

FILED  
Court of Appeals  
Division II  
State of Washington  
5/1/2020 4:02 PM

CASE 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 AND RAINIER REGION, ET AL., Respondent/Defendant

Respondents.

---

**BRIEF OF RESPONDENTS**

---

John R. Connelly, Jr.  
WBSA #12183  
Micah R. LeBank  
WBSA #38047  
Marta L. O'Brien  
WSBA #46416

Connelly Law Offices, PLLC  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100

*Attorneys for Respondent Sun Theresa Choe*

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ISSUES PRESENTED .....3

    1. Whether NPIP’s assignment of errors and requests for relief are procedurally improper.....3

    2. Whether NPIP (a non-party) may ask this Court to interpret and enforce whether an email constitutes a CR 2A agreement when NPIP:

        (a) never intervened in the trial court proceeding; and .....3

        (b) did not move for summary judgment or file any motion to enforce the CR 2A Agreement pursuant to CR 56 .....3

    3. Whether the trial court abused its discretion when it denied NPIP’s request to reopen discovery prior to the December 6, 2019 reasonableness hearing.....3

III. RESPONSE TO STATEMENT OF THE CASE .....3

IV. ARGUMENT .....12

    A. Standard of Review .....12

    B. NPIP’s Request to Interpret and Enforce the Terms in the email is Procedurally Improper.....14

    C. No CR 2A Agreement Exists Between Ms. Choe and NPIP that Precluded Choe From Moving for a Second Reasonableness Determination on December 6, 2019 .....18

    D. NPIP Did Not Present Any Evidence that the Covenant Judgment Was Not Reasonable or Was the Result of Bad Faith, Collusion or Fraud on the Part of the Settling Parties .....26

    E. The Court Did Not Abuse its Discretion When it Denied NPIP’s Request to Conduct Discovery Prior to the Reasonableness Hearing on December 6, 2019 .....27

V. CONCLUSION.....35

## TABLE OF AUTHORITIES

### Cases

<i>Absher Constr. Co. v. Kent School District No. 415</i> , 77 Wash.App. 137, 890 P.2d 1071 (1995).....	15
<i>Beltran-Serrano v. City of Tacoma</i> , 10 Wash.App.2d 1002 (2019) (unpublished opinion) .....	16
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990) .....	19
<i>Bernal v. Am. Honda Motor Co.</i> , 87 Wn.2d 406, 553 P.2d 107 (1976) .....	14, 15
<i>Besel v. Viking Ins. Co. of Wisconsin</i> , 146 Wn.2d 730, 49 P.3d 887 (2002) .....	26, 28
<i>Blackhawk Heating &amp; Plumbing Co. v. Driver</i> , 140 U.S.App.D.C. 31, 433 F.2d 1137 (1970).....	14
<i>Bird v. Best Plumbing Grp., LLC</i> , 175 Wn.2d 756 (2012) .....	28, 29, 32
<i>Brinkerhoff v. Campbell</i> , 99 Wash.App. 692, 994 P.2d 911 (2000)...	15, 19
<i>Brown v. State</i> , 130 Wn.2d 430, 924 P.2d 908, 922 (1996) .....	25
<i>City of Everett v. Estate of Sumstad</i> , 95 Wn.2d 853, 631 P.2d 366 (1981) .....	20
<i>Condon v. Condon</i> , 177 Wn.2d 150, 298 P.3d 86 (2013).....	15, 18, 19, 22
<i>Crown Controls, Inc. v. Smiley</i> , 110 Wn.2d 695, 756 P.2d 717 (1988) ...	27
<i>Cruz v. Chavez</i> , 186 Wash.App. 913, 347 P.3d 912 (2015) .....	16, 19
<i>Glover v. Tacoma Gen. Hosp.</i> , 98 Wn.2d 708, 658 P. 2d 1230 (1983).....	2, 6, 8, 9, 11, 12, 25, 26, 27, 32, 35
<i>Guy Stickney, Inc. v. Underwood</i> , 67 Wn.2d 824, 410 P.2d 7 (1966) .....	25
<i>Hearst Commc'ns., Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	19

<i>Hidalgo v. Barker</i> , 176 Wash.App. 527, 309 P.3d 687 (2013).....	28
<i>Howard v. Dimaggio</i> , 70 Wash.App. 734, 855 P.2d 335 (1993).....	22
<i>Howard v. Royal Specialty Underwriting, Inc.</i> , 121 Wash.App. 372, 89 P.3d 265, 269 (2004).....	2, 22, 30, 33, 34
<i>James S. Black &amp; Co. v. P &amp; R Co.</i> , 12 Wash.App. 533, 530 P.2d 722 (1975).....	21
<i>Keystone Land &amp; Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	10, 20
<i>Marriage of Ferree</i> , 71 Wash.App. 35, 856 P.2d 706 (1993) .....	18, 21
<i>Martin v. Johnson</i> , 141 Wash.App. 611, 170 P.3d 1198 (2007) .....	33, 35
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006).....	13, 30
<i>McGary v. Westlake Investors</i> , 99 Wn.2d 280, 661 P.2d 971 (1983).....	24
<i>Moeller v. Farmers Ins. Co. of Wash.</i> , 173 Wn.2d 264, 267 P.3d 998 (2011) .....	13
<i>Morris v. Maks</i> , 69 Wash.App. 865, 850 P.2d 1357 (1993).....	19
<i>Meresse v. Stelma</i> , 100 Wash.App. 857, 999 P.2d 1267 (2000).....	14
<i>Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007).....	26, 29
<i>Oliver v. Flow Int'l Corp.</i> , 137 Wash.App. 655, 662, 155 P.3d 140 (2006) .....	20
<i>Paskaly v. Seale</i> , 506 F.2d 1209 (9th Cir. 1974) .....	14
<i>In re Patterson</i> , 93 Wash.App. 579, 969 P.2d 1106 (1999) .....	19, 21
<i>Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.</i> , 128 Wash.App. 317, 116 P.3d 404 (2005).....	2, 29, 30, 32, 33, 34
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wash.App. 424, 878 P.2d 483 (1994).....	14
<i>Sandeman v. Sayres</i> , 50 Wn.2d 539, 314 P.2d 428 (1957).....	22

