and relative fault, the risks and expenses of continued litigation, the insureds' ability to pay, evidence of bad faith, collusion, or fraud, the extent of plaintiffs' preparation and investigation, and ***the interests of Philadelphia may all be assessed based on other evidence in Philadelphia's possession and the discovery already submitted to Philadelphia***.[18]

Undeterred by these holdings, however, on remand Philadelphia

[16] *Steel I*, 195 Wn. App. at 818-19; CP 521-22.

[17] *Id.* at 821.

[18] *Steel I*, 195 Wn. App. at 841 (emphasis added).

resumed its demands for discovery, resulting in another series of discovery motions.[19] Philadelphia demanded depositions of the Parents, defendants, defense counsel, and the SGALs—***17 depositions*** in all.[20] Ultimately, on June 22, 2017, the trial court entered its Discovery order in which it ordered that the defendants, defense counsel, the Parents, and the SGALs could be deposed on the following topics:

> 1. Defendants John Masterson (as representative of Olympia Early Learning Center), Rose Horgdal, and Steve Olson, may be deposed with respect to 1) defendants' ability to pay or contribute to a settlement or judgment, and 2) in their opinion, the veracity of the factual confessions signed by those individuals.
>
> 2. [Defense counsel] Michael Bolasina may be deposed with respect to 1) the risks of continuing litigation, 2) preparation for trial, and 3) his opinions regarding liability.
>
> 3. The [Parents] may be deposed with respect to the facts necessary to evaluate both liability and damages known by plaintiffs at the time of settlement (for example, the [P]arents' observations regarding their children). Due to dismissal of the [Parents'] claims, Philadelphia may not depose the [Parents] with respect to the [Parents'] loss of consortium claims.
>
> 4. Settlement Guardians ad Litem may be deposed with respect to 1) the circumstances regarding their retention, 2) how they were retained and by whom, 3) the process of their retention, 4) what information was provided to them and by whom, and 5) whether they were influenced by any counsel regarding their reports. Philadelphia may

[19] CP 3622.

[20] CP 7524-531.

not depose them regarding their understanding of the reasonableness hearing as separate coverage litigation.[21]

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Review is required under RAP 13.4 (b)(1) and (b)(2) because (1) the Court of Appeals' holding that pre-settlement knowledge obtained after settlement—implicitly including merits evidence generated after settlement—can be relevant to a trial court's reasonableness determination ignores Washington appellate precedent holding that reasonableness must be determined by the "posture of the case at the time of settlement"

Division Two's holding that pre-settlement knowledge obtained after settlement—including merits evidence generated after settlement—"can be" relevant to a trial court's determination of the reasonableness of a covenant judgment settlement is in conflict with decisions of this Court or the Court of Appeals, requiring review under RAP 13.4 (b)(1) and (b)(2).

Regarding a covenant judgment settlement in Washington, RCW 4.22.060(1) provides that when parties enter into a "release, covenant not to sue, covenant not to enforce judgment, or similar agreement***, a determination that the amount to be paid is reasonable must be secured***." *Steel I*, 195 Wn. App. at 830 (emphasis added). The trial court's reasonableness determination is one of ***objective*** reasonableness, *Dana v. Piper*, 173 Wn. App. 761, 776, 295 P.3d 305 (2013), utilizing nine factors often referred to as the "*Glover*" or "*Glover/Chaussee*" factors. *Steel I*, 195 Wn. App. at 831 (listing the *Glover* factors).

However, the scope of a trial court's inquiry in covenant judgment reasonableness determinations is much more restricted than a jury's

[21] CP 7849-851.

determination in a trial setting. As Division Three has observed, RCW 4.22.060(1)'s language "narrowly confine[s] the trial court's evaluation of a settlement agreement to a stand-alone reasonable settlement amount." *Hidalgo v. Barker*, 176 Wn. App. 527, 543–44, 309 P.3d 687 (2013). Consistent with the narrow confines of a trial court's reasonableness determination, RCW 4.22.060 only requires five days' notice (which may be further shortened by the trial court) of settlement and a reasonableness hearing to the original ***parties*** (i.e., the settling parties) in the lawsuit. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 407, 161 P.3d 406 (2007) (insurer not entitled to statutory notice of settlement because it was not a party to the suit between the settling parties), *review denied*, 163 Wn.2d 1055, 187 P.3d 752 (2008).[22] As a result, reasonableness hearings may proceed without the defendants' insurer participating ***at all***. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 320-21, 326, 116 P.3d 404 (2005) (trial court properly held reasonableness hearing on six days' notice to insurer even

[22] Even as to the original parties, this Court has explained how the mere 5-day notice required under the statute reflects the intended summary nature of the proceedings:

> "The requirement for 5 days' notice to all parties of the reasonableness hearing is obviously for the purpose of giving all parties the opportunity to appear and be heard at that hearing and to do their best to insure that the settlement is in fact a reasonable one—a matter of obvious importance to all nonsettling parties because the claim of a settling plaintiff against a nonsettling party is ordinarily reduced by the amount of the settlement. The 5–day written notice to parties requirement of the statute, RCW 4.22.060(1), is much the same as the requirement for a 5–day notice of presentation for findings of fact (CR 52(c)) and the 5–day notice of presentation for judgments (CR 54(f)(2))."

