

No. 45881-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MARYANNE LINDEBLAD, in her official capacity as Director of
Washington State Health Care Authority, and WASHINGTON STATE
HEALTH CARE AUTHORITY,

Appellants,

COORDINATED CARE CORP.; UNITEDHEALTHCARE OF
WASHINGTON, INC.; and AMERIGROUP WASHINGTON, INC.,

Intervenors,

v.

COMMUNITY HEALTH PLAN OF WASHINGTON, a Washington
Health Plan,

Respondent.

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I. INTRODUCTION

Community Health Plan of Washington (“CHPW”) has not met its burden under CR 56 of establishing that it is entitled to partial summary judgment on either the Substantive Claim or the Procedural Claim.¹ *See* Answer of CHPW dated November 26, 2014 (“Answer”). The trial court erred in ruling otherwise. At a bare minimum, the Health Care Authority (“Authority”) has established that there are genuine issues of material fact on both claims, which precludes summary judgment. *See* Opening Brief of Appellants dated September 15, 2014 (“Opening Brief”). The only way to determine the facts upon which the outcome of this litigation depends is to have a trial. Only then can it be determined what all six parties were anticipating during the procurement process and were intending when they signed the Contract.

In its Answer, CHPW failed to establish the absence of material facts, failed to show it is entitled to judgment as a matter of law, and failed to negate the Authority’s explanation of the factual, political, and legal background to the issuance of the Request for Proposals and the execution of the Contract. As a result, the Court should reverse the trial court.

¹ The defined terms in this Reply Brief are the same as used in the Authority’s Opening Brief.

II. ARGUMENT

A. **CHPW Is Not Entitled To Summary Judgment Because There Are Genuine Issues Of Material Fact**

The parties are before the Court on summary judgment, not after a trial on the merits. The issues are simply too complicated to resolve in summary fashion, given the significant differences in how the six parties interpret the applicable terms of the RFP and the Contract. The trial court's narrow reading of those provisions, its refusal to consider the extrinsic evidence introduced by the Authority and the New Plans, and its weighing of the evidence (rather than determining that issues of fact exist) does not withstand scrutiny under the standards of CR 56.

“Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Kreidler v. Cascade Nat'l Ins. Co.*, 182 Wn. App. 557, 567, 329 P.3d 928 (2014). “If reasonable minds can differ on facts controlling the outcome of the litigation, then there is a genuine issue of material fact and summary judgment is improper.” *Kreidler*, 182 Wn. App. at 567.

The Court undertakes a de novo review of summary judgment motions and construes “all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Id.* If “the issue at bar requires the weighing of competing, apparently competent evidence, then summary

judgment is improper and [the Court] will reverse and remand for a trial to resolve the factual issues.” *Id.* (internal quotes and citation omitted).

The Court should apply the same principles here that it recently reiterated in *Kreidler*. With respect to the Substantive Claim, “reasonable minds can differ on facts controlling the outcome of the litigation[.]” *Id.* As a result, “there is a genuine issue of material fact and summary judgment is improper.” *Id.* In the Answer, CHPW does not contend that there are no disputed material facts, which essentially is an admission that summary judgment is improper.

The voluminous disputed facts center around topics such as what CHPW intended when submitting its bid to the RFP; what CHPW intended by signing the Contract; what CHPW understood the Assignment Methodology to be; and why CHPW engaged in a vigorous lobbying effort at the Legislature to terminate the entire process, even after it was awarded a contract. CHPW’s attempts to distinguish or discredit the Authority’s evidence and factual assertions only serve to highlight the existence of issues of material fact.

Similarly, with respect to the Procedural Claim, “reasonable minds can differ on facts controlling the outcome of the litigation[.]” *Id.* As a result, “there is a genuine issue of material fact and summary judgment is improper.” *Id.* The disputed facts center around topics such as

Clay King's statements at the CHPW dispute conference that he would not be making the final decision (including the unrebutted testimony of the Authority employee who took notes on behalf of Mr. King) and CHPW's failure to object to Director Lindeblad's involvement in the weeks following the dispute conference, thereby acknowledging that she was intending to make the final decision. Again, CHPW's attempt at countering the Authority's facts merely highlights that genuine issues of material fact exist, requiring a trial.

B. The Court Should Reverse The Trial Court's Granting Of The Motion On Substantive Claim

The trial court erred by overlooking basic principles of judicial interpretation of contracts when granting partial summary judgment to CHPW regarding the Assignment Methodology. In light of those principles, it is clear that summary judgment is improper.