<i>Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.</i> , 76 Wash.App. 267, 883 P.2d 1387 (1994).....	24
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003) .....	13, 30
<i>Stottlemyre v. Reed</i> , 35 Wash.App. 169, 665 P.2d 1383 .....	19
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 210 P.3d 318 (2009).....	16
<i>United States v. General Motors Corp.</i> , 171 U.S.App.D.C. 27, 518 F.2d 420, (1975).....	14
<i>Villas at Harbour Pointe Owners Ass'n ex rel. Constr. Associates, Inc. v. Mut. of Enumclaw Ins. Co.</i> , 137 Wash.App. 751, 154 P.3d 950 (2007)...	29
<i>Voorde Poorte v. Evans</i> , 66 Wash.App. 358, 832 P.2d 105 (1992) .....	15
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 104, 621 P.2d 1279 (1980).....	22
<i>Water's Edge Homeowners Ass'n.</i> , 152 Wash. App. at 582, 216 P.3d at 1116.....	32
<i>Werlinger v. Warner</i> , 126 Wash.App. 342, 109 P.3d 22 (2005) .....	12, 29
<i>Wood v. Lucy, Lady Duff–Gordon</i> , 222 N.Y. 88, 118 N.E. 214 (1917) ...	20

**Statutes**

RCW Chapter 48.180.....	5
RCW 2.44.010 .....	22
RCW 4.22.060 .....	28, 29

**Rules**

GR 14.1 .....	16
RAP 2.4(a) .....	14
CR 56 .....	15, 17, 18
PCLR 7(a)(8) .....	17
PCLR 7(a)(6) .....	17

## I. INTRODUCTION

Respondent Sun Theresa Choe (“Choe”) submits this opposition to Non-Profit Insurance Program (“NPIP”)’s appeal. In this appeal, NPIP asks this Court to rule on a motion that NPIP never brought before the trial court: Whether an email between Ms. Choe’s and NPIP’s counsel constituted a CR 2A agreement that precluded Ms. Choe from asking for a subsequent reasonableness determination of the settlement between Choe and Goodwill.

In addition to having no merit, this assignment of error is procedurally improper. NPIP never intervened in the lower court proceeding and failed to file a separate motion to address the “contract” NPIP alleges was formed by the exchange of emails, despite two years of litigation in the federal case and weeks of notice that Choe would ask the trial court to conduct a reasonableness hearing on December 6, 2019. NPIP asks this Court to make a novel ruling that a CR 2A agreement exists and precluded Choe from moving for a second reasonableness determination on December 6, 2019. NPIP then encourages this Court to apply the standard of review that applies to motions for summary judgment (*de novo*) when no such motion was ever brought. The Court should decline to do so.

In the alternative, NPIP asks this Court to rule that the trial court abused its discretion by denying NPIP’s request to reopen discovery prior

to the December 6, 2019 reasonableness hearing. The trial court's decision to allow an intervening party to reopen and conduct additional discovery is discretionary. *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn.App. 317, 322, 116 P.3d 404 (2005); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wash. App. 372, 379-380, 89 P.3d 265, 269 (2004). The trial court did not abuse its discretion when it denied NPIP's request to reopen discovery. NPIP coordinated the defense of the underlying lawsuit with defense counsel and had access to all of the discovery. In addition, it also had eight months to conduct additional discovery in the federal action. Despite this, it did not oppose a single *Glover* factor and did not present any new evidence that had not been presented at the first reasonableness hearing. NPIP's claim that it should have been permitted to conduct additional discovery is made out of whole cloth. The trial court asked NPIP at the reasonableness hearing to make a *prima facie* showing of what information it sought to obtain by reopening discovery that was not already presented to the court. NPIP could not name a single piece of evidence or testimony the court had not already considered.

The trial court properly evaluated the *Glover* factors and found the settlement between Choe and Goodwill was reasonable for the second time. NPIP was provided with notice of the hearing and had an opportunity to participate. Despite this, it made the choice not to oppose a single *Glover*

factor. NPIP cannot now claim for the first time on appeal that it was not given a fair shake.

Accordingly, Choe asks this Court to uphold the December 6, 2019 order and deny NPIP's request to find a CR 2A agreement precluded Choe from seeking a second reasonableness determination. At best, the proper remedy is to remand to the lower court for further consideration.

## **II. ISSUES PRESENTED**

1. Whether NPIP's assignment of errors and requests for relief are procedurally improper.

2. Whether NPIP (a non-party) may ask this Court to interpret and enforce whether an email constitutes a CR 2A agreement when NPIP:

(a) never intervened in the trial court proceedings; and

(b) did not move for summary judgment or file any motion to enforce the purported CR 2A agreement pursuant to CR 56.

3. Whether the trial court abused its discretion when it denied NPIP's request to reopen discovery prior to the December 6, 2019 hearing.

## **III. RESPONSE TO NPIP'S STATEMENT OF THE CASE**

Choe filed suit against Goodwill of the Olympics and Rainier Region ("Goodwill") in Pierce County Superior Court for injuries she sustained at a Goodwill Outlet on September 20, 2014 (the "Underlying Suit"). CP 1-6. NPIP is an insurance risk pooling entity that is comprised of

hundreds of non-profit members, including Goodwill. CP 1083. NPIP purchased a retained limit commercial general liability policy through the commercial insurance company, American Alternative Insurance Corporation (“AAIC”). *Id.* Pursuant to the agreement between NPIP and AAIC, NPIP is responsible for defending Goodwill and owes a contractual duty to defend. AAIC, however, is responsible for payment of all sums above a small \$50,000.00 retained limit and retains exclusive authority to settle all claims over that amount. AAIC refused to settle and indemnify Goodwill for Choe’s claims and filed a declaratory action against Goodwill and NPIP less than two weeks before trial on December 4, 2017 requesting a declination of coverage in the U.S. District of Western Washington (Cause No. 3:17-cv-05978) (the “federal case”). CP 1078. Abandoned by its insurer and facing a trial where it faced the risk of a large judgment, Goodwill was forced to take matters into its own hands to protect itself. With trial already underway, Goodwill and Choe entered into a covenant judgment settlement. As is typical the agreement calls for a stipulated judgment to be entered against Goodwill and Goodwill assigned its rights to bring claims against AAIC and NPIP. In return, Choe agreed not to execute on the assets of Goodwill but retained the right to pursue claims against Goodwill’s insurers including NPIP and AAIC. CP 851.

