

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Received
Washington State Supreme Court

JUN 04 2014
Ronald R. Carpenter
Clerk

WEST COAST, INC. a Washington)
Corporation,)
)
 Appellant,)
)
 Vs.)
)
 CAMANO CO-OPERATIVE)
 WATER AND POWER CO., a)
 Washington Corporation,)
)
 Respondent.)
 _____)

RESPONDENTS'
ANSWER TO PETITION
FOR REVIEW

COMES NOW Respondent, by and through its attorney C. Thomas Moser, in opposition to Petitioner's Petition For Discretionary Review and now asks this Court to deny the petition.

Petition For Review: Petitioner ("West Coast" hereinafter) seeks review of the Court of Appeals decision based upon West Coast's claim that the decision affirming the trial court was "in error" and "create[d] new conflicts with existing law¹".

Respondent ("Camano Co-op" or "Co-op" hereinafter) believes the Court of Appeal's decision to affirm the trial court was not in error and

¹ Petition, page 1

ORIGINAL

there is no conflict with any existing case law that would require this Court to accept review.

I. STATEMENT OF THE CASE

West Coast provides an incomplete and unfair statement of the case that was tried before the Honorable Judge Susan K. Cook in Skagit County Superior Court. This contract dispute is based on a written contract, called a Developer Extension Agreement, signed October 27, 2004. The parties failed to agree on even the most fundamental elements of the proposed project that was the subject of the Development Extension Agreement. The trial court correctly determined that the signed Developer Extension Agreement was inconsistent with what West Coast intended to construct. The parties were literally talking about development on different sides and different ends of West Camano Drive and thus had no meeting of the minds or mutual assent. As determined by the trial judge (**Appendix 1, Findings**) the failures were several and continuous, including the following:

- The Developer Extension Agreement referenced plans and specifications approved by the Co-op, but no plans were attached. *Finding No. 39.*
- The Developer Extension Agreement did not incorporate the oral agreement to share the cost of construction. *Finding No. 33.*
- The construction plans did not even exist at the time Appellant signed the Developer Extension Agreement. *Conclusion 2(c).*

- After the Agreement was signed construction plans were prepared by the engineer showing three crossings under West Camano Drive. Appellant did not notice that detail. *Finding No. 45.*
- To make matters worse, Appellant never talked to the engineer before signing the October 2004 Developer Extension Agreement and never talked to him at all in 2004. *Finding No. 45.*
- The engineering plans were approved by the Camano Coop board and sent to the State Department of Health, but not accepted by that agency. *Finding No. 47.*
- A disagreement between the parties occurred about what portion of the project was to be a shared cost. A meeting was scheduled to discuss this disagreement but Mr. Robinett declined to attend, so the issue never got resolved. *Finding No. 49.*
- The Co-op attempted a second time to discuss the disagreement over cost sharing with West Coast, but the invitation to resolve the issue was ignored by Mr. Robinett. *Finding No. 54.*
- The disagreement about the scope of the developer extension project surfaced in January 2006 when Mr. Robinett first objected to the engineering plans approved by the Co-op. *Finding No. 55.*

The parties were working with different assumptions and expectations about the work to be performed and the scope of the project. The parties did not even reach accord on how the project would be designed. West Coast's Statement of The Case does not mention any of these failures in the Agreement.

Another factual omission is that West Coast waited until one day before the six-year statute of limitations expired on written agreements and missed the three-year statute of limitations on oral agreements. See **Appendix 2**, Order Granting Summary Judgment, April 4, 2011.

Therefore, much of the history outlined in West Coast's Statement of Facts do not apply because the oral discussions and agreement between the parties were not before the trial judge for consideration.

West Coast incorrectly states that on November 1, 2004 Camano Co-op, approved "different plans" for upgrading the water system. The reference to "different plans" is misleading because the plans were not different from any other plans. The fact is there were no plans attached to the Developer Extension Agreement, despite the fact that the Agreement referenced attached plans. The trial court found that the necessary elements for a contract were missing, stating that at the time the Agreement was signed no plans were attached (Finding No. 39) and did not even exist at the time the Agreement was signed. (Conclusion 2(c)). The plans developed in November were "different" from the prior plans only in the sense that nothing was ever attached to the Agreement.

