Supreme Court No. 101198-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF HELENE DOST; ROBERT W. DOST;
AND SUSAN H. FRANCIOLI,

Appellants

v.

MUKILTEO RETIREMENT APARTMENTS, LLC;
DUANE CLARK; AND RON STRUTHERS,

Respondents.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This case arises from the wrongful death of Helene Dost after she fell and lay helpless and injured for 15 hours on the floor of her senior assisted living unit owned and operated by defendants. Petitioner asks this Court to reverse an unpublished decision denying enforcement of a claimed settlement where defendants admittedly refused to accept all three material terms of the Estate's settlement offer. Defendants agreed to settle only "for the amount remaining in the eroding tail insurance policy" without mentioning the other two terms demanded by the Estate—sworn declarations of no other insurance and classification of payment as general damages. The trial court did not apply the proper standard of review for a summary decision and failed to follow established contract law.

The Court of Appeals correctly reversed, ruling no mutual assent as to all material terms. Deciding defendants accepted only one term and not the other two terms, while adding new terms, the opinion conforms with numerous cases on offer and acceptance. Petitioner's argument that the phrase "your demand" in its response should be read in isolation disregards established contract law and ignores common English grammar. It also disregards MRA's conduct and statements explicitly rejecting the material sworn declaration and classification terms from the offer.

This Court should deny review.

FACTS RELEVANT TO ANSWER

Helene Dost fell onto the floor of her senior assisted living unit at the Harbour Pointe Retirement and Assisted Living Center. She lay helpless and injured for over 15 hours due to management's failure to follow established policies and contractual duties requiring it to check on residents twice a day and after missed meals. CP 806-13. Mukilteo Retirement Apartments, LLC, operated the Harbour Pointe facility through its owners and board members, Duane Clark and Ron Struthers (collectively "MRA"). CP 803, 805. Ms. Dost was 88 years old when she took her last breath just eight weeks after the fall, leaving behind two children, five grandchildren, and three great grandchildren. CP 806, 813.

The Estate filed a negligence / wrongful death action against MRA. In November 2020, after exchanging written discovery, taking two depositions, and defending two depositions, the Estate made a settlement offer (1) for the amount remaining on the eroding tail insurance policy; (2) requiring all three defendants to provide sworn declarations of no other insurance coverage; and (3) agreeing to classify payment as general damages. CP 249; Op. 6. The trial court and Court of Appeals found these to be the three material conditions of the Estate's offer that required assent. CP 8 (FF ¶ 3); Op. 6.

On November 16, 2020, MRA's counsel replied by e-mail:

> In response to the settlement demand conveyed in your November 4, 2020 letter, I am authorized on behalf of the Defendants to accept your global settlement demand for the amount remaining in the eroding tail insurance policy, [1] in full and final settlement of all claims against all Defendants in this matter.

CP 256. MRA did not simply say they were accepting the settlement demand. *Id*. Instead they specifically limited their acceptance to the amount remaining on the policy. *Id*. They were accepting the demand for the remaining policy amount without accepting or otherwise mentioning the demands for the sworn declarations or classifying payment as general damages. *Id*. MRA offered to "get a proposed settlement agreement and release prepared" for the Estate's review. *Id*. The Estate's offer had not mentioned a release.

MRA counsel provided a draft settlement agreement in December. CP 260-67. To settle all claims, MRA agreed to pay $808,442, the total sum remaining on the eroding limits insurance policy. CP 261. MRA counsel indicated the $808,442 "is not final, but close." CP 260. He further stated he would "confirm final numbers with the insurer…[i]f the language looks

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[1] "In an eroding policy…the insurer's payments to defense counsel to defend the liability suit count against the policy limits." *North Am. Spec. Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 559 (5th Cir. 2008) Tail coverage is "[a]n extension of a claims-made professional-liability policy to protect against claims and lawsuits filed after the end of the policy period but based on negligent acts that occurred during the policy period." *Black's Law Dict.* (10th ed. 2014) p. 1681.

good." *Id*. Estate's counsel responded that a final number was needed to review the amount. CP 269.

