NO. 99456-1

THE SUPREME COURT
STATE OF WASHINGTON

MARY C. HRUDKAJ,
TABITHA GRABARCZYK,
PAMELA E. OWENS,
JOI CAUDILL,

PETITIONERS,

v.

QUEEN ANN WATER WORKS, LLC,
AND GERARD A. FITZPATRICK AND
CATHERINE FITZPATRICK,

RESPONDENTS.

Court of Appeals No. 52984-0-II

RESPONDENTS' RESPONSE TO PETITIONERS MOTION TO EXTEND TIME TO FILE PETITION FOR REVIEW

Respondents by and through their counsel of record, submit this response to Petitioners' Motion to Extend Time to File Petition for (Discretionary) Review.

Respondents object to granting Petitioners' Motion for Extension of Time to File Petition for (Discretionary) Review. Respondents object because the Appeal was not timely, was filed improperly, was not in proper form, the filing fee was not paid; and petitioners did not serve respondents with their Notice of Discretionary Review to the Supreme Court, nor did they serve their Motion to Extend Time for Filing Petition For Discretionary Review and Petition For (Discretionary) Review to Supreme Court on the undersigned.

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Respondents further contend petitioners did not establish extraordinary circumstances to support an extension of time nor was it explained that this was not a miscarriage of justice. RAP 18.8(b)

This isn't the first time during the appeal process the petitioners have been late. The Court of Appeals decision was filed September 1, 2020. The petitioners allegedly filed a Motion for Reconsideration on September 21, 2020. On September 24, 2020 petitioners' attorney called the Court of Appeals and found out his brief, allegedly filed timely, had not been received by the Court. He was instructed by the Court to file a Motion for Extension of Time and file his brief, which he did later that night. The filing was September 25, 2020. Ex 1. The petitioner's Motion for an Extension of Time to File his Motion for Reconsideration was granted December 7, 2020. Petitioners' Motion for Reconsideration was denied December 28, 2020. Petitioners' Motion for Discretionary Review to this Court was not filed timely or properly.

In *Reichelt v. Raymark Industries 52 Wash App. 763, 764 P.2d 653 (1988)* a Petition for Review was filed late. There were no extraordinary circumstances found to allow the late filing. The Court further indicated that in cases where the petition was timely filed but some aspect of the filing was challenged, the appeal was allowed where there were "extra- ordinary circumstances", i.e., "circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. The court indicated in such cases it would be a gross miscarriage of justice where there was reasonable diligence conduct RAP 18.8(b)." *Reichelt* at 765,766. The Court further indicated that RAP 18.8(b) permits an extension "only in extraordinary circumstances and to prevent a gross miscarriage of justice" and clearly favors the policy of finality of judicial decisions over the

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competing policy of reaching the merits in every case." *Reichelt* at 765. In the present case there was a late filing, errors in the procedure and lack of due diligence.

Petitioners not only filed the Motion for Discretionary Review in the wrong Court, they did not file a Petition for Review, did not pay a filing fee and did not serve the respondents. Respondents have received all the documents submitted by petitioners from the Court, they have not been served by mail or email.

The petitioners' Motion to Extend Time for Filing Petition for Discretionary Review did not set out material reasons for the delay, the sequence of events was vague and there was no reference to persons, dates or documentation to support the events mentioned and their effect on counsel or his time to support extraordinary circumstances. Petitioner did not address the issue of miscarriage of justice.

Respondents respectfully request that petitioners' Motion be denied for the reasons stated above. Petitioners' conduct is prejudicial and costly.

Dated this 17th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that service of a copy of the document on which this certificate appears was made on the 17th day of March, 2021, by sending the same via electronic mail to the following:

Eugene Austin
eugene.c.austin@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 17th day of March, 2021.

THE GEISNESS LAW FIRM

By: s/Melinda Birch
Melinda Birch

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EXHIBIT 1

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

Queen Ann Water Works, LLC, and Gerard A. Fitzpatrick and Catherine Fitzpatrick, Appellents, v. Mary C. Hrudkaj, Tabitha Grabarczyk, Pamela E. Owens, Joi Caudill, Respondents.	**Superior Court No. 13-2-00049-4** **Court of Appeals No. 52984-0** **MOTION TO EXTEND TIME FOR FILING MOTION TO RECONSIDER**

COMES NOW, Respondents, by and through their attorney, Eugene C. Austin, and ask the court for an order extending the time to file Respondents' brief in this matter to September 25, 2020.

On September 1, 2020, the Court issued it opinion in the above entitled case. The dead line for filing a Motion for Reconsideration was on September 21, 2020. On September 21, 2020, Respondents counsel attempted to file its Motion for Reconsideration using the Washington Court's portal at https://ac.courts.wa.gov/. Respondents' counsel logged into the site verified the correct information and attached motion. Counsel attempted to send the file and it appeared to upload without a problem. However, when counsel contacted the court on September 24, 2020, he learned that the document had not been received. Counsel spoke with Ms. Harper who verified the

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upload had not gone through. Counsel is, therefore, resubmitting the Motion for Reconsideration, and asks the Court to grant its Motion to Extend Time for

This motion is submitted for consideration without oral argument.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE STATEMENTS CONTAINED IN THIS MOTION AND DECLARATION ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

DATED this 24th day of September, 2020.

Eugene C. Austin, WSBA # 31129
Attorney for Defendant/Appellent

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September 24, 2020 - 7:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52984-0
Appellate Court Case Title:	Mary C. Hrudkaj et al., Respondent v. Queen Anne Water Works LLC, et al., Appellant
Superior Court Case Number:	13-2-00049-4

The following documents have been uploaded:

- 529840_Motion_20200924194236D2662026_0901.pdf
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  Motion 1 - Extend Time to File
  The Original File Name was Motion to Extend MR.pdf
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  Motion 2 - Reconsideration
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A copy of the uploaded files will be sent to:

- melinda@geisnesslaw.com
- peter@geisnesslaw.com
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Comments:

Sender Name: Eugene Austin - Email: gaustin@co.mason.wa.us
Address:
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SHELTON, WA, 98524
Phone: 360-427-9670 - Extension 598

Note: The Filing Id is 20200924194236D2662026

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

Queen Ann Water Works, LLC, and Gerard A. Fitzpatrick and Catherine Fitzpatrick, Appellents, v. Mary C. Hrudkaj, Tabitha Grabarczyk, Pamela E. Owens, Joi Caudill, Respondents.	**Superior Court No. 13-2-00049-4** **Court of Appeals No. 52984-0** **MOTION FOR RECONSIDERATION**

COMES NOW, Appellants, by and through their attorney of record, Eugene C. Austin and moves the Court pursuant to RAP 12.4 to reconsider its ruling a September 1, 2020, holding the trial court abused its discretion in determining that the statement read into the record on November 12, 2016, were not sufficient to establish a CR 2A agreement.