Brewer v. Fibreboard Corp., 127 Wn.2d 512, 524, 901 P.2d 297 (1995) (quoting *Zamora v. Mobil Oil*, Corp., 104 Wn.2d 211, 222, 704 P.2d 591 (1985)).

where insurer chose not to participate in hearing when denied additional discovery). Indeed, as the Court of Appeals expressly has held, "Regardless of whether the insurer disputes the amount of the settlement, the trial court must make an objective finding . . . that the settlement is reasonable." *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 378, 89 P.3d 265 (2004).

Further consistent with the narrow confines of a trial court's reasonableness determination, "[t]he trial court's role at a settlement hearing is not to exhaustively analyze any one *Chaussee* factor in determining whether a settlement is reasonable; rather, it is to weigh each relevant factor as necessary to the case before it." *Justus v. Morgan*, 199 Wn. App. 1039, 2017 WL 4277678, at *5 (2017).[23] And in determining reasonableness, the trial court does not "ultimately conclude the merits of any legal theory," such as determining whether evidence conclusively negated or established Petitioners' claims. *Justus*, 2017 WL 4277678, at *7. Rather, the trial court's role is to determine the "plausible merit" or "possibility of the legal claims." *Id.* at *6, 7. Instead, the trial court's ultimate inquiry is whether the parties "deci[ded] to settle for an amount within the range of evidence." *Martin v. Johnson*, 141 Wn. App. 611, 621, 170 P.3d 1198 (2007).

As a necessary corollary to the limited, non-exhaustive scope of a trial court's reasonableness determination, this Court has flatly rejected the

[23] Pursuant to GR 14.1(a), Appellants cite this and all other unpublished Washington decisions in this brief only as nonbinding authorities accorded such persuasive value as the Court deems appropriate.

proposition that a reasonableness hearing should devolve into a "mini-trial" on liability issues. *Glover for Cobb v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). Indeed, "[t]he law does not require settling parties to prepare for a reasonableness hearing as exhaustively and expensively as if they were preparing for trial," such as engaging in merits discovery in the first instance after settlement. *Sykes v. Singh*, 2018 WL 3844350, at *5 (Wash. Ct. App. Aug. 13, 2018).

Instead, the Court's inquiry ultimately is one of ***objective*** reasonableness. *Dana*, 173 Wn. App. at 776. That is, the Court's inquiry is whether reasonable persons in the same circumstances could reach the same result. And because the trial court's "narrowly confined" reasonableness determination seeks to determine what an objectively reasonable person could have done under the same circumstances, it narrows the scope of evidence to "the posture of the case at the time the settlements were reached," *Mavroudis v. Pittsburgh–Corning Corp.*, 86 Wn. App. 22, 38, 935 P.2d 684 (1997). Thus, determining reasonableness based on information generated after settlement is improper, as it premises a reasonableness determination on a different litigation posture than the parties had at the time of the settlement. *See Mavroudis*, 86 Wn. App. at 38. For example, *Mavroudis* held that the trial court had not improperly determined the reasonableness of pre-trial settlements by considering evidence adduced at a subsequent trial against non-settling parties. *Id.*

Contrary to *Mavroudis*, *Dana*, and *Harbour Pointe*, the Court of

Appeals' holding that pre-settlement information obtained after settlement—including evidence generated after the settlement—can be relevant to the trial court's reasonableness determination creates a reasonableness proceeding in which objective reasonableness is determined based on an ***entirely different*** posture than the one that existed for the parties at the time of settlement. For example, at that time of settlement in this case, ***none*** of the Parents had been deposed regarding liability and damages, the areas of inquiry ordered by the trial court. No such testimony had been created, and no such evidence was available to the parties when they settled. It is through this lens—the posture of the case at the time of settlement—that the trial court must apply the relevant reasonableness factors, such as Petitioners' damages, the merits of Petitioners' liability theory, the defendants' relative fault, the merits of the defense's theory, and the risks and expenses of continuing litigation. The trial court's task in determining reasonableness is not to engage in an exhaustive inquiry into evidence that ***could have been discovered*** before the settlement; it is simply to apply the reasonableness factors to the pre-settlement corpus of evidence developed by the parties and determine a reasonable settlement amount. As a result, the Court of Appeals' decision in this case authorizing the generation of new post-settlement evidence conflicts with these previous decisions, requiring review.

Moreover, the Court of Appeals' holding conflicts with the limited scope of a trial court's reasonableness determination and reasonableness proceedings under *Glover*, *Hidalgo*, *Martin*, *Justus*, and *Sykes* by opening

the door to Philadelphia taking post-settlement liability and damages depositions. Rather than limiting the trial court's inquiry to a non-exhaustive evaluation of whether the parties settled for an amount within the reasonable range of evidence existing at the time of settlement, the Court of Appeals' holding opens the floodgates to intervening insurers completely reopening discovery post-settlement. Under the Court of Appeals' holding, any time an intervening insurer identifies alleged "relevance" to one of the *Glover* factors, it should be permitted to conduct new depositions of witnesses on the case's merits, issue new interrogatories or document requests to the settling parties regarding the case's merits, or otherwise supplement the pre-settlement merits discovery conducted by the parties. Thus, contrary to Washington law, the Court of Appeals' holding in this case sanctions a complete "do over" of merits discovery as part of an exhaustive, trial-like preparation for the reasonableness hearing, conflicting with these previous decisions and requiring review.