A reasonableness hearing was scheduled before the trial court with the Honorable Stanley Rumbaugh, on March 16, 2018. CP 892. Prior to the reasonableness hearing, NPIP made similar representations to Choe that it does in its opening brief. Appellant's br. at 5. NPIP represented that it was a self-insured or self-funded risk pool under Chapter 48.180 RCW and that it was not an insurer under Title 48. NPIP also represented it did not engage in claims handling, defense of claims, or the settlement of claims. CP 905. NPIP further represented to Choe that those duties and responsibilities were handled solely by AAIC. *Id.*

NPIP moved to intervene on January 18, 2018. CP 930-939. Choe informed NPIP that she would agree to NPIP intervening for the limited purpose of participating in the reasonableness hearing but would not agree to reopen discovery. CP 1074. Based on the representations from NPIP that it did not engage in the defense, adjustment, or settlement of the claims against Goodwill, Choe agreed that NPIP did not have to participate in the reasonableness hearing. This agreement was based on the representations of NPIP and relied on the accuracy of those representations. CP at 893, 905-906. It was made clear to NPIP, however, that should those representations prove false that a subsequent reasonableness hearing would need to occur. CP at 1212-1213. This agreement was memorialized in an e-mail that was sent by NPIP's counsel:

**From:** Micah LeBank [mailto:mlebank@connelly-law.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> 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) 654-6601  
Fax: (206) 624-3585  
Email: [rosner@sohalang.com](mailto:rosner@sohalang.com)  
Visit <http://www.sohalang.com/news-resources/> for Soha & Lang, P.S. News & Resources.

CP 1069. Accordingly, NPIP did not intervene in the underlying suit or participate in the March 6, 2018 reasonableness hearing.

The reasonableness hearing was conducted on March 16, 2018. AAIC participated in the March 16, 2018 reasonableness hearing and presented evidence and arguments contesting the *Glover* factors. CP 887. Namely, AAIC alleged that contributory fault should have been assigned to Choe, destroying joint and several liability between Goodwill and a co-defendant, Enrique Franco. CP 790-803. AAIC initially claimed in its response that the settlement between Choe and Goodwill was the result of bad faith, collusion or fraud. *Id.* However, after reviewing the email exchanges between counsel for Choe and Goodwill AAIC abandoned this

argument and conceded that there was no evidence of bad faith, collusion, or fraud at the reasonableness hearing. *See* Verbatim Transcript of Proceedings of March 16, 2018 Reasonableness Hearing, CP 1026; *see also* CP 821-851; 923-934. The court agreed, finding no evidence of bad faith, collusion or fraud between Choe and Goodwill. CP 1026.

The court also found the nature and extent of Ms. Choe's injuries were considerable. CP 1032-1033. The court considered the arguments by counsel for AAIC that Choe was contributorily negligent for her injuries and rejected this entirely. CP 1030-1031.

Counsel from Soha & Lang for NPIP was present in the courtroom on March 16, 2018 but did not participate in the hearing. CP 896.

The court found that the reasonable settlement amount was \$2,050,000.00 and that the settlement was not the result of bad faith, collusion or fraud. CP 1028-1036. An order was entered consistent with the ruling of the court.

Litigation proceeded in the federal case before Judge Settle between Goodwill, Choe, NPIP and AAIC. Discovery was conducted for approximately eight months. During discovery, Choe and Goodwill obtained evidence that NPIP engaged in joint claims handling with AAIC. CP 905. NPIP coordinated the defense of Goodwill during the underlying suit. CP 894. NPIP hired defense counsel, Jerry Moberg, to defend

Goodwill. CP 894. NPIP worked closely with Mr. Moberg regarding discovery, depositions, and retention of experts and received regular updates regarding such as summaries of depositions and expert opinions. CP 1028; 1030; 894; and 1213.

Choe and Goodwill discovered during the federal case that NPIP was negligent and behaved in bad faith by, among other actions and omissions, failing to mediate or make any reasonable offer to settle this claim and deferring to AAIC rather than Goodwill even after AAIC notified NPIP it intended to file a declaratory action disclaiming coverage. *Id.* In the federal case, AAIC still maintains that NPIP was responsible for both defending and adjusting the claim in the Underlying Suit and that AAIC's only role was to reimburse NPIP for defense and indemnity costs. NPIP disagrees with AAIC and claims that AAIC was responsible for adjusting all claims that exceeded its \$50,000.00 self-insured retention. CP 1028; 1030; 894; and 1213.

On November 13, 2019, Choe filed a motion for a new reasonableness determination based on the *Glover* factors and served the motion on NPIP. CP 892-902. It was set for a hearing before the Honorable Stanley Rumbaugh in Pierce County Superior Court on November 22, 2019. *Id.* NPIP requested and Choe granted an extension of the reasonableness hearing until December 6, 2019. CP 1214. From November 13, 2019 to

December 6, 2019, NPIP did not intervene in this case, did not file a separate motion to address the purported CR 2A agreement, did not move to continue the hearing, and did not file a motion to reopen discovery prior to the December 6, 2019 hearing.

In response to the motion for a second reasonableness determination (on a regular motion calendar), NPIP asked the trial court to rule that the email between NPIP and Choe constituted a CR 2A agreement that precluded Choe from moving for a subsequent reasonableness determination. In the alternative, NPIP asked the court to allow NPIP to conduct discovery prior to a second reasonableness hearing. CP 1035-1061. Significantly, in its response, NPIP did not contest a single *Glover* factor. CP 1049-1061; *see also* Verbatim Transcript of Proceedings at pg. 13:7-10 and 14:6-10 (“Let me just start by saying this Court already entered an order determining that the settlement was reasonable....[NPIP has] not challenged that.”). NPIP claimed that, at a minimum, it should be permitted to depose counsel for Choe and Goodwill. CP 1049-1061. Despite this, NPIP had not made such a request during the eight months of discovery that had occurred in the federal case. Verbatim Transcript of Proceedings at pg. 8:3-19; CP 1208, 1215.

At the hearing on December 6, 2019, the court considered NPIP’s request to conduct additional discovery. Verbatim Transcript of

Proceedings at pg. at 8. Counsel for Choe cited the holdings in *Howard* and *Red Oaks* to support that NPIP, having coordinated the defense during the underlying suit and just conducted discovery for eight months in the federal case, had no right to reopen discovery. NPIP never asked to depose counsel for Choe and Goodwill in the federal case (discovery had just closed in the federal case on November 26, 2019). Nevertheless, from discovery in the federal case, there was still no evidence of bad faith, collusion, or fraud between Choe and Goodwill. *Id.*