MATTERS THE COURT HAS MISAPPREHENDED

1. The Court has misapprehended facts surrounding the "basic principles" of a tenetive agreement stated on the record on November 15, 2016.
2. The Court has misapprehended the facts of the November 12, 2015, agreement and, therefore, the application of CR 2A status
3. The Court has mistakenly its own belief as to what the parties intend to supply terms and conditions that do not exist.

ARGUMENT

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The court has misapprehended the applicability and import of the facts in this case and incorrectly determined the intent of the parties.

> CR 2A applies to preclude enforcement of an agreement when "(1) the agreement was made by the parties or attorneys 'in respect to the proceedings in a cause[,]' and (2) the purport of the agreement is disputed." 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. The party moving to enforce a settlement agreement carries the burden of proving there is no genuine dispute as to the material terms or existence of the agreement.

Cruz v. Chavez, 186 Wn.App. 913, 919 – 920, 347 P.3d 912 (Div. 1 2015) (internal citations omitted). Settlement and CR 2A agreements are subject to the law of contracts. *Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86, (Wash. 2013). For such agreements to be enforceable there must be a meeting on the minds. See, *Sandeman v. Sayres*, 50 Wash.2d 539, 541-42, 314 P.2d 428 (1957); *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn.App. 846, 22 P.3d 804, 851 (Wash.App. Div. 1 2001); *Gaskill v. City of Mercer Island*, 19 Wn.App. 307, 576 P.2d 1318, (Wash.App. Div. 2 1978). In the current case, the facts do not support a finding that the parties intended a binding agreement or that the terms were sufficient to create a CR 2A agreement.

Statements/Facts on Record November 12, 2015

"Basic Principles"

In its Reply Brief, Appellants assert they "do[ ] not know what was meant by the 'basic principles' or what was meant by the appellants sought to enforce the 'basic principles'" Reply Brief of Appellants, at 8. This admission is interesting and highly probative of whether there is "a dispute over the existence or material terms of the agreement." *In re Marriage of Ferree*, 71 Wn.App. 35, 40, 856 P.2d 706 (1993). This is because it was the Appellants, who at the November 12, 2019, hearing, stated on the record that we were only providing "you the ***basic principles*** of our agreement." VRP (Nov. 12, 2015) at 2 (emphasis added). In their Reply Brief, Appellants

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acknowledge they do not know what the agreement was. The Court misapprehended this statement by Appellants' counsel when it misquoted the transcript by leaving out the word "basic" in its statement of facts. UNPUBLISHED OPINION, 52984-0-II, at 7. This is important because purported agreement was not even about the "principles," but merely about the "basic principles" that would be applied to the anticipated agreement. The Court has stated: "Respondents argued that the parties only read into the record a "basic framework" and it was not a completed agreement." UNPUBLISHED OPINION, 52984-0-II, at 9. While this is fairly accurate interpretation of an argument made at the August 29, 2020, hearing, it misconstrues the use of "basic framework." Respondents did not have access to the transcripts of that hearing until after they filed their response to Appellant's Brief[1] and were not able to adequately discuss this in their response. However, on reading the transcript, Respondent argued that:

> As Mr. Geisness said on page 2, it says and Judge, I'd like to say Mr. Austin will probably indicate the same; is that this is going — is where we're going to give you a basic principles of our agreement. We haven't finalized the wording of some of the parts.[2]
>
> Basic principles, basic framework, is not an agreement. And certainly not an enforceable one, because we don't know what all those – all those principles are.

VRP (Sep. 21, 2016) at 4. "Basic framework" is simply used as a synonym for "basic principles." Various courts around the country have used these words in a similar way, it is the ordinary meaning applied to them. See, *Rhode Island Economic Development Corp. v. Parking Co., L.P.*, 892 A.2d 87, (R.I. 2006) ("these basic principles provide a general framework" examining condemnation); *Silagy v. State*, 101 N.J.Super. 455, 244 A.2d 542, 546 (N.J.Co. 1968) ("Within

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[1] On August 12, 2019, the Respondents filed their reply to Appellants' brief. On August 30, 2019, Appellants filed additional transcripts for the trial courts hearing on the enforceability of in court statements as a CR 2A agreement, held on August 29, 2016. Because Respondents had already filed their response brief and did not have access to the August 29 transcript, they objected to Appellant motion. The objection was denied on September 16, 2019, and the supplemental transcript was allowed. The Court has made numerous references to this document in its ruling.

[2] Quoting Mr. Geisness, See, VPR (11/12/2015) at 2. Counsel was reading from a transcript prepared prior to the transcripts filed with the Court of Appeals. However, the language is essentially the same.

