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NO. 54458-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

NON PROFIT INSURANCE PROGRAM, a non-party,

Non-Party Appellant,

v.

SUN THERESA CHOE, Respondent/Plaintiff; GOODWILL OF THE  
OLYMPICS, ET AL., Respondent/Defendant

Respondents.

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**NON-PARTY/APPELLANT NON PROFIT INSURANCE  
PROGRAM'S OPENING BRIEF**

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## I. INTRODUCTION

This appeal is about the enforcement of a written CR 2A settlement agreement (“CR 2A Settlement Agreement”).

On January 6, 2016, Plaintiff/Respondent Sun Theresa Choe (“Choe”) filed the present lawsuit against Enrique Hernandez Franco (“Franco”) and Goodwill of the Olympics and Rainier Region (“Goodwill”) for injuries when Franco struck Choe with a vehicle in the loading zone of the Goodwill outlet store in Tacoma, Washington. At the time, Goodwill was a member of non-party Non Profit Insurance Program (“NPIP”), which purchased a liability insurance policy from American Alternative Insurance Corporation (“AAIC”) naming Goodwill as an insured. AAIC agreed that Goodwill should be afforded a defense under a reservation of rights.

Shortly before trial in December 2017, Goodwill and Choe entered into a \$2,050,000.00 covenant judgment settlement (the “Settlement”) and moved for a reasonableness hearing. AAIC intervened the same day. The trial court entered judgment against Goodwill and scheduled a reasonableness hearing for March 16, 2018.

NPIP also sought to intervene, and indicated that it intended to conduct discovery regarding the reasonableness of the settlement, including depositions of defense counsel and attorneys who negotiated the Settlement, access to their files, all documents exchanged by Goodwill, Choe, and

Franco, and testimony from liability experts and defense attorneys about the apportionment of liability. CP 937-38, 1065. Choe resisted NPIP's requested discovery, but represented to NPIP that Choe would not seek to use the reasonableness determination against NPIP. Accordingly, Choe and NPIP entered into the CR 2A Settlement Agreement on January 23, 2018. CP 1069. It was memorialized by email:

**From:** Micah LeBank [<mailto:mlebank@connellylaw.com>]  
**Sent:** Tuesday, January 23, 2018 1:21 PM  
**To:** Paul Rosner  
**Cc:** Sarah E. Davenport; Brooke Marvin; Steven Soha; Angela Murray  
**Subject:** Re: Choe v. Goodwill Proposed Stipulated Motion for NPIP to Intervene

Paul: we agree the terms as set forth below regarding NPIP.

Micah

Sent from my iPhone

On Jan 23, 2018, at 1:17 PM, Paul Rosner  
<[rosner@sohalang.com](mailto:rosner@sohalang.com)> wrote:

Yes. If your client (as assignee of Goodwill) will agree that the reasonableness determination made by the court in the above matter will not be binding on or used against NPIP, there will be no reason for NPIP to intervene and NPIP will strike its motion.

Sincerely,

Paul M. Rosner, J.D., CPCU  
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Tel.: (206) 6546601  
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Email: rosner@sohalang.com  
Visit <http://www.sohalang.com/newsresources/>  
for Soha & Lang, P.S. News & Resources.

*Id.* (emphasis added).

In reliance on the CR 2A Settlement Agreement, NPIP withdrew its motion to intervene and its request for discovery regarding the reasonableness of the settlement.

On March 16, 2018, the trial court held a reasonableness hearing for the Settlement. AAIC opposed Choe's motion for reasonableness determination. NPIP did not appear—relying on the CR 2A Settlement Agreement that any determination at the hearing would be binding or used against NPIP. The Court found the Settlement to be reasonable.

Nearly two years later, without moving to reopen the case, without providing advanced notice to NPIP, and without NPIP being a party to the present case, Choe filed a motion in this lawsuit to bind and enforce the March 16, 2018 reasonableness determination against NPIP. On December 6, 2019, the trial court granted the motion. This appeal is for this Court to determine whether the trial court erred by granting this motion.

In reviewing this question, NPIP asks this Court to find that the trial court erred by: (1) failing to enforce the CR 2A Settlement Agreement; and (2) alternatively, not allowing NPIP to conduct the discovery that it had

requested in January 2017 prior to entry of an order enforcing the March 16, 2018 reasonableness determination against NPIP.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by entering the order on December 6, 2019 granting Choe's motion to enforce the March 16, 2018 reasonableness determination against NPIP despite the binding CR 2A Settlement Agreement that the reasonableness determination would not be used against or binding on NPIP.