The court also noted that NPIP had requested discovery to contest the reasonableness of the covenant judgment for the same reasons AAIC had in the first reasonableness hearing on March 16, 2018. Namely, AAIC contested whether Ms. Choe was contributorily negligent and whether the settlement was the result of bad faith, collusion, or fraud. *Id.* at p. 14 (“[AAIC] appeared to have the same kind of motivation to oppose the reasonableness hearing that NPIP would have.”) In the first reasonableness hearing, the court reviewed and considered extensive briefing, evidence and argument by counsel, and did not find AAIC’s arguments of contributory negligence by Choe persuasive. CP 1034-1035. In addition, there was no evidence of bad faith, collusion, or fraud. *Id.* The court, reciting the evidence and briefing it considered in the first reasonableness hearing, remarked to NPIP’s counsel that “...it seems to me that despite the

agreement not to bound by the determination, reasonable is reasonable unless you have [sic] some *prima facie* showing that...the Plaintiff...somehow colluded to try to stick NPIP with a judgment they shouldn't be stuck with, and I didn't hear anything of the kind." Verbatim Transcript of Proceedings at pg. 17. NPIP made no *prima facie* showing that there was any new evidence that would justify reopening discovery. The court found that NPIP was making the same arguments AAIC had in the prior reasonableness hearing based on the "the same facts, same law, same issues." *Id.* The court remarked to NPIP's counsel: "...you're entitled to your own opinion, but you're not entitled to change the facts. Those are what they are," to which counsel for NPIP responded: "Right." *Id.*

The court then entered an order granting Choe's motion. The court asked counsel for NPIP if the form of the order was consistent with the court's ruling. Counsel for NPIP agree it was. *Id.* at 19:12-13. The order provides:

...it is hereby ORDERED, ADJUDGED AND DECREED that upon reviewing the factors set forth in *Glover v. Tacoma Gen. Hosp.*, 98 Wn. 2d 708, 717-718, 658 P. 2d 1230 (1983), as set forth above, that the stipulated judgment entered between Theresa Sun Choe and Goodwill of the Olympic and Rainier Region and cash payment in the amount of \$2,050,000.00 is REASONABLE.

IT FURTHER ORDERED that there is no evidence of any bad faith, collusion or fraud on the part of the settling parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Non-Profit Insurance Program (NPIP) had notice of this motion for reasonableness determination and an opportunity to be heard and present oral argument.

CP 1213-1214. The order itself evidences that the court considered the *Glover* factors. The order further evidences that NPIP had notice of the motion and an opportunity to be heard and present oral argument. In this appeal, NPIP does not claim any deficiencies in the process nor does it challenge the trial court's findings of reasonableness. NPIP concedes in its opening brief that "...whether the reasonableness determination entered by the trial court is valid is not a question before this Court." Appellants' br. at 17. Instead, NPIP attempts to argue for the first time on appeal that the e-mail exchange between counsel precluded the trial court from entering a subsequent order on reasonableness when it never filed a motion on this issue below.

#### **IV. ARGUMENT**

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

Reasonableness determinations are reviewed for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). NPIP concedes on appeal that the settlement between Ms. Choe and Goodwill was reasonable and was not the result of bad faith, collusion, or fraud. Appellants' br. at 17. However, NPIP includes as an assignment of error

that the court abused its discretion when it denied NPIP's request to reopen discovery. "Abuse of discretion occurs only when a trial court's decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wash.2d 264, 278, 267 P.3d 998 (2011) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006)). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.'" *Mayer*, 156 Wash.2d at 684, 132 P.3d 115 (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

Apparently knowing that it cannot establish that the trial court abused its discretion, NPIP attempts to obtain *de novo* review by claiming that this standard should apply to the interpretation of the alleged CR 2A agreement. The *de novo* standard does not apply because NPIP did not move for summary judgment and never asked the court to interpret or enforce the purported CR 2A agreement. The *de novo* standard of review does not apply to the Court's December 6, 2019 ruling. That issue was not properly before the lower court and it is not properly before this Court on appeal.

**B. NPIP’s Request to Interpret and Enforce the Terms in the email is Procedurally Improper.**

NPIP’s assignments of error have no merit and are procedurally improper. In this appeal, NPIP asks this Court to rule on a motion NPIP never brought before the trial court: whether the email between Choe’s and NPIP’s counsel was a CR 2A agreement that precluded Choe from requesting a second reasonableness determination. “An appellate court generally will not review a matter on which the trial court did not rule.” *Meresse v. Stelma*, 100 Wn. App. 857, 867, 999 P.2d 1267 (2000); see RAP 2.4(a). Although there is a general rule allowing the court to affirm on any ground not considered by the trial court, that rule is based on the underlying assumption that the parties had a full and fair opportunity to develop facts relevant to that decision. *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976); see *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). When this opportunity is not available, the proper resolution is to remand. *Bernal*, 87 Wn.2d at 414. Caution must be exercised so as not to deny the appellant the right to dispute the facts material to the new theory. *United States v. General Motors Corp.*, 171 U.S.App.D.C. 27, 518 F.2d 420, 441 (1975); *Blackhawk Heating & Plumbing Co. v. Driver*, 140 U.S.App.D.C. 31, 433 F.2d 1137, 1144 (1970); *Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir. 1974). In *Bernal*, the

Washington State Supreme Court found the proper remedy was remand when appellants have not had a full and fair opportunity to dispute material facts. *Bernal v. Am. Honda Motor Co.*, 87 Wash. 2d 406, 414–15, 553 P.2d 107, 112 (1976).

In *Condon v. Condon*, 177 Wn.2d 150, 157, 298 P.3d 86 (2013) the Washington Supreme Court made clear that the proper procedure for enforcing a settlement agreement is through a motion to enforce a settlement. The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to enforce a settlement agreement. *Id.* at 161. A trial court abuses its discretion when it enforces a settlement agreement without holding an evidentiary hearing when there are disputed issues of fact. *Id.* at 157 (citing *Brinkerhoff v. Campbell*, 99 Wash. App. 692, 697, 994 P.2d 911 (2000)).

NPIP is, or should be, aware that the correct procedure for interpreting and enforcing a CR 2A agreement is to bring a motion for summary judgment pursuant to CR 56 before the trial court. *Condon*, 177 Wn.2d at 157. Interpretation of an unambiguous contract is a question of law. *Absher Constr. Co. v. Kent School District No. 415*, 77 Wash.App. 137, 141, 890 P.2d 1071 (1995). “If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *Voorde Poorte v. Evans*, 66 Wash.App. 358, 362, 832 P.2d 105

(1992). Indeed, NPIP cites cases with that exact procedural history in its opening brief. Appellants’ br. at 18 (citing *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009) “(On May 6, 2005, the trial court heard the motions in both cases together, and three days later entered an order granting summary judgment in favor of Sellers”)); and at 19 (*Cruz v. Chavez*, 186 Wash.App. 913, 915, 347 P.3d 912 (2015) (“The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed.”)).