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the framework of these basic principles of law"); *Borough of Brielle v. Zeigler*, 73 N.J.Super. 352, 179 A.2d 789, 793 (N.J.Co. 1962) ("it is nevertheless within the framework of these basic principles that the issues in the present case must be determined."); *Fertico Belgium S.A. v. Phosphate Chemicals Export Ass'n, Inc.*, 510 N.E.2d 334, 70 N.Y.2d 76 ("Viewed within the framework of these basic principles"); *People v. Becker*, 759 P.2d 26, 29 (Colo. 1988) ("A brief restatement of the basic principles of the overbreadth doctrine will set the legal framework for our resolution..."); *G & G Trucking Co., Inc. v. Public Utilities Com'n of State of Colo.*, 745 P.2d 211, 215 (Colo. 1987) ("...we first summarize those basic principles of public utility law which provide the framework for our analysis."); *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239, 242 (Colo. 1987) ("Basic principles of tort law provide the framework ..."); *Alexander v. Alexander*, 701 S.W.2d 48, (Tex.App. —Dallas 1985) ("...must be resolved within the framework of certain basic principles of contract and insurance law."). It is thus common to view "basic principles" as equivalent to a "framework." While "framework" can serve as a support structure, no one would argue that the framework of a house is the entire complete house. Thus, the common ordinary meaning of framework and by implication "basic principles" in not a complete agreement. As the Court noted in its opinion, courts will give "words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent." UNPUBLISHED OPINION, 52984-0-II, at 13, citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 - 504, 115 P.3d 262 (2005). The "ordinary, usual, and popular" meaning of "basic principles" is nothing more than a framework for an incomplete agreement. However, the fact that the Appellants did not understand what "basic principles" means (Reply Brief of Appellants, at 8; VRP (Nov. 12, 2015) at 2) , their own words demonstrate that "the purport of the agreement is disputed." *In re Patterson*, 93 Wn.App. 579, 582, 969 P.2d 1106 (1999) (alteration

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in original) (quoting *In re Marriage of Ferree*, 71 Wn.App. 35, 39, 856 P.2d 706 (1993)).

Rule 2A states that:

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

CR 2A. "Basic principles" are insufficient to form a complete and enforceable agreement because there can be no meeting of the minds on the essential terms and conditions. As this Court stated, "An enforceable contract requires 'a mutual intention or meeting of the minds on the essential terms of the agreement.'" UNPUBLISHED OPINION, 52984-0-II, at 13, citing *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn.App. 846, 851, 22 P.3d 804 (2001). "Basic principles" can only show that the parties intended to have an agreement sometime in the future, not what their intent was for what was yet to be negotiated. Such an agreement is only a wish to come to an agreement; a "meeting of the minds" has not yet occurred. This is not enforceable under Washington law. *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945, 648 (Wash. 2004) citing *Sandeman v. Sayres*, 50 Wash.2d 539, 541-42, 314 P.2d 428 (1957).

"Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract." *Morris v. Maks*, 69 Wn.App. 865, 869, 850 P.2d 1357 (Div. 1 1993) citing *Loewi v. Long,* 76 Wash. 480, 484, 136 P. 673 (1913). As was the case in *Morris v. Maks*, most cases involve a writing, and one was anticipated in this case. (See, VRP (Nov. 12, 2015) at 3, 4, 6, 8, 9). However, an agreement can be made on the record, but it must meet standard contract requirements (See, *Cruz v. Chavez*, 186 Wn.App. 913, 347 P.3d 912 (Div. 1 2015)), including the considerations listed in *Morris v. Maks*. In the current case, what was

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read into the record did not meet these standards and the Court misapprehended the scope and import of the terms.

We have already discussed the meaning of "basic principles" as demonstrating that a complete agreement was not contemplated nor intended to be put on the record; the parties only thought they were very close to an agreement and sought a continuance to see if they could complete it. It should be noted that no one ever claims on the record that this is a complete agreement or that it is intended to be a CR 2A agreement or one that it would be sufficient under RCW 2.44.010 to bind the parties as a complete and final agreement. See, VRP (Nov. 12, 2015) generally.

Terms of the Purported Agreement

After the Appellants' counsel tells the court that "we're going to give you the basic principles of our agreement" (VRP (Nov. 12, 2015) at 2. This discussion proceeds as follows:[3]

1. It is stated, "for settlement of this matter that the applicable agreements are – there's three applicable agreements that will be binding on the – the parties." *Id.*, at 2 – 3. This is not material to the Settlement agreement because this was not disputed. The agreements run with the land and were put in place by the original developers. See UNPUBLISHED OPINION, 52984-0-II, at 3. Further, the agreements apply to all users including those that are not a party to the lawsuit.

2. Next it is stated "in exchange for this agreement, Mr. Fitzpatrick and QAW agree that they will abide by the – these agreements and the terms thereof." VRP (Nov. 12, 2015) at 3. These statements are not material to the alleged agreement because Fitzpatrick and QAW are merely agreeing to do what they were already obligated and required to do.

3. Immediately following the statements about complying with the agreement, it is

[3] The numbers in this section are intended only to show the approximate order in the Court Record.

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stated that "There's some amendments to the – to the agreement. These arise out of this settlement agreement and a mediation that took place in August of 2014. Those should be – will be attached to the settlement agreement and made a part of the – the governing documents." VRP (Nov. 12, 2015) at 4. This demonstrates that there are additional terms (amendments) that are not being put on the record. In its opinion, the court incorrectly states that "that previously agreed to amendments to the applicable agreements will be attached to a written settlement agreement and will be made a part of the applicable documents." UNPUBLISHED OPINION, 52984-0-II, at 8. However, the court misapprehends this statement. There is no language that indicates the amendments were agreed upon only that they "arise out of this settlement agreement and a mediation that took place in August of 2014."[4] VRP (Nov. 12, 2015) at 3. The Court reads into the statement something that is not supported by the record. Courts generally do not read into contracts things that are not there because parties have the freedom draft contracts. See, *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 188 Wn.2d 171, 195, 393 P.3d 748, (Wash. 2017). In fact, the mediation mentioned in the hearing was a failure.[5] The trial attorney entered the lawsuit in October of 2014, and did not participate in the mediation. See Record at 16. The parties discussed a number of issues that the Respondents thought might assist Fitzpatrick in managing the water system, but Fitzpatrick's attorney declined to discuss the issues that were important to the Respondents, such as rates, and refused to conduct further mediation. These were still open issues. Generally, negotiations are not discussed in court. However, because the Court inferred agreements/amendments that were not read into the record or complete, it is necessary to explain what happened. Finally, the parties state the intent to create a written settlement agreement that will include the full agreement. VRP (Nov.

[4] Because the applicable agreements apply to all water system users, many changes would also require their approval.

[5] Fitzpatrick got angry and left the mediation meeting within the first five minutes, leaving his second attorney to conduct discussions.

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12, 2015) at 3.