To interpret a contract, the Court must determine the parties' intent, for which it applies the "context rule." *Fedway Marketplace West, LLC v. State*, ___ Wn. App. ___, 336 P.3d 615, 620 (2014). The context rule allows the Court, "when viewing the contract as a whole, to consider extrinsic evidence, such as [1] the circumstances leading to the execution of the contract, [2] the subsequent conduct of the parties and [3] the

reasonableness of the parties' respective interpretations." *Fedway Marketplace*, 336 P.3d at 621 (internal quotes and citation omitted). The Court employs the context rule "even when the disputed provision is unambiguous." *Id.*

At a minimum, the circumstances of CHPW's lobbying leading to the execution of the Contract create genuine issues of material fact as to the meaning and intent of the Assignment Methodology. Similarly, the subsequent conduct of CHPW, which tried to kill the procurement process even after it was awarded a contract, create genuine issues of material fact on those topics. In addition, the reasonableness of the parties' respective interpretations shows directly conflicting interpretations of the Contract's terms, which only the jury can sort out.

CHPW attempts in two virtually identical footnotes to brush aside the crucial importance of its vigorous legislative lobbying efforts. *See Answer at 27 n.7, 43 n.16.* CHPW does not deny any of the evidence of its lobbying and does not deny the Authority's explanation of CHPW's intent to derail the entire procurement process. *Id.; see also* Opening Brief at 34-35. Instead, CHPW, without citation to any evidence, tries to suggest that its lobbying was focused on some other aspect of the Assignment Methodology. *See Answer at 27 n.7.* Again, at a minimum,

there are genuine issues of material fact regarding CHPW's lobbying and its corresponding knowledge of the meaning of the RFP and the Contract.

Furthermore, there is no evidence that anyone with executive or management responsibility at the Authority or the New Plans ever stated or believed that the Assignment Pool would exclude Plan Reconnect and Family Connect clients. Indeed, the evidence is directly the opposite. *See, e.g.*, Opening Brief at 33-34; Brief of Petitioner-Intervenors dated October 15, 2014, at 5-7.

The Authority's interpretation of the Assignment Methodology quite clearly is reasonable. The Authority is the entity that administers the program at issue and drafted the RFP and the Contract. The Legislature designated the Authority as the State's Medicaid agency, making it responsible to federal auditors for the proper expenditure of literally billions of dollars each year in Medicaid funds. *See, e.g.*, 42 C.F.R. § 433.32 (responsibility to report to federal government); RCW 74.09.530(1) (designation as Medicaid agency). The Authority does not lightly enter into contracts with private companies such as the five Plans, who during the term of the Contract provided medical services to millions of low-income and disabled Washington citizens and reaped substantial monetary rewards. Therefore, only the trier of fact can make the decision on the meaning and intent of the Assignment Methodology.

The trial court erred by ignoring all of the extrinsic evidence that favored the position of the Authority and the New Plans.

The Authority has shown that CHPW lobbied the Legislature before, during, and even *after* the procurement process to have the entire process and the Contract thrown out, because of concerns over what CHPW perceived as potentially devastating effects of the Assignment Methodology on its financial position. *See* Opening Brief at 7-9, 34-35. Yet in the lawsuit, CHPW asserts that the Assignment Methodology must be construed as overwhelmingly favorable to it. These pre- and post-litigation positions are directly at odds. In light of the position CHPW is currently advancing, the trier of fact, as a matter of contract interpretation, is entitled to discover why CHPW was engaged in such a vigorous legislative lobbying effort to toss out the methodology and indeed the entire Contract. The only way to determine what CHPW really thought during the procurement process, and what CHPW really intended when signing the Contract, is to have a trial on the merits.

The Authority also has explained that all “potential enrollees” must be included in the Assignment Pool for purposes of implementing the Assignment Methodology. *See* Opening Brief at 11-12, 26-27. The Authority has further explained that Plan Reconnect and Family Connect clients are “potential enrollees,” just like anyone else who was not actually

enrolled in Medicaid in the previous month. *Id.* This is simply a way of determining who is included in the denominator of the calculation for the Assignment Methodology.

CHPW attempts to obscure the issue by suggesting that the Authority was assigning Plan Reconnect and Family Connect clients to plans other than those to which the clients already had a personal or family connection. *See* Answer at 7-8, 22-23. The issue is not whether Plan Reconnect and Family Connect clients must be assigned to the plans to which they had a connection; the issue is whether those clients are counted for purposes of the Assignment Methodology. And the answer is “yes, they are counted,” because Plan Reconnect and Family Connect clients are “potential enrollees” and only by including them in the calculation could the underlying intent of the RFP — bolstering the enrollment of plans that are new to the State — be fulfilled.