Despite ample notice that Choe would move for a second reasonableness determination, NPIP failed to intervene or even file a separate motion to interpret or enforce the email exchange that NPIP claims created a binding agreement that prevented Choe from requesting a subsequent reasonableness hearing. In *Beltran-Serrano*, this Court found that because Beltran-Serrano failed to file a separate motion to exclude an expert it was not entitled to the relief sought on appeal, namely, the exclusion of that expert’s opinion when considering the ruling on the motion for summary judgment. *Beltran-Serrano v. City of Tacoma*, 10 Wash.App.2d 1002 (2019).<sup>1</sup> The Court found remand was appropriate

---

<sup>1</sup> Unpublished decision (2019 WL 3938570 at \*4-5) offered for whatever persuasive value this Court deems appropriate pursuant to GR 14.1.

because the issue was not properly before the court and the parties had not had the opportunity to fully brief the issue below. *Id*

Here, NPIP failed to intervene and file a separate motion prior to the reasonableness hearing on December 6, 2019. NPIP never filed a motion for summary judgment or a motion asking for the trial court to delay a second reasonableness determination until NPIP obtained a ruling on that issue. Instead, NPIP made these arguments in its response brief. CP 1045-1057. NPIP did not note a separate motion pursuant to the Pierce County Local Rules. *Id*.

Choe did not have sufficient notice or time to dispute NPIP's claim that the email was a CR 2A agreement. Had NPIP properly filed a motion for summary judgment pursuant to CR 56, the motion would have been set on a twenty-eight-day calendar. CR 56. Choe would have received seventeen days and twenty-four pages to respond to NPIP's arguments regarding the email. *See* CR 56; PCLR 7(a)(8). Instead, Choe had **one** day to respond to NPIP's allegations regarding the email and was limited in her reply to five pages pursuant to local rules. *See* PCLR 7(a)(6)-(8). Choe was never presented with a full and fair opportunity to respond because NPIP never properly raised these issues before the trial court.

If NPIP believed the e-mail was a CR 2A agreement that precluded Choe from asking for a second reasonableness determination, the correct

procedure was to intervene and file a motion for summary judgment pursuant to CR 56. NPIP did neither, yet it still asks this Court to deny Choe the opportunity to fully brief and respond to these arguments. Appellate courts are not the proper fora to enforce motions for summary judgment that were never filed. NPIP failed to perfect this issue by filing an appropriate motion to enforce the purported CR 2A agreement before the trial court. No evidentiary hearing occurred, and the parameters set out by the Washington Supreme Court in *Condon* have not been met. Instead, NPIP now asks this Court to review the CR 2A agreement for the first time on appeal. NPIP failed to preserve this issue below and is therefore precluded from having this Court interpret the e-mail that it claims creates a CR 2A agreement. Because NPIP's appeal is procedurally deficient and NPIP failed to file a separate motion for the relief sought, NPIP's appeal should be dismissed and remanded to the trial court for further consideration.

**C. No CR 2A Agreement Exists Between Choe and NPIP that Precluded Choe from Moving for a Second Reasonableness Determination on December 6, 2019.**

Summary judgment procedures are applied to determine whether there is a genuine dispute regarding the existence and material terms of a settlement agreement. *Condon*, 298 at 161-162; *In re Marriage of Ferree*, 71 Wash.App. 35, 44, 856 P.2d 706 (1993). The party moving to enforce a settlement agreement carries the burden of proving there is no genuine

dispute as to the material terms or existence of the agreement. *Brinkerhoff v. Campbell*, 99 Wash.App. 692, 696–97, 994 P.2d 911 (2000). If the moving party meets its burden, “the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact.” *In re Patterson*, 93 Wash.App. 579, 969 P.2d 1106 (1999); *Cruz v. Chavez*, 186 Wash.App. 913, 919–20, 347 P.3d 912, 915 (2015).

Settlement agreements are contracts; general principles of contract law govern their construction. *Condon*, 177 Wn.2d at 162; *Morris v. Maks*, 69 Wash.App. 865, 868, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993); *Stottlemire v. Reed*, 35 Wash.App. 169, 171, 665 P.2d 1383, review denied, 100 Wn.2d 1015 (1983). Washington follows the objective manifestation theory of contracts. *Hearst Commc’ns., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). For a contract to form, the parties must objectively manifest their mutual assent to be bound and the terms assented to must be sufficiently definite. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). “[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst* at 503. The parties’ subjective intent is generally irrelevant if we can determine their intent from the reasonable meaning of the words

used. *Id.* at 504; *see also City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981) (“The subjective intentions of the parties are irrelevant”). Whether there was mutual assent is normally a question of fact but may be determined as a matter of law where reasonable minds could reach but one conclusion. *Keystone* at 178 n.10. Courts will also not imply obligations into contracts, absent legal necessity typically resulting from inadequate consideration. *Oliver v. Flow Int'l Corp.*, 137 Wash.App. 655, 662, 155 P.3d 140 (2006) (citing as support *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), in which the Wood court implied an obligation upon the plaintiff to make reasonable efforts to market the defendant's goods under an exclusive licensing contract, where otherwise the defendant could have no compensation for agreeing to transfer her rights).

NPIP alleges that a CR 2A agreement was formed when counsel for Choe and NPIP exchanged emails regarding whether or not NPIP would intervene prior to the March 16, 2018 reasonableness hearing. CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A applies to preclude enforcement of an agreement when: “(1) the agreement was made by the parties or attorneys ‘in respect to the proceedings in a cause,’ and (2) the purport of the agreement is disputed.” *In re Patterson*, 93 Wash.App. 579, 582, 969 P.2d 1106 (1999) (alteration in original) (quoting *in re Marriage of Ferree*, 71 Wash.App. 35, 39, 856 P.2d 706 (1993)). The purport of an agreement is disputed within the meaning of CR 2A if there is a genuine dispute over the existence or material terms of the agreement. *Patterson*, 93 Wash. App. at 583, 969 P.2d 1106. An agreement is disputed within the meaning of CR 2A only if there is a genuine dispute over the existence or material terms of the agreement:

On its face, CR 2A says that the “purport” of the agreement must be disputed. According to Black's Law Dictionary, the “purport” of something is its meaning, import, substantial meaning, substance, legal effect. According to Webster's Third New International Dictionary, the “purport” of something is the meaning it conveys, professes or implies, or its substance or gist. The substance, gist, or legal effect of an agreement is found in its existence and material terms, and it follows that the “purport” of an agreement is disputed only when its existence or material terms are disputed.

[And], the dispute must be a genuine one.

*In re Patterson*, 93 Wash.App. at 583–84 (citing *in re Marriage of Ferree*, 71 Wash.App. 35, 40, 856 P.2d 706 (1993)).