4. The written agreement was integral to the settlement and intended by the parties to be the only binding agreement. This is why nothing took effect and no deadline began to run until that last signature was obtained on the written agreement. VRP (Nov. 12, 2015) at 3, 6. Because there was no written agreement and the amendments were not written into the record, the amendments were never made part of any settlement even though they were material to the agreement. This demonstrates a lack of "meeting of the minds" (*Sandeman,* at 541-42; *Saluteen-Maschersky* at 851), an incomplete agreement, and intent for a later agreement (*Keystone* 94 P.3d at 648 (agreements to agree are unenforceable). The parties did not intend for the statement on the record to be the CR 2A agreement, it was merely intended as justification for continuing the trial and attempting to complete a settlement. This was not a CR 2A agreement and is not enforceable as such.

5. Fitzpatrick agreed to "facilitate the release of – of three liens that are still showing as – as being active, although the – the Fitzpatricks agree that they have been satisfied." While this is arguably a clearly defined agreed to provision, it was not integral to the lawsuit and, therefore, not material to the final agreement. Fitzpatrick was required by RCW 60.04.071 to release the liens; he is not agreeing to anything he was not already obligated to do. This concession is insufficient to support the enforcement of a CR 2A agreement, particularly where so many terms, conditions, issues are left unstated.

6. "The parties agree that they will accept the – the rate increase to $42 monthly, effective as of the date of the signing of this agreement. There will be no retroactive payments." VRP (Nov. 12, 2015) at 3. This term is expressly conditional on the completion of a final signed agreement. This is a condition precedent to any final agreement. Without the signed agreement, it

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is completely unenforceable against either party and illusory. *Koller v. Flerchinger*, 73 Wn.2d 857, 860, 441 P.2d 126, (Wash. 1968); *Sandeman v. Sayres*, 50 Wn.2d 539, 541 – 542, 314 P.2d 428, (Wash. 1957). Without a signed agreement, the date cannot be ascertained and the agreement fails. More importantly, it clearly demonstrates that the intent of the parties was for the written agreement to be the enforceable agreement, not the incomplete statements made on the record. Parties may make an agreement dependent upon compliance with certain precedent conditions, and when those conditions are not met, there is no binding agreement. *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964). Here, the parties made the signature date a material condition to any agreement. VRP (Nov. 12, 2015) at 3, 6. The intent to have a written agreement is clear, and the Respondents are entitled to have that intent (benefit of their bargain) recognized by the court. "Where a court's judgment enforces a settlement agreement, the court does not have the authority to impose obligations to which the parties themselves did not agree." *Aguirre v. AT & T Wireless Services*, 118 Wn.App. 236, 241, 75 P.3d 603, (Wash.App. Div. 1 2003) citing *Evans v. Jeff D.*, 475 U.S. 717, 726-27, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986); *Sandeman,* at 541-42; *Saluteen-Maschersky* at 851. This is at least partly acknowledged by the Court in its opinion where it found that the written agreement was unenforceable. UNPUBLISHED OPINION, 52984-0-II, at 18 - 19. However, by making this finding, the court effectively invalidates the "agreement" as stated on the record because there is no longer an effective date and it can no longer be viewed as a CR 2A agreement for that reason.

7. Immediately after the $42 rate increase, it is stated that "[t]here is a contention over – contention over a special assessment for tree cutting, which is some disagreement over whether it's a special assessment or not." VRP (Nov. 12, 2015) at 3. The language demonstrates that there is no agreement here. There is "contention" and "disagreement" over a material aspect of the case.

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This cannot be viewed as an agreement, but only as a dispute, which CR 2A prohibits enforcement of. Next there is a statement that "defendants agree that they will provide some proof of — that the work was done and what amounts were paid." VRP (Nov. 12, 2015) at 3. While clearer, it does not what proof is required or how much would be sufficient; this was still to be determined. Then counsel for the Respondents states "I believe the deadline is still 30 days." *Id.*

> MR. GEISNESS: Well, no, I — I haven't had a chance to determine that.
> MR. AUSTIN: Okay. So that's up in the air. But –
> MR. GEISNESS: I think it will probably be –
> MR. AUSTIN: – there will be a deadline.
> MR. GEISNESS: – a little bit longer, but I – you know –
> MR. AUSTIN: Yeah, so there will be –
> MR. GEISNESS: We might be able to absolve that before we ever have to finish signing the agreement, but anyway.
> MR. AUSTIN: Okay. Yeah, so –
> MR. GEISNESS: But I think – if – if – it wouldn't be much longer than 30 days, okay.
> MR. AUSTIN: Okay. Yeah, so there will be a deadline for providing that evidence. And if that evidence is provided, then the – they'll be – my clients agree that that's a – that they'll make the payments on that and it'll be – there'll be some arrangement made for that to be paid in a monthly – on a monthly basis.

VRP (Nov. 12, 2015) at 4. There is no agreement here. Appellants say no to the thirty days. Based on that, Respondents' counsel says "that's up in the air." There appears to be an agreement that there will be an agreement on a deadline that may or may not be around thirty days. Additionally, it's not defined when the deadline would start to run. Presumably, it would be the date the written agreement is signed as with other conditions because that is the document that is to set all this out for the court. This cannot be considered an agreement and fails as a CR 2A agreement.

8. The parties then move on to the "2015 rate increase," which occurred after the case was filed. "Defendants agree that they will treat this rate increase as it is outlined in the existing documents" and will "have a meeting as soon as possible to discuss it and provide evidence." VRP (Nov. 12, 2015) at 4. If an agreement cannot be reached, it will "go through the dispute resolution

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process for the rate increases, as outlined in the third-party beneficiary contract." *Id.*, at 3 – 4. The parties do not state whether the "dispute resolution process" is the existing process or the one contemplated and mentioned on the record, but not defined. *Id.*, at 5. If it is the existing one, the Fitzpatricks could start the process anytime; however, the clause itself would not become enforceable until the completion of the written agreement, because the agreement is interdependent on other conditions being agreed to and many of those terms are dependent on a signed agreement. *Koller v. Flerchinger*, at 860; VRP (Nov. 12, 2015) at 3, 4, 6. If the process is the one contemplated on the record (*Id.*), then the clause fails because "dispute resolution clause" is not defined on the record. This clause does not meet the standards for and enforceable agreement under CR 2A or contract law.