II. ARGUMENT

1) Conflict in Case Law - Contract

West Coast's first claim is that the "decision of the Court of Appeals is in conflict with cases analyzing executory contract.²" West Coast does not explain how the Court of Appeals decision is in conflict

² Petition, page 9

with existing case law. However West Coast does reference two court cases in apparent support of the argument that there is a conflict of law. The Court of Appeals determined that “Washington courts follow the ‘objective manifestation’ theory of contracts³” citing several recent cases. West Coast does not articulate why the Court of Appeals was in error with regard to that determination.

Citing *Wise v. City of Chelan*, 133 Wn. App. 167, 135 P. 3d 951 (2006), West Coast argues that the elements of a contract in *Wise* are present in the instant case, but fails to state how that holding in *Wise* is in conflict with the Court of Appeals opinion.

West Coast then cites a 1920 case, *Mowbray Pearson Co. v. E. H. Stanton Co.*, 109 Wash. 601, 187 P. 370 (1920) for the proposition that a promise for a promise is sufficient for a contract. Again, West Coast fails to explain how *Mowbray* is in conflict with the Court of Appeals opinion. In *Mowbray* the Supreme Court reversed a trial court jury award for the plaintiff that was based on a written contract. The contract stated that the defendant agreed to sell ice to the plaintiff for delivery to north Spokane at a specific price per ton and not sell to other distributors. When the defendant refused to sell ice, plaintiff sued for damages. In reversing the

³ Unpublished Opinion, page 4

trial court the Supreme Court held there was no contract because one party did not make any promise:

It did not constitute a promise on the part of the respondent to solicit and deliver ice in the district defined, nor did it constitute a promise to buy of the appellant the ice it might sell in case it did solicit sales therein.

Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 604, 187 P. 370, 371 (1920)

The *Mowbray* court simply determined that one of the parties (the plaintiff buyer) made no promise to do anything. The instant case is not about a simple promise for a promise, or about failure of consideration. This case is about the parties having no objective manifestation of mutual assent to the terms of the contract.

With regard to the contract issue raised in the Petition the effort by West Coast to address the considerations governing acceptance for Review in RAP 13.4(b) fails.

2) Conflict of Law - Dues

Having just argued that a promise for a promise constitutes a contract, citing the *Mowbray* case, West Coast now abandons that reasoning to argue that a unilateral statement by one party is sufficient to bind both parties. West Coast argues that it was required to pay dues for water shares in the Co-op only as a conditional contract, and that the

condition was unilaterally imposed by Mr. Robinett, the principal for West Coast.

West Coast argues that the opinion “of the Court of Appeals ignores the contingent nature of the obligation to pay dues under the purchased shares⁴” and cites a number of prior cases. However, the Court of Appeals correctly understood that Mr. Robinett’s letter was not a conditional contract. Pointing out that West Coast never demanded that the Co-op buy back the shares, the Court of Appeals stated the following concerning Mr. Robinett’s letter about the Co-op buying back the water shares from West Coast:

The letter merely states that West Coast ‘may’ sell back the shares to the Co-op for the same price purchased.⁵

There was no demand that the Co-op repurchase the shares for the obvious reason the shares have value and will be required for the future sub-division and residential development of the property.

The only conflicting authority cited by West Coast in support of the contingent obligation theory is *First Methodist Episcopal Church v. Soden*, 131 Wash. 228, 229 P. 534 (1924) involving a promissory note and a conditional delivery of the note. There was no question that the delivery of the note was conditional on a future event. The holding in *First*

⁴ Petition, page 15

⁵ Opinion, page 7

Methodist was later criticized in *Nelson Equipment Co. v. Goodman*, 42 Wash. 2d 284, 254 P.2d 727 (1953) in a case involving parol testimony that was inconsistent with the writing. The Supreme Court in *Nelson* declined to apply the analysis in *First Methodist* and made the following holding:

The parol testimony, that defendant had until June 15, 1951, to decide whether he desired to keep the machine, is inconsistent with the written instruments, contradicts the terms of the writings, and hence, is inadmissible.

Nelson Equip. Co. v. Goodman, 42 Wn.2d 284, 290, 254 P.2d 727, 730 (1953)

However, the instant case is not about the parol evidence rule, it is about whether the Co-op has an obligation to repurchase West Coast's water share, or if there was ever a demand that the shares be repurchased.

3) Issue Raised For First Time On Appeal.