2. Alternatively, the trial court erred in entering the December 6, 2018 order without allowing NPIP to conduct discovery request in January 2018.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err by entering the order on December 6, 2019 granting Choe's motion to enforce the March 16, 2018 reasonableness determination against NPIP despite the CR 2A Settlement Agreement whereby Choe agreed that she would not seek to bind NPIP to the reasonableness determination or use the reasonableness determination against NPIP? Assignment of Error 1.

2. Alternatively, did the trial court abuse its discretion by entering the December 6, 2019 order without allowing NPIP an opportunity to conduct discovery into the reasonableness of the Settlement given NPIP's

request prior to entering into the CR 2A Settlement Agreement that it intended to seek such discovery that was different from the discovery sought by AAIC prior to the reasonableness hearing on the Settlement? Assignment of Error 2.

#### **IV. STATEMENT OF THE CASE**

##### **A. The Parties**

NPIP is a self-insurance risk pool organized under RCW 48.180 *et seq* consisting of nonprofit entities in Washington state. Pursuant to RCW 48.01.050, organizations like NPIP which consist of nonprofit entities that join together to self-fund or self-insure under chapter 48.180 RCW are not insurers under Title 48 of the RCW.

AAIC is a commercial insurer that issued the Retained Limit insurance policy at issue in this case (the “AAIC Policy”). *See* CP 380-740. NPIP and Goodwill are named insureds under the AAIC Policy that NPIP acquired on behalf of itself and Goodwill. CP 297.

Goodwill was a member of NPIP at the time of the accident involving Choe. CP 297. Choe was a Goodwill customer on September 20, 2014, when she allegedly sustained injuries when she was struck by a truck in the loading zone of the Goodwill outlet store in Tacoma. CP 2.

**B. NPIP's Status and Involvement with this Case**

NPIP is not a party to this case. Its involvement is limited to the issues discussed in this appeal, which resulted from Choe's attempt to bind NPIP to a reasonableness determination, in violation of a nearly two-year-old CR 2A Settlement Agreement.

NPIP is not an insurer, does not issue insurance, and is, in fact, the named insured under the AAIC Policy. CP 330. NPIP purchases insurance from commercial insurers, such as AAIC, for its members, such as Goodwill. Each member's insurance coverage is limited to the insurance policy provided by the insurer and the coverage contained in that policy.

Under the AAIC Policy, AAIC owed a duty to indemnify NPIP and Goodwill for covered claims in excess of the \$50,000 self-insured retention ("SIR"). *See e.g.*, CP 586, 747. The AAIC Policy expressly provides AAIC with the right to associate in the defense, and the sole right to make settlement determinations above the SIR.

The AAIC Policy provides as follows:

**B. DEFENSE AND INDEMNIFICATION**

\* \* \*

6. You must obtain our prior written approval before offering or agreeing to pay an amount which is in excess of the **Retained Limit** in order to settle any **Claim** under this Coverage Part.

7. We shall have the right and you shall avail us of the opportunity to associate with you in the defense of any **Claim** that in our sole opinion may create indemnification obligations for us under this Coverage Part.

8. We shall have the right to settle any **Claim** that in our sole opinion may create indemnification obligations for us under this Coverage Part.

CP 492-93, 497-98, 747-48.

Under the AAIC Policy, NPIP had no contractual right to settle or attempt to settle the claim against Goodwill independently of AAIC. This makes sense, because NPIP is an *insured under the AAIC Policy, not an insurer*, and the purpose of the SIR is to place a layer of risk onto an insured prior to triggering the obligations of an insurer.

**C. Procedural History**

Choe was a customer at Goodwill's outlet store in Tacoma, Washington on September 20, 2014. CP 2-3. While walking in the loading zone, Choe was struck by a vehicle operated by Franco, causing her severe injuries. *Id.* On January 6, 2016, Choe filed this suit against Goodwill and Franco. Choe alleged failure to exercise reasonable care in the design of the loading area on the part of Goodwill and negligent operation of a vehicle on the part of Franco. CP 4-5.

For reasons that are resolved, Goodwill did not appear in the lawsuit until after Choe had obtained an order of default and subsequently moved for entry of a default judgment in the summer of 2017. CP 299, 745. On

June 30, 2017, Goodwill was served with notice of the default judgment and other pleadings. CP 1047. Shortly thereafter, Goodwill notified NPIP of the claim against it, and NPIP subsequently notified AAIC. CP 299.