MRA's draft also omitted both the material requirement for sworn declarations of no other insurance and for classifying payment as general damages. CP 263-64; *see* Op., at 3 ("But [MRA] did not acknowledge an agreement to provide declarations or an agreement that it would classify the payment as general damages."). It also contained new non-agreed material terms—an elaborate confidentiality provision and hold harmless and indemnity provisions requiring the Estate to indemnify the defendants for third-party claims. CP 263-65. These new terms were not part of the Estate's offer and had not been discussed. *Id*.

The Estate made its offer for the amount remaining on the policy as existing on the day of their offer. CP 249. MRA did not accept this term. MRA counsel stated the settlement amount "will change based on what further work there is left to do on the file to close this matter out." CP 271. Instead of computing the settlement amount as of the date of Estate's offer, he continued to lower the amount with no definite number. *Id*. MRA's approach was to continually drain the amount through some uncertain date in the future. CP 295.

MRA's counsel provided a general payment ledger with fees and expenses showing $190,804.78 paid out in defense costs—even though the

parties had only exchanged written discovery and conducted four depositions. CP 244, 275. $809,195.22 claimed to be remaining on the eroding policy. Estate's counsel then asked for a detailed accounting. CP 278. MRA counsel responded the request "will take time and [sic] review" and that "it will obviously change the final numbers as well." CP 280.

In January 2021 MRA provided heavily redacted invoices—several entirely redacted. CP 282 & 307-41. MRA counsel stated the proposed settlement amount had been further reduced to $807,915.94. CP 288. Two months later, MRA counsel provided more redacted invoices. CP 290 & 307-41. The Estate then reviewed what information MRA provided. CP 290-92.

On March 30, 2021, the Estate rejected MRA's counteroffers as contradicting the terms of the Estate's offer and adding new material terms. CP 292, 302-41. MRA had neither agreed to the required sworn declarations, nor to classifying payment as general damages. MRA had unilaterally added confidentiality, hold harmless, and indemnity provisions. MRA improperly reduced the settlement amount by deducting attorney's fees and expenses unrelated to the case and failing to compute the settlement amount as of the date the Estate made its offer.

Responding in April 2021, MRA counsel claimed the only material term offered and accepted was the "eroding policy limits" amount—nothing

more. CP 294. He admitted the sworn declarations term was not part of his November 16, 2020 e-mail response and asserted any such requirement was immaterial for the settlement.[2] *Id*. He further stated, "[MRA] will not re-negotiate the agreed to settlement or offer anything other than the eroding policy, which due to [the Estate's] actions, has eroded even further." CP 295. He attached a new proposed "CR 2A agreement" containing "essential terms" and once again omitted the requirement for sworn declarations and classification of payment as general damages. CP 296-97. The new agreement included non-agreed terms (*i.e.*, binding arbitration, hold harmless, and indemnity) and indicated the settlement amount would be determined later. If their demand was not met, he threatened litigation "which will further erode the remaining policy proceeds." CP 295.

In May 2021, MRA moved to summarily enforce the settlement agreement. It argued the Estate refused "to abide by the policy limits

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[2] The author of the November 16, 2020 response unequivocally confirmed respondents' understanding in his April 16, 2021 letter:

> agreement. The (1) confidentiality provision and (2) lack of sworn representations cited in your letter were neither material to the parties' settlement nor were they a component of the offer/acceptance on November 16, 2020. If the confidentiality provision or lack of sworn

CP 294 (¶ 3). The statement was made ***by the same person*** who authored the November 16, 2020 response; ***specifically refers*** to the "offer/acceptance on November 16, 2020"; and ***confirmed*** respondents had not accepted the requirement for sworn declarations. Both the trial court and the Court of Appeals found that the requirement for providing sworn declarations was a material provision in the offer. CP 8 & Op. at 6.

settlement agreement which they themselves offered and [MRA] timely accepted." CP 708. The trial court granted MRA's motion, deciding "there was a clear and enforceable contract created when [MRA] accepted [the Estate's] settlement offer by e[-]mail." CP 5. The trial court found that MRA accepted the offer on November 16, 2020 "as to the three material conditions set forth in [the Estate's] November 4, 2020 offer." CP 8 (¶ 3). The Estate appealed.

Applying the appropriate review for summary proceedings, the Court of Appeals reversed on the grounds MRA did not accept all three material terms of the Estate's settlement offer. MRA only accepted one material term, the eroding policy limits, while remaining "silent about the other two material terms"—*i.e.*, sworn declarations from MRA that no other insurance policy exists that may provide coverage to satisfy any part of a judgment, and payment classified as general damages. Op. 6. The Court of Appeals correctly concluded MRA had made a counteroffer. *Id*.