B. Review is required under RAP 13.4(b)(2) because the Court of Appeals' conclusion that Philadelphia may engage in post-settlement discovery of the pre-settlement subjective opinions of the insureds and defense counsel ignores Washington appellate precedent that such evidence is irrelevant to the trial court's objective reasonableness determination

To the extent that it allows discovery of the insured's and defense counsel's subjective opinions, Division Two's holding that pre-settlement knowledge obtained after settlement "can be" relevant to a trial court's determination of the reasonableness of a covenant judgment settlement is in conflict with decisions of the Court of Appeals, requiring review under RAP

13.4(b)(2).

Contrary to the Court of Appeals' holding in this case, a trial court's reasonableness determination is one of ***objective*** reasonableness and, thus, "none of the[] [*Glover*] factors depends" on whether a party or their attorneys subjectively "considered the settlement reasonable." *Dana*, 173 Wn. App. at 776; *see also Howard*, 121 Wn. App. at 378 ("the trial court must make an objective finding . . . that the settlement is reasonable"). Instead, the trial court can determine whether a settlement was objectively reasonable by comparing the strength of a plaintiff's claims to the terms of the settlement, rendering inquiry into the subjective beliefs of a party or their attorneys improper**.** *Dana*, 173 Wn. App. at 773 (citing *Fischel & Kahn, Ltd. v. van Straaten Gallery*, 189 Ill.2d 579, 590, 244 Ill.Dec. 941, 727 N.E.2d 240, 246 (Ill. 2000); *1st Sec. Bank of Wash. v. Eriksen*, No. CV06-1004RSL, 2007 WL 188881, at *3 (W.D. Wash. Jan. 22, 2007).[24]

Indeed, as the Court of Appeals concluded during the first

[24] Petitioners anticipate that Philadelphia will argue that *Steel I* already rejected the proposition that *Dana* held that the subjective opinions of parties or their counsel are not relevant to a reasonableness determination. But in *Steel I*, Petitioners argued that "attorney-client communications are only ever subjective." 195 Wn. App. at 826-27. The Court of Appeals disagreed, reasoning: "the *Dana* court did not declare a sweeping rule that attorney-client communications *always* contain only subjective information that could never be placed at issue within the evaluation of a settlement's reasonableness." *Id.* Emphasis in original. The Court of Appeals' reasoning makes sense, as attorney-client communications can and do sometimes contain objective facts not shielded by privilege. *See Youngs v. Peacehealth*, 179 Wn.2d 645, 653, 316 P.3d 1035, 1039 (2014). Thus, the Court of Appeals correctly declined to fashion a bright-line rule stating that attorney-client communications are always subjective and therefore never discoverable for purposes of a reasonableness proceeding.

As opposed to attorney-client communications, however, the issue in this case is whether ***the opinions of a party's attorney*** are relevant to an objective reasonableness determination. Such attorney opinions are by definition subjective and categorically irrelevant.

interlocutory appeal in this case, the trial court's reasonableness determination "will primarily rely on objective evidence" and is "ordinarily established through expert witness testimony about matters like the extent of defendants' liability, the reasonableness of the damages amount in comparison with awards in other cases, and the expense that would have been required for the settling defendants to defend the lawsuit." *Steel I*, 195 Wn. App. at 829, 838 (citation omitted). Where the Court of Appeals' decision in this case holds that pre-settlement knowledge obtained after settlement (implicitly including subjective opinion evidence) can be relevant to the trial court's reasonableness determination so long as it was known to one of the parties, was not privileged, and is related to the *Glover* factors, it is in conflict with *Dana*, *Howard*, and *Steel I*, requiring review under RAP 13.4(b)(2).

C. Review is required under RAP 13.4 (b)(1) and (b)(2) because the Court of Appeals' conclusion that Philadelphia may engage in discovery regarding the SGALs conflicts with precedent holding that reasonableness is determined by the facts known by the parties at the time of settlement

To the extent that it allows discovery regarding the SGALs, Division Two's holding that pre-settlement knowledge obtained after settlement "can be" relevant to a trial court's determination of the reasonableness of a covenant judgment settlement is in conflict with decisions of this Court and the Court of Appeals, requiring review under RAP 13.4(b)(2).

Again, because the trial court's inquiry is one of objective reasonableness, the trial courts bases its determination on "the facts and law

at the time of settlement." *Villas at Harbour Pointe Owners Ass'n ex rel. Constr. Assocs., Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 762, 154 P.3d 950 (2007). And a trial court necessarily errs in considering post-settlement information in determining reasonableness. *Mavroudis*, 86 Wn. App. at 38.

