Supreme Court No. 100131-2
Court of Appeals No. 80400-6-I
(consolidated with No. 81332-3-I)

THE SUPREME COURT OF WASHINGTON

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EMILIO M. KOSROVANI and
LAUREL HANSEN,

*Petitioners*

v.

ROGER JOBS MOTORS, INC.,

*Respondent*

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# AMENDED PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Emilio Kosrovani ("Kosrovani") and Laurel Hansen ("Hansen") seek review of the decisions of the Court of Appeals designated below.

## II. CITATION TO COURT OF APPEALS DECISION AND RELATED ORDERS

The Court of Appeals declined review of two summary judgment orders entered by the superior court dismissing Kosrovani's personal injury case and Hansen's claims for loss of consortium, and affirmed that court's later ruling, entered while the appeal of those orders were pending, enforcing a purported settlement agreement wherein Hansen was not involved. The Court made its decisions after allowing the consolidation of a separate appeal of the settlement enforcement order jointly brought by Kosrovani and Hansen. It did so after denying, by order dated September 28, 2020, Kosrovani's motion to modify that Court's Commissioner's ruling denying the joinder of Hansen in the consolidated appeal. The appellate Court issued an Unpublished Opinion, *Kosrovani v. Roger Jobs Motors, Inc*, *noted at* 2021 WL WL2808996 (Div. 1, July 6, 2021). The Court denied Kosrovani's motion for reconsideration and motion to publish on July 29, 2021. Copies of the Court's decision and related orders are reproduced in the Appendix beginning at A-1.

## III. ISSUES PRESENTED FOR REVIEW

1. In circumstances where Petitioners were denied their constitutional right to a fair and impartial tribunal, and where Kosrovani was denied his constitutional right of access to the court, did the Court of Appeals err in refusing review of two summary judgment dismissals on the ground of mootness and enforcing a disputed settlement agreement entered into in consideration of, and incident to, those dismissals?

2. Where an unmarried couple has been in a committed intimate relationship for over 29 years and where the relationship satisfies the factors of *Connell v. Francisco*, is a person in the relationship a foreseeable plaintiff to whom a duty of harm avoidance is owed and may she claim, *in equity,* compensation for services rendered, loss of income, and loss of consortium in a tort action for personal injuries brought by her cohabitant against the tortfeasor?

3. Is the court precluded from enforcing a disputed settlement agreement in derogation of the parties' right and freedom to contract, where (i) by its plain terms the settlement is *conditional* upon the execution of a to-be-drafted release, (ii) the terms of the release are not mutually assented to, and (iii) extrinsic evidence is allowed to be introduced showing an intent to form a tentative agreement in order to preserve the rights of first party insurers and to tender the lawsuit?

**Ancillary Issues:**

(a). Does a court lack jurisdiction and is it precluded from enforcing a disputed settlement agreement (a) in the absence of an indispensible party, resulting in that person's claims being extinguished, and (b) without the prior permission of the appellate court being sought under RAP 7.2(e) while the underlying action was being appealed?

(b). Is the appellate court precluded from holding that a party "settled directly with the other party" and enforcing a mediated settlement agreement under CR 2A in circumstances where (i) the agreement is not subscribed by a represented party's attorney who negotiated the agreement, (ii) the party had no role in reducing the agreement to writing, and (iii) no direct contact between the parties and between the parties and their adverse attorneys took place?

## IV. INTRODUCTION AND STATEMENT OF THE CASE

Judicial bias and lack of impartiality pervade this State's trial courts and the Court of Appeals. The bias is deeply embedded and systemic in nature. Its impact is most severely felt by persons of the lower socioeconomic classes, and racial, ethnic, gender and sexual minorities. Due to economic and social constraints, these persons often have no choice but to appear *pro se*, in the process being subjected to an equally severe and deep-seated bias of the courts against *pro se* litigants. Irrespective of the merits of the case, for a *pro se* minority plaintiff the compounded effect of these two sources of bias reduces the odds of prevailing to a range of very low to nonexistent.

Invariably, such a plaintiff is treated in a patronizing manner with disdain, denigration, his or her testimony is disbelieved, submitted briefs are not read or disregarded, arguments are rejected without good reason, and presented evidence ignored. The prime objective of the court then becomes the clearing of the docket and the appeasement of the defense. Despite having a meritorious case, such a plaintiff's case is often dismissed at the earliest juncture.

This dual bias and prejudice corrupt the judicial system and corrode its fabric. The result is that the system becomes definitively rigged in favor of the defense and judges become agents of industry and powerful

interests. The courts become bodies that perpetrate oppression, social injustice, and the exertion of undue authority in a setting where doing justice and providing just compensation and relief is their duty.

Judicial bias flourishes with impunity where little or none is done to inhibit it and where recourse against it by a litigant is practically nonexistent. Proof of actual or potential bias is next to impossible as motions for recusal are most often ruled upon by the very judges whose bias and impartiality is being questioned.

The intermediate appellate courts rarely address the issue of judicial bias, as they are themselves the subject of such bias, disguising it under the rubrics of a deferential attitude toward the trial court or its power to make discretionary rulings. In so doing, they strive to shield the lower court judges from embarrassment and reward the improprieties committed by these judges. They, in effect, enable the entrenchment and perpetuation of an unjust system.

Emilio M. Kosrovani, Ph.D., is a 69-year old analytic philosopher who suffered a traumatic brain injury on the premises of Roger Jobs Motors, Inc. (hereinafter, "Roger Jobs") in Bellingham on November 16, 2015. On November 9, 2018 he filed suit against Roger Jobs alleging premises liability and negligence. (CP 3-7) Relying on RCW 4.08.030, he also brought claims in the same suit on behalf of his cohabitant of 29 (now

32) years, Laurel Hansen, for compensation for services rendered, loss of income, and loss of consortium. (CP 7-9)

Kosrovani is a person of color and of an ethnic minority.

Roger Jobs was served on January 14, 2019. About two weeks after being served and before the close of pleadings, Roger Jobs brought a motion denominated as a motion for summary judgment alleging that Kosrovani has failed to state facts sufficient to support his cause of action for negligence. (CP 11-22) It also requested that Hansen be denied relief for loss of consortium because she and Kosrovani are not married to one another and are not state-registered domestic partners. (CP 16-19)

On March 1, 2019, before Kosrovani's discovery had commenced, the trial court heard his motion for continuance, (CP 48-50), granting a one-week continuance. (CP 72-73) The ruling effectively prevented Kosrovani from conducting any discovery ordinarily needed in a premises liability action, which include deposing the business's personnel, having a premises liability expert inspect its premises and maintenance records, and allowing medical experts to review the report and findings of that expert.

The ruling evinced prejudice, bias, and the intent to cripple Kosrovani's efforts to withstand Roger Jobs' summary judgment motion. The judge made derisive comments, later sanitized and excised from the record by her court reporter, about Kosrovani's Complaint. Though

Kosrovani expressed clear intent to cure the alleged factual deficiency of his Complaint, the trial court judge had already prejudged the case and came to believe that it is meritless. So univocal was she on the side of the defense that when Kosrovani remarked that Roger Jobs could have brought a CR 12(e) motion for a more definite statement, the court stated, "*We*'re not required to do it the way that you would." (RP 5-6) (Emphasis supplied.) The trial court inserted itself into the adversarial process, identifying itself in unison with the defense. The judge denied, in violation of CJC 2.6(a), Hansen, a person with claims and a legal interest in the proceeding, of an opportunity to speak. (RP 8, 9, 19)

Kosrovani responded in opposition to the motion as to Hansen's claims arguing that he and Hansen have had a committed intimate relationship for 29 years and that Hansen is entitled to equitable relief. (CP 74-85; 369-71) On March 8, 2019, the trial court granted Roger Jobs' motion on her loss of consortium claim. (CP 145-47; RP 28-29) The court permitted Kosrovani, as attorney, to argue the matter on behalf of Hansen.

Judge Montoya-Lewis' dismissal of Hansen's claim was based on her ruling that there is a "statutory definition of who has the cause of action." (RP 26) The issue she ruled upon was not just the procedural issue of how the claim was brought, but the substantive issue of whether Hansen is entitled to relief for loss of consortium. Without identifying the

statute, the court ruled that her claim "is a claim based on a statute that Ms. Hansen does not fit." (RP 23). It ruled on the substantive nature of the cause, stating, "the loss of consortium claim itself is not equitable [but] ... something that the statute itself says, 'this is how this works'." (RP 24). The court failed to identify the nonexistent statute, relying solely on the defense's contention that there is one. (RP 23-24) The court dismissed the claim by summary judgment. (CP 145-47)

Observing Judge Montoya-Lewis's overt bias and partiality toward the defense, Kosrovani made the plainly obvious inference that her intent is to dismiss the entire case from the start, to railroad Kosrovani, and to clear the docket for the incoming assigned judge, Lee Grochmal, within the three-week interim period that she had control of the case. Expecting with certainty the denial of his filed motion for leave to amend (CP 86-89), on March 14, 2019 Kosrovani entered into a stipulated Amended Complaint to cure the alleged factual deficiency. (CP 192-201) On March 7, and 14, 2019, he also initiated discovery by serving Roger Jobs with Interrogatories, Requests for Production, and Request for Inspection of its premises. (CP 216-17 and 285-322)

Given his expectation of certain dismissal of his own claim due to Judge Montoya-Lewis's bias and pro-defense partiality, he presented the court with a written motion for recusal, supported by a declaration, at the

commencement of the hearing of March 15, 2019. (CP 205-08; RP 31). Judge Montoya-Lewis herself ruled on the recusal motion, in contravention of CJC Rules 2.7 and 2.11, and denied it, finding no actual bias. (RP 31; CP 209-210)

The court then made multiple rulings (enumerated in the appellate record), all favoring the defense, further evincing its partiality. It struck the core of his medical expert's declaration as "conclusory" without taking into account the lack of discovery (RP 47-49; CP 220-222), refused tender of his expert's curriculum vitae presented as proof of competence without considering the *Burnet* factors (RP 47), denied his motion to exclude evidence of prior injuries litigated in a malpractice suit introduced by Roger Jobs only in its reply brief (RP 44-46), found, without a scintilla of evidence and without even bothering to look at the earlier malpractice suit complaint ("I don't think I even have to look at it") that his injuries at issue in that suit are "the same injuries" as those pleaded in the subject premises liability complaint, and granted Roger Jobs' motion as to all premises liability claims. (CP 211-212). Judge Montoya-Lewis added at the end, "I did review the Amended Complaint …I don't think it cures the issues that have been raised by this motion …." (RP 54)

The court denied reconsideration (CP 353-54), finding Kosrovani

did not have good reason for delay in obtaining evidence or had not indicated what facts would be established by discovery. (CP 354)

A timely appeal of the summary judgment decisions was filed. While the perfection of the appeal was pending, Judge Montoya-Lewis was appointed to the State Supreme Court in late, 2019.

In view of the expected strong sentiment of the Court of Appeals to protect the honor and reputation of Judge Montoya-Lewis and to avoid offence to the higher judiciary, and cognizant of the pre-existing severe prejudice of that Court against *pro se* plaintiff-appellants, Kosrovani reasoned that, despite the merits of his case, the appointment of Judge Montoya-Lewis renders it realistically impossible to prevail in his appeal. In particular, where argument and evidence of her bias and lack of impartiality would be made in the opening brief, the chances of reversal of the summary judgments would be nil.

Having been denied access to the courts by the failure of the superior court to provide a fair and impartial tribunal and to provide access to the court by enabling discovery, and in view of the circumstances having no realistic recourse in the appeals courts for obtaining a reversal, Kosrovani elected to hire an attorney, enter into a tentative settlement with Roger Jobs, then submit first party insurance claims under his and Hansen's auto and umbrella policies. Kosrovani reasoned that if coverage

is granted, he can then tender the lawsuit to the insurers, and if tender is accepted, allow the insurers to proceed. If tender is denied he would conclude the settlement and proceed with arbitration with the insurer as to his damages above the settlement amount. (CP 417; 424)

A mediation was held in which Kosrovani was represented by Chalmers Johnson, G.S. Jones, P.S. Hansen did not participate. A "Memorandum" of settlement was signed by Kosrovani, but not his attorney, stating that "the settlement is conditioned upon execution of a full release of all claims by Claimants/Plaintiffs against Defendants and Defendants' Insurers...." (CP 595) The amount of the settlement is insignificant in relation to the injury sustained. A draft release (CP 598-99) was later mailed to Kosrovani, who did not accept it.

While Kosrovani's claim submissions to his insurers were still being processed, and before any negotiation as to the language of the release, Roger Jobs prematurely brought a motion in trial court seeking to enforce the settlement. Kosrovani opposed the motion on numerous grounds. He cross-moved for leave to amend his complaint to plead rescission of the contract and for joinder of Hansen as a co-plaintiff.

The trial court failed to hold a full evidentiary hearing, denied Hansen from providing testimony (RP 4), and on February 28, 2020

entered an order enforcing the settlement. (CP 491-96) It struck the cross-motion for leave to amend. (CP 487-90)

Kosrovani and Hansen then jointly appealed the order enforcing the settlement enforcement. (CP 557-76)

The Court of Appeals allowed the consolidation of the two appeals, but denied Kosrovani's motion for joinder of Hansen. It also denied his motion to modify the latter ruling. See Appendix, at A-14-17..