For the first time West Coast raises the issue of "Supervening Frustration Doctrine" in its Petition For Review to this Court. Citing *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 112 Wn. 2d 694, 733 P. 2d 70 (1989) West Coast argues that because the Court of Appeals affirmed the trial court and West Coast cannot develop its property "the reason for purchasing the extra lots

vanished.⁶ This is the first time the doctrine of supervening frustration has been raised by West Coast.

The appellate courts will only consider issues not raised in the trial court under limited circumstances. RAP 2.5 provides the claims that may be raised for the first time on appeal:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

If the Court does decide to review this new claim of error not raised before either the Court of Appeals or the trial court, the Co-op points out that West Coast still is the owner of the water shares and has never asked the Co-op to repurchase the shares. West Coast simply wishes to both keep the water shares because they are a valuable asset, but also wants to be relieved of paying dues until some point in the future.

4) Petitioner Assigned No Error to Findings and Conclusions Concerning Dues.

The trial court determined that like all shareholders West Coast was required to pay dues and assessments, and for several months after

⁶ Petition, page 16. It is assumed that the word “lots” in the Petition was intended to refer to water shares in the Co-op.

purchase of 20 shares West Coast did pay dues. In Findings Of Fact that are not challenged by West Coast, the trial court stated:

64. Shareholders in the Coop are required to pay membership fees (also called dues) and assessments. Resolution 2011-28 is the most recent resolution adopting rates and charges.

65. Plaintiff paid dues and assessments for the first several months after purchasing 20 additional shares, but discontinued payments after Plaintiff believed it was not getting cooperation from the Co-op to approve its project.

In the Assignments of Error West Coast did not assign error to either of these trial court findings. West Cost now asks this Court to accept a Petition For Discretionary Review to challenge Findings that were not challenged in the appeal to the Court of Appeals. Such Findings become verities on appeal and will not be considered by the appellate courts. RAP 10.3(g). Unchallenged findings are verities on appeal. *Standing Rock Homeowners Association v. Misich*, 106 Wash. App. 231, 23 P.3d 520 (2001).

4) Unjust Enrichment

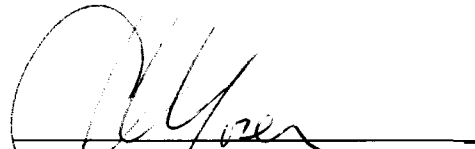
Finally, West Coast raises the issue of “unjust enrichment” for the first time on appeal. It should be recalled that the dues are a matter facing all owners of the Camano Co-op, not just West Coast. See Finding of Fact Number 64. It is a shared shareholder responsibility to pay dues. Nothing

in the record supports West Coast's new argument that the dues structure is unjust. West Coast makes no reference to the trial court record in support of this new claim of error.

III. CONCLUSION

Petitioner has failed to demonstrate how the Court of Appeals committed any error or how this appeal complies with any of the considerations governing acceptance of review by this Court pursuant to RAP 13.4(b). The Petition should be denied.

DATED this 3 day of June, 2014.



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APPENDIX

Appendix 1: Findings of Fact, Conclusions of Law

Appendix 2: Order Granting Summary Judgment Motion To Dismiss
Complaint

RECEIVED

AUG 03 2012

**C. THOMAS MOSER
LAW OFFICE**

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY**

| | | |
|---|---|--|
| WEST COAST, INC., a Washington corporation, |) | |
| |) | |
| Plaintiff, |) | No. 11-2-00063-2 |
| |) | |
| CAMANO CO-OPERATIVE WATER AND POWER CO., a Washington corporation, |) | FINDINGS OF FACT AND CONCLUSIONS OF LAW |
| |) | |
| Defendant, |) | |
| |) | |
| |) | |

The major issue at trial was whether Defendant Camano Co-op breached the Developer Extension Agreement by requiring Plaintiff West Coast to construct three “crossovers” and eleven residential service connections as part of West Coast’s installation of an 8-inch water main. West Coast’s position is that the contract did not require any crossovers or service connections on the west side of the road. Camano Co-op’s position is that no binding contract existed between the parties. I find that the parties never reached agreement as to essential elements of the contract and therefore West Coast’s breach of contract claim should be dismissed. I also find for Camano Co-op on its cross claim for unpaid membership fees.