Where the contract language is unambiguous, the court should not read ambiguity into the contract. *James S. Black & Co. v. P & R Co.*, 12

Wn.App. 533, 535, 530 P.2d 722 (1975). Furthermore, the court may neither create a contract for the parties that they did not make themselves, nor impose obligations that never before existed. *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980). “[I]f a term is so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties, there cannot be an enforceable agreement.” *Keystone*, 152 Wn.2d at 178 (quoting *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957)). In *Howard v. Dimaggio*, 70 Wash.App. 734, 739, 855 P.2d 335, 337 (1993) the court found that even though the evidence established the attorneys agreed on the amount of the settlement, it also established the attorneys did not reach an agreement on the terms of the hold harmless and release documents, and the agreement was silent on those material terms. The court found that “...noncompliance with CR 2A and RCW 2.44.010 left the trial court without authority to enforce the alleged settlement agreement.” *Id.* Similarly, in *Condon* the Washington Supreme Court found that the trial court had erred by enforcing a release agreement that was not implied within the agreement. 177 Wn.2d at 163.

The email between Choe and NPIP is similar to the agreement in *Howard* and *Condon*. Terms that NPIP now claims are part of the agreement are not in the email. The email provides: “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 to NPIP to intervene and NPIP will strike its motion.” CP 1069. To which, counsel for Ms. Choe responds “Paul: we agree [to] the terms as set forth below regarding NPIP.” *Id.* The email does not mention CR 2A. It does not contain any release language indicating that Choe would *never* seek a reasonableness determination that would be binding on NPIP. Instead, the e-mail uses the word “the” to connote a singular reasonableness hearing that was set to occur on March 16, 2018. It does not state, as NPIP suggests, that Choe would be prohibited from seeking a future reasonableness hearing. NPIP could have proposed those terms and stated in plain language that Choe would never move for a reasonableness determination binding on NPIP, but it did not. NPIP now asks the Court to read and imply terms in the email that were never explicitly stated or proposed by NPIP and were not agreed to by Choe. The Court should decline to do so.

There was no meeting of the minds between Choe and NPIP. In response to the allegations raised by NPIP in its response to the motion for the reasonableness determination, Choe’s counsel provided a declaration disputing NPIP’s characterization of the email and disagreed regarding the material terms. CP 1211-1222. This declaration, in itself, is sufficient to defeat summary judgment. Choe’s counsel stated that if NPIP wanted to

prevent a reasonableness hearing from occurring in the future it should have stated so in its e-mail, but that “such a statement never would have been agreed to.” *Id.*

There is no ambiguity in the terms in the email. A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash.App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995). A provision, however, is not ambiguous merely because the parties suggest opposing meanings. *Shafer*, 76 Wash.App. at 275, 883 P.2d 1387. “Ambiguity will not be read into a contract where it can be reasonably avoided.” *McGary v. Westlake Investors*, 99 Wash.2d 280, 285, 661 P.2d 971 (1983). The court should not read any ambiguity into this language simply because NPIP does not want to be bound by any reasonableness determination. The language of the e-mail specifically states that “*the* reasonableness determination by the court in the above matter will not be binding on or used against NPIP.” *Id.* [Emphasis added]. At that time, the only reasonableness hearing that was scheduled to occur was the reasonableness hearing set for March 16, 2018.

Even if an ambiguity does exist, it should be construed against NPIP because NPIP drafted the terms in the email and sent it to counsel for Choe.

“Contract language ... is construed most strongly against the party who drafted it, or whose attorney prepared it.” *Brown v. State*, 130 Wash. 2d 430, 457, 924 P.2d 908, 922 (1996) (citing *Guy Stickney, Inc. v. Underwood*, 67 Wash.2d 824, 827, 410 P.2d 7 (1966)). NPIP drafted the e-mail in the singular with the use of the term “the.” It does not say that NPIP would not be bound by *any* reasonableness determination made in the future. Furthermore, there is no explicit language in the email that states Choe will never move for a reasonableness determination that would bind NPIP. Accordingly, any ambiguity in the language must be resolved in favor of Choe.

Furthermore, there is no consideration paid by NPIP to enforce the agreement. NPIP did not pay Choe anything for the agreement and NPIP cannot point to any benefit that was conferred on Choe for not holding a second reasonableness hearing. Choe abided by her end of the deal and did not attempt to bind NPIP to the March 16, 2018 reasonableness hearing. Instead, she moved for a second hearing providing the appropriate notice to NPIP and providing it with an opportunity to present argument and evidence. Despite this, NPIP chose not to oppose a single *Glover* factor. NPIP’s claim of prejudice fails because it did not even attempt to oppose the reasonableness of the settlement.

Because the terms in the email are clear and did not preclude Choe from moving for a second reasonableness determination, and due to the procedural deficiencies in filing this appeal discussed in the previous section, NPIP is not entitled to this relief on appeal. If the Court is inclined to reach a ruling on the whether the email precluded the second reasonableness determination, the Court should rule that the plain language of the email did not preclude Choe from moving for a second reasonableness determination binding on NPIP.

**D. NPIP Did Not Present Any Evidence that the Covenant Judgment Was Not Reasonable or Was the Result of Bad Faith, Collusion or Fraud on the Part of the Settling Parties.**

NPIP concedes in its opening brief that “...whether the reasonableness determination entered by the trial court is valid is not a question before this Court.” Appellants’ br. at 17. In determining whether the amount of a stipulated judgment or settlement is reasonable, the court should consider nine different factors, known as the *Glover* factors. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002); *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 925 n. 21, 169 P.3d 1 (2007). Those factors are:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud;

the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

*Id.* at 738 (quoting *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717-18, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988)). In this matter, Choe moved the court for a second reasonableness determination based on the *Glover* factors. CP 892-902; CP 1204-1210. NPIP responded but did not contest a single *Glover* factor. CP 1045-1057.

NPIP does not include as an assignment of error that the court abused its discretion when it ruled, based on the *Glover* factors, that the covenant judgment was reasonable and was not the result of bad faith, collusion or fraud. NPIP's admission that the reasonableness determination by the court on December 6, 2019 was valid, undercuts and is fatal to its assignment of error that the trial court abused its discretion when it denied NPIP's request to reopen discovery before the December 6, 2019 hearing.