REASONS THIS COURT SHOULD DENY REVIEW

MRA offers inadequate reasons for this Court to accept review. The unanimous decision of the Court of Appeals conforms with well-established Washington law. MRA's petition fails to establish any conflict with a decision of the Supreme Court or Court of Appeals, or an issue of substantial public interest. *See* RAP 13.4(b). This Court should deny review.

A. There is no conflict with *Hearst Communications*.

Washington courts have long held that "[t]he acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract." *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). "[A] purported acceptance which changes the terms of the offer in any material respect operations only as a counteroffer, and does not consummate the contract." *Id*.

The appellate court's decision that there was no mutual assent is entirely consistent with *Hearst Commc'ns v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005), which restated a corollary to the "objective manifestations" theory that courts impute an "intention corresponding to the reasonable meaning of the words used," generally giving words their "ordinary, usual, and meaning." 154 Wn.2d at 503-04.

MRA argues a "direct conflict" with the *Hearst* case by claiming the Court of Appeals failed to give a reasonable interpretation to its November 16 email. Pet. 10. There is no direct conflict. *Hearst* was a contract interpretation case, not a contract formation case, and did not involve an issue about the meaning of a "your demand" preamble.

MRA argues the general language "your November 4, 2020 letter" and "your global settlement demand" in the "preamble"[3] made plain and unequivocal its acceptance of all three material terms of the Estate's settlement offer, despite the effective language in the following clause stating what is actually being accepted specifically refers only to the eroding policy settlement amount term.

The Court of Appeals correctly "focus[ed] on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst Commc'ns*, 154 Wn.2d at 501; Op. at 5. The Court of Appeals correctly rejected MRA's strained preamble argument because it fails to account for the entire language of the sentence. Op. 6.

The rule is simple enough. The fallacy is MRA's theory of applying it to the November 16 e-mail. MRA adulterates this rule of interpretation by reading the preamble in isolation as the controlling language of acceptance, when the second clause of the sentence plainly provides the effective language in terms of what MRA is specifically accepting from the Estate's settlement offer, *i.e.*, only the eroding policy settlement amount. MRA's

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[3] MRA's counsel called it a "preamble" during oral arguments. *Estate of Dost v. Mukilteo Ret. Apts.*, No. 82959-9-I (June 15, 2022), at 9 min., 13 sec. to 10 min., 10 sec.; https://www.tvw.org/watch/?clientID=9375922947&eventID=2022061071&startStreamAt=553&stopStreamAt=610.

conduct reflected the same intention: all draft settlement agreements and emails it sent to the Estate only included the eroding policy settlement amount language and nothing of the other two material terms.

MRA's theory violates the rule that "[a] phrase cannot be interpreted in isolation." *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); *see also Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010) ("Usually, the intended meaning is apparent from the surrounding context."); *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992) ("The McDonalds' reading of exclusion 3 disregards an important provision of the policy and is thus unreasonable."); *Morgan v. Prudential Ins. Co. of America*, 86 Wn.2d 432, 434, 545 P.2d 1193, (1976) ("The contract should be given a practical and reasonable rather than a literal interpretation; it should not be given a strained or forced construction..."); *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014) (language is interpreted "in the context of other contract provisions").

Courts view language in its entirety; do not interpret phrases in isolation; and give meaning and effect to all the language. *Kroeber v. GEICO Ins. Co.*, 184 Wn.2d 925, 930, 366 P.3d 1237 (2016); *Pub. Util. Dist. 362 No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 373, 705 P.2d 1195 (1985) ("An interpretation which gives a

reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, imprudent or meaningless."); *Hansen Serv. v. Lunn*, 155 Wash. 182, 190, 283 P. 695 (1930) ("Effect must be given to all of the language of the contract and a meaning and effect ascribed to each of the words and phrases used therein").

The operative acceptance clause referring only to the eroding policy limits prevails over the "your demand" preamble. "A basic rule of textual interpretation is that the specific prevails over the general." *T-Mobile U.S. Inc. v. Selective Ins. Co. of Am.*, 194 Wn.2d 413, 423, 450 P.3d 150 (2019). "[S]pecific terms modify or restrict the application of general terms where both are used in sequence." *Dean v. McFarland*, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972); *Keeton v. Dept. of Social and Health Services*, 34 Wn. App. 353, 361, 661 P.2d 982 (1983) ("[W]here a general provision precedes specific exceptions or qualifications to the general proposition, both are given effect with the exceptions limited to those specifically delineated, unless indicated otherwise.")