9. The parties next move onto the issue of "door knock fees." What is important to note here, for determining the intent of the parties, is at the time counsel for the Respondents mentions the door knock fees, he believes it to be an unresolved issue. Respondents' counsel is presenting an agreement he knows is incomplete at the time and requires additional negotiation. Only when Appellants' counsel announced that they are agreeing to no door knock fees does this become an agreed condition. However, it is not so agreed to that they did not continue to negotiate it, as the exceptions in the unsigned agreement provided by Appellants demonstrate. Vlerks Papers 1, at 77 - 78. However, the intent of the parties, as to the entire agreement, is clear that they were putting an incomplete agreement on the record, not a CR 2A agreement.

10. The parties then move on to two items that appear to be agreed to, but the exact language is still pending subject to the written agreement. These are conditions that existing customers will not pay for expansion of the water system, and that Appellants will present a

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"financial plan" for an emergency fund that will require two signatures on the checks.[6]

11. For the next item, special assessments, it is clear that this is not agreed to. Counsel states the parties are still working on "proper notice," "timely proof of the work being done," and "that it be limited to a specific time," "perhaps" 90 days. This is another clear statement that the agreement is not complete or intended to be binding. Nothing is agreed upon, other than that there will be a clause to address these unresolved issues. An agreement to agree is not enforceable in Washington. *Keystone,* 94 P.3d at 648; *Sandeman v. Sayres*, 50 Wn.2d 539, 541 – 542, 314 P.2d 428, (Wash. 1957). There is no meeting of the minds and no CR 2A agreement; this provision was still in dispute.

12. Next, there is a clear agreement on one provision that "the parties will refrain from blocking the roadway, or harassing the other party." VRP (Nov. 12, 2015) at 5. This issue arises from restraining orders that were issued during the lawsuit and not the actual subject matter of the case. See, Record at 9 - 11. This clause would likely not be material to a finalized agreement on the water system, but would be important to the Respondents.

13. The parties agree that the written document will contain a clause making it binding on the parties. This is probably clear enough for enforcement at some point; however, the parties contemplate a written agreement that is not effective until signed. VRP (Nov. 12, 2015) at 3, 4, 6. Further, this clause is intended to apply to the contemplated written agreement that does not become effective until signed. Without the signed agreement many key provisions, and agreement in general are unenforceable. *Koller v. Flerchinger*, 73 Wn.2d at 860.

14. In exchange for these agreements the case would be dismissed. VRP (Nov. 12, 2015) at 5. However, because the entire agreement is dependent on the completion of a written

[6] Not clearly stated that signatures refer to checks, but the court appears to correctly infer this. UNPUBLISHED OPINION, 52984-0-II,, at 8.

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agreement signed by all the parties (*Id.*, at 6), this clause is not enforceable without such agreement. It is a valid condition precedent to a binding agreement. *Koller v. Flerchinger*, 73 Wn.2d at 860. It is dependent on all matters being agreed to and a written agreement signed. VRP (Nov. 12, 2015) at 6.

15. There is an unclear statement about a waiver clause. The trial court noted this in its ruling on CR 2A status. VRP (Sep. 21, 2016) at 14. The Court of Appeals interpreted this as "any prior waiver be considered a continuing waiver." UNPUBLISHED OPINION, 52984-0-II at 8; VRP (Nov. 12, 2015) at 6.

16. It is stated that there will be a "severability clause." However, absolutely nothing is put on the record as to what will be included in this clause. The total words mentioned on this subject are "severability clause," nothing more. VRP (Nov. 12, 2015) at 6. The trail court noted this in its ruling on the applicability of a CR 2A agreement. VRP (August 21, 2016) at 15. There is nothing about what is being severed or what will happen if there is a severance. VRP (Nov. 12, 2015) at 6. This is no small matter. The Court of Appeals decided that the mere mention of a "severability clause" was sufficient for it, without concern or evidence as to what the parties might be talking about, its own interpretation of what it thinks the parties may have come up with if they were intending the same terms as the Court decided to imply. The Appellate Court states "courts are "loathe to upset the terms of an agreement and strive to give effect to the intent of the parties" especially where the agreement contains a severance clause. UNPUBLISHED OPINION, 52984-0-II at 17, citing *Zuver v. Airtouch Communications Inc.,* 153 Wn.2d 293, 320, 103 P.3d 753 (2004). However, that is exactly what the Court has does when it supplants its own thoughts for the unexpressed thoughts of multiple contracting parties. While, the severability clause may have ended up being drafted as the Court thinks it should, there are other issues that can be addressed

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by a severability clause. For example, the clause may be used to sever the agreement in to separate agreements. This may have actually been necessary because the parties were contemplating amending the applicable agreements and making other changes that would affect other parties, who were subject to the original agreements, but who were not parties to the lawsuit and therefore could not be bound by changes to the agreements. Additionally, contract law allows the parties to draft agreements to suit their needs. *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 188 Wn.2d 171, 195, 393 P.3d 748, (Wash. 2017). It is possible that the parties may have desired to exempt certain provision, considering them to of absolute necessity, without which the agreements would be useless or unduly oppressive to them. The parties may have sought to include terms that would require the parties to replace unenforceable clauses by some mutually agreed to means. See, *Arpac Corp. v. Murray*, 226 Ill.App.3d 65, 80, 589 N.E.2d 640, (Ill.App. 1 Dist. 1992) ("agreement specifically allows, in a severability clause, a court to modify"). There may be other things that would have been included, there is no reason for the clause to have intent and form the Court imagines it would have if it were drafting the clause. However, none of these alternatives are expressed in the two words, "severability clause." Respondents can find no caselaw to support the conclusion that the court may insert its own subjective intent and language into a clause absent clear objective evidence as to what the parties intended. Objective intent cannot be inferred by the possible two-word title of a clause. It can only show an objective intent to have a clause.

17. Next, there is an inference that there will be a new "dispute resolution clause" that is still under negotiation. VRP (Nov. 12, 2015) at 6. The fact that it is still being negotiated is prima facia evidence that it is not agreed to. Further, because there is no discussion of what the clause stated or what still needed to be modified, this cannot be an agreement on the record. There is no way to determine what would be included in this clause. However, the objective intent of the

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parties is to change or replace any existing dispute clause. This is nothing more than an unenforceable agreement to agree. *Keystone,* 94 P.3d at 648; *Sandeman v. Sayres*, 50 Wn.2d at 541 – 542.