In refusing review of the summary judgment orders based on mootness, the Court of Appeals ignored its own commissioner's ruling denying Roger Jobs' motion on mootness, and the failure of Roger Jobs to move to modify that ruling under RAP 17.7. It further ignored the argument that the refusal to review the summary judgment dismissal of Hansen's claims effectively extinguishes her claims and, based on res judicata and claim preclusion, bars her from litigating them in trial court.

The Court of Appeals decision acknowledged that the trial court lacked authority to enter its enforcement order, but it retroactively granted the trial court permission under RAP 7.2(e)(1) to do so.

The Court further held that the settlement was not conditional on the execution of a release, and that, though the release had not been negotiated and its terms had not been agreed to, Kosrovani had an unconditional duty to execute a modified version of it.

## V. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

### A. This Court Should Accept Review Based on RAP 13.4(b)(4), as the Issues of Bias, Lack of Impartiality, and Lack of Fairness of the Trial Court Judge, Now a Sitting Member of This Court, and of the Court of Appeals, Are Matters of Substantial Public Interest and Import, and the Issue of Whether Violations of Due Process Arising from Bias and Denial of Access to the Court Render a Subsequent Settlement Voidable and Its Enforcement Void Is a Matter of First Impression for this Court.

#### 1. The Voidness of the Summary Judgments Against Petitioners Renders the Subsequent Settlement Voidable and the Order Enforcing Settlement Void; It Moots the Review of the Order.

The issue of whether the violation of Due Process and denial of access to the court renders voidable a subsequent settlement entered to incident to or in consideration thereof is one of first impression for this Court. It is an established principle in equity that where a detriment or prejudice is suffered incident to a judgment later declared void, courts issue orders that negate that prejudice, *e.g.*, by awarding restitution. *In re Marriage of Hardt*, 39 Wn.App. 493, 496, 693 P.2d 1386 (1985)(affirming vacation of divorce decree and awarding reimbursement to husband for child support payments made pursuant to the void decree). See Restatement (Second) of Judgments 2d. (1982), sec.16, cmt *c*.

#### 2. Violations of Due Process and the Appearance of Fairness Render the Summary Judgments Void.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942

(1955). The right to a fair tribunal is embodied in the right to due process. The "administration of justice is dependent upon the impartiality, disinterestedness and fairness on the part of the judge." *State ex rel. McFerran v. Justice Court of Evangeline Starr*, 32 Wn.2d 544, 548, 202 P.2d 927 (1949). The constitutional right to a fair trial is so fundamental to our justice system that denial of this right is considered a structural error that requires reversal. *Williams v. Pennsylvania,* 136 S. Ct. 1899, 1909-10, 195 L. Ed. 2d 132 (2016).

A hallmark of violation of the due process right to a fair tribunal is when the judge prejudges the matter from the outset, making up his or her mind as to the matter before taking any evidence or hearing any argument. *In re Dependency of B.K*, Court of Appeals No. 76675-9-I, *affirmed*, at 449 P.3d 1054 (2019).

A judicial proceeding is valid only if it has an *appearance* of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995); *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017).

The record shows actual and potential bias manifested by Judge Montoya-Lewis. The Court of Appeals, too, was swayed by Judge Montoya-Lewis' position as a member of this Court and, in contravention

to CJC 2.4, has acted with the motive to shield her from any finding of impropriety. These circumstances cast dark cloud upon the impartiality of those courts and are inconsistent with the appearance of fairness doctrine.

### 3. The Trial Court's Denial of an Opportunity to Conduct Discovery in Violation of Kosrovani's Constitutional Right of Access to the Courts Guaranteed by Article 1, Section 10, of the Washington State Constitution Renders the Summary Judgment Dismissing his Personal Injury Claim Void.

This Court has held, "[t]he people have a right of access to courts, indeed, it is the bedrock foundation upon which rest all the people's rights and obligations." *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 985-86, 216 P.3d 374 (2009). "The right of access to courts includes the right to discovery authorized by the civil rules." *Id.* "[I]t is common knowledge that extensive discovery in necessary to effectively pursue ... a plaintiff's claim ..." *Id.* The "broad right of discovery is necessary to ensure access to the party seeking the discovery. The right of access ... is a general principle, implicated whenever a party seeks discovery. Plaintiff, as the party seeking discovery, therefore has a significant interest in receiving it." *Id.* The constitutional right of access to the courts is inherent in article 1, section 10 of the Washington State constitution. "*Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to the courts.*" *Putman,* at 978 (emphasis added).

Petitioners were severely prejudiced by the trial court's substantial transgression of their due process rights and their constitutional right of access to the courts. The enforcement of the purported settlement would be mooted by a holding of the Court of Appeals if it held that the summary judgment proceedings that came prior were void. The prejudicial effect of the proceedings before a biased judge requires that the parties be left as though no proceedings in trial court have been conducted, including proceedings to enforce a disputed settlement. Without the trial court's dismissals, Kosrovani would not have been placed in a compromised position, would not have faced the burden of this appeal, and would not have considered the settlement in the first place.

The conduct of the trial court and the Court of Appeals reflect upon the integrity and independence of these courts. Their conduct affects the public trust and confidence in the judiciary and its faith in the rule of law. This matter is of broad public import and substantial public interest.

Because the independence of the Court of Appeals is in doubt and in the interest of judicial economy, this Court should conduct a *de novo* review of the summary judgment proceedings, remand to the trial court, and allow the parties to start anew.

### B. Review of Hansen's Equitable Claim Under the Committed Intimate Relationship Doctrine is Warranted Under RAP 13.4(b)(4) as It Is an Issue of Substantial Public Interest.

### 1. This is a Matter of Substantial Social Import and Has Broad Impact and Relevance Beyond this Case.

This is an issue of first impression for this Court. The common law of loss of consortium in this country has evolved as the "institutions and conditions of society," noted in RCW 4.04.10, have changed. The cohabitation of unmarried couples is now so prevalent that 59% of adults aged 18-44 have lived with an unmarried partner, exceeding the number who have been married. (Pew Research, Nov. 6, 2019). Unmarried couples in committed intimate relationships, whether or not registered as partners, are now conferred many rights and benefits at law and in equity.

The law of this State on loss of consortium has not kept pace with the changes in society. Whereas other jurisdictions have addressed the issue and extended the common law, this Court has not. See, in particular, *Lozoya v. Sanchez*, 133 N.M. 579, 66 P.3d 948 (2003) (establishing a presumption for couples living together and adopting a set of eight factors for deeming a relationship significant enough to recover), *Dunphy v. Gregor*, 136 N.J. 99, 642 A.2d 372 (1994)(adopting a set of criteria for when an unmarried person may recover), *Butcher v. Superior Court*, 139 Cal.App.3d 58, 199 Cal. Rptr 503 (CT.App. 1983), and *Trombley v. Starr-Wood Cardiac Group*, 3 P.2d 916 (Alaska, 2000). (CP 80-84; RP 23-27).

The committed intimate relationship doctrine is an *equitable* doctrine developed to address situations where the application of the law

is uncertain or produces inequitable outcomes. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001). There are hundreds of thousand of couples in this state who are in these relationships but who have not registered their partnerships. It is of commonplace knowledge that where a member of a household consisting of such a couple gets injured by the act or omission of a tortfeasor, the other member's life and livelihood is affected, at times severely so. Yet, the affected person has no remedy at law and, despite the equitable nature of the doctrine, no case in Washington has held whether he or she has a cause of action in equity.

This Court has the opportunity to clarify the reach of that doctrine, extend the common law, and provide guidance as to whether and under what circumstances a person in such a relationship is entitled to recovery for his or her pecuniary loss, compensation for services rendered, and loss of consortium when his or her committed intimate partner becomes injured or disabled at the instance of a tortfeasor.

The historical roots and treatment of loss of consortium are in the common law. The landmark decision of this Court in *Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (1980), *overturning Ash v. S.S. Mullen, Inc.*, 42 Wn.2d 345, 261 P.2d 118 (1953), upheld an award of loss of consortium damages to a woman for the first time. "Courts have a

duty to "reassess the common law and alter it where justice requires." *Id.* at Wn.2d 95.

Loss of consortium not involving wrongful death has always been an action brought under the common law. It has never been a statutory action. There is no substantive statute defining such loss. Thus, the trial court erred in concluding that it is statutory and that equity may not be invoked until one "gets past the statute." (RP 24) RCW 4.08.030 is procedural and permissive; it is not substantive law, as it does not define who is entitled to recovery for loss of consortium.

Hansen's claims were litigated on the merits, reduced to judgment, and timely appealed. Even if the issue of the settlement is reached, Hansen is not bound by the disposition of Kosrovani's claims pursuant to enforcement of a settlement. *Reichelt v. Johns Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987); *Hooper v. Yakima County*, 79 Wn.App. 770, 775-76, 904 P.2d 1193 (1995). The Opinion of the Court of Appeals mistakenly concluded that her claims were mere "potential claims" and that the purported settlement does not extinguish them. Opinion, at *9. It deliberately overlooked the plain fact that the claims were adjudicated on the merits, reduced to and merged into judgment, that Hansen was the real party in interest as those claims, and that enforcement of the settlement

would extinguish them due to the lapse of the statute of limitations and by the application of the principles of res judicata and claim preclusion.

The Court of Appeals' failure to review Hansen's appeal conflicts with *Bennett v. Hardy,* 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (holding that there is an exception to the rule of non-reviewability when the question affects the right to maintain an action). It results in the forfeiture of her claim, severe prejudice, and substantial injustice.

**2. An Ancillary Issue is Whether Hansen Was an Indispensible Party, and There is a Conflict Between Divisions 1 and 2 of the Court of Appeals on Whether the Absence of an Indispensible Party Deprives the Trial Court of Jurisdiction, Warranting Review Based on RAP 13.4(b)(2).**

In the event the issue of the enforcement of the settlement is reached, an ancillary issue is whether Hansen was an indispensible party in the those proceedings and whether the trial court lacked jurisdiction in her absence. If it lacked jurisdiction the enforcement order is void.

In a leading case, Division 2 of the Court of Appeals has held that a trial court lacks jurisdiction to adjudicate a dispute if all necessary parties are not before it. *Woodfield Neighborhood Homeowner's Assn. v Graziano*, 154 Wn.App. 1, 225 P.3d 246 (2009). See generally, Ende, D., 14 Wash. Prac., Civil Procedure, sec. 11.23 (3rd ed.)(2016). Division 1 has held that the matter is procedural. *MHM & F, LLC v. Pryor*, 168 Wn.App. 451, 277 P.3d 62 (2012).

### 3. A Second Ancillary Issue is Whether, Irrespective of the Jurisdictional Issue, Hansen's Absence Renders the Entire Settlement Void.

Hansen was a real party in interest in the suit, bud did not participate in the settlement. Without her consent the settlement is void, as it extinguishes her claims. *Ebsary v. Pioneer Human Services*, 59 Wn. App. 218, 796 P.2d 769 (1990) (holding that a settlement and release encompassing the claims of persons not represented in the settlement and having the effect of extinguishing their claims is null and void). (CP 403-04; 468-70; 504-507; 537-41)

The Court's Opinion states that *Ebsary* does not apply because Hansen was not a party. Opinion, at *8-9. But *Ebsary* would have been decided the same even if the persons not included were real parties in interest in the suit and represented by an agent or trustee, and not named parties. With Kosrovani having acted as her *de facto* representative, and Hansen having been a privy and a real party in interest, *Ebsary* applies.

The settlement is void and the order enforcing it must be vacated.

## C. The Court of Appeals Decision Conflicts With the Basic Right of Parties to Freely Contract and With Settled Law and Principles of Contract Construction as Established in Decisions of This Court and the Court of Appeals, Warranting Review Under RAP 13.4(b)(1), (b)(2), and (b)(4).

It is established Washington law and this Court has consistently held that "Washington courts are loathe to interfere with the rights of

parties to contract as they please between themselves." *Mgmt., Inc. v. Schassberger*, 39 Wn.2d 321, 326, 235 P.2d 293 (1951).

The courts of this state have also consistently adhered to the rule of contract construction that "prevent[s] courts from disregarding contract language the parties used," *Better Financial Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wn.App. 697, 711, 51 P.3d 108 (2002), and the further rule that courts do not add to the terms of a contract or impose obligations that the parties did not assume themselves, *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013); *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987). Lastly, courts in this state have consistently held that certain words in a contract express conditionality or contingency, guiding the construal of contracts. *Ross v. Harding*, 64 Wn.2d 231, 237, 391 P.2d 526 (1964)("Any words which express ... the idea that the performance of a promise is dependent on some other event will create a condition"); *Tacoma Park, LLC v. NW, LLC*, 122 Wn.App. 73, 96 P.3d 454 (2004)(Words such as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' suggest a *conditional* intent, *not a promise*).

The Court of Appeals Opinion flouts all of these rules and principles, concluding that, despite the plain and clearly expressed term in the agreement stating, "this settlement is *conditioned* upon execution of a full release," and despite its lack of any obligatory language requiring the

execution of a release, the settlement was *unconditional* and obligated Petitioner Kosrovani to execute a release whose terms he did not assent to.