Goodwill tendered defense and indemnity of the lawsuit to AAIC. While AAIC was deciding whether to accept the tender and afford coverage to Goodwill, NPIP contacted an experienced civil defense attorney, about the possible need to provide Goodwill with a defense. On July 12, 2017, AAIC initially reported that it would be denying coverage to Goodwill, but later decided to accept defense coverage to Goodwill under a reservation of rights. CP 24, 300. From that point on, Goodwill was continually defended by the defense counsel appointed by NPIP and approved by AAIC.

On November 23, 2017, AAIC filed a lawsuit in the United States District Court for the Western District of Washington, arguing that AAIC had no duty to defend or indemnify Goodwill under various provisions of the AAIC Policy (the “Coverage Lawsuit”). CP 1078. NPIP was not involved in the decision to file the Coverage Lawsuit and was named as a defendant in that suit. *Id.* The Coverage Lawsuit remains pending.

**D. Goodwill and Choe Enter into the Settlement**

Trial was scheduled to begin on December 4, 2017. On December 5, 2017, Goodwill and Choe entered into a settlement in

principle, and on or about December 12, 2017, Goodwill and Choe finalized the Settlement as discussed above. CP 851.

The Settlement contains a \$300,000 payment by Goodwill to Choe, a stipulated covenant judgment of \$1.75 million against Goodwill in favor of Choe, a covenant not to execute on that judgment against Goodwill personally, and an assignment of all of Goodwill's rights against AAIC. *Id.* The Court approved the Settlement on December 14, 2017, and subsequently set a reasonableness determination on the covenant judgment for March 16, 2018. CP 927, 929.

**E. AAIC and NPIP Sought to Intervene**

On December 12, 2017, AAIC moved to intervene. CP 933, 1047. NPIP did not immediately move to intervene as it was unclear whether the Settlement impacted NPIP since the Settlement expressly limited recovery to Goodwill's putative claims against AAIC, and Goodwill only assigned its rights, causes of action, and claims, against AAIC. There was no mention in the Settlement regarding assignment of any claims against NPIP.

In pertinent part, the Settlement provides:

“[A]ll rights and causes of action of every kind arising out of the Pierce County Action and the AAIC Policy and insurance coverage...[and] any rights it has as a member of NPIP necessary for Plaintiff to effectuate its claims or actions against AAIC.”

And,

“The covenant not to execute limits any further recovery by Plaintiff against Goodwill to the proceeds of the AAIC Policy and the rights owed by AAIC to Goodwill.”

CP 846, 848.

Ultimately, due to the uncertainty regarding the Settlement, NPIP sought to intervene via stipulated motion with Choe’s counsel. CP 1048. NPIP’s then-counsel, Paul Rosner, testified that upon intervening in this case, he would have sought the following initial discovery:

- Depositions of defense counsel and attorneys who negotiated the Settlement;
- Access to the files of the attorneys who negotiated the Settlement;
- Access to the documents and information exchanged in prior discovery between Choe, Franco, and Goodwill; and
- Depositions from liability experts regarding the apportionment of liability between Choe, Franco, and Goodwill.

CP 937-38, 1065.

Not only would NPIP have conducted this discovery and participated in the reasonableness hearing alongside AAIC, it would have retained a separate liability expert to testify at the reasonableness hearing that a jury would have found Choe at least 1% liable, which would have potentially reduced Goodwill’s liability. CP 1065. Had Choe been found at least 1% liable, Goodwill would not have been jointly and severally liable

for the entire judgment, and the reasonableness of the amount of the Settlement against Goodwill would likely have been found unreasonable. Moreover, this initial discovery may have led to additional discovery. CP 930.

However, Choe and NPIP disagreed about this discovery, with Choe's counsel expressing a reluctance to 'allowing' NPIP to conduct extensive discovery into the basis for the Settlement. CP 1068-73. Accordingly, Choe and NPIP began negotiating a settlement whereby NPIP would not need to intervene, conduct discovery, or retain a separate liability expert.

**F. NPIP and Choe Enter into the CR 2A Settlement Agreement**

Choe's counsel chose to make a deal with NPIP. NPIP would have no reason to intervene and participate in the reasonableness hearing if Choe agreed to never use the reasonableness determination against NPIP. Accordingly, Choe negotiated the CR 2A Settlement Agreement with NPIP to avoid NPIP intervening in this case and participating in the reasonableness process.