18. It is clearly stated on the record that "the effective date will be the date of the last signature obtained for the settlement." VRP (Nov. 12, 2015) at 6. This is a clear statement that the parties did not intend what was stated on the record to be an enforceable agreement. Counsel then adds "And with that, then the lawsuit would be dismissed." *Id.* "That" being the signed agreement, which was required to determine how things would work, what was actually agreed to, when the agreement would become enforceable, and what the deadlines were. This is supported by other statements that a signed agreement is necessary for the agreement to be effective. *Id.*, at 3, 4, 6. This single requirement prevents the record of November 15, 2016, from being considered as a valid CR 2A agreement. By the court's own reasoning, the agreement presented by Appellants was not signed and was not binding on the parties. UNPUBLISHED OPINION, 52984-0-II at 18 - 19. However, without a signed agreement there is no final agreement and everything stated on the record becomes unenforceable.[7] See *Koller v. Flerchinger*, 73 Wn.2d at 860; VRP (Nov. 12, 2015) at 6. This is not a valid CR 2A agreement.

19. There is one final item that is clearly agreed to on the record. The parties agreed to a deadline of (two weeks), specifically December 4, 2016[8], for the conclusion of negotiations and completion of a signed agreement. VRP (Nov. 12, 2015) at 8 – 9. This is a time specific agreement between the parties. The parties could continue to negotiate if they agreed, but they were not bound

[7] Of a final note, if the effective date of the agreement is not the date of the last signature on the written agreement as stated on the record, then it can only be the date of the hearing, August 12, 2016, or possibly December 4, 2016, the date for the presentment of the written agreement to the court. However, this would result in Appellants being in material breach of the agreements for the past three years. No waiver was granted.

[8] Date set by the trial court for presentment of the signed agreement.

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to agree or continue negotiating once that date had passed. The fact that negotiations continued for another eight months only highlights the fact that there was no enforceable agreement and that there is a valid dispute over the agreement, which means CR 2A does not apply.

Misapprehension by the court.

The Court stated in its opinion:

> We review the trial court's decision to enforce a settlement agreement pursuant to CR 2A and RCW 2.44.010 under the abuse of discretion standard. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, *review denied*, 122 Wn.2d 1020 (1993). An abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. *Id.* A trial court abuses its discretion when it erroneously interprets a contract. *See Bauman v. Turpen*, 139 Wn. App. 78, 93-94, 160 P.3d 1050 (2007).

UNPUBLISHED OPINION, 52984-0-II, at 12. However, the court left out that it is the burden of the party seeking enforcement of a CR 2A agreement to demonstrate that there is no dispute. *Cruz v. Chavez*, 186 Wn.App. 913, 920, 347 P.3d 912 (Div. 1 2015) citing *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 696-97, 994 P.2d 911 (2000). Further, the reviewing court should look at the evidence in the light most favorable to the Respondent. *Cruz v. Chavez*, 186 Wn.App. at 920.

The primary goal of the court "is to ascertain the intent of the parties." UNPUBLISHED OPINION, 52984-0-II, at 13, citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). As shown above, the court has misapprehended the intent of the parties to put a final and complete agreement on the record, in various ways.

1) The parties (Appellants) stated that they were only presenting the "basic principles" of the agreement. VRP (Nov. 12, 2015) at 2.
2) It was repeatedly stated by the parties that the terms of various clauses were still being negotiated. VRP (Nov. 12, 2015) at 3 – 9.
3) It was repeatedly stated that the agreement would not be effective until it was in writing and signed by all the parties. VRP (Nov. 12, 2015) at 3, 6.
4) Deadlines that were dependent upon a final written document were not yet established, agreed on, or were unclear. VRP (Nov. 12, 2015) at 3 - 4, 5, 6.

In the current case, the intent of the parties or meeting of the minds was not demonstrated

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by the facts in this case. The court misapprehended the intent by inferring what it thought should be negotiated in various anticipated clauses to the agreement and by not addressing some issues. These include:

1. the possible amendments to the applicable agreements (VRP (Nov. 12, 2015) at 3)
2. disagreement over special assessments (*Id.*)
3. disagreement over whether tree cutting is a special assessment (*Id.* at 3). This is an issue the court did not address when it attempted to interpret the parties' intent. UNPUBLISHED OPINION, 52984-0-II, at 15.
4. what proof is required a special assessment (VRP (Nov. 12, 2015) at 3)
5. what the deadline for showing proof would be a special assessment (*Id.* at 3 -4)
6. what the proper notice, what constitutes "timely proof", what the time limit for special assessments would be (*Id.*, at 5)
7. what is in the "severability clause" (*Id.* at 6)
8. what would be in the "dispute resolution clause" (*Id.* at 6).

These are not inconsequential issues for the Respondents as they constitute the bulk of the lawsuit. Additionally, the agreement on the applicable agreements only constitutes an agreement by Appellants to do what they are already obligated to do.

Washington follows the objective manifestation test for contracts. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent, *id.* at 177-178. To determine whether a party has manifested an intent to enter into a contract, court impute an intention corresponding to the reasonable meaning of a person's words and acts. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 587, 790 P.2d 124 (1990), overruled in part on other grounds by *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 832 P.2d 1310 (1992). Here, the actions and words indicate that the parties did not intend a binding agreement. Rather, that was left for the written agreement.

"An abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. A trial court abuses its discretion when it erroneously

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interprets a contract." UNPUBLISHED OPINION, 52984-0-II, at 12 citing *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, review denied, 122 Wn.2d 1020 (1993); *Bauman v. Turpen*, 139 Wn. App. 78, 93-94, 160 P.3d 1050 (2007). However, an abuse of discretion does not occur when the parties intended further negotiations on undefined terms. VRP (Nov. 12, 2015) at 3 - 6. When the court determines that there were material elements that were not stated. VRP (August 29, 2016) at 15. Courts do not generally determine intent by filling in the terms of an agreement when the terms have never been stated. Doing so would effectively force a party into an agreement they never made. *Aguirre v. AT & T Wireless Services*, 118 Wn.App. at 241. An abuse of discretion does not occur when the parties make it clear, on the record, that the entire agreement is dependent on a final written agreement. VRP (Nov. 12, 2015) at 3, 6. Determining that there was not an enforceable agreement is not an abuse of discretion, when some terms are dependent on prior discussions/negotiations, one party was not privy to, that were not formally agreed to, and that were not on the record. VRP (Nov. 12, 2015) at 3.