The Opinion allows courts to improperly ignore, modify, and upset the balance of contractual rights between parties and to abandon the parties' freedom and right to contract. It disregards the contract language, adds to its terms, imposes an obligation the parties did not agree to, varies and contradicts the written word, and renders the term 'this settlement is conditioned upon' meaningless or legally ineffective.

A release being itself a contract, the holding is in conflict with the basic principle of freedom to contract. It implies that a party may not reserve the right to assent to a release to which he would be bound by means of a clear and unambiguous sentence expressing conditionality.

The Opinion undercuts the contractual rights of parties and their freedom to contract. Review is warranted as the preservation of the right is a matter of substantial public import.

**D. The Court of Appeals Decision Retroactively Conferring Jurisdiction to the Trial Court By Consent or Waiver Conflicts With the Holding of This Court in *Condon v. Condon*, With a Line of Its Own Decisions, and With Longstanding Traditional Doctrine on Subject Matter Jurisdiction, Warranting Review Based on RAP 13.4(b)(1) and (b)(2).**

**1. Traditional Doctrine and Established Precedent on Subject Matter Jurisdiction and Court Authority Were Violated.**

Under the analysis in *Condon,* at 158-59, a court's jurisdiction ceases after final judgment and, in order for the trial court to regain jurisdiction to enforce a settlement entered into after final judgment dismissal, it is necessary that the judgment be vacated under CR 60(b), the original action reinstated, and a motion to enforce the settlement be brought, or an original action for enforcement be instituted. Roger Jobs did not do any of this. It sought to enforce solely by postjudgment motion.

The Court of Appeals Opinion neglects *Condon*, and holds that, even though the trial court lacked authority in entering its enforcement order, the appeals Court may *retroactively* grant permission under RAP 7.2(e)(1) to confer authority to the trial court to enter that order. The Opinion is inconsistent with a line of cases in which that Court has held to the contrary, *i.e.*, that if a decision under review is modified without permission the appellate court will vacate or disregard the improper order. *State v. Moro,* 117 Wn.App. 913, 925, 73 P.3d 1029 (2003); *State v. Pruitt*, 145 Wn.App. 784, 793-94, 187 P.3d 326 (2008); *State ex rel. Shafer v. Bloomer*, 94 Wn.App. 246, 250, 973 P.2d 1062 (1999).

This line of cases is consistent with longstanding traditional doctrine adhered to by courts in this state that a judgment or order entered by a court lacking power, and without jurisdiction, is void from its inception and must be vacated. A jurisdictional defect cannot later be

remedied by consent or waiver. The holding directly conflicts with established legal doctrine, and the holdings of numerous cases, including *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 842 (1987)(Judgment entered by a court lacking in inherent power is void); *In re Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989)( A void order is void from its inception); *Allstate v. Khani*, 75 Wn.App. 317, 323, 877 P.2d 724 (1994)(Court has a *nondiscretionary* duty to vacate); and *In the Marriage of McDermott*, 175 Wn.App. 467, 307 P.3d 717 (2013)(Void judgment must be vacated even if matter settled years prior).

**E. The Court of Appeals Opinion Interpreting CR 2A Conflicts With the Rules of Statutory Interpretation and with that Court's Own Precedent, Warranting Review Based on RAP 13.4((b)(2).**

CR 2A provides that "[N]o agreement or consent between parties or attorneys with respect to a proceeding in a cause ... will be regarded ... unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same." The Opinion, purportedly based on the Court's own precedent, *In re Patterson*, 93 Wn.App. 579, 584-85, 869 P.2d 1106 (1999), held that the trial court did not err in enforcing the settlement under CR 2A, for though Kosrovani's attorney did not sign the agreement, the rule binds a party to who "undertakes settlement directly with the other party, reduces it to writing, and signs it" to the settlement.

The Opinion conflicts with *Patterson*, as the facts in the record fail

to provide any evidence of such an undertaking. Kosrovani also presented an affidavit with his motion for reconsideration attesting to facts to the contrary --that he did not even meet with or speak to the other party or its attorney. The Court's opinion interpreting CR 2A is in conflict with rules of statutory interpretation. The conjunction 'and' in the final clause implies that the clause is associated with *each disjunct* of the subject.

The holding also fails to comport with the established use of the key term, 'proceeding in a cause' and is in derogation of its proper construal. The language of CR 2A restricts its context and application to *prejudgment trial court* proceedings, not to an ongoing appellate review of a trial court decision. Where all causes have been dismissed, there is no longer a proceeding *in* a cause and the rule is inapplicable.

Where the requisites of CR 2A are not met the court has no authority to act and its judgment is void. *Long v. Harrold*, 76 Wn.App. 317, 884 P.2d 934 (1994).

**CONCLUSION.** This Court is asked to vacate the settlement enforcement orders, reverse the summary judgment dismissals, permit Hansen's joinder to bring her causes of action in equity, and remand to the trial court with instructions to assign to a new judge.

Respectfully submitted this 6th day of September, 2021.

Emilio M. Kosrovani, Ph.D., WSBA #33762
Petitioner and Attorney for Laurel D. Hansen, Co-Petitioner

CERTIFICATE OF SERVICE

EMILIO M. KOSROVANI declares under penalty of perjury under the laws of the State of Washington that on the 6th day of Sept., 2021, he served Elizabeth Berman Lovell and Alfred E Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent Roger Jobs Motors, Inc., with a copy of

Amended Petition for Review

by means of the electronic filing and service portal of the State of Washington Appellate Courts to Elizabeth Berman Lovell and Alfred Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent.

Dated this 6th day of Sept., 2021.

Emilio M. Kosrovani, Ph.D.
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# APPENDIX

FILED
7/6/2021
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | |
|---|---|
| EMILIO M. KOSROVANI, a single individual,<br><br>Appellant,<br><br>v.<br><br>ROGER JOBS MOTORS, INC. dba ROGER JOBS AUDI, VW, PORSCHE dba AUDI BELLINGHAM,<br><br>Respondents. | No. 80400-6-I (consolidated with No. 81332-3)<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION |

ANDRUS, A.C.J. — Emilio Kosrovani, an attorney, appealed the summary judgment dismissal of his pro se complaint against Roger Jobs Motors, Inc. (RJM). While that appeal was pending, Kosrovani and RJM entered into a Civil Rule 2A (CR 2A) settlement agreement that required him to execute a release of his claims, dismiss his lawsuit, and withdraw his appeal. Kosrovani refused to do so. The trial court granted RJM's motion to enforce the agreement and entered an order to that effect without this court's permission as required by RAP 7.2(e). Kosrovani then appealed the enforcement order. We retroactively grant permission to the trial court to formally enter the order enforcing the settlement. On the merits of Kosrovani's appeal of this order, we conclude the trial court did not err in deeming the settlement agreement enforceable. Because that agreement requires

Kosrovani to withdraw his appeal, his challenge to the summary judgment dismissal of his lawsuit against RJM is moot. We affirm the order enforcing the settlement agreement and dismiss the remaining appeal as moot.

## FACTS

RJM operates a car dealership and service department in Bellingham. On November 9, 2018, Kosrovani filed a pro se personal injury lawsuit against RJM asserting claims of premises liability, negligence, and loss of consortium on behalf of his domestic partner Laurel Hansen. The complaint alleged that on November 16, 2015, Kosrovani sustained "traumatic injury to his brain and severe neurological injuries" while walking towards the exit door of RJM's showroom.

On February 1, 2019, RJM moved for summary judgment dismissal of Kosrovani's claims on the ground that he lacked admissible evidence that RJM breached any duty owing to him or that RJM proximately caused the alleged injuries. RJM further argued that Kosrovani could not prosecute a loss of consortium claim on behalf of Hansen, who was not identified in the complaint as a party, because he was neither married nor in a state-registered domestic partnership with her as required by RCW 4.08.030. On March 8, 2019, the trial court dismissed Kosrovani's loss of consortium claim but continued the hearing on his remaining claims for one week.

Kosrovani opposed RJM's motion and submitted evidence, through witness declarations, medical records, and Social Security Administration correspondence, to support his claims. He also filed an amended complaint that omitted all claims arising from loss of consortium on Hansen's behalf and alleged that his injuries

were caused by exposure to an unknown environmental hazard or contact with electrical current or electromagnetic forces.

On March 15, 2019, the trial court granted summary judgment dismissal of Kosrovani's remaining claims. The court subsequently denied Kosrovani's motion for reconsideration. Kosrovani filed a notice of appeal.

On December 18, 2019, while the appeal was pending, Kosrovani and RJM mediated the dispute and entered into a "CR 2A Memorandum of Settlement." The agreement stated that "the above matter . . . has been settled at mediation on the following terms: Insurer will pay to the claimant's attorney in trust $15,000 . . . two weeks from obtaining the signed release." The agreement further provided that "[t]his settlement is conditioned upon execution of a full release of all claims by Claimants/Plaintiffs against Defendants and Defendant's insurers" as well as the following other agreed terms and conditions: (1) dismissal of the lawsuit and withdrawal of the appeal upon receipt of the funds, (2) acknowledgement that RJM's non-liability has been litigated and determined by the court, and (3) confidentiality of the settlement agreement. The agreement specified that "[o]ther than as stated above, there are no additional representations or agreements of the parties." Although Kosrovani was represented by counsel during the mediation, he signed the agreement himself. Counsel for RJM also signed the agreement.

Pursuant to the agreement, RJM sent Kosrovani a "Release and Settlement of Claims" for his signature. When Kosrovani refused to sign the release or dismiss the appeal, RJM filed a motion in the trial court to enforce the agreement.

Kosrovani opposed the motion and filed a motion for leave to file a second amended complaint joining Hansen as a party.

On February 28, 2020, the trial court granted RJM's motion to enforce the agreement but struck from the "Release and Settlement of Claims" document a paragraph relating to any reference to indemnification for subrogation claims. The court struck Kosrovani's motion to amend the complaint as moot. The court ordered Kosrovani to sign the amended version of the "Release and Settlement of Claims," dismiss all claims in the lawsuit, and withdraw his appeal. The court later denied Kosrovani's motion for reconsideration. Kosrovani appealed, and this court consolidated his two appeals for review.

ANALYSIS

Kosrovani challenges both the order enforcing the settlement agreement and the summary judgment dismissal of his claims against RJM. If we conclude that the trial court properly enforced the settlement agreement, then Kosrovani's challenge to the dismissal of his complaint will be rendered moot. "A case is moot when it involves only abstract propositions or questions, the substantial questions in the trial court no longer exist, or a court can no longer provide effective relief." Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). We therefore begin our analysis with Kosrovani's challenge to the enforcement order.

Kosrovani first contends the trial court lacked jurisdiction to enforce the postjudgment settlement agreement because RJM failed to follow the proper

procedure set forth in RAP 7.2(e) to pursue postjudgment relief at the trial court during the pendency of an appeal.

Under RAP 7.2(e), the trial court has authority to hear and determine:

> (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and
>
> (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.

RJM correctly notes that RAP 7.2(e) did not bar the trial court from considering RJM's postjudgment motion to enforce the settlement agreement. But Kosrovani is correct that the relief RJM sought, if granted, would affect the outcome of the summary judgment appeal by rendering it moot. Therefore, pursuant to RAP 7.2(e), RJM should have sought and obtained permission from this court to enter the order enforcing the settlement agreement before it was formally filed. Instead, RJM filed a motion in this court to dismiss the summary judgment appeal, which a commissioner dismissed as premature. We agree that RJM did not follow the proper procedure under RAP 7.2(e) to pursue postjudgment relief.

But this violation of RAP 7.2(e) does not mandate reversal. RAP 1.2 vests this court with discretion to overlook procedural imperfections. See RAP 1.2(a) ("[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits"). Had RJM sought permission to file the order, we would have granted it. And the parties have fully briefed the merits of their arguments regarding enforceability of the settlement agreement. We therefore

exercise our discretion to retroactively grant permission for the trial court to formally enter the enforcement order and reach the merits of the issue.[1]

Kosrovani argues the trial court erred by enforcing the settlement agreement because there is a genuine factual dispute as to its material terms. We disagree.

We review an order enforcing a CR 2A settlement agreement de novo, as with a summary judgment order. Condon v. Condon, 177 Wn.2d 150, 162, 298 P.3d 86 (2013). The party moving to enforce a settlement agreement has the burden of proving that no genuine dispute exists over the existence and material terms of the agreement. Brinkerhoff v. Campbell, 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000). We must view the evidence in the light most favorable to the nonmoving party and determine whether reasonable minds could reach but one conclusion. Condon, 177 Wn.2d at 162. If the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first resolving such issues following an evidentiary hearing. Brinkerhoff, 99 Wn. App. at 697.

CR 2A provides as follows:

> 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.

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[1] Kosrovani argues that RAP 7.2(e)(1) and (2) are inapplicable to RJM's motion. We agree that RAP 7.2(e)(2) does not apply in this situation. However, RAP 7.2(e)(1) authorizes the trial court to hear and determine "postjudgment motions authorized by the civil rules." Here, the postjudgment motion to enforce the CR 2A agreement expressly stated that the settlement was conditioned upon "dismissal of lawsuit and withdrawal of appeal." Because CR 2A applies to agreements "in respect to proceedings in a cause," the trial court was authorized to hear and determine RJM's motion pursuant to RAP 7.2(e)(1).