Choe stipulated that the reasonableness determination of the Settlement would not be binding on or used against NPIP. CP 1064, 1069. In return, NPIP would not seek to intervene, and thus, would not seek the extensive discovery it has requested previously, nor would it participate in

the subsequent reasonableness hearing. *Id.* The CR 2A Settlement Agreement was confirmed in writing via emails between Choe's and NPIP's counsel:

**From:** Micah LeBank [<mailto:mlebank@connellylaw.com>]  
**Sent:** Tuesday, January 23, 2018 1:21 PM  
**To:** Paul Rosner  
**Cc:** Sarah E. Davenport; Brooke Marvin; Steven Soha; Angela Murray  
**Subject:** Re: Choe v. Goodwill Proposed Stipulated Motion for NPIP to Intervene

Paul: we agree the terms as set forth below regarding NPIP.

Micah

Sent from my iPhone

On Jan 23, 2018, at 1:17 PM, Paul Rosner  
<[rosner@sohalang.com](mailto:rosner@sohalang.com)> wrote:

Yes. If your client (as assignee of Goodwill) will agree that the reasonableness determination made by the court in the above matter will not be binding on or used against NPIP, there will be no reason for NPIP to intervene and NPIP will strike its motion.

Sincerely,

Paul M. Rosner, J.D., CPCU  
Soha & Lang, P.S.  
1325 Fourth Avenue, Suite 2000  
Seattle, WA 98101  
Tel.: (206) 6546601  
Fax : (206) 6243585  
Email: [rosner@sohalang.com](mailto:rosner@sohalang.com)  
Visit <http://www.sohalang.com/newsresources/>  
for Soha & Lang, P.S. News & Resources.

*Id.* (emphasis added).

**G. Because of the CR 2A Settlement Agreement, NPIP did not Intervene, Seek Discovery, or Participate in the Reasonableness Hearing**

In reliance on the CR 2A Settlement Agreement, NPIP struck its motion to intervene, did not conduct discovery, did not hire a separate liability expert, and did not appear, nor present any evidence, at the March 16, 2018 reasonableness hearing. CP 1065.

The trial court ultimately approved the Settlement as reasonable on March 16, 2018. CP 1035. No party, including AAIC, represented NPIP's interests at the hearing. In fact, the only time NPIP was mentioned at the reasonableness hearing was when counsel for AAIC noted that NPIP was the entity defending Goodwill (by appointing defense counsel) and that AAIC was reimbursing defense costs. CP 1026. In other words, in accordance with the CR 2A Settlement Agreement with NPIP, Choe made no attempt to bind NPIP—much less mention it—at the reasonableness hearing. CP 1023-37.

**H. AAIC Files the Coverage Lawsuit**

By this time, the Coverage Lawsuit was proceeding. AAIC filed this lawsuit based on its position that it owed no duty to defend or indemnify Goodwill in the present lawsuit. CP 1078, 1088.

The parties have filed five (5) summary judgment motions in the Coverage Lawsuit, including on the issue of whether the Settlement Agreement establishes the minimum amount of AAIC's liability to Choe for alleged bad faith. *See e.g.*, CP 1156. The court in the Coverage Lawsuit denied this motion, finding "at most the Court may conclude that there exists a hypothetical set of allegations that, if proved, would entitle Choe to a presumptive measure of damages in the amount of the settlement."<sup>1</sup>

Despite that, NPIP faces the potential that Choe will use the Settlement against it as "presumptive measure of damages" in the Coverage Lawsuit. The result of that determination would be leaving NPIP "holding the bag" for damages it had no part in determining, and in fact was prevented from disputing, by virtue of the CR 2A Settlement Agreement.