"[S]pecific terms and exact terms are given greater weight than general language.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) *quoting Restatement (Second) of Contracts* § 203(3) (1981); *see also McGary v. Westlake Investors*, 99 Wn.2d 280, 286, 661

P.2d 971 (1983) ("Reading the provisions together, the specific language of the addendum providing for a negotiated rate or arbitration must prevail over the general terms of the notice-of-rental-increase provision[.]").

> Attention and understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.

Foote v. Viking Ins. Co. of Wisc., 57 Wn. App. 831, 834-35, 790 P.2d 659 (1990), *quoting Restatement (Second) of Contracts*, § 203 cmt e.

The Court of Appeals correctly rejected MRA's "your demand" preamble theory. *See Spokane Sch. Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 331 P.3d 60 (2014) (courts "will not read the language of a preamble to contradict the contract's specific provisions outlining the grievance process and imposing limitations on which grievances may be arbitrated."); *Brackett v. Schafer*, 41 Wn.2d 828, 834, 252 P.2d 294 (1953) (recital clause may not be resorted to in aid of construction where there is no ambiguity in the operative portion of the agreement).

MRA's "your demand" preamble introduced the subject matter rather than set forth specific rights and obligations of the parties; it is not itself the operative part of MRA's acceptance and cannot be the basis of a legal and binding obligation. *See Groen v. Children's Hosp. Med. Ctr.*, 972 N.E.2d 648, 654 (Ohio App. 2012) (collecting cases); *see also State v. Superior Court In and For Thurston County*, 92 Wash. 16, 28 & 32, 159 P.

92 (1916) (preamble is introductory clause that recites the motive or design of what follows, but never enlarges the operative part).

MRA's theory also violates the rule that "the terms assented to must be sufficiently definite so that a court can decide just what it means and fix exactly the legal liability of the parties." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004). Courts construe ambiguities against the drafter. *Adler*, 153 Wn.2d at 355 "[A]ny ambiguity between these arguably conflicting provisions is resolved against the drafter."); *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990); *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 713, 334 P.3d 116 (2014). "[A]cceptance must be unequivocal." *Rorvig v. Douglas*, 123 Wn.2d 854, 858, 873 P.2d 492 (1994) (*citing Restatement (Second) of Contracts*, § 61 cmt. a).

> An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent.

Restatement (Second) of Contracts, § 61 cmt. a (1981).

MRA did not clearly state what it would accept all three material terms of the offer. Even if the operative eroding policy language in the second clause is ignored, the "your demand" preamble is too indefinite and uncertain to show MRA unequivocally accepted all material terms offered by the Estate. *Cf. Schuehle v. Schuehle*, 21 Wn.2d 609, 613-14, 152 P.2d

608 (1944) (seller's offer to buyer stated as "Now this deal is at your request and at your figures" too indefinite as to price because the phrase "at your figures" did not mean the same to each party, therefore parties did not mutually assent to one and the same purchase price).

Giving meaning and effect to every word and phrase in the email response, MRA only assented to settle "for the amount remaining in the eroding tail insurance policy." Noticeably absent are the other two specific material terms in plaintiffs' offer. MRA made no mention of providing the sworn declarations or classifying the payment as general damages. *Id*. MRA disregards all the other consistent objective evidence establishing that they would not "offer anything other than the eroding policy;" that they deemed the sworn declarations to be not material to settlement; and that the requirement for sworn declarations was *specifically* not a component of defendants' November 16, 2020 response. CP 294. MRA consistently rejected the Estate's requirements for sworn declarations and classification of payment as general damages, while adding new non-agreed material terms. CP 261-65 (confidentiality, hold harmless and indemnity provisions not offered or discussed); CP 295-97.

B. There is no conflict with *Condon v. Condon.*

MRA cites in passing *Condon v. Condon*, 177 Wn.2d 150, 163, 298 P.3d 86 (2013), and two appellate decisions for the general principle that

courts apply the objective manifestations theory to determine whether parties mutually assented to a settlement agreement. Pet. 13. However, MRA does not allege a specific conflict with these decisions.