"The purpose of CR 2A is to give certainty and finality to settlements." Condon, 177 Wn.2d at 157. CR 2A applies to preclude enforcement of an agreement only when the agreement was made by the parties or attorneys "in respect to the proceedings in a cause" and the "purport" of the agreement is disputed. In re Marriage of Ferree, 71 Wn. App. 35, 40, 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." Cruz v. Chavez, 186 Wn. App. 913, 919-20, 347 P.3d 912 (2015). "A litigant's remorse or second thoughts about an agreement is not sufficient" to create a genuine dispute. Lavigne v. Green, 106 Wn. App. 12, 19, 23 P.3d 515 (2001). "Where the CR 2A requirements are met, a motion to enforce a settlement is a commonly accepted practice." Condon, 177 Wn.2d at 157.

Normal contract principles apply to the interpretation of a CR 2A settlement agreement. Morris v. Maks, 69 Wn. App. 865, 868-69, 850 P.2d 1357 (1993). We review a trial court's interpretation of the language of a contract de novo. In re Marriage of Pascal, 173 Wn. App. 836, 841, 295 P.3d 805 (2013). The primary objective of contract interpretation is to determine the parties' mutual intent at the time they executed the contract. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014). We do so by focusing on the objective manifestations of the agreement rather than the subjective intent of the parties. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "Courts will not revise a clear and unambiguous agreement or contract for

parties or impose obligations that the parties did not assume for themselves." Condon, 177 Wn.2d at 163.

Kosrovani first argues that the settlement agreement is unenforceable under CR 2A because it was not signed by the attorney who represented him at the mediation. He cites In re Patterson, 93 Wn. App. 579, 584-85, 969 P.2d 1106 (1999) for the proposition that a party's signature will suffice only if the parties enter into settlement without attorney involvement. Kosrovani reads this case too narrowly. In Patterson, the parties mediated and signed a CR 2A settlement agreement without their attorneys present. Patterson argued that the agreement was not enforceable because it was not signed by his attorney. This court, noting that "[t]he rule clearly anticipates that parties may directly enter into settlements," held that "[w]hen the party undertakes a settlement directly with the other party, reduces it to writing, and signs it, as in this case, the requirements of CR 2A are met just as if the attorney had participated." 93 Wn. App. at 585. Kosrovani, an attorney, was present with his counsel at the mediation. His signature on the agreement indicates his assent to its terms. The absence of his counsel's signature does not render the agreement unenforceable.

Kosrovani also argues that the CR 2A agreement is unenforceable without the signature of Hansen, whom he describes as a "claimant" and a "real party in interest." See Ebsary v. Pioneer Human Servs., 59 Wn. App. 218, 226-28, 796 P.2d 769 (1990) (upholding order vacating judgment based on settlement agreement that encompassed children's claims without authorization). But Hansen was not a party to the litigation below and is not a party to this appeal.

There is no dispute that the CR 2A settlement agreement does not extinguish her potential claims. Her signature is not required to make the settlement enforceable as against Kosrovani.

Kosrovani next contends that, under the terms of the CR 2A settlement agreement, his execution of a release was a condition precedent to the existence of a valid settlement agreement, and not a promise of future performance. He relies on the clause that reads "[t]his settlement is conditioned upon execution of a full release of all claims." He argues that this language evinces only a conditional intent, not a binding one, and that the settlement fails if the release is not executed for any reason. We disagree.

The agreement plainly states that the matter "has been settled" upon payment of the sum of $15,000. Kosrovani's interpretation would render the mediation process and the CR 2A settlement agreement pointless by giving him free rein to decide at a later date whether or not to actually sign the release he agreed to sign to settle the matter. "Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail." Better Fin. Sols., Inc. v. Transtech Elec., Inc., 112 Wn. App. 697, 712 n. 40, 51 P.3d 108 (2002) (quoting Byrne v. Ackerlund, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987)). Kosrovani's execution of the release was the required performance of his promise in the settlement agreement. His failure to execute the release breached that promise.

Lastly, Kosrovani maintains the CR 2A settlement agreement is unenforceable because it did not include all material terms as to the scope of the release. He points out that the "Release and Settlement of Claims" that RJM drafted contained a clause requiring him to indemnify RJM from any subrogation claims that his insurers and medical providers might have. The CR 2A agreement, as he correctly points out, was silent on this issue. But the fact that RJM included a provision over which the parties did not negotiate in the release document does not render unenforceable the remaining terms to which they did agree.

It is undisputed that Kosrovani agreed to dismiss his lawsuit against RJM and to withdraw his appeal as a part of the settlement. This language supports the conclusion that Kosrovani agreed to execute a general release; a dismissal with prejudice has the legal effect of precluding future claims. Condon v. Condon, 177 Wn.2d at 164. The trial court thus had the authority to compel Kosrovani to execute a general release.

A provision requiring a settling plaintiff to defend and indemnify a defendant from subrogation claims, however, is outside the scope of a general release and cannot be implied in a settlement agreement. Id. at 164. The trial court acknowledged that the "Release and Settlement of Claims," as proposed by RJM, included an indemnification provision that was not discussed in the CR 2A settlement agreement. The trial court correctly struck the indemnification clause from the "Release and Settlement of Claims" document because the parties had not agreed to it.

Kosrovani argues that the fact the trial court struck this language from the "Release and Settlement of Claims" proves that the parties had not reached agreement on all material terms. RJM, however, indicated that the indemnification clause was not material and it "offered to remove that language from the release, so that [Kosrovani was] not waiving those claims on behalf of other third parties." The court acknowledged this offer and removed the disputed indemnification clause from the release before ordering Kosrovani to sign it. The court did not require Kosrovani to accept a settlement term to which he had not agreed.

The trial court did not err in granting RJM's motion to enforce the CR 2A agreement and ordering Kosrovani to sign the amended "Release and Settlement of Claims" and to dismiss his claims. Because our decision moots Kosrovani's appeal of the dismissal of those claims, we need not reach the parties' arguments raised in that appeal.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Coleman, J.

FILED
7/29/2021
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| EMILIO M. KOSROVANI, a single individual,<br><br>Appellant,<br><br>v.<br><br>ROGER JOBS MOTORS, INC. dba ROGER JOBS AUDI, VW, PORSCHE dba AUDI BELLINGHAM,<br><br>Respondents. | No. 80400-6-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant, Emilio Kosrovani, has moved for reconsideration of the opinion filed in this case on July 6, 2021. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

For the Court:

Andrus, A.C.J.
Judge

FILED
7/29/2021
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| EMILIO M. KOSROVANI, a single individual,<br><br>Appellant,<br><br>v.<br><br>ROGER JOBS MOTORS, INC. dba ROGER JOBS AUDI, VW, PORSCHE dba AUDI BELLINGHAM,<br><br>Respondents. | No. 80400-6-I<br><br>ORDER DENYING MOTION TO PUBLISH OPINION |

Appellant, Emilio Kosrovani, has moved for publication of the opinion filed in this case on July 6, 2021. The panel hearing the case has considered the motion and has determined that the motion to publish should be denied. The court hereby

ORDERS that the motion to publish the opinion is denied.

For the Court:

Andrus, A.C.J.
Judge

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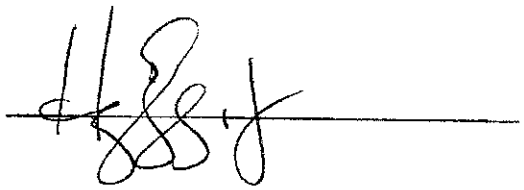
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

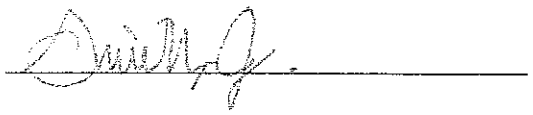
| | | |
|---|---|---|
| EMILIO M. KOSROVANI, a single individual,<br><br>Appellant,<br><br>v.<br><br>ROGER JOB MOTORS, INC., dba ROGER JOBS AUDI, VW, PORSCHE dba AUDI BELLINGHAM,<br><br>Respondent. | ) | No. 80400-6-I<br>(consolidated with 81332-3-I)<br><br>ORDER ON MOTIONS TO MODIFY |

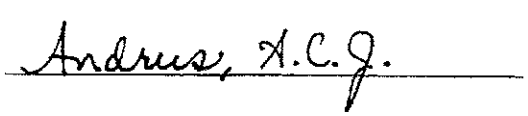
Appellant, Emilio Kosrovani, pro se, moves to modify (1) the commissioner's August 6, 2020, ruling denying joinder of Laurel Hansen, a non-party to the underlying lawsuit, and (2) the clerk/court administrator's September 9, 2020, ruling setting the date for his opening brief to be filed as September 25, 2020. Respondent, Roger Jobs Motors, has filed answers to both motions. Appellant has filed replies to respondent's answers. Having considered the motions under RAP 17.7, we have determined that appellant's motion to modify the commissioner's ruling should be denied. The due date for appellant's opening brief shall be extended to October 26, 2020. Now, therefore, it is

ORDERED that the motion to modify the commissioner's August 6, 2020, ruling is denied; and it is further

ORDERED that appellant's opening brief shall be due October 26, 2020.







RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
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CASE #: 80400-6-I (anchor case)
Emilio M. Kosrovani, Appellant v. Roger Jobs Motors, Inc., Respondent
CASE #: 81332-3-I (consolidated case)
Emilio M. Kosrovani, Appellant v. Roger Jobs Motors, Inc., Respondent

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on April 27, 2020:

> On August 28, 2019, appellant Emilio Kosrovani filed a notice of appeal seeking review of several orders of the Whatcom County Superior Court in Cause No. 18-2-02112-37. The matter was designated No. 80400-6-I in this Court. On April 14, 2020, Kosrovani filed a second notice of appeal, designated No. 81332-3-I in this Court, seeking review of certain post-judgment orders in the same trial court matter. Respondent Roger Jobs Motors, Inc., has filed a motion to stay the first appeal, No. 80400-6-I, pending resolution of the second appeal, No. 81332-3-I, contending that resolution of the second appeal will render the first appeal moot. Kosrovani opposes the stay and has filed a motion for consolidation of the two appeals and a motion to join Laurel Hansen as an appellant under RAP 5.3(i).
>
> Because the two appeals involve a single trial court matter, consolidation is appropriate. See RAP 3.3. Respondent's motion for a stay is denied. As to his motion to join Laurel Hansen as an appellant, Kosrovani fails to provide any basis to establish that Hansen was a party in the trial court, such that joinder under RAP 5.3(i) would be appropriate. The motion for joinder is denied at this time, without prejudice to Kosrovani or Hansen to renew such a motion on proper grounds.



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As the record is complete in No. 80400-6-I, which will be the anchor case in the consolidated appeal, Kosrovani shall file a supplemental designation of clerk's papers and supplemental statement of arrangements to complete the record necessary to review the orders attached to his second notice of appeal by May 11, 2020, and his opening brief addressing all his assignments of error, or a proper motion for extension of time, by June 15, 2020.

Going forward, all filings should be made in 80400-6-I only. You may reference the consolidated case but no documents should be filed in 81332-3-I. In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

No. 80400-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

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EMILIO M. KOSROVANI,, *Appellant*

v.

ROGER JOBS MOTORS, INC., *Respondent*

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# MOTION FOR RECONSIDERATION

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Emilio M. Kosrovani, WSBA #33762
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Appellant, and Attorney for
Nonparty Laurel Hansen

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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

**1. Identity of Party.**

Appellant Emilio Kosrovani requests the relief designated in Part 2

**2. Statement of Relief Sought.**

Kosrovani respectfully requests that the Court reconsider and withdraw its decision filed July 6, 2021 affirming the trial court and terminating review, and review the summary judgment dismissals appealed in the anchor case herein.

The decision states that appellate review of the trial court's summary judgment dismissals of Kosrovani and Hansen's claims is moot for the reason that Kosrovani settled the entire matter with Roger Jobs Motors and that, though it initially lacked permission to do so, the trial court is retroactively given authority by this Court to enforce the settlement. The Court upheld the settlement as enforceable as to Kosrovani but not as to his domestic partner Hansen.

**3. Facts Relevant to Matters at Issue.**

This is the appeal of two summary judgments entered March 8th and 15th, 2019 dismissing Kosrovani's personal injury action which was based on theories of premises liability, and dismissing the claims of his

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long-time cohabitant Laurel Hansen for loss of consortium. The appeal was filed under Case No. 80400-6-I ("Anchor case").

While the appeal was pending, Kosrovani signed a purported agreement to settle with Roger Jobs. Hansen was not involved in that agreement. The trial court entered an order dated February 28, 2020 enforcing the settlement and struck Kosrovani's motion for leave to amend to join Hansen. Kosrovani and Hansen jointly appealed the trial court's orders by filing a Notice of Appeal dated August 14, 2020. The latter was filed under Case No. 81332-2-I ("Consolidated Case")

**Relevant Additional Procedural Facts**.

In the ensuing proceedings to consolidate the two appeals, the following notation ruling dated April 27, 2020 was made by Commissioner Jennifer Koh:

> Respondent Roger Jobs Motors, Inc., has filed a motion to stay the first appeal, No. 80400-6-I, pending resolution of the second appeal, No. 81332-3-I, contending that resolution of the second appeal will render the first appeal moot. Kosrovani opposes the stay and has filed a motion for consolidation of the two appeals ....