Here, the parties executed the Settlement agreements between September 19, 2012 and September 27, 2012.[25] In contrast, the trial court did not appoint the SGALs until ***after*** the parties entered into the settlements.[26] Likewise, their reports were dated October 20 through October 25, well after the settlements.[27] Accordingly, the circumstances surrounding the SGALs necessarily involve events ***extrinsic and subsequent*** to the settlements, not "the facts and law at the time of settlement." What the SGALs knew after the fact, how they learned it, and from who simply had no bearing on the Court's objective reasonableness determination regarding ***the parties'*** settlement under *Habour Pointe* and *Mavroudis*. Thus, to the extent that the Court of Appeals' holding in this case permits such discovery, it conflicts with *Harbour Pointe* and *Mavroudis*, requiring review under RAP 13.4(b)(2).

D. Review is required under RAP 13.4(b)(4) because the Court of Appeals' decision undermining strong Washington policies incentivizing insurers to defend their insureds and favoring settlement is of unquestionable substantial public interest as it will impact both insureds and tort litigants across Washington

[25] *See, e.g.,* CP at 4349-4355, 4376, 4397.

[26] CP 19-24, 3496, 3514, 3525, 3539, 3549, 3558, 7873-78, 7946-51, 8006-11, 8066-71, 8124-29.

[27] CP 512, 523, 537, 547, 556, 578.

Finally, RAP 13.4(b)(4) provides that review will be accepted where the petition involves issues of substantial public interest that should be determined by the Supreme Court. This petition involves the issues of (a) whether Washington law prohibits intervening insurers in a covenant judgment reasonableness hearing from generating new post-settlement evidence regarding the underlying merits of the case; (b) whether the subjective opinions of the underlying parties or their attorneys categorically are irrelevant to a trial court's objective reasonableness determination; and (c) did the Court of Appeals err in holding that such post-settlement discovery can be relevant to a reasonableness determination?

First, the Court of Appeals' decision in this case undermines Washington's strong policy of incentivizing insurers to fulfill their duty to defend their insureds in lawsuits. "The insurer's duty to defend is one of the main benefits of the insurance contract." *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). Indeed, as this Court has recognized, "The defense may be of greater benefit to the insured than [indemnification]." *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765-66, 58 P.3d 276 (2002). And this Court has recognized this principle as one of the policies underlying its endorsement of reasonableness hearings to approve covenant judgment settlements and establish the presumptive measure of damages against insurers in subsequent bad faith litigation:

> "An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go

> away. To limit an insurer's liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured."

Bird v. Best Plumbing Grp., LLC, 175 Wn.2d 756, 765, 287 P.3d 551 (2012) (quoting *Truck*, 147 Wn.2d at 765-66).

Similarly, previous Washington appellant decisions have expressly recognized that insurance companies intervening in a reasonableness hearing are typically not a "stranger to the case," and, thus, have prohibited them from reopening discovery and required them to proceed to a reasonableness hearing on a few days' notice. *Red Oaks*, 128 Wn. App. at 325-26; *Howard*, 121 Wn. App. at 379-80 Implicit in these cases is the principle that insurance companies, in contesting the reasonableness of a settlement, should be held to the same evidence generated in the defense they provided for their insureds as an incentive for insurance companies to provide a vigorous and robust defense. As a corollary, per *Truck*, an insurer who failed to ensure its insureds received the fruits of an adequate defense—including discovery—should not be permitted to reap those same fruits in attacking the reasonableness of a settlement.

This case presents the exact scenario denounced by *Truck*. Philadelphia admitted it was responsible for providing its insureds with an adequate defense. However, after failing to ensure any meaningful discovery was conducted prior to the covenant judgments, Philadelphia essentially sought a complete "do-over" on discovery in this case to protect its own financial interests. And the Court of Appeals' holding that pre-settlement information generated after settlement may be relevant to and

discoverable in reasonableness proceedings despite the fact such discovery was not sought ***at all*** before settlement serves only to reward insurance companies who "do nothing" to defend their insureds, knowing that they will simply be able to engage in full discovery in the first instance in challenging the amount of a covenant judgment that may be later used against them. Such a result would completely undermine our Supreme Court's express policy statements in *Truck* and the fundamental relationship between insurers and their insureds under Washington law. Accordingly, these issues are of paramount public importance to tort litigants and insureds across Washington, warranting review under RAP 13.4(b)(4).

Second, the Court of Appeals' decision in this case undermines Washington law strongly favoring settlement. *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (2007); *Martin*, 141 Wn. App. at 622 applying this policy in the reasonableness hearing context). Requiring settling parties to incur the costs and expenses of repeating fact discovery and other litigation components—or, as Philadelphia seeks to do here, perform them for the first time—completely obviates the cost-avoidance incentive of settlement, among others. Accordingly, these issues also are of paramount public importance to litigants and insureds across Washington, warranting review under RAP 13.4(b)(4).

VI. CONCLUSION

For the above reasons, Petitioners respectfully request that the Court accept review of Division Two's decision in this case and the issues presented in this petition.