Having reviewed the evidence, having listened to witness testimony and argument of counsel, the Court now makes the following:

FINDINGS OF FACT

1. Plaintiff West Coast, Inc. (West Coast) is a Washington corporation and has its registered office and principal place of business in Snohomish County, Washington. West Coast's business includes developing unimproved real property, including construction and installation of utilities.
2. Defendant Camano Co-Operative Water and Power Co. (Camano Co-op) is a Washington corporation formed under the laws of the State of Washington and has its registered office and principal place of business on Camano Island, Island County, Washington. Camano Co-op's business is to provide water and infrastructure to deliver that water as a water purveyor to certain residents of Camano Island, Washington.
3. John Robinett is a principal shareholder of West Coast and was at all material times involved in the formation of the contractual relationship between West Coast and Camano Co-op, and the work performed by West Coast.
4. Kelly Wynn is the owner of Water & Wastewater Services, LLC and was at all material times an agent for Camano Co-op having actual and apparent authority to act on behalf of principal as to certain matters. Kelly Wynn was likewise involved in the formation of the contractual relationship between West Coast and Camano Co-op.
5. This action was initially filed in Island County, Washington but by stipulation of the parties and Order of the Island County Superior Court, venue was transferred to Skagit County Superior Court.
6. In late 2003 John Robinett learned of the availability of a parcel of real property which could be developed for the construction of single family

homes. This property is located in an area of Camano Island, Washington known as Saratoga Ridge and is generally situated east of West Camano Drive and generally north of Uplands Road.

7. West Coast signed a Purchase & Sale Agreement for the property in early January, 2004.
8. When John Robinett contacted Island County officials he was informed that a county requirement for development included obtaining and delivering sufficient fire flow to the property site in order to provide an adequate ability to react to and fight fires occurring on the site.
9. Robinett contacted Camano Co-op to talk about the fire flow issue and was referred to Kelly Wynn at Water & Wastewater Services LLC.
10. On January 23, 2004 John Robinett, contacted Kelly Wynn by telephone. John Robinett told Kelly Wynn his company was interested in exploring development of the property. John Robinett followed the telephone conversation with a facsimile addressed to Kelly Wynn dated January 23, 2004, attaching a copy of a tax assessor's map showing the location of the property to be developed.
11. By a facsimile transmitted on January 23, 2004, Kelly Wynn sent John Robinett six pages, including a facsimile cover page dated January 24, 2004. The six pages included a two page Memorandum, dated July 30, 2003 and three other pages of water distribution system drawings made by Camano Co-op's engineer, George Bratton.
12. The attachments to the Bratton memo are drawings of the existing water system in the area of West Camano Drive north of Uplands Road. Those drawings depict the water mains that existed there in the fall of 2004.

13. The Bratten drawings show a 4" water main along the west side of West Camano Drive. This 4" main supplies water to 11 houses on the west side of West Camano Drive. It runs from a fire hydrant on the east side of West Camano Drive through a crossover under the road and then south along the west side of West Camano Drive, extending beyond the intersection of West Camano Drive and Uplands Road.
14. The Bratten drawings also show 1½" PVC water mains on the east side of West Camano Drive. One 1½" main runs south from the same fire hydrant. The other 1½" main runs north from the intersection of West Camano Drive and Uplands Road. These two 1½" mains supply water to the houses on the east side of West Camano Drive. The two 1½" mains do not connect and have been described as "spurs."
15. The Bratten drawings do not depict a 4-inch main on the east side of West Camano Drive between the fire hydrant and Uplands Road. The only 4-inch main on West Camano Drive in this vicinity was located on the west side of the drive.
16. The Bratten memo describes two possible options to achieve the required fire flow to the Saratoga Ridge development. Option number one requires replacing approximately 1910 feet of 4-inch AC (asbestos/concrete) pipe on West Camano Drive south of Uplands Road with 8-inch PVC pipe.
17. Option number two requires replacing approximately 4,120 feet of 4-inch AC pipe on West Camano Drive from Uplands Road north to Chapman Road.