Commissioner Koh denied Roger Jobs' motion. She granted Kosrovani's motion to consolidated the two appeals. Thereafter, Roger Jobs failed to move under RAP 17.7 to modify the Commissioner's ruling.

On August 6, 2020, the Commissioner entered an order denying

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Kosrovani's motion for joinder of Hansen in this appeal. On September 28, 2020, this Court denied Kosrovani's motion to modify that order.

**4. Grounds for Relief and Argument.**

**Preliminary Remarks and Motion to Certify.**

Appellant has assigned error and brought forth argument supported by the record that in the summary proceedings he has been deprived of his constitutional right to a fair and impartial tribunal, his right of access to the court was denied, that Judge Montoya-Lewis was biased against him and his case, and that the appearance of fairness was not maintained.

Motivated by the glaringly obvious desire to avoid offending Judge Montoya-Lewis and to shield the higher judiciary from embarrassment, this Court has refused to review the appeal of two summary judgments that comprise the anchor case. This is despite the Commissioner's ruling,

Having such a motive casts a dark cloud upon the impartiality of this Court and is inconsistent with the appearance of fairness doctrine. It evinces bias, prejudice, and a lack of independence, integrity, and impartiality, all of which contravene CANON 1, Rules 1.1 and 1.2, and CANON 2, Rules 2.2 and 2.3 of the Code of Judicial Conduct. The fact that Judge Montoya-Lewis is a member of the State Supreme Court is an external influence that has swayed this Court's conduct in breach of Rule 2.4. In failing to review the appeal of the two summary judgments, and in

issuing an opinion that is not rooted in objectivity, truth, the law, and principles of fairness, the Court has in breach of CJC Rule 2.6 and 2.7 failed to ensure the right of Appellant to be heard.

Given the circumstances, Judges Andrus, Coburn and Hazelrigg are requested to disqualify and recuse themselves, as required by CJC Rule 2.11, withdraw the filed Unpublished Opinion, and this Court is moved to certify this appeal to the State Supreme Court.

**A. RAP 2.4(a) Entitles an Appellant Full Review of the Decisions Designated in the Notice of Appeal.**

RAP 2.4(a) states that "[t]he appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal." The decisions appealed in the two appeals are appealable by right under RAP 2.2 and 6.1. In granting Kosrovani's motion to consolidate, and in denying Roger Jobs' motion to stay, this Court has already given its mandate to carry out a full review.

**B. The Holding of This Court on "Mootness" Severely Prejudices Kosrovani and Hansen.**

In denying the rights to a full appeal, the holding severely prejudices Kosrovani and Hansen. It implies that if, after the issuance of a mandate herein, the trial court were to vacate its enforcement order under CR 60(b) due to Respondent's post-order breach of confidentiality and violation of the order to seal, as alleged, Kosrovani and Hansen would be

deprived of the right to pursue their appeal of the summary judgments. The opportunity to reinstate their causes of action would be forever lost.

**C. Roger Jobs' Failure to Move to Modify the Commissioner's Ruling Foreclosed this Court from Reconsidering the Issue of "Mootness" that It Has Already Ruled Upon.**

Given Commissioner Koh's ruling requiring Kosrovani to brief the anchor case in its entirety, this Court is judicially estopped from invoking Roger Jobs' "mootness" argument that it has already rejected. Roger Jobs's failure to move to modify that ruling can only mean that it decided to accept the Commissioner's decision. It thus foreclosed this Court's consideration of the same issue. *Cf.*, *State v. Rolax*, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985)(holding in a criminal case that "failure to file a motion to modify a commissioner's ruling cuts off appellate review").

The Commissioner's ruling became the law of the case. This Court's election to reconsider Roger Jobs' "mootness" issue in the face of the clear and unambiguous order of the Commissioner, and despite Roger Jobs' failure to move to modify, contravenes procedural fairness and violates the appearance of fairness doctrine.

**D. Kosrovani Has Sufficiently Rebutted the "Mootness" Argument and This Court Has Failed to Heed His Rebuttal.**

In his Opening Brief, Kosrovani argued that the two summary judgments are void for the reason that the trial court violated Kosrovani's

constitutional right of access to the court and his right to a fair and impartial tribunal. Kosrovani was severely prejudiced by these violations.

In his Reply Brief, relying on the Restatement (Second) of Judgments (1982), sec. 16, cmt. *c*, Kosrovani argued that "where a detriment or prejudice is suffered incident to a judgment later declared void, courts issue orders that negate that prejudice." Reply Br. at 4. He reasoned that a settlement agreement, as well as an order enforcing the agreement, "entered in consideration of, or incident to, the dismissal later declared void is itself void." *Id.*, at 5. He urged that "[t]he enforcement of the purported settlement would be mooted by a holding of this Court ... that the summary judgment proceedings that came prior are void." *Id*, at 3.

This argument sufficiently rebuts and neutralizes Roger Jobs' "mootness" argument. It entails that this Court is necessarily required to review the appeal of the summary judgments and make a determination as to whether Kosrovani is correct and the judgments are indeed void.

### E. The Trial Court Lacked Jurisdiction in Entering Its Enforcement Order and Cannot Regain Jurisdiction By Means of Permission Retroactively Granted by the Appellate Court.

#### 1. The Mechanism for Regaining Jurisdiction is as Laid Out in *Condon v. Condon.*

Kosrovani's central argument based on lack of jurisdiction is that after the dismissal of the action by summary judgment the trial court's

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jurisdiction over the case and its subject matter ceased. This Court thereafter assumed jurisdiction.

Based on the analysis in *Condon v. Condon*, 177 Wn.2d 150, 158-59, 298 P.3d 86 (2013), in order for the trial court to regain jurisdiction to enforce a later settlement it is necessary that the dismissal judgments be vacated under CR 60(b), the original action reinstated, and a motion to enforce the settlement be brought, or an original action for enforcement be instituted. Opening Br. at 22-23.

The record is clear that Roger Jobs did not do any of this. It merely sought relief by postjudgment motion to the trial court.

This Court has neglected Kosrovani's central argument. Instead it has construed the mechanism of a trial court's regaining of jurisdiction after judgment during an appeal as an issue turning only upon this Court's grant of permission, given at any time, under RAP 7.2(e). This is error.

**2. Jurisdiction May Not Be Retroactively Conferred.**

Washington adheres to the traditional doctrine of subject matter jurisdiction which asserts that a judgment of a court lacking subject matter jurisdiction is void and forever subject to attack. Restatement of Judgments 2d, sec. 12, cmt. *a*. "Relief from the judgment ought to be granted in almost all circumstances." *Id.*, at sec. 69, cmt. *c*. Under the

traditional view, subject matter jurisdiction "*may not be conferred* by consent, waiver, or estoppel." *Id.*, cmt. *d* (emphasis supplied).

A judgment is void if entered by a court without jurisdiction of the parties or subject matter, or if entered by a court "which lacks the inherent power to make or enter the particular order involved." *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 842 (1987)(quoting *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)). A void order is void from its inception. *In re Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989).

The matter of a trial court's lack of jurisdiction is not a mere "procedural imperfection" or defect that can be remedied *post hoc* by any court by consent or waiver. A court has a *nondiscretionary* duty to vacate a void judgment. *Allstate v. Khani*, 75 Wn.App. 317, 323, 877 P.2d 724 (1994). Thus, jurisdiction may not be conferred retroactively; a lack of jurisdiction cannot be remedied *ex post facto*. Rather, when a court acts without jurisdiction, any order it has issued is void for want of jurisdiction and *must be vacated. Id.* This is so even if neither party objected to the court's exercise of subject matter jurisdiction and even if the controversy was settled years prior. *In the Marriage of McDermott*, 175 Wn.App. 467, 307 P.3d 717 (2013). This Court's ruling goes against long-established traditional doctrine on subject matter jurisdiction.

**3. Permission by this Court under RAP 7.2(e) Was Not**

**Availing to Roger Jobs to Invoke Jurisdiction.**

This Court's Opinion acknowledges that the trial court lacked authority, and therefore jurisdiction, in entering its enforcement order. But the Court holds that had Roger Jobs requested permission under RAP 7.2(e) permission would have been granted, and jurisdiction to the trial court conferred. For the following reasons, this is mistaken or irrelevant.

**a. Roger Jobs' Failure to Seek Permission Left the Trial Court Without Jurisdiction.**

Even if jurisdiction could have been conferred by permission, the clear fact is that Roger Jobs did seek such permission. Without it, the trial court lacked jurisdiction. What this Court would have done had permission been sought is not determinable and, therefore, irrelevant.

**b. Roger Jobs' Motion to Enforce Was Not Authorized Under CR 2A Which Applies Only to "Proceedings in a Cause."**

RAP 7.2(e) grants authority to the trial court so long as the postjudgment motion or action is *authorized* by the civil or criminal rules or by statute. For the reasons below, Roger Jobs' motion to enforce was not so authorized by CR 2A.

Referencing *In re Patterson*, 93 Wn.App. 579, 583, 969 P.2d 1106 (1999), Kosrovani has argued that CR 2A is not one such civil rule that may fall under RAP 7.2(e)(1) where an appeal is pending. This is so for

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the reason that CR 2A only applies to agreements "in respect to *a proceeding in a cause*." No such proceeding was pending.

This phrase has always meant and can be plausibly interpreted to apply only to causes of action *pending* before a court for adjudication. It has no application when a case has been dismissed on the merits and all causes merged into judgment.

There was no such proceeding pending when Kosrovani entered into the purported settlement. All causes belonging to him and to Hansen had been dismissed by the trial court. There cannot be any proceeding in causes that have been dismissed. Kosrovani Br. at 24.

An appellate court's review of a decision on the merits reduced to final judgment is not a proceeding *in* a cause. It is merely a review of the lower court's reasoning and basis for its decision. Without an analysis of the key term, 'proceeding in a cause,' this Court has merely assumed that an appellate review is such a proceeding and ignored the argument.

**c. Roger Jobs' Motion to Enforce Was Not Authorized Under CR 2A, as the "Memorandum" Was Not Subscribed to by Kosrovani's Attorney and Kosrovani Had No Direct Contact with Roger Jobs' Principal or Attorney at Mediation.**

**(i) The Plain Language of CR 2A Requires Subscription by the Attorney of a Represented Party.**

Kosrovani has argued that none of the requirements of CR 2A were met. Kosrovani Br. at 25. In particular, the requirement that the

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agreement "be in writing *and* subscribed by the attorneys denying the same" was not met. It is uncontroverted that he was represented by an attorney who handled all negotiations but who did not sign the agreement.

Court rules are interpreted like statutes and are subject to the principles of statutory construction. *State v. Royal*, 122 Wn.2d 412, 424, 838 P.2d 258 (1993). A court will not read into a statute missing language whether it believes the omission was intentional or inadvertent. *Christie v. Maxwell*, 40 Wn.App. 40, 696 P.2d 1256 (1985). A basic principal of statutory construction, *expressio unius est exclusio alterius*, provides that to express one thing implies the exclusion of the other. *State v. Williams*, 29 Wn.App. 86, 91, 627 P.2d 581 (1981). Omissions are deemed exclusions. *Id.* The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face the court must give effect to it. *Randy Reynolds & Associates v. Harmon*, 193 Wn.2d 143, 437 P.3d 677 (2019). Strict compliance is required for enforcement under CR 2A. *Bryant v. Palmer Coking Coal Co.*, 67 Wn.App. 176, 179, 858 P.2d 1110 (1992). Where requisites of CR 2A are not met, the court has no authority to act. *Id.* If it does, the judgment is void. *Long v. Harrold*, 76 Wn.App. 317, 884 P.2d 934 (1994).

The plain language of CR 2A requires subscription to the agreement by the attorneys representing a party. Though in its initial

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phrase the rule contemplates settlements reached directly by the parties, *In re Patterson*, 93 Wn. App. 579, 584-85, 869 P.2d 1106 (1999), this can only be plausibly interpreted to address situations where the parties are *unrepresented*. This is so because its proviso, "unless .. in writing and subscribed by the attorneys denying the same" clearly signifies that when a person is represented the signature of his or her attorney is required for the agreement to be enforced. The omission of language expressing the sufficiency of a party signature when represented by attorney excludes it.

**(ii) This Court's Opinion Wrongly Assumes Facts *Against* Kosrovani For Which Evidence is Entirely Lacking.**

The Court's Opinion, at 8, is based on the ruling in *In re Patterson* that "[w]hen the party undertakes a settlement *directly* with the other party and reduces it to writing, and signs it, ..., the requirements of CR 2A are met just as if the attorney had participated." *Id.* at 585 (emphasis supplied). *In re Patterson* was erroneously decided, and even if it was not it is clearly distinguishable from Kosrovani's case on factual grounds.