RESPECTFULLY SUBMITTED this 12th day of August, 2019

PFAU COCHRAN VERTETIS AMALA, PLLC

By: /s/ Darrell L. Cochran
Darrell L. Cochran, WSBA No. 22851
Christopher E. Love, WSBA No. 42832

CERTIFICATE OF SERVICE

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on August 12, 2019, I served the foregoing by directing delivery via Email to the following individuals:

Steve Soha
Paul Rosner
Soha & Lang PS
1325 Fourth Ave. Suite 2000
Seattle, WA 98101-2570
Attorneys for Philadelphia Indemnity

Harold Carr
Karen Kay
Law Office of Harold Carr, PS
4239 Martin Way E
Olympia, WA 98516-5335

William Ashbaugh
Hackett Beecher & Hart
1601 5th Ave. Ste. 2200
Seattle, WA 98101
Attorney for: Steve Olson

Paul Meyer
402 Capitol Way S Ste. 12
Olympia, WA 98501
Attorney for: Olympia Early Learning Center

Michael C. Bolasina
Summit Law Group
315 Fifth Avenue
Suite 1000
Seattle, WA 98104-2682
Attorney for: Rose Horgdahl

///

///

DATED this 12th day of August, 2019.

/s/ Sarah Awes
Sarah Awes
Legal Assistant to Darrell Cochran

Filed
Washington State
Court of Appeals
Division Two

May 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LISA STEEL, individually and as Guardian ad Litem for J.T., a minor; and DOUGLAS THOMPSON and KRISTI BARBIERI, individually and as Guardian ad Litem for S.R.B., Petitioners, v. OLYMPIC EARLY LEARNING CENTER; STEVE OLSEN, individually; and ROSE HORGDAHL, individually; PHILADELPHIA INDEMNITY INSURANCE COMPANY, intervenor, Respondents, and AMANDA MYRICK, individually and as Guardian ad Litem for S.A., a minor; NATALIE BOND, individually and as Guardian ad Litem for A.K., a minor; ALICIA MENDOZA, individually and as Guardian ad Litem for M.M., a minor; and G.S.J., individually and as Guardian ad Litem for J.J., a minor, Plaintiffs.	No. 50981-4-II UNPUBLISHED OPINION

MELNICK, P.J. — Lisa Steel, Douglas Thompson, and Kristi Barbieri, as individuals and as guardians ad litem for their minor children (collectively, Petitioners), and a number of other

plaintiffs[1] sued Olympia Early Learning Center (OELC) and its owner, Steve Olson, as well as one of its employees, Rose Horgdahl (collectively, the Insureds) after they learned that an OELC employee sexually abused minors in his care. The parties settled and entered into covenant judgments. As such, the plaintiffs agreed not to execute the judgments against the Insureds. In exchange, the Insureds agreed to assign the plaintiffs their bad faith claims against their insurance company, Philadelphia Indemnity Insurance Company (Philadelphia).

The plaintiffs and the Insureds agreed that the superior court would hold a reasonableness hearing. Philadelphia intervened and, after conducting some discovery, moved to dismiss the Petitioners. The superior court dismissed the Petitioners and did not hold a reasonableness hearing.

We granted discretionary review on two issues. First, did the trial court err by dismissing Petitioners? Second, did the trial court abuse its discretion in its discovery order, which permitted Philadelphia to conduct numerous depositions?

We conclude that the trial court erred in dismissing the Petitioners. We also conclude that the trial court did not err by allowing some discovery; however, we clarify the parameters of the discovery.[2] We reverse and remand.

[1] The other plaintiffs are not involved in this appellate review.

[2] It appears that the trial court's discovery order encompasses all of the plaintiffs and not just those who are involved in this appellate review. We only rule on those involved in this appellate review.

FACTS

I. BACKGROUND

An employee of OELC sexually abused minors in his care. The employee admitted to and was convicted of child rape and child molestation against two children who attended OELC. A number of minors and their parents sued, including the Petitioners.

Philadelphia insured OELC under a policy which provided limited Sexual or Physical Abuse or Molestation Vicarious Liability coverage.

The court set trial for October 2012. Between December 2011 and August 2012, the plaintiffs proposed settlement offers to Philadelphia valued at approximately $4 million.

On September 20, the plaintiffs and Insureds settled, and executed 12 separate settlement agreements (the Agreements). The Agreements totaled $25 million. The plaintiffs' attorney drafted the Agreements.

The relevant parts of the Agreements are identical. They provide:

> 1. Amount. Subject to the provisions of paragraphs 2, 3, and 4, Plaintiffs agree to settle the claims against Defendants, for entry of a judgment in the principal amount of [settlement amount] without costs or attorney's fees, against [the Insureds] and in favor of Plaintiffs.
>
> 2. Stipulated Judgment. Defendants shall stipulate to a judgment in favor of Plaintiffs in the principal amount of [settlement amount] . . . . Should a court determine that an amount other than the amount of the stipulated judgment is a reasonable settlement amount, Plaintiffs and Defendants agree to stipulate to . . . that amount . . . . Defendants agree that the [settlement amount] is reasonable and will argue in favor of reasonableness to the extent necessary hereafter, including, but not limited to, participation in a judicial reasonableness hearing and related hearings.
>
> 3. Covenant Not to Execute. Plaintiffs hereby irrevocably covenant and agree not to execute the judgment against [the Insureds].
>
> 4. Assignment of Claims. Defendants shall assign Plaintiffs any and all their rights against Philadelphia Indemnity Insurance Company and all related insurance companies . . . .
>
> 5. Release. Upon full execution of this Agreement by all parties, Plaintiffs forever release and discharge Defendants from any and all of Plaintiffs' claims,