CHPW concedes that a “potential enrollee” is someone “who is not enrolled with a health plan[.]” *See* Answer at 9 (quoting Contract, § 1.70). This should be the end of the analysis, because the Assignment Methodology includes all “potential enrollees.” But CHPW then claims that a person who is *not* currently a Medicaid client, and who is therefore *not* currently enrolled in a Medicaid managed care plan, is somehow excluded from the definition of “potential enrollee.” *See* Answer at 10.

There is no basis in the plain language of the Contract for the proposition that a person who is not enrolled in a plan is anything other than a “potential enrollee” of a plan.

C. The Court Should Reverse The Trial Court’s Granting Of The Motion On Procedural Claim

The trial court erred by overlooking basic principles of judicial interpretation of contracts when granting partial summary judgment to CHPW regarding the Procedural Claim. In light of those principles, it is clear that summary judgment is improper.

The Authority’s interpretation of the dispute-resolution clause and what the parties understood would happen in this circumstance quite clearly is reasonable. Therefore, only the trier of fact can make the decision on the meaning and intent of that clause and what the parties understood. The trial court erred by ignoring all of the extrinsic evidence that favored the position of the Authority and the New Plans.

The Authority has shown that CHPW knew before, during, and even *after* its dispute conference that Director Lindeblad had the authority to make the final decision and that she did intend to make the final decision. *See* Opening Brief at 19, 41-42. Yet in the lawsuit, CHPW asserts that a draft, unsigned, undated, unreviewed, and unsent letter from an Authority employee whom the Director asked to preside at the dispute

conference must be construed as the Authority's final decision on a significant matter of public policy. In the Answer, CHPW does not even attempt to rebut the Authority's evidence that CHPW was told at the dispute conference that Director Lindeblad would make the final decision. *See* Opening Brief at 41-42. The only way to determine what the parties intended with the dispute process, and what CHPW understood during that process, is to have a trial on the merits.

CHPW asserts that Mr. King was "prevented" from issuing final decisions. *See* Answer at 43. The Authority did not "prevent" Mr. King from doing anything. There is no basis in the Contract or in the evidence to conclude that Mr. King ever had the authority or the inclination to issue a final decision. And, again, CHPW does not rebut the testimony of Mr. King's assistant, who explained that Mr. King himself told the attendees at both dispute conferences that Director Lindeblad would have the final word. *See* Opening Brief at 40-42.

All the participants at the conferences understood that, under Section 2.9 of the Contract, Director Lindeblad had asked Mr. King to "hear" the presentations regarding the disputes but that she explicitly reserved the right to "determine" the Authority's final position herself. *Id.*; *see also* Contract § 2.9 (Director "may" designate a subordinate to "hear and determine" a dispute). CHPW did not object before, during, or

even after the dispute conference to the decision-making authority of the Director.

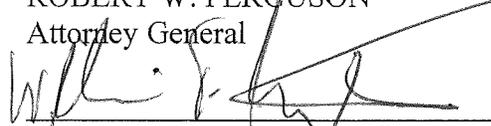
Even if CHPW were correct that the undated, unreviewed, unsigned, and unsent draft recommendations of Mr. King must somehow be construed as the Authority's final decisions, it is a tremendous leap of logic to then conclude that CHPW is entitled to millions of dollars in damages. There is no evidence that any alleged failure to adopt Mr. King's draft recommendation was the cause-in-fact of any financial harm to CHPW. Failure to prove causation means failure to prove breach of contract.

III. CONCLUSION

CHPW has not met its burden of establishing it is entitled to partial summary judgment under CR 56. The Authority has shown that there are genuine issues of material fact regarding both the Substantive Claim and the Procedural Claim and that CHPW is not entitled to judgment as a matter of law. The Court should reverse the trial court.

RESPECTFULLY SUBMITTED this 26th day of January, 2015.

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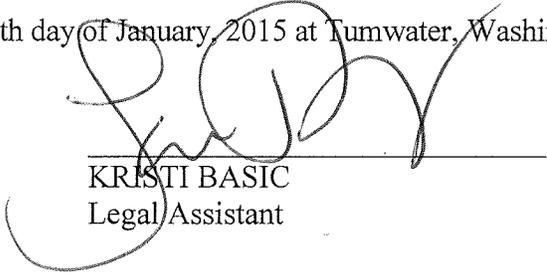
I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On January 26, 2015, I served a true and correct copy of the **Reply Brief of Appellants**, on the following parties to this action, via Electronic Mail (*per stipulated agreement by all parties*) to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of January, 2015 at Tumwater, Washington.



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January 26, 2015 - 3:29 PM

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