The proponent of an agreement that has been determined by the court to be prohibited by CR 2A, has the heavy burden of showing that it is an abuse of discretion. See, *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983). The proponent has the burden of showing that the agreement is not disputed. *Cruz v. Chavez*, 186 Wn.Appat 920. Further, under the abuse of discretion standard, the trial court's ruling is only set aside if the "decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons." *Morris v. Maks*, 69 Wn.App. 865, 867, 850 P.2d 1357 (Div. 1 1993). Additionally, the Respondents are entitled to have the matter reviewed by the appellate court in the light most favorable to the Respondents. *Cruz v. Chavez*, 186 Wn.App. 913, 920, 347 P.3d 912 (2015).

In the current case, the trial court noted a number of problems with holding the recording

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agreement to be a CR 2A agreement. It is irrelevant that the trial court only listed a few, as there were so many issues that have been pointed out by the Respondents. Respondents have outlined many more issues indicating there was no final agreement, negotiations were still ongoing, terms and dates were not agreed to, that the parties intended for the written agreement to be binding agreement, etc. When viewed in the light most favorable to the Respondents, the facts demonstrate that no enforceable CR 2A agreement was contemplated or made on the record. The parties only state what they hoped to accomplish. When viewed in the light most favorable to the Respondents, the facts demonstrate that the court did not abuse its discretion.

Special assessments

In its opinion, the Court misapprehended the intent of the parties relating to special assessments. The Court quotes one paragraph

> [Respondents' Counsel:] Any—the special assessments, we're working out some dealing to require that the—the proper notice before the assessment is made, and that there be timely proof of the work being done; that it be limited to a specific time, like perhaps 90—90 days.

UNPUBLISHED OPINION, 52984-0-II, at 16. The Court then skips over 19 lines of text, discussing various other issues, to where the court asks "And is that your clients' agreement as well?" to which counsel replies. "yes." *Id.* The court then misconstrues this acknowledgment to interpret agreement that "the parties agreed to a 90-day notice provision for special assessments." *Id.* However, it is not clear from the record if the 90 days refers to the time for notice to be given, when the work had to be done, did QAW have to allow 90 days before billing or did it have to give notice within 90 days of performing the work (or some other event)? However, more important to determining whether the parties agreed is the word "perhaps." The "ordinary, usual, and popular meaning" of the word perhaps is "possibly, maybe." Webster's II New College Dictionary 817 (1995). Courts will give "words in a contract their ordinary, usual, and popular meaning unless the

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agreement as a whole clearly demonstrates a contrary intent." UNPUBLISHED OPINION, 52984-0-II, at 13, citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 - 504, 115 P.3d 262 (2005). It the court applies this standard; it can only conclude that the parties had not agreed on a time period at all. Maybe they would in the future, but not at the time of the hearing.

The Court then goes on to state:

> And, as noted above, the parties agreed to be bound by the terms of the Declaration of Water Service, which sets for the payment requirements in paragraph 3.3. Therefore, even if there was no separate agreement as to a 90-day notice and payment plan for special assessments, it was not a material term that would undermine the agreement.

UNPUBLISHED OPINION, 52984-0-II, at 13. There are a number of the problems with this. First, in addition to not knowing what the 90 days related to, the parties had already stated that the Declaration of Water Service was subject to being amended. VRP (Nov. 12, 2015) at 3. These terms were not stated on the record. *Id.* Second, the entire agreement depended on all the items being successfully concluded; dismissal was strictly in "exchange" for agreement on the other items (Id., at 5, 6). Third, the provision was material to the Respondents. Not just the "90 days", but the other issues that are mentioned. The terms of these issues are not defined either. "Black's Law Dictionary defines 'material term' as: 'Contractual provisions dealing with significant issues such as subject matter, price, payment terms, quantity, quality, duration, or the work to be done.' *LaMore Restaurant Group, LLC v. Akers*, 2008 SD 32, 748 N.W.2d 756, (S.D. 2008) citing Black's Law Dictionary 998 (8th ed. 2004). Whether a clause is material depends on the intent and needs of the parties. While the Court might select this one term and conclude that it was not immaterial, it must be considered in light of the entire agreement and the intent of the parties. This was not the only clause that left most to the imagination. However, the terms limiting Appellants' actions were extremely important because Fitzpatrick had ignored and violated the applicable agreements on

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numerous occasions, both before and during the pendency of the lawsuit. Clerks Papers II, at 52 - 60. Fitzpatrick sometimes waited years to impose a special assessment. Clerks Papers II, at 57. Fitzpatrick would apply charges and rate changes without waiting the prescribed time periods. Clerks Papers II, at 52 - 56. The Respondents had to obtain restraining order against Fitzpatrick. Clerks Papers I, at 9 - 11. Respondents had to contest Fitzpatrick's attempts to circumvent the trial court at the UTC. _____. Even the court found Mr. Fitzpatrick not to be a credible witness. Clerks Papers II, at 60 - 62. Fitzpatrick's actions made a written agreement that clearly spelled out the terms he was required to abide by indispensable. Especially when the terms related to process, procedures, and time requirements. This was material to the Respondents and any agreement; there would be no meeting of the minds without these clauses.

Severability clause

As already discussed above, the record only mentions the term "severability clause" and absolutely no terms are provided. The trial court, which was much more familiar with the case, properly noted this problem. VRP (Sep. 21, 2016) at 15. The parties have the right to draft their own terms and conditions. See, *Zhaoyun Xia v. ProBuilders Specialty Ins. Co. RRG*, 188 Wn.2d 171, 195, 393 P.3d 748, (Wash. 2017). There is nothing in the record on which the court can determine what the intent of the parties was with respect to this clause. See VRP (Nov. 12, 2015) generally. A "severability clause" can refer to more than a "saving" provision for cases where a court finds one clause unenforceable. The Court might by chance be correct as to what the "severability clause" would look like if left to the ongoing negotiations of the parties. But it does not have the authority to write the clause where no language at all exists and the parties' intent as to that effect is not stated.