In the instant case, Kosrovani was represented by his attorney who negotiated the purported settlement; he did not represent himself at the mediation. Isolated in a separate room, he ***did not even meet*** or speak with Roger Jobs' attorney, Mr. Donohue, who signed the "Memorndum." Roger Jobs, the principal of Roger Jobs Motors, Inc. was not present at the mediation. Kosrovani has never met him or spoken to him. Kosrovani did

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*not* undertake settlement *directly* with the other party, nor did he reduce it to writing. He employed the services of attorney Chalmers Johnson and G.S. Jones, P.S. to do so. The fact that Kosrovani is an attorney is not relevant as he had no role as attorney in the process. Mr. Johnson handled all negotiations and was present at all times during the mediation. The handwritten insertions in the agreement are not Kosrovani's. Kosrovani did not draft the agreement, did not add to it, and had no role in reducing the agreement to writing. Decl. of Kosrovani attached.

The mediation process that took place cannot plausibly be deemed "undertaking a settlement *directly* with the other party." It differs starkly with the facts of *In re Patterson* where the parties mediated and signed the CR 2A agreement *without their attorneys even being present.*

**F. The "Memorandum" is Unenforceable as Its Enforcement Extinguishes Hansen's Claim and Deprives Her of the Pending Appeal of the Summary Dismissal of Her Claims.**

The Court's Opinion holds that Hansen's signature was not necessary because she was not a party and the agreement does not "extinguish her potential claims." Opinion, at 8. This ruling harbors errors and misconceptions.

**1. Hansen's Claims Are Not "Potential Claims," but Actual Claims that Were Adjudicated on the Merits and Reduced to Judgment.**

Hansen's claims were brought in trial court, argued on the merits at summary judgment, and dismissed. Kosrovani Br., at 41-44. They merged into judgment. That judgment has been appealed.

Kosrovani moved this Court to permit her joinder but was denied. That decision is in error.

**2. Hansen Was an Indispensible Party to the Enforcement Proceeding and the Trial Court Lacked Jurisdiction in Entering Its Order in Her Absence; the Order is Void.**

A trial court lacks jurisdiction to adjudicate a dispute if all necessary parties are not before it. *Woodfield Neighborhood Homeowner's Ass'n v Graziano*, 154 Wn.App. 1, 3, 225 P.3d 246 (2009). A party is necessary if that party's absence would impair its interest. *Id.*, at 4.

**3. Enforcement of the Purported Settlement *Does* Extinguish Hansen's Claims.**

The refusal of this Court to review the appeal of that judgment entails that Hansen's claims will be extinguished and forever barred by the principles of res judicata and claim preclusion. As has been previously argued at length in both trial court and in this Court, the enforcement of the settlement *would* extinguish Hansen's claims. See Appellant's Motion for Joinder of Laurel Hansen, at 11 ("Hansen's causes of action would be extinguished, without her approval and consent, if the court enforces the purported settlement of December 18, 2019. This works a 'forfeiture and injustice.'"); Appellant's Reply to Opposition to Motion for Joinder of

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Laurel Hansen, at 11; Motion to Modify Rulings, at 7 and 10; Reply to Respondent's Response to Motion to Modify Rulings, at 9, filed in this Court, and CP 468-69, 504-08, and 539-41. This Court has misapprehended this fact and overlooked its centrality in this appeal. The matter of the effect of the purported settlement on Hansen has been strenuously controverted all along.

A nonparty may have a concurrence of identity with a party for res judicata purposes if the nonparty is in privity with a party. *Stevens Couny v. Futurewise*, 146 Wn.App. 493, 503, 192 P.3d 1 (2008). A party has privity with a nonparty if the party adequately represented the nonparty's interests in the prior proceeding. *Id.* (internal citation omitted).

It is apparent that Hansen has been in privity with Kosrovani and that Kosrovani represented her in the underlying action wherein summary judgment dismissing her claim was granted and in the appeal thereof herein. If so, res judicata and claim preclusion principles would render the conclusion that Hansen may not further pursue her claim in trial court. Thus, her claims are extinguished if the purported settlement is enforced.

**4. Hansen's Non-Party Status is Irrelevant.**

The fact that Hansen was not a party in the underlying action is irrelevant, as her claims were adjudicated on the merits and merged into judgment under the doctrine of merger. The claim for loss of consortium

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was Hansen's claim. It was not Kosrovani who claimed to have suffered the loss. Hansen was the claimant, and a real party in interest under *Rinke v. Johns Manville*, 47 Wn.App. 222, 734 P2d 533(1987). See Kosrovani Br. at 25-26 and 49.

**5. A Mistaken Exegesis of Procedural Facts May Underlie the Court's Misapprehension.**

This Court's ruling may be founded on the presupposition that the claim and cause of action belonging to Hansen in the original Complaint were abandoned once the Amended Complaint was filed. But they were not abandoned as (a) they had already been adjudicated on the merits, reduced and merged into judgment, and (b) the Amended Complaint did not take effect as it was never served upon Roger Jobs pursuant to CR 5(a). (See Roger Jobs' admission at CP 241; Reply to Roger Jobs' Opposition to Motion for Joinder of Laurel Hansen, at 3, 9.)

**6. Kosrovani Lacked Authority to Settle Hansen's Claims; Lacking Her Consent, the Settlement Must Be Vacated.**

Following *Ebsary v. Pioneer Human Services*, 89 Wn.App. 218, 796 P.2d 769 (1990), where the claims of persons are settled without their authorization the settlement collapses in its entirety and any order or judgment approving or enforcing it is vacated. *Ebsary* was decided on the finding that there was no authority on the part of the Department of Labor and Industries to settle the claims of the decedent's adult children, no

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participation in the negotiations by the children, and no attempt to settle with them. Yet the signed agreement operated as a release of their claim. There is no indication or basis that the ruling of the court in *Ebsary* would have been any different had the children been mere holders of claims but not parties or litigants in the lawsuit. The children's vested rights to compensation accrued at the time of their father's death.

The facts are similar in the instant case where Kosrovani lacked the authority to settle Hansen's claim, there was no negotiation of her claim, and no participation by her in the mediation. Reply Br. at 30; (CP 403-404; RP 11-12). She never signed the "Memorandum." As noted in Reply Br., at 30, Kosrovani's authority was severely curtailed by Hansen, such that he could not represent her at the mediation. (CP 554-56)

**G. The Construction of the Agreement in Accord With the Plain Meaning Rule Supports Kosrovani's Position.**

**1. The Purported Agreement Is Conditional on Its Face.**

Kosrovani has argued that the "Memorandum" is by its terms a conditional instrument, the acceptance and execution of a later release being a condition precedent the satisfaction of which is required to ripen his contractual promise to settle. Kosrovani has supported his argument by reasoning that the plain language of the "Memorandum" contains the term, "This settlement is *conditioned* upon execution of a full release ...," a term that, pursuant to extensive case law, carries the meaning of a

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conditional intent, not a promise. Kosrovani Br. at 27-28. He has pointed out that that sentence takes as its subject the *settlement itself*, not its effectuation or implementation. *Id.* at 28. Still further, he has noted that the "Memorandum" fails to contain any obligatory language such as "Claimants *shall* execute a release," or "... *agree* to sign a release." Its contractual clause does not have scope over its condition clause, *id.* at 28-29, and courts do not impose obligations on parties that they did not assume themselves. *Id.*, at 29.

The Court's Opinion disagrees, reasoning that

> "[t]he agreement plainly states the matter 'has been settled' upon payment of the sum of $15,000. Kosrovani's interpretation would render the mediation process and the CR 2A settlement agreement pointless by giving him free rein to decide at a later date whether or not to actually sign the release he agreed to sign to settle the matter." Opinion, at 9.

With due respect, the Court is conflating contract *construction* with contract *interpretation*. As the analysis in his Opening Brief, citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) and *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944) lays out, "construction ... is the determination of the *meaning* of terms within a contract and their legal effect." Kosrovani Br. at 26. "Interpretation is a process where the parties' *intent* is ascertained by considering, *inter alia*, extrinsic evidence. *Id.* Interpretation is a question of fact; construction is a matter of law. In construing a contract, the "plain

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meaning rule" is employed: Words are given their ordinary, usual, and popular meanings. *Id.* at 27. The court does not attempt to ascertain what was intended, only what was written. *Id.* at 26. The time-worn expression is, "the court only looks at the four corners of the contract."

Kosrovani further cited to *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn.App. 73, 96 P.3d 454, 457 (2004) in support of the proposition that in *construing* the language of a contract, words such as 'on condition' or 'conditioned upon' mean that any promise being made is subject to a condition precedent. Contrary to the Court's contention, Kosrovani is *not interpreting* the contract.

The "Memorandum" employs such a term and, thus, is conditional on its face. It plainly says that the *settlement*, itself, is conditional. Kosrovani Br. at 28. This goes to the very essence of the contract. "It concerns the *very fact* and *existence* of the settlement." *Id.*

Looking at its textual language alone and only within the four corners of the instrument, Kosrovani's construal depicts the plain and obvious meaning of the "Memorandum."

**2. The Reasoning of the Court's Opinion in Construing the "Memorandum" is Unpersuasive.**

The Court reasons that the construal urged by Kosrovani renders the agreement "pointless" because it would give him "free rein to decide later whether or nor to sign the release he agreed to sign." This is

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mistaken for several reasons. *First*, it presupposes what is at issue, *i.e.*, whether or not he did agree to sign a release. Under the plain language construal, there is no obligatory language that states he did agree or that requires him to sign a release. Instead, the plain language makes the instrument *conditional* upon him signing a release: If he fails to sign, there is no settlement. Given this language, it cannot, without begging the question, be assumed that he did agree to sign a release.

Secondly, instead of "pointless," the plain language construal renders the agreement into a contract to negotiate. Kosrovani Br. at 32-33, citing *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004). Contingent and conditional agreements requiring the meeting of the minds as to a further document are very frequently reached at mediation. It is not "pointless" to agree on some things and leave others for future negotiation. A lack of finality reached in one sitting does not render a settlement agreement "pointless."

The Court is implicitly importing into the process of contract construal the intent or expectation of finality that Roger Jobs may have had in engaging in the mediation process. But that is not contract construction; it is interpretation in view of surrounding circumstances.

### 3. The Case Law Cited by the Court's Opinion Does Not Support Its Holding.

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The Opinion cites *Better Financial Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wn.App 697, 712 n. 40, 51 P.3d 108 (2002) and *Byrne v. Ackerlund*, 108 Wn.2d 445, 453-54, 739 P.2d 1138 (1987) for the rule that "[w]here one construction would make a contract unreasonable, and another, *equally consistent with its language*, would make it reasonable, the latter more rational construction must prevail" (emphasis added.). Both cases deal with contract *construction*, not interpretation.

But the former also held that that there exists "the rule for the construction of contracts that prevents courts from disregarding contract language the parties used." *Better Financial* at 711. In the case herein, this Court's construal of the key clause, 'this settlement is conditioned upon execution of ...' does just that. It disregards the contract language that clearly expresses contingency or conditionality.

In *Byrne*, the key issue was whether the lien of a former wife against property awarded to her former husband by an agreed dissolution decree could be executed to effect a forced sale where the decree stated that the lien was "payable upon the voluntary or involuntary transfer of the property." The court's decision turned on the construction of the "involuntary transfer" portion of quoted phrase It held that "the rational construction of 'involuntary' suggests ... a foreclosure or similar events," and the decree does not grant the wife the right to force a sale. *Id.* at 454.

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The key to the court's reasoning in *Byrne* in the application of the first-quoted rule was that the two possible constructions were *equally consistent with its language.*

In the case herein, the two different constructions of 'this settlement is conditioned upon ...' are *not* equally consistent with the language. The Court's construal disregards and is in derogation of the plain meaning of the key term, 'conditional.' Moreover, it imposes an obligation on Kosrovani that is not contained in the contract. Courts do not add to the terms of a contract or impose obligations that the parties did not assume themselves. *Condon,* at 163; *Byrne*, at 455.

Even if by the operation of law the imposition of such an obligation is presumed where a contract is silent on the issue of a release, *Condon, supra,* the parties have a right to contract around it, which they did in this case. They made it a condition precedent.

The construal of the key clause as expressing a condition precedent is not unreasonable. Its benefits include providing the opportunity for a plaintiff in a personal injury action to enter into a tentative settlement, then tender the case to his first party insurers and allow them to purchase his rights in the case against the tortfeasor.

**H. The Court's Opinion Entails that There Was A Disputed Issue of Material Fact Raised for the Purposes of CR 2A**

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### 1. The Opinion's Ruling that Kosrovani Breached the Agreement is Mistaken.

The Court's Opinion grants that the "Memorandum" and Release contain a provision requiring Kosrovani to defend and indemnify Roger Jobs from subrogation claims which was not discussed by the parties and not agreed to by Kosrovani. Opinion, at 9-11. But the Opinion nonetheless maintains that Kosrovani breached the contract, and endorses Roger Jobs' claimed right to seek its enforcement. *Id.* This is error.

### 2. Roger Jobs Did Not Have a Right to Immediate Performance and the Judicial Remedy of Enforcement Was Not Available to It.