18. The distances of both options (1910 feet and 4,120 feet) are shown on the drawings attached to the Bratten memo and clearly indicate where each option is located in relation to Uplands Road.
19. John Robinett did not receive any design or drawings of George Bratton showing three road crossings or work on the west side of West Camano Drive until after he signed the Developer Extension Agreement.
20. Prior to February 12, 2004 John Robinett purchased a copy of the Developer Extension Manual and paid an application fee. The Developer Extension Manual is also referred to as the DE Manual or Developer Project Manual. The Manual is incorporated into the Developer Extension Agreement which requires that the project be subject to the design standards of the Manual.
21. John Robinett and Bert Cronin attended the February 19, 2004 meeting of the Board of Directors of Camano Co-op and took with them a copy of the 2003 Bratton memo. John Robinett put the 2003 Bratton memo on the table. Robinett and the Board chose to discuss providing fire flow to the development using option number one from the Bratten memo.
22. Robinett did not understand that option number one in the Bratten memo described replacing the 4-inch main south of Uplands Road. He believed that option described work north of Uplands Road.
23. The Bratten memo originally described option number one as "1,910 feet of 4-inch AC pipe on West Camano Dr. south of Uplands Road."
24. Sometime after the Bratten memo was created the word "south" was crossed out of that phrase and the word "north" was written in. There is

no evidence about when this notation was made or who made it. Kelly Wynn's file for this project contains copies of both versions.

25. Robinett asked the Board of Directors to share the cost of installing the water line to his property. There was no Board decision about cost sharing by the time Robinett and Cronin left the meeting. Robinett left the meeting with confirmation of the requirements for the size of the pipe (8-inch) and its location (east side of West Camano Drive).

26. The Board of Directors minutes of February 19, 2004 indicate that the Board agreed to pay 50 percent of the expense for the West Camano upgrade and to apply a latecomer fee for the following 10 years. The minutes further indicate the Co-op Board told Robinett that it would be willing to provide water to the property. There was discussion about applying the funds paid for water shares to "retrofit offsite deficiencies." The Board also advised the two men that they could hire the Co-op engineer to design the project.

27. The Co-op's purpose in agreeing to share one-half of the cost of the 8" main on West Camano Drive was because there were inadequacies in their system that they had some responsibility to correct. The inadequacies were the age and material of the existing pipe, the lack of road crossings and services. Part of the reason the Co-op agreed to cost-share the West Camano Drive upgrade was so the entire project could all be done at the same time to avoid additional cost and disruption of service.

28. A few days after the Board meeting John Robinett called Kelly Wynn and asked what the Board of Directors had decided about his proposal. Kelly

Wynn told him the Board had decided to cost share with his company.

There was no discussion about the 2003 memo or design of the project.

29. Based upon the representations of the Board, and the review of the Bratten memo, West Coast's purchase of the Saratoga Ridge property was finalized for \$565,000 in April, 2004.
30. Robinett chose Camano Co-op's engineer, George Bratten, to design the plans for the water main.
31. Between April 2004 and October 2004 Robinett requested the Developer Extension Agreement to sign, was told it was forthcoming, and commenced to do preliminary work incident to the development of the Saratoga Ridge property.
32. On October 22, 2004 Kelly Wynn sent a memorandum to John Robinett with another copy of the DE Manual and asked him to complete the agreement and pay the fee. He also advised that the Co-op would follow the manual and the engineer should have plans soon. The DE Manual contained the form of agreement between the developer and the Co-op.
33. On October 27, 2004 John Robinett sent to Kelly Wynn a letter, a check and the signed Developer Extension Agreement, stating that "the enclosed Development Extension Agreement is not on point, but I forward it to you to keep the process moving forward." Mr. Robinett also noted that the written agreement was "silent" on the cost splitting agreement. He noted that there was an oral agreement on latecomer fees. Mr. Robinett testified he did not see the payback provision in the written agreement when he sent the letter.

34. The Developer Extension Agreement required the “extension will be installed in roads and/or easements and/or on other improved rights of way and shall be for the use and benefit (of plaintiff’s property to be developed).”
35. The Developer Extension Agreement described the proposed extension as “approximately 2660 lineal feet of water main and appurtenances.”
36. Robinett wrote in the “2660” for the length of the proposed extension. He obtained that number by adding the 750 feet of pipe needed along Uplands Road to the 1,910 feet he thought he was going to install on West Camano Drive. These are the distances set out in option one of the Bratten memo for water mains located south of Uplands Road.
37. There is no definition of the term “appurtenances” in the Developer Extension Agreement but the Developer Project Manual uses the term in its “Conveyance of Water Facility” document as follows: “valves, water services, fittings and other appurtenances.”
38. A reading of the Developer Project Manual Design Standards section 2 “System Standards and Requirements” makes clear that “water services” includes the pipe and equipment to bring water from the main line to the point of use.
39. The Developer Extension Agreement required the extension to be “installed in accordance with plans and specifications approved by the water company...attached hereto...” There were no plans attached to the Developer Extension Agreement.
40. The Developer Project Manual Section 02660 (Waterlines) subsection 3.7F reads as follows: “(w)here shown in the plans, existing water service

connections shall be reconnected to the new water mains installed under this Contract using the materials specified. The location of water service connections shall be verified in the field by the Contractor.”