Parties' intent

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The Court claims that the "parties stated on the record their intent regarding the 'binding effect of this agreement on the—the parties.'" UNPUBLISHED OPINION, 52984-0-II, at 17 quoting VRP (Nov. 12, 2015) at 6. However, this conclusion is inaccurate because it ignores all the facts discussed in this motion and, more importantly, it misquotes the record. The actual quote is:

> ***And we have some – another clause that there is a binding – to include the binding effect of this agreement on the – the parties.*** That no waiver will be – of any of the terms be binding going forward, or will – will count as a continuing waiver. Severability clause. There — there will be a dispute resolution clause, which we have a little bit of modification to do to. And each of the authorities — each of the parties agree that they have authority to sign the document.

VRP (Nov. 12, 2015) at 6 (emphasis added). The parties are not discussing the binding effect of everything that was stated on the record. Rather, counsel is discussing a single "clause" that will be included in the written agreement that will make clear that it is binding on all the parties. This would make the written agreement the CR 2A agreement. From this one misapprehended fact, the Court concludes that "[t]he attorneys' reading of their CR 2A agreement into the record before the trial court on November 12, 2015, was binding on their clients under RCW 2.44.010 because it was made in open court." UNPUBLISHED OPINION, 52984-0-II, at 18. Yet there is no evidence to support this conclusion. The record demonstrates numerous clauses that were still subject to negotiation. VRP (Nov. 12, 2015) at 3 - 6. Terms that were not defined on the record. *id.* Deadlines that were dependent on the final signing of a written agreement that this Court has found the parties are not bound by. VRP (Nov. 12, 2015) at 6; UNPUBLISHED OPINION, 52984-0-II, at 18 – 19. Additionally, the parties never state that the provisions read into the record were intended to be a CR 2A agreement or that it would be binding. VRP (Nov. 12, 2015) generally. The fact are overwhelmingly against this. RCW 2.44.010 grants authority to an attorney "[t]o bind his or her client in any of the proceedings in an action" that are made in court. If any of the Nov. 12, 2015,

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statements are subject to this provision, the statements that the agreements were subject to a written agreement that would only be effective as of the date of the last signature obtained for the settlement. VRP (Nov. 12, 2015) at 3, 6. Although the Respondents keep referring to this provision, it is because it so clearly demonstrates the intent of the parties that the items stated on the record were still subject to negotiation and not intended as a CR 2A agreement. Because it cannot be. Without the agreement, there is no effective date and nothing to make anything in the record enforceable on the parties; the statements made on the record on November 12, 2015, fail as a contractual agreement and fail as a CR 2A, which is subject to contractual requirements. *Cruz v. Chavez*, 186 Wn.App. 913, 915, 920, 347 P.3d 912 (2015). The requirement of a written contract is material and essential to the agreement.

CONCLUSION

The trial court did not abuse its discretion when it found the alleged agreement to be unenforceable under CR 2A.

> CR 2A applies to preclude enforcement of an agreement when "(1) the agreement was made by the parties or attorneys 'in respect to the proceedings in a cause[,]' and (2) the purport of the agreement is disputed." 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. The party moving to enforce a settlement agreement carries the burden of proving there is no genuine dispute as to the material terms or existence of the agreement.

Cruz v. Chavez, 186 Wn.App. 913, 919 – 920, 347 P.3d 912 (Div. 1 2015) (internal citations omitted). Although the Appellants have the burden "of proving there is no genuine dispute as to the material terms or existence of the agreement," the Respondents have demonstrated the opposite. The parties did not contemplate a CR 2A agreement, rather the intended to continue the trial so that they could attempt to complete a settlement that would be finalized in a written agreement as a CR 2A agreement. Because the terms were never agreed to, there was no meeting

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of the minds and no agreement. Further, because there is no written agreement to finalize the agreement and establish an effective date, there is no enforceable agreement to settle the case. The court should, therefore, reconsider its ruling of September 1, 2020, find that there was no valid CR 2A agreement, and reinstate the decision of the lower court made after a full trial of the matter.

DATED this 20th day of September 2020.

Eugene C. Austin, WSBA # 31129
Attorney for Plaintiffs

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DATED this 20th day of September 2020.

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September 24, 2020 - 7:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52984-0
Appellate Court Case Title:	Mary C. Hrudkaj et al., Respondent v. Queen Anne Water Works LLC, et al., Appellant
Superior Court Case Number:	13-2-00049-4

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99456-1

SUPREME COURT
STATE OF WASHINGTON

Mary C. Hrudkaj,
Tabitha Grabarczyk,
Pamela E. Owens,
Joi Caudill,

Petitioners

v.

Queen Ann Water Works, LLC, and Gerard A. Fitzpatrick and Catherine Fitzpatrick,

Respondents.

Court of Appeals No. 52984-0-II

DECLARATION OF MELINDA BIRCH

I, Melinda Birch, declare the following to be true and correct to the best of my knowledge.

I am the assistant to the attorney for Respondents Gerard A. Fitzpatrick and Catherine Fitzpatrick . They are the owners/operators of Queen Ann Water Works, LLC.

On January 27, 2021 Petitioners' attorney, Eugene Austin, filed a Notice of Discretionary Review with the Supreme Court, but did not serve Respondents' attorney or his firm a copy by electronic mail or by US Mail. The only notification of that filing the

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Respondents' attorney received was from the Supreme Court. On February 16, 2021 Petitioners' attorney, Eugene Austin, filed a Motion to Extend Time for Filing a Petition for Review and also filed a Petition for Review with the Supreme Court, but he did not serve Respondents' attorney or his firm a copy by electronic mail or by US Mail. The only notification of that filing the Respondents' attorney received was from the Supreme Court.

Dated this 17th day of March, 2021.

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By: s/Melinda Birch
Melinda Birch

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Superior Court Case Number:	13-2-00049-4

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