If the provision was not agreed to, then Roger Jobs' act of including it in the Release represented a *material* change to the terms of the contract. It demanded that Kosrovani accept a *new* obligation. Though there is an implied duty of good faith and fair dealing imposed by every contract, that duty does not extend so far as to require one party "to accept a new obligation which represents a material change in the terms of the contract." *Betchard-Clayton, Inc. v. King*, 41 Wn.App. 887, 890, 707 P.2d 1361 (1985). Since Kosrovani did not give consent to this material change and did not accept the new obligation, there was no right of immediate performance held by Roger Jobs and no breach of contract by Kosrovani. See *id.*, at 890-91. Judicial remedies such as specific

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performance did not become available to Roger Jobs. *Id.* Its act of commencing enforcement proceedings was improper.

**3. In the Least, the Inclusion of Additional Material Terms to the "Memorandum" Raised an Issue of Material Fact as to Its Existence and Enforceability.**

The fact that the contract was represented to the trial court by Roger Jobs as being inclusive of the provision on indemnity and subrogation that Kosrovani had not agreed to, together with the claimed right to enforce the contract as presented, gave rise to an issue of material fact as to the existence and enforceability of the agreement. Kosrovani's presentation to the trial court sufficiently raised the issue.

**4. The Trial Court Abused Its Discretion in Failing to Hold an Evidentiary Hearing.**

If Kosrovani successfully raised an issue of material fact then the trial court abused its discretion in enforcing the contract without first holding an evidentiary hearing. Kosrovani Br. at 33-34; *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 698, 994 P.2d 911 (2000); *Condon*, at 161-2.

**I. The Extrinsic Evidence Produced at the Hearing and at Reconsideration Was Sufficient to Trigger Evidentiary Hearing.**

In contract interpretation, the ascertaining of the parties' intent is the primary goal of the trial court. The context rule, developed in *Berg*, *supra*, at 667, recognizes that intent of the parties cannot be ascertained without examining the context surrounding the execution of the contract.

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Extrinsic evidence may include all the circumstances surrounding the making of the contract, the subsequent acts, and conduct of the parties.

The trial court's allowance of extrinsic evidence by Kosrovani was sufficient to trigger a full evidentiary hearing. Kosrovani Br. at 34-35. The evidence showed that Kosrovani intended a provisional contract that enabled him to make first party insurance claims and tender the lawsuit to his or Hansen's insurers. Enforcement and dismissal of the lawsuit defeated his purpose and prejudiced the rights of the insurers. *Id.*

**CONCLUSION**

There are multiple defects in the execution of the settlement contract that render it unenforceable: the lack of endorsement by Kosrovani's counsel, the nonoccurrence of direct settlement, the noninvolvement of Hansen, and the res judicata effect of extinguishment on Hansen's claim. There are jurisdictional defects and the issues of an agreement being voidable when entered into after void judgments.

Lastly, there are issues entailed by the Opinion having to do with the right of Respondent to commence enforcement proceedings, the trial court's failure to regard the summary judgment process, and the existence of a genuine issue of material fact as to the contract's existence.

This Court is respectfully requested to withdraw its Opinion and certify this appeal to the State Supreme Court.

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DATED this 25th day of July, 2021.

Respectfully Submitted,

Emilio M. Kosrovani, WSBA #33762
Appellant and Attorney for nonparty Laurel Hansen

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## DECLARATION OF EMILIO M. KOSROVANI

I, Emilio M. Kosrovani, declare as follows:

1. I am 69 years old, competent to be a witness, and personally knowledgeable about the facts in this Declaration.

2. Except for the motion for reconsideration hearing of July 22, 2019 and the mediation that took place on December 18, 2019, I represented myself and Laurel Hansen in the underlying action brought under Whatcom County Superior Court cause no.18-2-02112-37. I had no authority to represent Hansen at the mediation. I have continued to represent myself and Hansen herein in the Court of Appeals.

3. I employed the services of attorney Chalmers Johnson of G.S. Jones, P.S. to represent me at the mediation. Mr. Johnson did not represent Hansen.

4. At the mediation, Mr. Johnson was present at all times and handled all negotiations. I was isolated in a separate room and never met, spoke with, or communicated in any other way, such as by electronic means, with Mr. Donohue who was representing Roger Jobs Motors, Inc. The mediator and Mr. Johnson shuttled back and forth between the room I was in and where Mr. Donohue was stationed. Mr. Roger Jobs, the principal of Roger Jobs Motors, Inc., was not present. Without his

presence and with no opportunity to meet or speak with Mr. Donohue, I did not reach a settlement directly with either Mr. Donohue or Mr. Jobs.

5. I did not draft the document entitled "2A Memorandum of Settlement" (CP 595). Except for my signature and initials, I did not add to it or amend it. The handwritten insertions and added provisions in the document are not mine. Mr. Johnson added a confidentiality clause on my behalf. I had no role in reducing the agreement to writing. I had no role as an attorney in the mediation process and relied entirely on Mr. Johnson's legal advice.

6. Hansen was with me at the mediation but not a participant in it. She opposed the settlement and vigorously voiced her opposition.

7. At no time during the mediation were the terms of a release discussed or even mentioned. I was never presented with or shown a draft release at the mediation. Nor was one presented to my counsel.

8. In the weeks subsequent to the mediation, counsel for Roger Jobs Motors first contacted Mr. Johnson, not me, about the release.

I certify under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

Executed on this 25th day of July, 2021 at Bellingham, WA.

Emilio M. Kosrovani

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CERTIFICATE OF SERVICE

EMILIO M. KOSROVANI declares under penalty of perjury under the laws of the State of Washington that on the 25th day of July, 2021, he served Elizabeth Berman Lovell and Alfred E. Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent Roger Jobs Motors, Inc., with a copy of

Motion for Reconsideration;
Declaration of Emilio M. Kosrovani

by means of the electronic filing and service portal of the Court of Appeals to Elizabeth Berman Lovell and Alfred Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent.

Dated this 25th day of July, 2021.

Emilio M. Kosrovani, Ph.D.
Attorney at Law

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No. 80400-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION ONE

---

EMILIO M. KOSROVANI,, *Appellant*

v.

ROGER JOBS MOTORS, INC., *Respondent*

---

# APPELLANT'S MOTION TO PUBLISH

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Emilio M. Kosrovani, WSBA #33762
P.O. Box 3102
Bellingham, WA 98227
(360)647-4433
Appellant, and Attorney for
Nonparty Laurel Hansen

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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

**1. Identity of Moving Party.**

Appellant Emilio Kosrovani requests the relief designated in Part 2 on behalf of himself and nonparty Laurel Hansen.

**2. Statement of Relief Sought.**

Kosrovani respectfully requests that in the event the Court denies his Motion for Reconsideration, filed herewith, the Court publish its decision filed July 6, 2021 pursuant to RAP 12.3(e).

**3. Facts Relevant to Matters at Issue.**

The Court issued its Unpublished Opinion, *Kosrovani v. Roger Jobs Motors, Inc*, *noted at* 2021 WL2808996, on July 6, 2021 affirming the trial court's order enforcing a settlement agreement. It declined, based on mootness, review of two summary judgments dismissing Kosrovani's personal injury action and Hansen's claim for loss of consortium.

In his Motion for Reconsideration, Kosrovani has asked this Court to withdraw and reverse its opinion and certify this appeal to the State Supreme Court.

RAP 12.3(e) provides, in pertinent part, that "[a] motion requesting the Court of Appeals to publish an opinion that has been ordered filed for public record should be served and filed within 20 days after the opinion

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has been filed." The rule is silent, as is RAP 12.4, as to the effect of the filing of a timely motion for reconsideration upon the time limit for filing a motion to publish. Whether the time limit is extended by the filing of the former is unclear. In the exercise of caution, Kosrovani is filing both motions simultaneously.

RAP 12.3(e) also permits a nonparty to move to publish. Hansen has an interest herein for the reason that the summary judgment dismissal of her claim for loss of consortium has been under appeal. She is the real party in interest as to the cause of action in which her claim was litigated. The decision of the Court affirming enforcement of a settlement that she was not involved in severely impacts her by extinguishing her claim.

**4. Grounds for Relief and Argument.**

**Ruling on Jurisdiction and the Authority of the Trial Court**

The Opinion acknowledges that, due to Roger Jobs' violation of RAP 7.2(e), the trial court lacked authority, and therefore jurisdiction, in entering its enforcement order. Opinion at 5. But the Court describes the violation as a "procedural imperfection" that does not mandate reversal and may be remedied by the exercise of discretion by this Court under RAP 1.2 to retroactively confer jurisdiction. *Id.*, at 5-6.

The Opinion's holding conflicts with longstanding doctrine in this state that a judgment or order entered by a court lacking power, and

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without jurisdiction, is void from its inception and must be vacated. A jurisdictional defect cannot later be remedied by consent or waiver. This Court's holding directly conflicts with established legal doctrine, and the holdings of numerous cases, including *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 842 (1987)(Judgment entered by a court lacking in inherent power is void); *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968)(same); *In re Marriage of Leslie*, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989)( A void order is void from its inception); *Allstate v. Khani*, 75 Wn.App. 317, 323, 877 P.2d 724 (1994)(A court has a *nondiscretionary* duty to vacate a void judgment); *In the Marriage of McDermott*, 175 Wn.App. 467, 307 P.3d 717 (2013)(Void judgment must be vacated even if controversy was settled years prior).

The Court's holding lacks precedent altogether and breaks new legal ground.

The Opinion further holds that the trial court had authority to enter an enforcement order under CR 2A during the pendency of the appeal for the reason that "CR 2A applies to agreements 'in respect to proceedings in a cause'" and the trial court was authorized to hear and determine RJM's motion pursuant to RAP 7.2(e)(1). Opinion, at 6, n. 1.

Without an analysis of the key term, 'proceeding in a cause,' and with an unreasoned application of that term to an appellate review, this

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Court's holding breaks new legal ground. It implies that there was a proceeding *in a cause* even though all causes had been dismissed. The holding fails to comport with the established use of the term, is in derogation of the proper construal of the rule under the principles of statutory interpretation, fails to attach meaning to the preposition 'in' occurring therein, and raises questions as to how an appellate review is such a proceeding when no testimony is permitted and no evidence taken. It fails to acknowledge the intent of the state Supreme Court, as evident in the language of CR 2A taken as a whole, that the rule be applied to prejudgment *trial court* proceedings awaiting adjudication on the merits. CR 2A is a trial court rule and the context to which it refers is clearly that of a *trial court proceeding*, not an appellate review. *Cf.*, *In re Marriage of Ferree*, 71 Wn.App. 35, n. 6, 856 P.2d 706 (1993)("We do not mean to include settlement agreements not related to the proceedings in a cause.") The holding of this Court is to the contrary and thus modifies an established use of a legal term or determines a new question of law under RAP 12.3(a)(3) and (4).

The Opinion further holds that merely because Kosrovani was an attorney and "was present with his counsel at the mediation," he undertook the settlement *directly* with Roger Jobs Motors, and "the absence of his counsel's signature does not render the agreement unenforceable."

Opinion, at 8. It is purportedly based on *In re Patterson*, 93 Wn.App. 579, 583, 969 P.2d 1106 (1999), where the parties, though represented, met with one another in the absence of their counsel, reached agreement, and reduced it to writing by themselves. The Court's holding extends *In re Patterson* to the situation herein where Kosrovani's counsel handled all negotiations, was present at all times during the mediation, and where Kosrovani never even met the other party or its counsel, did not communicate with either, and did not draft, add to, or otherwise reduce the purported agreement into writing.

The Opinion thus adopts a novel expanded definition of '*directly undertaking to settle*,' applies it to the fact pattern herein, and thereby modifies the established precedent of *In re Patterson*. It does so without any analysis of the textual content of CR 2A by employing rules of statutory interpretation, and is in derogation of its plain language. It reads into the rule omitted language and implies that a party plaintiff who is an attorney acting *pro se* may never hire an outside attorney and allow him to solely assume the role of his counsel and negotiator, without the party plaintiff being implicated as the one who "*directly* settled" with the other party or its counsel. The fact that the plaintiff did not even meet with or communicate with the other party or its counsel does not, as implied by the Opinion, make any difference or make the settlement indirect.

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**Ruling on the Conditional Nature of the Settlement Agreement.**

Disregarding the plain language of the agreement which states, "the settlement is *conditional* upon the execution of a release," the Opinion construes Kosrovani's promise to settle as an *unconditional* promise that obligates him to execute a general release. The construal ignores the common meaning of 'conditional upon,' and is contrary to the principles of contract construction, as it is *not consistent with* the plain language of the agreement and *disregards* that language. It is in direct conflict with major case law holding otherwise. These cases include *Ross v. Harding*, 64 Wn.2d 231, 237, 391 P.2d 526 (1964)("Any words which express ... the idea that the performance of a promise is dependent on some other event will create a condition"); *Tacoma Park, LLC v. NW, LLC*, 122 Wn.App. 73, 96 P.3d 454 (2004)(Words such as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' and 'after' suggest a conditional intent, not a promise); and *Lokan & Assoc. v. American Beef Processing*, 177 Wn.App. 490, 911 P.3d 1285 (2013)(The intent of the parties to create a condition precedent may often be illuminated by phrases and words such as 'on condition,' 'provided that,' 'so that' ...).