**I. The Trial Court Conducts the Renewed Reasonableness Hearing Against NPIP**

Around the same time that Choe sought to enforce the Settlement as the "presumptive measure of damages" in the Coverage Lawsuit against AAIC, Choe filed a motion seeking to bind NPIP to the reasonableness determination. CP 892. At the December 6, 2019 hearing on this motion,

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<sup>1</sup> NPIP asks the Court to take judicial notice of the order in the Coverage Lawsuit entered on January 15, 2020, Dkt. 84, p. 6. Interestingly, the court denied Choe's motion, noting that "damages depend on liability" and that if the court were to conclude the presumptive measure of damages were identical to the measure of damages for indemnification, Choe potentially faced double recovery. The court did, however, grant Choe's motion insofar as it requested an order precluding AAIC from relitigating the issues of bad faith, collusion, or fraud.

the trial court in this lawsuit expressed concern over the CR 2A Settlement Agreement; however, it ultimately held that “reasonable is reasonable” so that the Settlement was reasonable and binding against NPIP without allowing NPIP to seek the discovery that it initially requested back in January 2018. *See* Verbatim Transcript of Proceedings at p. 14.

NPIP timely appealed this ruling.

#### **V. SUMMARY OF ARGUMENT**

The trial court erred by granting Choe’s motion for reasonableness determination against NPIP despite a binding CR 2A Settlement Agreement that said reasonableness determination would not be binding on or used against NPIP. The prejudice NPIP faces as a result of this determination cannot be understated. NPIP was brought into the Coverage Lawsuit without having waived legal rights, namely the opportunity to challenge what could be the presumptive measure of damages in that lawsuit: the Settlement, in reliance on its agreement with Choe. In other words, NPIP faces the potential of a multi-million dollar judgment based on the reasonableness hearing setting the presumptive measure of damages in the Coverage Lawsuit despite the plain language of the CR 2A Settlement Agreement that stated the reasonableness determination would not be used against or binding on NPIP.

The trial court's entry of an order binding NPIP to the reasonableness hearing entered into in this case therefore undermines the confidence with which parties can enter into settlement agreements in exchange for foregoing important legal rights.

Covenant judgments inherently raise the specter of collusion, which is why courts often allow insurers to intervene and conduct limited discovery to ensure no collusion, bad faith, or fraud took place. In reliance on the CR 2A Settlement Agreement, NPIP withdrew its request to intervene and seek discovery prior to the reasonableness hearing. Accordingly the trial court's refusal to allow NPIP to conduct targeted discovery into the Settlement in December 2019 constituted an abuse of discretion.

## VI. ARGUMENT

### A. **Standard of Review**

Settlement agreements, including CR 2A agreements, are interpreted according to normal contract principals. *In re Marriage of Pascale*, 173 Wn. App. 836, 841, 295 P.3d 805 (2013), *citing Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). Contracts are interpreted de novo as a matter of law. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Likewise, settlement agreements, including a trial court's ruling to enforce a settlement, is

reviewed de novo. *Pascale*, 173 Wn. App. at 841-42, *see also Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). Therefore, the question of whether the trial court properly interpreted the CR 2A Settlement Agreement when it entered an order enforcing the reasonableness determination against NPIP requires an analysis of the plain language of the CR 2A Settlement Agreement and is reviewed de novo.

Whether the trial court erred by failing to allow NPIP to conduct targeted discovery into the Settlement is reviewed for abuse of discretion. *Steel v. Philadelphia Indemnity Insurance Co.*, 195 Wn. App. 811, 822, 381 P.3d 111 (2016) (analyzing an intervening insurance company's attempt to conduct discovery into a covenant judgment), *citing Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 694. When a trial court bases its decision on an erroneous view of the law or applies an incorrect legal analysis, it necessarily abuses its discretion. *Id.*

It should be noted that reasonableness determinations are normally reviewed for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). However, whether the reasonableness determination entered by the trial court is valid is not a question before this Court.

**B. NPIP and Choe Agreed that NPIP Was Not Bound by the Reasonableness Determination**

Courts encourage settlement and narrowing of issues. *See e.g., Lavigne*, 106 Wn. App. at 19, *citing In re Marriage of Ferree*, 71 Wn. App. 35, 40-41, 856 P.2d 706 (1993) (“The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action; indeed, the compromise of litigation is to be encouraged.”).

The construction and enforcement of settlement agreements are governed by principles of law which apply to interpretation of contracts generally. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, (1983) *review denied*, 100 Wn.2d 1015 (1983), *see also, Morris*, 69 Wn. App. at 868.

“It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009), *citing Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). In other words, parties are free to enter into agreements, and absent a public policy to the contrary, courts will enforce those agreements to create a new legal obligation. 1 Samuel Williston, *A Treatise on the Law of Contracts* § 1, at 1–2 (Walter H.E. Jaeger ed., 3d ed. 1957).