MRA cites *Condon* without acknowledging that case supports the Court of Appeals' conclusion there was no mutual assent here. In *Condon*, the defendant counteroffered with a settlement release that went beyond the general release proposed by the injured party by requiring a hold harmless and indemnity of the defendant for any third-party claims. The Supreme Court held there was no mutual assent to the additional terms and no enforceable settlement agreement.

As in *Condon*, MRA counteroffered by only agreeing to one of the three material offered terms and also demanding a hold harmless and indemnity of the defendants before it would pay the eroding policy limits. The Estate's original offer to settle had included no release provision, general or specific, and no hold harmless or indemnity of the defendants. Agreement must be expressly stated and cannot be implied; there was no burden on the Estate to object to the hold harmless and indemnity provisions. *See Condon*, 177 Wn.2d at 165. Since there was no meeting of the minds on release terms, there was no binding settlement agreement.

Like a hold harmless, adding an extensive confidentiality provision without negotiation is a material change that constitutes a counteroffer. *See*,

e.g., *Lakin v. Bloomin' Brands, Inc.*, No. 17-cv-13088, 2019 U.S. Dist. LEXIS 207316, at *4 (E.D. Mich. Dec. 2, 2019); *Reed v. Ezelle Inv. Props.*, 353 F. Supp. 3d 1025, 1031-32 (D. Or. 2018).

Objective manifestations showed there was no meeting of the minds on reasonable fees to be deducted from the policy limits, sworn declarations, classification as general damages, confidentiality, or release terms. These parties were still negotiating. *Koller v. Flerchinger*, 73 Wn.2d 857, 859, 441 P.2d 126 (1968) ("These changes constituted offers and counteroffers. The parties were still negotiating and there was never a meeting of the minds.").

C. MRA's complaint is against established common law rather than the Court of Appeals' rationale.

Under the "mirror image" rule, considered "one of the sacred rubrics of classical common law," a contract is not formed unless the offer and acceptance are identical. Daniel P. O'Gorman, *The Restatement (Second) of Contracts Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency*, 36 U. Haw. L. Rev. 169, 206 & nn 211, 213 (2014). Washington courts have followed the mirror image rule for over a hundred years.

> It is a well-settled principle of law that to constitute a contract the minds of the parties must assent to the same thing in the same sense. There must be a mutual assent to all of the propositions, for so long as any matter forming an element of the contract is left open the contract is not complete.

Loewi v. Long, 76 Wash. 480, 485, 136 P. 673 (1913), *quoting Green v. Cole*, 103 Mo. 70, 76, 15 S.W. 317 (1891); *accord, Strange & Co. v. Puget Sound Machinery Depot*, 176 Wash. 90, 98, 28 P.2d 111 (1934) "[T]he minds of the parties must assent to the same thing in the same sense.").

"The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract." *Sea-Van Invs. Assocs.,* 125 Wn.2d 120 at 126 (no meeting of the minds where only material term agreed to was price); *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993) ("It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time."); *Koller v. Flerchinger*, 73 Wn.2d 857, 859, 441 P.2d 126 (1968) ("These changes constituted offers and counteroffers. The parties were still negotiating and there was never a meeting of the minds."); *Blue Mt. Constr. Co. v. Grant Cy. Sch. Dist. 150-204*, 49 Wn.2d 685, 688, 306 P.2d 209 (1957) ("An expression of assent that changes the terms of the offer in any material respect may be operative as a counteroffer; but it is not an acceptance and consummates no contract.").

This case is similar to *Blue Mt. Constr. Co.* where a school district sent a letter purportedly accepting *in toto* the bid (offer) from a contractor to build a new high school. 49 Wn.2d at 687 ("Your proposal, dated

February 16, 1954, for construction of the High School for Coulee City School District 150-204J, is hereby accepted as of this date. The contract is awarded to you."). The school district included a proposed contract that differed from the terms of the offer. *Id*. This Court held the school district's letter was a counteroffer because what was being accepted could not be determined from the letter, standing alone, and the contract supplied by the school district materially differed from the offer. *Id*. at 688-89. Read together, the conflicting documents made the purported school district's acceptance "too indefinite to constitute an acceptance." *Id*.