**E. The Court Did Not Abuse its Discretion When it Denied NPIP's Request to Conduct Discovery Prior to the Reasonableness Hearing on December 6, 2019.**

The trial court did not abuse its discretion when it denied NPIP's request to reopen discovery prior to the reasonableness hearing on December 6, 2019. It is well established under Washington law that where an insurer (or insurance like entity) refuses to defend or indemnify its

insured defendant in a third-party case, the insured defendant then has the right to protect its interests by settling that third-party case and assigning its rights against the insurer to the plaintiff. The propriety of this type of settlement mechanism has repeatedly been endorsed by the Washington Supreme Court:

We have recognized an insured defendant may independently negotiate a pretrial settlement if the defendant's liability insurer refuses in bad faith to settle the plaintiff's claims. *Besel v. Viking Ins. Co.*, 146 Wash.2d 730, 736, 49 P.3d 887 (2002). This protection for the insured augments another well-established rule: “[I]f an insurer acts in bad faith by refusing to effect a settlement for a small sum, an insured can recover from the insurer the amount of a judgment rendered against the insured, even if the judgment exceeds contractual policy limits.” *Id.* at 735, 49 P.3d 887.

*Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 764-66 (2012). Once the covenant judgment is entered, the settling parties have a statutory right to present the settlement to the court for a determination of its reasonableness. *Id.* at 767 (“We take this opportunity to explicitly approve the application of RCW 4.22.060 to reasonableness hearings involving covenant judgments. Our earlier opinions have done so in essence, and subsequent cases have done so in practice.”); *Hidalgo v. Barker*, 309 P.3d 687, 694-95 (Wash. App. Div. 3, 2013) (noting the Washington Supreme Court in *Bird* “has approve[d] the application of RCW 4.22.060 to covenant judgments assigning insurance bad faith claims, to which the statute would otherwise not apply.”).

No notice of the settlement to the insurer is required; only a five-day notice of the subsequent reasonableness hearing is required. *Mutual of Enumclaw Insurance Company v. T & G Construction, Inc.*, 165 Wn.2d 255, 268-69 (2008); *Villas at Harbour Pointe Owners Ass'n ex rel. Constr. Associates, Inc. v. Mut. of Enumclaw Ins. Co.*, 137 Wn. App. 751, 759, 154 P.3d 950, 953 (2007) (citing *Red Oaks Condominium Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn.App. 317, 322, 116 P.3d 404 (2005)). And as the statute, RCW 4.22.060, makes clear, once requested by the Plaintiffs, the reasonableness hearing “shall” be held. The entire purpose of this statutory procedure is to create a presumption that the settlement was reasonable in any subsequent insurance coverage action. The only defenses to this presumption are (1) that the insurer was not in breach of its contract or good faith duties, or (2) a showing of collusion or fraud:

If the amount of the covenant judgment is deemed reasonable by a trial court, it becomes the presumptive measure of damages in a later bad faith action against the insurer. *Id.* at 738, 49 P.3d 887. The insurer still must be found liable in the bad faith action and may rebut the presumptive measure by showing the settlement was the product of fraud or collusion. *Mut. of Enumclaw Ins. Co. v. T & G Constr., Inc.*, 165 Wash.2d 255, 264, 199 P.3d 376 (2008).

*Bird*, 175 Wn.2d at 765.

Reasonableness determinations are reviewed for an abuse of discretion. *Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22 (2005). The trial court did not abuse its discretion when it denied NPIP’s

request to reopen discovery “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable’ if ‘the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.’” *Mayer*, 156 Wash.2d at 684, 132 P.3d 115 (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)).

There is no right of an intervening party to conduct discovery prior to a reasonableness hearing. The court’s decision to allow an intervening party to conduct additional discovery is discretionary. *Red Oaks Condominium Owners Ass’n v. Sundquist Holdings, Inc.*, 128 Wn.App. 317, 322, 116 P.3d 404 (2005); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wash. App. 372, 379-380, 89 P.3d 265, 269 (2004). In *Red Oaks*, Division I Court of Appeals analyzed arguments made by the insurer, Mutual of Enumclaw (MOE), as to why the court should grant MOE’s request to reopen discovery prior to a reasonableness hearing:

In *Howard v. Royal Specialty Underwriting, Inc.*, we were presented with a similar argument. In *Howard*, a contractor entered into a settlement agreement with an employee and assigned its rights against its insurer. The insurer sought a reversal of the superior court’s determination that the settlement was reasonable. In addition to contesting the reasonableness of the settlement, the insurer argued that the trial court erred in denying its motion for a continuance in order to conduct discovery. We explained why the trial court

did not abuse its discretion in denying the insurance company more time:

Royal received notice of the reasonableness hearing 30 days before the hearing. Royal was not a complete “stranger to the case.” Royal provided counsel for its insured Cascade, and Cascade had the opportunity to participate in discovery. Royal had access to all of Howard's medical records and copies of the correspondence between the settling parties. At the reasonableness hearing, Royal was allowed to cross-examine Howard's treating physician and was able to present substantial evidence. Under these circumstances, the trial court did not abuse its discretion in refusing to reopen discovery and continue the hearing.

Similarly, MOE was not a stranger to this case. It was notified of the claims against Sundquist almost a year in advance of the hearing, defended Sundquist under a reservation of rights, agreed to the tolling of the statute of limitations, paid for an investigation into the claims, and was aware of ongoing settlement negotiations. It should have been no surprise to MOE that the parties settled quickly once a lawsuit was initiated. Further, the trial court permitted MOE to participate in the reasonableness hearing, but it chose not to.

In contrast to *Howard*, MOE was only given six days' notice and three days to review the settlement agreement. But the notice indicated the settlement amount, so MOE was provided six days to determine whether the amount was reasonable. And, as the superior court noted, whether the settlement agreement was contingent was not relevant to whether the amount was reasonable under the *Chaussee* factors. Given the circumstances surrounding this dispute, six days' notice was consistent with due process because it was a reasonable amount of time for MOE to make an appearance and defend its interests at the hearing.

*Red Oaks Condo. Owners Ass'n*, 128 Wash.App. at 325–26, 116 P.3d at 408–09. *Red Oaks* and *Howard* are the primary cases on insurers requests to reopen discovery after a reasonableness hearing and yet NPIP fails to mention or address either of them in its brief. *See generally* Appellants’ br. at 25-27.