1. Choe and NPIP Entered into a Binding Settlement Agreement Releasing NPIP From Being Bound by the Covenant Judgment in Exchange for NPIP's Agreement Not to Participate in the Reasonableness Hearing

In determining whether informal writings, such as the email communications between NPIP and Choe's counsel, are sufficient to establish terms, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris*, 69 Wn. App. at 869, citing *Loewi v. Long*, 76 Wn. 480, 484, 136 P. 673 (1913).

All three factors are met in the CR 2A Settlement Agreement between NPIP and Choe. The terms are all clearly stated by the informal correspondence giving rise to the release of NPIP.

a. *Choe and NPIP Agreed on the Subject Matter and Material Terms of the CR 2A Settlement Agreement*

Under principles of contract law, which govern settlement agreements, mutual assent is an essential element for the formation, or existence, of a valid agreement. *Cruz v. Chavez*, 186 Wn. App. 913, 915, 347 P.3d 912 (2015). The course of correspondence and actual agreement between NPIP and Choe clearly indicate that the parties were discussing NPIP's pending intervention in the lawsuit and desire to conduct discovery, and Choe's reticence to 'allow' NPIP to conduct such discovery. For nearly

two weeks, the evidence shows NPIP and Choe discussed and negotiated the proposed stipulated motion for NPIP to intervene. CP 1068-73.

Ultimately, NPIP proposed that, “**If your client (as assignee of Goodwill) will agree** that the reasonableness determination made by the court in the above matter will not be binding on or used against NPIP, there will be no reason for NPIP to intervene and NPIP will strike its motion.” CP 1053. Choe’s counsel responded the same day, “Paul: **we agree** (sic) the terms as set forth below regarding NPIP.” *Id.* It is hard to imagine a more definitive evidencing a meeting of the minds than the language used by Choe: “we agree”.

Likewise, the January 23, 2018 correspondence between NPIP and Choe provides the material terms of the agreement: whether NPIP would strike its motion to intervene (and thus forgo conducting discovery) in exchange for Choe’s agreement that the pending reasonableness determination would not be binding on or used against NPIP. NPIP struck its motion, and Choe did not seek to bind NPIP to the reasonableness determination at the hearing.

*b. NPIP and Choe Intended to be Bound by the CR 2A Settlement Agreement*

Choe argued in its Reply in Support of Motion for Reasonableness Determination against NPIP that the CR 2A Settlement Agreement applied only to the March 16, 2018 hearing, not the subsequent motion against

NPIP. CP 1208. However, the evidence supports an opposite conclusion: the parties reached a definitive settlement on January 23, 2018 that the reasonableness determination would not be binding on or used against NPIP. Choe attempts to use this argument to show it did not intend to be bound by the CR 2A Settlement Agreement to this case.

In applying all the normal contract interpretation principles, in the end “the reviewing court strives to ascertain the meaning of what is written in the contract, and not what the parties intended to be written.” *Bort v. Parker*, 110 Wn. App. 561, 574 (2002), *see also Ledaura, LLC v. Gould*, 155 Wn. App. 786, 799, 237 P.2d 914, 920 (2010) (“we strive to ascertain the meaning of what is written in the contract, and not what the parties intended to be written but did not memorialize.”).

To that end, the plain language of the CR 2A Settlement Agreement makes it clear that Choe and NPIP intended to be bound by their agreement *in this case*. There is no case law that supports Choe’s attempt to have a covenant judgment held reasonable multiple times against multiple parties. As the trial court noted: “reasonable is reasonable.” Verbatim Transcript at p. 14. Whether a covenant judgment is reasonable is a one-time determination, it cannot be reasonable towards one party, but unreasonable towards another. Accordingly, Choe’s attempt to bind NPIP to the

reasonableness determination, given its stated intention not to do so, violates the CR 2A Settlement Agreement.

Moreover, Choe's attempt to re-negotiate the CR 2A Settlement Agreement two years later violates Washington law. A party disputing the terms of a settlement "must in addition come forth with evidence demonstrating the existence of a dispute regarding the material terms of the agreement or the intent to be bound thereby." *Morris*, 69 Wn. App. at 871. Choe has made no attempt to do so. There is no requirement that a subsequent formal agreement be entered into, and in fact, Washington law has enforced CR 2A agreements even when the parties contemplated such additional formal written agreements but failed to enter into one. *Id.* at 872.