> causes of action, damages, debts, expenses, costs, attorneys' fees, and other taxable costs, and any other demands of whatsoever kind, nature or description, whether past, present or future, known or unknown, and based on acts or omissions which are alleged or could have been alleged in the lawsuit.
>
> . . . .
>
> 7. Dismissal. Not less than 30 days after the effective date of this agreement, the parties to this agreement shall file a stipulation and order for dismissal of all claims of Plaintiffs against Defendants. The order of dismissal shall, however, state that the Court will retain jurisdiction for the purposes of conducting a fairness hearing and any related hearings unless such hearings occur before the dismissal. Additionally, the dismissal will not extinguish or in any way impede the legal effect of the judgment . . . . The judgment will remain active subject to the covenant not to execute described in paragraph 3 above.

Clerk's Papers (CP) at 834-35; *see also* CP at 858-59, 880-81, 990-91. As part of the Agreements, the Insureds also admitted that the alleged sexual abuse occurred, that the Insureds acted negligently, and that damages resulted.

On September 26, the plaintiffs and Insureds filed a stipulated order to appoint specific Settlement Guardians ad Litem (SGALs) for the minor children, which the court signed.

The plaintiffs then moved for entry of the Agreements and sought a reasonableness hearing. Philadelphia moved to intervene to conduct "focused discovery" on the issue of whether the Agreements were reasonable. CP at 104. The trial court granted Philadelphia's motion.

In November, the trial court heard arguments from the parties regarding the necessity of a reasonableness hearing. The court concluded that a reasonableness hearing was required under RCW 4.22.060. A few weeks later, the court entered a written opinion clarifying its oral ruling that it must hold a reasonableness hearing.

II. DISCOVERY ORDER

On January 13, 2017, Philadelphia brought a motion to compel the deposition of the Insureds, the Petitioners, and the SGALs. After hearing argument, the court granted the motion but clarified that "such depositions are limited to factors of reasonableness." CP at 3611.

Within the next few months, the parties filed numerous motions regarding the scope of discovery. On May 5, concerned with the repeated and ongoing disputes regarding the scope of discovery, the trial court instructed Philadelphia to submit a list of proposed deponents and topics. It ordered that the list include individuals Philadelphia wished to depose and "in general terms, questions that they wish[ed] to ask these witnesses as it relate[d] to the reasonableness factors." Report of Proceedings (May 5, 2017) at 9.

Two weeks later, the court held a hearing regarding Philadelphia's proposed list. The court heard the parties' arguments and then ruled that Philadelphia could conduct numerous depositions. It entered an order regarding who could be deposed and the scope of the depositions.

III. DISMISSAL ORDER

On March 9, 2017, Philadelphia moved to dismiss the Petitioners. Philadelphia argued that a substantial change in the law occurred and that the trial court's November 2012 ruling requiring a reasonableness hearing should be reconsidered. Specifically, Philadelphia argued that the Agreements completely released the Insureds from liability and insulated the insurer from any obligation to pay. As result, Philadelphia claimed that under *Mutual of Enumclaw Insurance Co. v. Day*, 197 Wn. App. 753, 393 P.3d 786, *review denied*, 188 Wn.2d 1016 (2017), a reasonableness hearing was unnecessary and the court should dismiss the Petitioners.

The court heard argument and then entered a written order dismissing "[a]ll claims of all the [Petitioners] . . . with prejudice." CP at 7852. It agreed with Philadelphia that the Agreements contained a full release. It ruled that it had the authority to revisit and reverse its previous order under CR 60(c).

The court certified both orders under RAP 2.3(b)(4). The Petitioners sought discretionary review, which we granted.

ANALYSIS

I. TRIAL COURT'S AUTHORITY TO MODIFY PREVIOUS ORDER

The Petitioners argue the trial court committed procedural error when it reversed its November 2012 order. They contend that no procedural tool exists for the trial court to modify that order. We disagree.

In *Chaffee v. Keller Rohrback LLP*, 200 Wn. App. 66, 76, 401 P.3d 418 (2017), the court recognized that "'permitting a trial court to correct any mistakes prior to entry of final judgment serves the interests of judicial economy.'" (Quoting *Alwood v. Harper*, 94 Wn. App. 396, 400-01, 973 P.2d 12 (1999).) Additionally, "the authority of trial courts to revisit interlocutory orders 'allows them to correct not only simple mistakes, but also decisions based on shifting precedent, rather than waiting for the time-consuming, costly process of appeal.'" *Chaffee*, 200 Wn. App. at 76-77 (quoting *United States v. Martin*, 226 F.3d 1042, 1049 (9th Cir. 2000)); *see also Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37, 864 P.2d 921 (1993) ("A judge may reverse or modify a pretrial ruling at any time prior to the entry of final judgment.").

Here, the November 2012 written order was not a final order. Therefore, the court had authority to revisit and reverse its previous nonfinal order.[3]

II. NECESSITY OF A REASONABLENESS HEARING

The parties dispute whether a reasonableness hearing is required. The Petitioners argue that, because the Agreements do not insulate the Insureds from liability, the Agreements are covenant judgments and the statute requires a reasonableness hearing.