41. The Developer Project Manual in Section 02660 Waterlines 3.6(A) “Existing System Maintenance” required West Coast to “acquaint (itself) with all aspects of the existing system prior to starting construction on new mains.”
42. The Developer Project Manual also provides in section 3.6 (C) “Existing System Maintenance” (e)xisting water services shall be located by the Contractor prior to beginning work so that it may be properly protected and maintained in service during construction and during changeover from the existing pipes to the pipe installed under this contract.
43. George Bratton prepared preliminary plans for the project that were presented to the Board of Directors at its November 2004 meeting. The Board approved the plans to be sent to the State Department of Health.
44. On November 12, 2004 engineer George Bratton sent layout drawings for the water main to Downing & Associates, who was the surveyor hired by Plaintiff for the project. These layout drawings depicted three crossovers (where the water main crosses West Camano Drive underground), called for abandoning the 4-inch and 1.5-inch mains on West Camano Drive and for transferring service to the new 8-inch main. The plans also show the 8-inch main along West Camano Drive to be 1770 feet in length.
45. On November 22, 2004 the plans were also sent to John Robinett. The plans at page 109 show three crossings of West Camano Road. John Robinett looked at the plans but did not notice the details of the road

crossings. He also never talked to George Bratton prior to signing the Agreement and did not talk to him at all in 2004.

46. After Robinett received the plans he contacted Jeff Van Den Top of Plats Plus. He asked Van Den Top to come up with a number representing the cost to put the plans "on the ground."

47. The Washington Department of Health did not accept the plans and sent a letter dated December 2, 2004 to the Co-op advising that revisions were required related to decommissioning a spring that was a water source for the Co-op. The plans were later revised after the spring was decommissioned and they were then approved by the State Department of Health in January, 2006.

48. The November, 2004 Bratten plans are the only plans approved by the Board or by the Department of Health.

49. On November 22, 2004 Kelly Wynn on behalf of the Co-op wrote a letter to Plaintiff in response to Mr. Robinett's October 27, 2004 letter about the oral agreement made at the February 2004 Board meeting. The letter points out that the Co-op thought it was agreeing to pay half of the West Camano Road portion of the project, not the entire project including the Upland Drive portion. The letter invites Mr. Robinett to discuss that matter with the Board at its December meeting. Mr. Robinett did not attend that meeting. The letter also asks Plaintiff to make a deposit for the engineer's work.

50. On February 1, 2005 the Co-op sent a letter to the Island County Planning Department advising of the Developer Extension Agreement for the development of Saratoga Ridge.

51. On March 3, 2005 Kelly Wynn spoke with John Robinett and the conversation was memorialized in a memo of the date. Plaintiff requested that the insurance coverage be reduced and that a bill for 20 shares in the Co-op be sent. The Co-op granted Plaintiff's request to reduce the required insurance coverage for the project from \$2,000,000 to \$1,000,000.
52. On April 6, 2005 John Robinett sent a letter and check for \$100,000.00 to the Co-op for purchase of 20 water shares and stated that "In the event the Plat is not approved as proposed or approved for less than the proposed 21 lots, West Coast, Inc. may sell back to the Co-op any unused water shares..."
53. On November 15, 2005 Kelly Wynn sent a letter to Plaintiff seeking to resolve areas of disagreement in the Developer Extension Agreement: 1) the cost sharing; and 2) that payments for the Co-op's share would be paid 30 days after the construction was completed and accepted by the Co-op. The letter contained signature blocks for both parties. Mr. Robinett received, but did not respond to the letter.
54. On December 15, 2005 Kelly Wynn sent another letter to Plaintiff seeking to resolve areas of disagreement in the Developer Extension Agreement: 1) the cost sharing' and 2) that payments for the Co-op's share would be paid 30 days after the construction was completed and accepted by the Co-op. The letter contained signature blocks for both parties. Mr. Robinett received, but did not respond to the letter.
55. On January 16, 2006 Robinett sent a letter to Kelly Wynn about the "West Camano Upgrade" and for the first time objected to the construction plans

including improvements on the west side of West Camano Road. Mr. Robinett referenced the February 19, 2004 Board meeting and stated “(t)he water line on the West side of West Camano Drive was not part of that discussion.”