The CR 2A Settlement Agreement between NPIP and Choe is binding and enforceable. The subject matter of the settlement was agreed on, the material terms were stated, and the evidence supports finding that NPIP and Choe intended to be bound (and for almost two years were) by the confirming emails.

2. NPIP is Prejudiced by Choe's Attempt to Renege on Her Agreement

The prejudice faced by NPIP is clear. Washington courts have long recognized the potential prejudice faced by insurers after an insured negotiates a covenant judgment with an injured plaintiff. The purpose of a reasonableness hearing following a covenant judgment settlement is to

establish the presumptive value of the bad faith claim that the plaintiff/assignee will seek to recover against the insurer. *Werlinger v. Wagner*, 126 Wn. App. 342, 350-51, 109 P.3d 22 (2005) (“the sole purpose of the covenant judgment [is] to serve as the presumptive measure of damages in a separate bad faith lawsuit.”) (emphasis added). As the *Bird* Court explained:

This type of settlement agreement, often referred to as a covenant judgment, “does not release a tortfeasor from liability; it is simply ‘an agreement to seek recovery only from a specific asset – the proceeds of the insurance policy and the rights owed by the insurer to the insured.’”

*Bird v. Best Plumbing Grp. LLC*, 175 Wn.2d 756, 765, 287 P.3d 551 (2012), citing *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002) (quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 399, 823 P.2d 499 (1992)).

Washington courts have long recognized the pitfalls of covenant judgments of this sort. For example, in *Chaussee v. Maryland Casualty Company*, 60 Wn. App. 504, 803 P.2d 1339 (1991), the Court of Appeals noted that “an insured may settle for an inflated amount to escape exposure and thus call into question the reasonableness of the settlement.” *Id.* at 510. The only purpose of the reasonableness hearing is to create a measure of damages to assert in a subsequent bad faith claim.

To that end, a non-party insurer is generally allowed to intervene so it can appear for the reasonableness hearing and be given an opportunity to be heard on the issue of reasonableness to address these issues. *See e.g., Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wash. App. 317, 116 P.3d 404 (2005) (analyzing whether the insurer received sufficient notice to intervene and analyze the settlement).

When NPIP agreed that it would not appear in the lawsuit or conduct discovery, it relinquished important legal rights. As noted above, the question of whether the Settlement was reasonable was realistically before the trial court only once: on March 16, 2018. NPIP agreed not to challenge Choe's evidence regarding the reasonableness of the Settlement by choosing not to intervene, and in turn Choe agreed to that the reasonableness determination would not be used against or binding on NPIP.

NPIP was not invited to, nor did it participate, in any of the discussions or negotiations leading up to the entry of the stipulated judgment. The only purpose behind the reasonableness determination against NPIP in this particular case is to place NPIP at a distinct disadvantage in the Coverage Lawsuit.

Goodwill, a member of NPIP at the time of first reasonableness hearing, is now financially motivated to help Choe establish a bad faith

claim against it. NPIP is thus prejudiced in its defense in the Coverage Lawsuit by Choe's attempt to renege on the CR 2A Settlement Agreement.

**C. Alternatively, the Trial Court Erred by Not Permitting NPIP to Conduct Discovery**

RCW 4.22.060 provides a statutory mechanism for courts to assess the reasonableness of settlement agreements. Washington Courts have established a well-recognized rule that an insured/defendant may independently negotiate a settlement and covenant judgment if the insured's/defendant's liability acts in bad faith by refusing to settle the plaintiff's claims. *Bird*, 175 at 767, *Besel* 146 Wn.2d at 736.

A covenant judgment typically involves (1) a stipulated settlement/judgment by the defendant in favor of the plaintiff, (2) plaintiff's covenant not to execute on the settlement/judgment against the defendant's assets, and (3) an assignment by the defendant to the plaintiff of potential bad faith claims against the defendant's insurer. *Bird*, 175 Wn.2d at 764-65, *citing* Thomas V. Harris, Washington Insurance Law § 10.02, at 10-3 (3d ed. 2010).

Here, that would involve Goodwill's assignment of rights to Choe to pursue a claim against AAIC and the proceeds of the AAIC Policy. Furthermore, the determination of whether the Settlement is reasonable is not a "claim" or cause of action presented in this case. Instead, it is merely a device to presumptively set damages in connection with an entirely

different set of claims to be adjudicated in a separate lawsuit: in this situation, the claims against AAIC in the Coverage Lawsuit.