[3] Although the trial court relied on CR 60 as a basis for its ruling, that rule was inapplicable in this situation.

Philadelphia argues that a reasonableness hearing is unnecessary because the Agreements "fully and unconditionally release[d] the [Insureds] from liability for the claims brought against them." Br. of Resp't at 38. We agree with the Petitioners.

A. Legal Principles

1. Reasonableness Hearings Following Covenant Judgments

"An insured may independently negotiate a settlement if the insurer refuses in bad faith to settle a claim. In such a case, the insurer is liable for the settlement to the extent the settlement is reasonable and paid in good faith." *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736, 49 P.3d 887 (2002). These types of a settlement agreements are called covenant judgments.

Covenant judgments typically involve three features: "(1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff's covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured's coverage and bad faith claims against the insurer." *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764-65, 287 P.3d 551 (2012).

Reasonableness hearings under RCW 4.22.060 apply to covenant judgments. *Bird*, 175 Wn.2d at 767. The statute provides: "A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured." RCW 4.22.060(1).

"If the amount of the covenant judgment is deemed reasonable . . . , it becomes the presumptive measure of damages in a later bad faith action against the insurer." *Bird*, 175 Wn.2d at 765. If the court determines that a settlement is unreasonable, then it sets a different reasonable

amount, and this amount becomes the presumptive measure of damages in the subsequent bad faith action. *Besel*, 146 Wn.2d at 738.

However, if a reasonableness hearing will have no effect in the subsequent bad faith litigation, i.e., if the amount determined by the court at the conclusion of the hearing will not be used as the presumptive measure of damages in the subsequent bad faith action, the court need not hold a reasonableness hearing. This result rests on the reasoning that the court has no jurisdiction to conduct the hearing because the hearing will have no effect, and thus, there is no justiciable case or controversy. *See Villas at Harbour Pointe Owners Ass'n v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 760-61, 154 P.3d 950 (2007).

Therefore, determining whether the Agreements can or cannot be used in the Petitioners' anticipated bad faith litigation against Philadelphia is dispositive in determining whether a reasonableness hearing must be held.

2. Bad Faith Litigation

An insurer has a quasi-fiduciary duty to its insureds. RCW 48.01.030; *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 696, 295 P.3d 239 (2013). Good faith requires an insurer to deal fairly with insureds. *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 915 n.9, 169 P.3d 1 (2007). To succeed on a bad faith claim against an insurer, the insured must prove a duty, a breach of the duty, and damages proximately caused by the breach of the duty. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

When an assigned bad faith claim is brought following a covenant judgment, the assignee can use the amount entered following a reasonableness hearing as the presumptive measure of damages in the bad faith litigation. *Bird*, 175 Wn.2d at 765.

However, an insurer can rebut this presumption by showing that, at the time the court entered the judgment, the insured was legally insulated from liability. *Day*, 197 Wn. App. at 757. If the insurer can make this showing, then the amount found at the reasonableness hearing will not be used as the presumptive measure of damages in the later bad faith litigation. *See Day*, 197 Wn. App. at 759-60, 766.

In *Werlinger v. Clarendon National Insurance Co.*, 129 Wn. App. 804, 807, 120 P.3d 593 (2005), the parties executed a traditional covenant judgment. The parties settled for a monetary amount, the plaintiffs agreed not to hold the insureds personally liable on that amount, and the insureds assigned their bad faith claims against their insurance company to the plaintiffs. *Werlinger*, 129 Wn. App. at 807. However, at the time the parties settled, the insureds were shielded from any personal liability by their bankruptcy status. *Werlinger*, 129 Wn. App. at 809. The court concluded that this insulation rebutted the presumption of harm. *Werlinger*, 129 Wn. App. at 809-10.

In *Day*, the insured entered into a covenant judgment with the plaintiffs. 197 Wn. App. at 759. The agreement only assigned the insured's bad faith claim against her insurance agent, not her insurance provider. *Day*, 197 Wn. App. at 759. The agreement included an obligation to fully satisfy the judgments against the insured once the assigned claims against her insurance agent were resolved. *Day*, 197 Wn. App. at 759. The plaintiffs and insurance agent then settled the assigned bad faith claim. *Day*, 197 Wn. App. at 760. Approximately one year later, the trial court reviewed the plaintiffs and insured's personal injury lawsuit, found the settlement reasonable, and entered the agreed judgments. *Day*, 197 Wn. App. at 760.

In the bad faith claim she retained against her insurance provider, the insured attempted to use the stipulated amount from her original settlement with the plaintiffs as the presumptive amount of damages. *Day*, 197 Wn. App. at 760-61. However, the court recognized that the assigned claims against the insurance agent had already been settled; therefore, under the terms of the agreement, the agreed judgments against the insured were already fully satisfied. *Day*, 197 Wn. App. at 765. "As a consequence, [the insured] was legally insulated from any exposure based on the agreed judgments." *Day*, 197 Wn. App. at 766. The court concluded that this insulation rebutted the presumption of harm. *Day*, 197 Wn. App. at 766.