56. On March 2, 2006 the Co-op sent a letter to Plaintiff stating that the Co-op believed the plans approved in November 2004 and sent to the Department of Health were the plans agreed on between the parties and the Co-op was “unwilling to change the plan as was presented and agreed upon in the Developer Extension agreement.” The letter also stated that agreement required the project be “installed in accordance with the plans and specifications approved by the water company.”

57. On April 26, 2006 the Co-op applied for a permit from Island County to perform work on road right-of-way. The permit was approved on June 1, 2006.

58. On April 27, 2006 Kelly Wynn wrote a letter to Plaintiff concerning a phone call from John Robinett on April 17, 2006 seeking more details for the project construction. Mr. Wynn advised Plaintiff that the construction plan was based on information from the Plaintiff’s surveyor and more detail can be provided based on additional information. The letter reminded Mr. Robinett that the November 2004 plans were already approved and submitted to the Department of Health.

59. On June 6, 2006, Wynn wrote a letter to Robinett explaining the Board’s position. He said Camano Co-op agreed to cost share on the “approximately 1770 feet of 8” class C-900 water main to be located on the east side of West Camano Road... This 8” line extension will also

replace the existing 4" A.C. water main on the west side of West Camano."

60. On July 6, 2006 John Robinett responded. Mr. Robinett outlined his understanding of the history of discussions between him and the Board.

Mr. Robinett made these points:

- a) Referring to the 2003 memo and his discussion with the Board, Mr. Robinett stated "There was nothing contained in the memo he provided me, or discussed at the Board meeting about improving the water line on the west side of West Camano Drive." "The water line in the West side of West Camano Drive has no nexus to my project."
- b) Mr. Robinett stated that the October 27, 2004 agreement he signed was "the standard form" and it did not address the cost sharing and payment of bills that he thought were agreed to between the parties.
- c) Mr. Robinett stated that he disagreed with the March 2, 2006 letter from the Co-op because "there were no plans made available to me when I signed the Developer Extension Agreement."
- d) The letter concludes stating that Mr. Robinett hopes the co-op would "honor the agreement that was conveyed to me by Kelly Wynn after I met with the Board."

61. Plaintiff hired another engineer, Joe Smeby of Omega Engineering, Inc. to prepare construction plans for the project. Mr. Robinett told the engineer

to not include road crossings in the plans. Mr. Smeby prepared the plans and they were submitted to the Co-op for approval.

62. On August 16, 2006 Kelly Wynn responded to West Coast's revised plans prepared by Mr. Smeby. He said that the plans were not approved by the Board at its July 2006 meeting and further revisions must "include the three (3) road crossings on West Camano Road as well as the service lines as originally described on the plan prepared by George Bratton."

63. There were two options for construction of the road crossings. Island County required that the crossings be made by boring under the road, rather than the less expensive process of cutting into the road. Plaintiff's contractor advised that the three 4-inch borings and connections would cost approximately \$50,000 each.

64. Shareholders in the Coop are required to pay membership fees (also called dues) and assessments. Resolution 2011-28 is the most recent resolution adopting rates and charges.

65. Plaintiff paid dues and assessments for the first several months after purchasing 20 additional shares, but discontinued payments after Plaintiff believed it was not getting cooperation from the Co-op to approve its project.

66. Plaintiff's account shows a balance owing of \$107,894.65 through July 6, 2012, which is documented in a summary and in a detailed accounting.

67. The plat was approved by the County.

68. Camano Co-op never agreed to the repurchase of shares.

69. West Coast never made any demand to Camano Co-op for repurchase of shares.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this litigation.
2. The signed October 27, 2004 agreement is not an enforceable contract because it does not contain essential elements.
 - a) The length of the new 8-inch main set out in the Developer Extension Agreement (2660 lineal feet) is the sum of 750 feet and 1910 feet from option number one of the Bratten memo. These distances describe water mains south of Uplands Road, however, not where the proposed 8-inch extension was to be built.
 - b) The location of the existing 4-inch main on West Camano Drive was never discussed by the parties. This 4-inch main, which was “to be replaced with 8-inch PVC,” was thought by West Coast to run along the east side (or perhaps both sides) of the Drive. The Bratten diagram shows the 4-inch main only on the west side. Without agreement on the location of the existing main it was impossible to know which existing customer would need to be re-connected to the new main.
 - c) The Developer Extension Agreement provides that the “plans and specifications... are attached hereto ...” but no plans were attached and no plans even existed at the time the Developer Extension Agreement was signed by West Coast. The parties could not, there, have agreed upon any of the construction details, including the road crossovers, at that time.