Instead, NPIP misconstrues and misrepresents the holdings in *Bird* and *Water’s Edge Homeowners Assoc. v. Water’s Edge Assocs.*, 152 Wn. App. 572, 216 P. 3d 1110 (2009). NPIP claims that *Water’s Edge* holds: “At a minimum, this requires depositions of individual that negotiated and agreed to the Settlement Terms.” *See* Appellants’ br. at 26. Nowhere in *Water’s Edge* does the court make this statement. *Water’s Edge* merely represents a situation where the trial court permitted the insurer to conduct “limited discovery.” *Water’s Edge Homeowners Ass’n.*, 152 Wash. App. at 582, 216 P.3d at 1116 (“The trial court allowed Farmers to intervene and conduct limited discovery.”). The issue on appeal in *Water’s Edge* was whether the court abused its discretion when examining the reasonableness of the settlement under the *Glover* factors. *Id.* There is no discussion in *Water’s Edge* regarding what depositions were or were not critical to the court’s determination or whether an intervenor is entitled to conduct any discovery at all prior to a reasonableness determination. Contrary to NPIP’s

position there is no general rule that there is some minimum amount of discovery that needs to occur before a reasonableness determination.<sup>2</sup>

Similar to *Red Oaks* and *Howard*, NPIP is no stranger to this case. NPIP hired defense counsel, Jerry Moberg, and coordinated the defense of Goodwill during the Underlying Suit. CP 894. It was provided with all of the discovery, approved the retention of experts, and participated in settlement negotiations. *Id.* Prior to the hearing on December 6, 2019, NPIP also had eight months to conduct discovery in the federal case. NPIP never asked to depose counsel for Choe and Goodwill in the federal case even though issues pertaining to bad faith, collusion, or fraud would have been defenses to the counterclaims against it in the federal case as well.

Contrary to *Howard*, NPIP did not file a motion to continue the hearing and instead, Choe voluntarily continued the hearing at NPIP's request. Despite this, NPIP never intervened prior to the reasonableness hearing to request additional discovery and NPIP still has not formally intervened in the Underlying Suit.

The trial court did not abuse its discretion when it denied NPIP's request to reopen discovery. The court considered the pleadings and

---

<sup>2</sup> For example, in *Martin v. Johnson*, 141 Wash. App. 611, 623, 170 P.3d 1198, 1204 (2007) this court affirmed a reasonableness determination where the settlement had occurred quickly and no discovery had occurred. The court noted that “[w]e cannot infer bad faith, collusion, or fraud merely based on innuendo and speculation alone.” *Id.*

arguments of counsel. *See generally* Verbatim Report of Proceedings (December of 2019). The court also considered the holdings in *Red Oaks* and *Howard*. NPIP did not cite to any other authority that would permit it to reopen discovery and did not identify any information that it sought, besides general conclusory statements that it has the right to depose counsel that represented the parties entering into a covenant judgment.

During the reasonableness hearing on December 6, 2019, the trial court discussed NPIP's request for discovery at length. The court noted that NPIP had the same interests and motivations AAIC had in the first reasonableness hearing on March 16, 2018. The court asked counsel for NPIP to make a "*prima facie* showing that...the Plaintiff...somehow colluded to try to stick NPIP with a judgment they shouldn't be stuck with." *Id.* at p. 17. NPIP was unable to make a *prima facie* showing that there was any new evidence that would justify reopening discovery. The court commented that NPIP was making the same arguments that AAIC had made in the prior reasonableness hearing based on the "the same facts, same law, same issues." *Id.* Accordingly, the court denied NPIP's request to reopen discovery. On these facts, NPIP has no basis for claiming that the court abused its discretion by denying NPIP's request for discovery.

Moreover, NPIP's concession that it does not dispute the findings of the reasonableness determination made by the court on December 6, 2019

further undermines its claim it was entitled to reopen discovery. If there was any evidence the covenant judgment was the result of the bad faith, collusion or fraud that evidence would cut against the *Glover* factors. After all, evidence of bad faith, collusion, or fraud is one of the nine *Glover* factors. By failing to challenge the findings of the court on reasonableness, NPIP is also conceding that its request for discovery has no merit. NPIP was provided with the e-mails exchanged between Choe and Goodwill and those e-mails were part of the record before the trial court. CP at 821-843. Those exchanges do not remotely show any evidence of bad faith, collusion or fraud – they show an arms-length transaction between counsel. *Id.*; *see also*, CP 1033. *Martin v. Johnson*, 141 Wash. App. 611, 623, 170 P.3d 1198, 1204 (2007) (“[F]raud will not be presumed and must be proven by evidence that is clear, cogent, and convincing.”). NPIP has not even come close to meeting this standard.

## **VI. CONCLUSION**

The trial court did not abuse its discretion in finding the settlement between Choe and Goodwill reasonable for the second time. NPIP did not oppose a single *Glover* factor and did not provide any evidence of bad faith, collusion, or fraud – let alone clear, cogent and convincing evidence. The e-mail exchange between Choe and NPIP is clear on its face and does not prevent Choe from seeking a second reasonableness determination. NPIP

cannot add words to the e-mail that do not exist. This court should decline NPIP's request to evaluate the alleged CR 2A agreement for the first time on appeal and should remand this case to the trial court.

Furthermore, the trial court did not abuse its discretion when it denied NPIP's request to reopen discovery. NPIP had two years to prepare for the second reasonableness hearing and had ample time to conduct discovery in the federal case. NPIP did not present any new evidence that was not before the trial court during the first reasonableness hearing. The ruling of the trial court should be affirmed.

DATED this 1<sup>st</sup> day of May, 2020.

CONNELLY LAW OFFICES, PLLC

By: /s/ Micah R. LeBank

John R. Connelly, Jr., WBSA #12183

Micah R. LeBank, WBSA #38047

Marta L. O'Brien, WSBA #46416

*Attorneys for Sun Theresa Choe*

# CONNELLY LAW OFFICES

May 01, 2020 - 4:02 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54458-0  
**Appellate Court Case Title:** Sun Theresa Choe, Respondent v. Goodwill of the Olympics, et al., Respondent  
**Superior Court Case Number:** 16-2-04360-2

### The following documents have been uploaded:

- 544580\_Briefs\_20200501160044D2385339\_9652.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Respondents Opening Brief-FINAL .pdf*

### A copy of the uploaded files will be sent to:

- JonathanDemella@dwt.com
- MOBrien@connelly-law.com
- eharris@williamskastner.com
- jaimeallen@dwt.com
- jconnelly@connelly-law.com
- kathleenforgette@dwt.com
- kmosebar@williamskastner.com
- sleake@williamskastner.com

### Comments:

---

Sender Name: Brooke Marvin - Email: bmarvin@connelly-law.com

**Filing on Behalf of:** Micah R Lebank - Email: mlebank@connelly-law.com (Alternate Email: bmarvin@connelly-law.com)

Address:  
2301 N. 30th Street  
Tacoma, WA, 98403  
Phone: (253) 593-5100

**Note: The Filing Id is 20200501160044D2385339**