Based on the above, determining whether the Insureds here are legally insulated from liability is dispositive to the issue of whether the trial court must conduct a reasonableness hearing. This issue is resolved by looking to the language of the Agreements.

3. Contract Interpretation

We interpret settlement agreements in the same way as other contracts. *McGuire v. Bates*, 169 Wn.2d 185, 188, 234 P.3d 205 (2010). The primary objective of contract interpretation is to ascertain the mutual intent of the parties at the time they executed the contract. *Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). Washington follows the "objective manifestation theory" of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties' intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Hearst*, 154 Wn.2d at 504. We view the contract as a whole, interpreting particular language in the context of other contract provisions. *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669, 15 P.3d 115 (2000).

We also attempt to interpret contractual language in a way that gives effect to all provisions. *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 5, 277 P.3d 679 (2012).

A contract provision is ambiguous if its meaning is uncertain or is subject to two or more reasonable interpretations. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014). "We generally construe ambiguities against the contract's drafter." *Viking Bank*, 183 Wn. App. at 713.

B. The Agreements

The Agreements here are contracts. Viewing the Agreements as a whole, it is clear that the parties intended to enter into valid and enforceable covenant judgments. This intent is evidenced by the Agreements' provisions requiring the Insureds' participation at a reasonableness hearing, because such hearings are mandatory when parties enter into valid covenant judgments. RCW 4.22.060(1); *Bird*, 175 Wn.2d at 767. Additionally, the Agreements contain the three main features that *Bird* described of covenant judgments: "(1) a stipulated or consent judgment between the plaintiff and insured, (2) a plaintiff's covenant not to execute on that judgment against the insured, and (3) an assignment to the plaintiff of the insured's coverage and bad faith claims against the insurer." 175 Wn.2d at 764-65.

The plain language of the release provision supports this interpretation. The release provision contemplates release only upon "full execution" of the Agreements. "Execute" is defined as: "To perform or complete (a contract or duty)." BLACK'S LAW DICTIONARY 609 (8th ed. 2004). Because the Agreements contain provisions contemplating future action by the Insureds, the Petitioners do not release the Insureds until those future duties are performed.

Finally, this interpretation gives effect to all provisions in the Agreements. On the other hand, accepting Philadelphia's argument that the release was effective on signing would render numerous provisions meaningless.

Therefore, because the releases here are contingent on the parties' performance, the Insureds are not yet legally insulated from liability, the court erred in dismissing the Petitioners, and a RCW 4.22.060 reasonableness hearing is required.

III. DISCOVERY ORDER[4]

The Petitioners argue that the trial court abused its discretion because the discovery order allowed Philadelphia to collect information that was not known to the parties at the time of settlement. Because Philadelphia has conceded that it only seeks information known to the parties at the time of settlement, we disagree.

We review a trial court's discovery order for an abuse of discretion. *Cedell*, 176 Wn.2d at 694. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Cedell*, 176 Wn.2d at 694. A court necessarily abuses its discretion when basing its decision on an erroneous view of the law or applying an incorrect legal analysis. *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

CR 26 allows discovery regarding any nonprivileged matter relevant in actions to determine the reasonableness of a settlement. *Steel v. Olympia Early Learning Ctr.*, 195 Wn. App. 811, 822, 381 P.3d 111 (2016). If information is relevant, "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1).

[4] We iterate that to the extent the discovery order involves parties other than the Petitioners, this opinion is inapplicable to them.

In determining the reasonableness of a settlement, the trial court is to consider the nine factors outlined in *Glover v. Tacoma General Hospital*, 98 Wn.2d 708, 717, 658 P.2d 1230 (1983), *abrogated on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988). *Bird*, 175 Wn.2d at 766. No single *Glover* factor controls, and all nine factors are not necessarily relevant in all cases. *Besel*, 146 Wn.2d at 739 n.2.

Philadelphia concedes that information is only relevant if it "was known by the parties at the time of settlement." Br. of Resp't at 25. Philadelphia concedes that newly discovered information post-settlement is irrelevant. Wash. Court of Appeals oral argument, *Steel v. Olympia Early Learning Ctr.*, No. 50981-4-II (Apr. 2, 2019), at 20 min., 35 sec. through 21 min., 33 sec. (on file with court).

Thus, the crux of the parties' dispute is whether pre-settlement knowledge obtained after settlement is relevant. We conclude that it can be. In so ruling, we do not intend to limit the trial court's ability to set the parameters of discovery except as follows. The discovery can only involve information known to at least one of the parties at the time of the settlement. It cannot be for privileged information or information otherwise undiscoverable. It must take into consideration the *Glover* factors.

Because this case is before us on interlocutory review, we cannot, with certainty, speculate as to other discovery issues that may arise. We leave it to the discretion of the trial court to follow the court rules on discovery and the case law that governs discovery.

We reverse the trial court's order dismissing the Petitioners. We remand for the trial court to direct discovery in accordance with this opinion and hold a reasonableness hearing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, P.J.

We concur:

Sutton, J.

Glasgow, J.

PCVA LAW

August 12, 2019 - 3:18 PM

Transmittal Information

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