- d) Likewise, without plans or specific discussion, the parties could not, and did not, agree on how the new 8-inch extension would fit into Camano Co-op's overall water plan, ie, where and how it would connect to the rest of the system.
- e) The parties had discussed cost-sharing on the project but that significant element was not made part of the Developer Extension Agreement.
3. Camano Co-op did not negligently or intentionally misrepresent anything to Plaintiff.
4. The court adopts the findings and conclusions from the court order entered April 4, 2011 in this matter.
5. The Plaintiff owes to Defendant the sum of \$107,894.65 through July 6, 2012 for unpaid dues and assessments.
6. Any conclusion of law that should have been designated as a finding of fact is so designated, and any finding that should have been designated as a conclusion is so designated.

Based upon the foregoing Findings and Conclusions, the Court makes the following:

ORDER

IT IS HEREBY ORDERED ADJUDGED and DECREED that the Plaintiff's Complaint is dismissed with prejudice; and

IT IS FURTHER ORDERED that judgment is entered against Plaintiff on the Counterclaim in the sum of \$107,894.65 through July 6, 2012.

Dated this 2 day of August, 2012.



SUSAN K. COOK
Superior Court Judge

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2011 APR -4 PM 3:26

JB

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

WEST COAST, INC., a Washington
corporation,

Plaintiff,

vs.

CAMANO CO-OPERATIVE WATER AND
POWER CO., a Washington corporation,

Defendant

No: 11-2-00063-2

**ORDER GRANTING SUMMARY
JUDGMENT MOTION TO DISMISS
COMPLAINT**

THIS MATTER having come before the court upon Defendant's Motion for Summary Judgment to Dismiss Complaint, the Plaintiff being represented by attorney W. Mitchell Cogdill, Defendant represented by attorney C. Thomas Moser, and the court having considered the following:

- Defendant's Summary Judgment Motion To Dismiss Complaint and attachments; and
- Plaintiff West Coast, Inc.'s Response to Defendant's Motion For Summary Judgment and attachments; and
- Defendant's Reply To Plaintiff's Response TO Summary Judgment Motion To Dismiss;

• Declaration with Attachments of Mitch Cogdill and John Robertt.

ORDER GRANTING SUMMARY
JUDGMENT MOTION TO DISMISS
COMPLAINT - 1

C. Thomas Moser, WSBA #7287
1204 Cleveland Avenue
Vernon, WA 98273
360-428-7900

John Robertt.

ORIGINAL

1 And the court being fully advised and having listened to argument of counsel, now makes
2 the following:

3 **ORDER**

4 **IT IS HEREBY ORDERED, AND DECREED** that the Summary Judgment Motion to
5 Dismiss Complaint is granted; and

6 **IT IS FURTHER ORDERED** that the three year statute of limitations has run on the
7 claim for breach of an alleged oral agreement and related causes of action; and

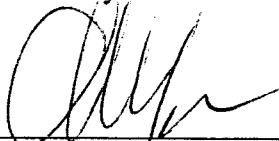
8 **IT IS FURTHER ORDERED** that all four causes of action are dismissed with prejudice
9 and this is a final appealable order of the court.

10 Done In Open Court this 4 day of April, 2011

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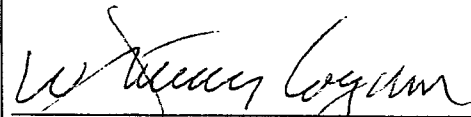
13 _____
14 Judge

15 Presented by:

16 

17 _____
18 C. THOMAS MOSER, WSBA# 7287
19 Attorney for Plaintiff

20 *copy received*
~~Approved for entry by:~~

21 

22 _____
23 W. Mitchell Cogdill, WSBA# 1950
24 Attorney for Defendant

25 ORDER GRANTING SUMMARY
JUDGMENT MOTION TO DISMISS
COMPLAINT - 2

C. Thomas Moser, WSBA #7287
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