Similar to *Blue Mt. Constr. Co.,* MRA's November 16, 2020 email response, standing alone, only provided assent to one of three material terms from the offer. Likewise, their proposed settlement agreements differed from the offer in several material respects by adding non-agreed terms and making no mention of the requirement for sworn declarations or the classification of payment as general damages. MRA did not unequivocally accept all material terms of the Estate's offer. MRA's responding terms materially changed offered terms, which operated as a counteroffer.

D. Public policy would be disserved if MRA's loose acceptance theory is allowed to validate otherwise equivocal or ambiguous responses to settlement offers.

MRA argues the Court of Appeals adopted an unprecedented contract formation standard whereby "any acceptance must now explicitly

restate each material term of the offer." Pet. 17. That is a *non sequitur*. MRA's purported acceptance did not fail because it did not restate each material term of the offer. The Court of Appeals simply ruled MRA's November 16 e-mail could not be reasonably interpreted as accepting the three material terms of the Estate's offer.

> …MRA's argument ignores the rest of defense counsel's statement where he qualifies MRA's acceptance to the demand "for the amount remaining in the eroding tail insurance policy." MRA's silence about two of the Estate's essential terms amounts to a material variation from the original settlement offer. *See Sea-Van*, 125 Wn.2d at 126-27 (no meeting of the minds where the only material term agreed to was price).

Op. 6; *cf. Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 476, 149 P.3d 691 (2006) ("The only material term agreed upon in the letters was the amount of the settlement.").

There are many ways to express unequivocal acceptance. For example, MRA could have responded by simply saying, "We accept your offer," without adding additional language that created doubt about the terms being accepted or adding additional terms not in the original offer. *Cf. Blue Mt. Constr.*, 49 Wn.2d at 689.

> Frequently an offeree, while making a positive acceptance of the offer, also makes a request or suggestion that some addition or modification be made. So long as it is clear that the offeree is positively and unequivocally accepting the offer, regardless of whether the request is granted or not, a contract is formed.

APB Realty, Inc. v. Georgia-Pacific LLC, 889 F.3d 26, 29 (1st Cir. 2018) *quoting 2 Williston on Contracts* § 6:16 (4th ed.); *accord, Rorvig v. Douglas*, 123 Wn.2d 854, 858-59, 873 P.2d 492 (1994) ("Even if the Douglases' changes are viewed as requests for changes to the contract rather than conditions of acceptance, no contract was formed because there was no unequivocal acceptance of the original terms.").

Here, even if MRA's statements and proposed contracts could be considered requests or suggestions for additions or modifications to the Estate's offer, MRA failed to accept the Estate's offer positively and unequivocally in its entirety with its three material terms.

MRA's theory rests on semantics rather than meaningful authority or policy concerns. Its purported e-mail acceptance was plainly limited to the settlement amount based on the eroding policy limits. Nothing in the "your demand" preamble indicated MRA was accepting the other two material terms in the Estate's offer, *i.e.*, the declarations of no other insurance and classification as general damages. No amount of semantics or legal legerdemain can change the plain meaning of MRA's email.

Courts normally require a greater exactitude when evaluating mutual assent than when they are asked to salvage an existing contract. While there is much room for interpretation once the parties are inside the framework of a contract, there is less in the field of offer and acceptance.

Greater precision of expression is required, and less help from the court given, when the parties are merely at the threshold of a contract. If courts should undertake to resolve ambiguities in the negotiations between parties, disregard clerical errors, and rearrange words, leaving out some and putting in others, it is hard to see where the line of demarcation could be drawn, and the general effect would inevitably be chaos and uncertainty. *See generally Wagner v. Rainier Mfg. Co.*, 371 P.2d 74, 77 (Or. 1962); *see also Condon*, 177 Wn.2d at 163 (court cannot enforce terms not implied within settlement agreement); *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 646, 211 P.3d 406 (2009) ("Washington courts do not, under the guise of interpretation, rewrite contracts or disregard the written language."). MRA offers no compelling reason to lower the bar.

CONCLUSION

This Court should deny review.

SUBMITTED this 22nd day of September 2022.

The undersigned certifies this brief contains 4850 words in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

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DATED: September 19, 2022, at Seattle, Washington.

s/ Gregory A. McBroom
Gregory A. McBroom

SMITH MCBROOM, PLLC

September 19, 2022 - 8:57 AM

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