It is undisputed that NPIP announced its intent to conduct discovery when it first sought to intervene. CP 930, 1067-73. NPIP's Motion to Intervene was expressly predicated on the need to conduct discovery, and its counsel repeatedly discussed the need to conduct discovery with Choe's counsel. *Id.* More importantly, however, the Washington Supreme Court has long-recognized that a covenant judgment inherently raises the "specter" of collusion and placed the onus on the trial court to conduct a meaningful reasonableness hearing to protect the non-settling parties. Here, NPIP received none of that protection.

Under *Bird*, NPIP has the right to have a full opportunity to present its own arguments regarding the reasonableness of the Settlement. *Bird*, 175 Wn.2d at 767. At a minimum, this requires depositions of individuals that negotiated and agreed to the Settlement terms. *Water's Edge Homeowners Assoc. v. Water's Edge Assocs.*, 152 Wn. App. 572, 216 P.3d 1110 (2009). One of the reasons the court in *Water's Edge* permitted the intervenor to conduct discovery was concern over the structure and method of settlement: "[t]hat of a joint effort to create, in a non-adversarial atmosphere, a resolution beneficial to both parties, yet highly prejudicial to Farmers, as intervenor." *Id.* at 595. There was, and is, no legitimate reason

for denying NPIP access to the witnesses and documents it needs to meaningfully participate in a reasonableness hearing.

In *Water's Edge*, limited and focused discovery—including the depositions of counsel involved in the settlement negotiations and discovery of their file materials—revealed significant collusion between Plaintiffs' counsel and personal counsel for the Defendants which eventually resulted in an \$8.75 million stipulated judgment amount being concocted over lunch with no meaningful negotiation. *Id.* at 581. After a full-day reasonableness hearing (rather than a half-hour as here), and months of consideration, the trial court ruled that the “reasonable” value of the settlement was not \$8.75 million, but rather \$400,000.<sup>30</sup> This never would or could have been uncovered if the court had not permitted the insurer in *Water's Edge* a limited amount of discovery and time to prepare for its meaningful participation and presentation of evidence at a reasonableness hearing. NPIP should be given that same opportunity here.

Neither this Court, nor NPIP, can meaningfully evaluate the reasonableness of the Settlement unless NPIP is given an opportunity to conduct discovery related to whether the settlement amounts were the product of some well-reasoned arms-length negotiations between the parties and their counsel, or numbers picked out of thin air and agreed to without meaningful negotiation. At a minimum, this requires depositions of defense

counsel and the attorneys who negotiated and agreed to the settlement terms.

## **VII. CONCLUSION**

Choe made a calculated choice to enter the CR 2A Settlement Agreement in order to prevent NPIP from intervening in this lawsuit and conducting extensive discovery prior to the March 16, 2018 reasonableness hearing. Choe succeeded, but agreed to not do what they sought to do just a few months ago: bind NPIP to the reasonableness determination made by this Court on March 16, 2018. The sanctity of contracts is in jeopardy.

If the Court does not reverse, it will send a message to litigants and attorneys that they can make promises that they are not bound to. Rather than encourage resolution prior to trial, such a result would have the opposite effect, and would discourage (rather than encourage) settling disputes. This would violate the well-established policy of Washington Courts to encourage settlements and hold parties to the terms of their agreements.

Alternatively, this Court allows Choe to eviscerate its own contractual obligations by allowing it to enforce the reasonableness determination against NPIP, it should at least allow NPIP an opportunity to conduct the discovery that it would have sought prior to entering into the CR 2A Settlement Agreement. This way, the Court would return the parties

to the position they were in prior to the CR 2A Settlement Agreement without prejudice to NPIP's rights to seek this discovery prior to a reasonableness determination that may be used against it as the presumptive measure of damages in the ongoing bad faith Coverage Lawsuit.

Accordingly, NPIP respectfully requests that this Court reverse the December 6, 2019 order finding the reasonableness determination binding and enforceable against NPIP, and hold that Choe is bound by the terms of the CR 2A Settlement Agreement. Alternatively, this Court should remand this case with an instruction that the trial court should allow NPIP to seek the discovery that it requested prior to the CR 2A Settlement Agreement.

RESPECTFULLY SUBMITTED this 3rd day of April, 2020.

*s/ Eliot M. Harris*

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date we caused to be served upon certain counsel of record at the address and in the manner indicated below a copy of the foregoing:

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DATED this 3rd day of April, 2020.

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