The Opinion is not supported by the case law, *Better Financial Solutions, Inc. v. Transtech Elec., Inc.*, 112 Wn.App. 697, 51 P.3d 108 (2002) and *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987),

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cited by the Opinion, which apply in circumstances where two constructions of a single term are *equally consistent with* the contract's language.

Further, ignoring that the instrument lacks any obligatory language committing Kosrovani to a promise to sign a release, the Opinion's construal fails to regard the rule that courts do not add to the terms of a contract or impose obligations that the parties did not assume themselves. The Opinion is in conflict with, *inter alia*, *Condon v. Condon*, 177 Wn.2d 150, 163, 298 P.3d 86 (2013) and *Byrne, supra*, at 455.

The Opinion modifies and extends the law of contracts in holding that an implied obligation to sign a general release exists in every settlement contract, *even when the parties have by their own words explicitly made it a condition precedent instead.* This is not what *Condon* held. It held that a general release is implied where the plaintiff manifests an *unconditional* intent to dismiss the lawsuit upon receipt of monetary consideration. Such is not the case herein where Kosrovani's promise to settle, per the literal language of the contract, was *conditional.* It was conditional on the execution of a release.:

The Opinion mistakenly states that "Kosrovani agreed to dismiss his lawsuit," implying he unconditionally did so, and, citing *Condon,* asserts that "a dismissal with prejudice has the legal effect of precluding

future claims." Opinion, at 10. But from the actual words in the contract such an unconditional intent to dismiss may not be imputed Moreover, there was *not even a lawsuit to dismiss* at the time the contract was signed, as the case had long been dismissed, with prejudice, prior to that time by summary judgment entered by the trial court on March 15, 2019.

A release being itself a contract, the holding is in conflict with the basic principle of freedom to contract. It is also in conflict with *Hearst Communications v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005) as to the principle in contract interpretation that limits consideration of surrounding circumstances "to determin[ing] the meaning of *specific words and terms used* and not to show an intention independent of the instrument or to *vary, contradict or modify the written word*" (last emphases supplied; internal quotations omitted). The construal varies, contradicts, and modifies the written word. It renders the clause 'this settlement is conditioned upon' meaningless. The subject of that clause is the settlement itself, not its effectuation or implementation.

The Court's reasoning suggesting that the construal indicated by the plain language and literal meaning of the instrument is somehow irrational or unreasonable merely because it does not enable a final resolution of the dispute in one single sitting at mediation, is without precedent and contrary to what commonly takes place in many

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settlements. It is inconsistent with the principle endorsed in *Keystone Land & Development v. Xerox*, 152 Wn.2d 171, 94 P.3d 954 (2004) that an intention to do something, such as execute a release. "is evidence of future contractual intent, *not the present contractual intent essential to an operative offer*." *Id.*, at 179 quoting *Pac. Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 556, 608 P.2d 266 (1981). It implies that a party to a settlement contract negotiation is acting unreasonably if he insists upon and reserves the right to read and assent to a release to which he would be bound, or else that such a reservation of right may not be made by means of a simple sentence expressing contingency or conditionality. This implication modifies the established law of contracts as applied to settlement contracts.

**Issue of Existence of Genuine Dispute over the Material Terms and Existence of Contract.**

The Court agrees with Kosrovani on the fact that the CR 2A agreement was silent on the issue of indemnification of Roger Jobs from subrogation claims of Kosrovani's medical providers and insurers, and that Kosrovani did not agree to such a provision. Opinion, at 10. Nonetheless, it holds that "the fact that RJM included a provision over which the parties did not negotiate in the release document does not render unenforceable the remaining terms to which they did agree." *Id.*

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The Court's holding is in conflict with the summary judgment process that enforcement proceedings follow, as established in *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 696, 994 P.2d 911 (2000) and *Condon,* at 161. It fails to follow the rule in summary judgment proceedings whereby the moving party needs to meet his or her initial burden of proof, and if he or she does, only then is the burden shifted to the nonmoving party. Roger Jobs came to court contending that the indemnification and subrogation clauses of the release, as well as its other provisions, were all mutually agreed to, even though Kosrovani and his counsel had not even been presented with a draft of the release at mediation. It could not support that contention and withdrew it in its reply brief. It thus defeated its own initiated proceeding. Even if its burden was met, Kosrovani successfully defeated the contention, thus raising a genuine issue of material fact over just what the material terms of the contract are. That triggered an evidentiary hearing to determine the intent of the parties and the terms of the agreement. Where such an issue over material terms is raised, a court abuses its discretion if it refuses to hold an evidentiary hearing. *Id.*

The Court's holding is in disregard of the summary judgment process that such an enforcement action necessarily must follow, fails to acknowledge the legal effect of the enforcement upon the subrogation claims of third parties, and relies solely on what Roger Jobs regarded as

"material," not on a legal definition of 'materiality' defined by case law. Opinion, at 11. It leaves the issue of what a nonmoving party needs to do to raise an issue of material fact over the existence and terms of a contract cloudy. Summary judgment proceedings are conducted with evidence viewed in the light most favorable to the nonmoving party. Only when reasonable minds would reach but one conclusion may summary judgment be granted. Even if a general release was *arguendo* implied, Roger Jobs' act of including the subrogation and indemnity clause represented a *material* change in the terms of the contract. Mutual assent, or "the meeting of minds,' did not occur. A genuine dispute concerning whether the parties agreed on all material terms was present.

The Opinion thus is in conflict with *Evans & Son, Inc. v. City of Yakima*, 136 Wn.App. 471, 149 P.3d 691 (2006)(holding that there was a genuine issue of material fact over whether the parties agreed to material terms where a settlement was contingent on execution of a formal settlement and release; only an expectation to sign a release was had, not a binding agreement); *Lavigne v. Green*, 106 Wn. App. 12, 23 P.3d 515 (2001)(holding that the failure during mediation to address terms of a release including material terms such as its hold harmless provision created an issue of material fact as to whether the agreement was disputed); and *Howard v. DiMaggio*, 70 Wn.App. 734, 855 P.2d 335

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(1994)(holding that court improperly enforced settlement where agreement was not reached on hold harmless and release documents).

**Procedural Rulings.**

The Opinion raises three issues of procedural law that modify, reverse, or are in conflict with a prior opinion of this Court or the state Supreme Court.

It holds, after granting consolidation of the two appeals and rejection of the motion of Respondent claiming the mootness of one, that if the Court concludes that the trial court's enforcement of the settlement was proper, "Kosrovani's challenge to the dismissal of his complaint will be rendered moot." Opinion, at 4.

The holding on mootness contravenes RAP 2.2, 2.4(a), and 6.1 that give the appellant the right to the appeal of the decisions of the trial court, with full review as a matter of right. That right is forever lost if the appeal is terminated without the review having been completed.

The holding is problematic. It implies that if, after the issuance of a mandate herein the trial court were to vacate its enforcement order under CR 60(b) due to *e.g.*, a post-order breach of the settlement agreement's confidentiality clause or the violation of the other orders by Roger Jobs, as has already been alleged by Kosrovani, Kosrovani and Hansen would be

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deprived of pursuing the appeal of the summary judgment dismissals and the opportunity to have their causes of action reinstated.

The holding is also in conflict with decisions of the state Supreme Court bearing on the legal effect of RAP 17.7, *e.g., State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985), which hold as a matter of established procedural law that once a ruling by a commissioner of the appellate court is made on an issue, and the nonprevailing party fails to move to modify that ruling, the Court is foreclosed from reconsidering that same issue. The holding implies that the Court may reconsider the same issue *sua sponte* notwithstanding its earlier ruling that constitutes the law of the case, and notwithstanding considerations of procedural fairness implicit in the Rules of Appellate Procedure.

Kosrovani was prejudiced by the Commissioner's ruling, as he relied on it by devoting the major porting of his Opening Brief and more than 90% of his Reply Brief on the matters involved in the dismissal summary judgments and not on the purported settlement.

The holding is further in conflict with the established principle in equity, as exemplified in *In re Marriage of Hardt*, 39 Wn.App. 493, 496, 693 P.2d 1386 (1985), that where a prejudice or detriment is suffered as a result of a void judgment, courts issue orders to negate that prejudice. Such orders include relief involving the reversal or vacating of any

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subsequent contract entered into in consideration of, or incident to, the void judgment. Kosrovani has all along maintained and argued at length that the summary judgments are void, that they prejudiced him and Hansen, that he was placed in a compromised position, and that he would not have considered the settlement had he not been faced with the burden of the appeal that he should not have faced if the trial court had been a fair and impartial tribunal and allowed him access to the courts.

**Ruling on Hansen's Claim.**

The Opinion mischaracterizes Hansen's claims as "potential claims" and mistakenly asserts that "the CR 2A settlement agreement does not extinguish [them]." Opinion, at 9. It concludes that her signature or consent was not required to render the agreement enforceable.

Hansen's claims are not "potential," but actual claims that have been litigated on the merits, reduced to judgment, and are before this Court on appeal. That the agreement does extinguish her claims has been asserted all along. It does so not only due to the lapse of the statute of limitations if the appeal is now terminated, but based on the principles of res judicata and claim preclusion.

Courts recognize an exception to the rule of non-reviewability when the question affects the right to maintain an action. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990).

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The Opinion wrongfully denies review of Hansen's claim and shuts the courtroom door on her. It is based on prejudice, oppression, and convenience, not on the rule of law and equity. The injustice caused to Hansen is grave. Hansen has been a real party in interest with regard to the loss of consortium claim since the inception of the lawsuit.

*Ebsary v. Pioneer Human Services*, 89 Wn.App. 218, 796 P.2d 769 (1990) held that where a settlement encompassing the claims of surviving children in a wrongful death action was entered into without their consent or authorization, it was void and had to be vacated. *Ebsary* applies with equal force herein. Hansen's "nonparty status" is irrelevant as she has been a real party in interest. The ruling in *Ebsary* would not have been any different if the children had been mere claimants, not parties joined in the suit. The ruling herein is in conflict with *Ebsary*.

The lower court erred, as has this Court, in disallowing Kosrovani's effort to effect joinder of Hansen. She has been an indispensible party to the settlement enforcement proceeding below and an aggrieved person under RAP 3.1 herein.

Pursuant to *Woodfield Neighborhood Homeowner's Assn. v Graziano*, 154 Wn.App. 1, 225 P.3d 246 (2009), a court lacks jurisdiction if it adjudicates a dispute without all necessary parties before it. This Court's Opinion conflicts with *Woodfield*.

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The Opinion fails to explain why the appeal of Hansen's claim may not proceed by means of her joinder herein if the settlement was not binding on her. It conflicts with *Hooper v. Yakima County*, 79 Wn.App. 770, 775-76, 904 P.2d 1193 (1995), *Rinke v. Johns-Manville Corp.*, 47 Wn.App. 222, 734 P.2d 533 (1987), and *Fox v. Sackman*, 22 Wn.App. 707, 591 P.2d 855 (1979)(holding that the real party in interest rule was intended to avoid a technicality's interference with the merits of the case and to prevent forfeiture when the determination of proper party is difficult or where an understandable mistake has been made; postjudment substitution of real party in interest may be made where no prejudice is inflicted.). It also fails to note why this Court has not reviewed the trial court's order striking Kosrovani's motion for leave to amend to join Hansen as a party plaintiff.

Hansen is not bound by a disposition of Kosrovani'c claim. Under *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987), a loss of consortium claim signifies the claimant's suffering of an original injury, is a separate claim, and is not derivative.

The Court's Opinion fails to treat Hansen equitably and does substantial injustice.

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## CONCLUSION

For the foregoing reasons, in the event this Court denies Kosrovani's Motion for Reconsideration and fails to withdraw its Opinion of July 6, 2021, it should publish that Opinion.

DATED this 25th day of July, 2021.

Respectfully Submitted,

Emilio M. Kosrovani, WSBA #33762
Appellant and Attorney for nonparty Laurel Hansen

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CERTIFICATE OF SERVICE

EMILIO M. KOSROVANI declares under penalty of perjury under the laws of the State of Washington that on the 25th day of July, 2021, he served Elizabeth Berman Lovell and Alfred E Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent Roger Jobs Motors, Inc., with a copy of

Appellant's Motion to Publish

by means of the electronic filing and service portal of the Court of Appeals to Elizabeth Berman Lovell and Alfred Donohue, Wilson Smith Cochran Dickerson, Attorneys for Respondent.

Dated this 25th day of July, 2021.

Emilio M. Kosrovani, Ph.D.
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## September 07, 2021 - 11:50 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 100,131-2 |
| **Appellate Court Case Title:** | Emilio M. Kosrovani et al. v. Roger Jobs Motors, Inc. |
| **Superior Court Case Number:** | 18-2-02112-6 |

**The following documents have been uploaded:**

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- Bermanlovell@wscd.com
- donohue@wscd.com
- emiliolawoffice@yahoo.com
- strelyuk@wscd.com

**Comments:**

Pursuant to letter ruling by the Deputy Clerk dated August 27, 2021 granting, in part, motion to file overlength Petition not exceeding 25 pages.

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Sender Name: Emilio Kosrovani - Email: emiliolawoffice@yahoo.com
Address:
PO BOX 3102
BELLINGHAM, WA, 98227-3102
Phone: 360-647-4433

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