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**No. 67859-1-I**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
FOR DIVISION I

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NICHOLAS R. PADVORAC,

Appellant

v.

SAN JUAN COUNTY,

Respondent

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**Appellant's Reply Brief**

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**I. The Settlement Agreement provided that the County pay  
Padvorac \$270,000 for his land.**

The terms of the Settlement Agreement are not ambiguous. Nowhere in the Settlement Agreement is there is a statement, reference or even a suggestion that the County could deduct monies given to Padvorac in 2008 from the \$270,000. CP 8-9 San Juan County argues on page 1 of its brief that under the terms of the Settlement Agreement, the County was to pay Padvorac the “total price” of \$270,000 for the land. But that is not what the Settlement Agreement says. It reads (verbatim) as follows:

***CR2A Settlement Agreement***

*San Juan County (“County”) and Nicholas R. Padvorac (“Padvorac”) enter into this Agreement in full settlement of the condemnation action filed by the County in San Juan County Superior Court (Cause No. 08-2-05219-3).*

- 1. Under threat of condemnation, Padvorac agrees to sell and San Juan County agrees to buy a portion of tax parcel number 251423-007 (“Property”) on Lopez Island, San Juan County.*

2. *The County shall survey the Property boundary and the parties will agree on a division of the parcel into two parcels as follows:*
  - a. *The parcel purchased by the County will be no more than 5 acres.*
  - b. *The parcel retained by Padvorac will be no less than 5 acres in size.*
  - c. *The triangular portion amounting to .31 acres located in the northwest corner of the Property, and reference on page 28 of the Eldred appraisal dated October 20, 2009, shall be included in the parcel acquired by the County.*
  - d. *The boundary between the two parcels will be at least 180 feet from the edge of the mitigated wetland as designed by Rosewood Environmental Services and approved by the U.S. Army Corps of engineers. The entire mitigated wetland and the adjacent 180-foot area shall be contained within the parcel acquired by the County.*
3. *San Juan County will pay Padvorac \$270,000 for the parcel created following the guidelines set out in paragraph 2. The County is responsible for all costs to subdivide and close the transaction, including real estate excise tax, if any, except the County shall not be responsible for Padvorac's attorneys fees.*
4. *The duties set out in the Agreement shall be completed within 90 days of the execution of this Agreement or as agreed by the parties. The survey shall include features of the Property, including the mitigated wetlands, necessary to establish the 180-foot area; and existing driveway cuts.*
5. *This Agreement is binding on both parties and is made subject to the provisions of CR2.*

6. *The parties shall attempt, in good faith, to resolve any issues that arise in implementing this agreement to Terry Lukens for resolution, first by mediation and then, failing agreement, by arbitration. An arbitration decision by Judge Lukens shall be final and binding on both parties.*
7. *The Lawsuit shall be dismissed with prejudice and without costs and fees to any party. CP8-9*

The Settlement Agreement stems from the RCW 8.08 Eminent Domain Condemnation Lawsuit filed in 2008.CP 60-63 The condemnation court ordered the parties to mediate before trial. The parties mediated and settled in 2009 on an agreed price and an agreed amount of land – 5 acres for \$270,000. Those are the essential terms of the agreement.

Settlement agreements are governed by contract principles and are “subject to judicial interpretation in light of the language used and the circumstances surrounding their making.” “*Stottlemyre v. Reed*, 35 Wash.App 169, 665 P.2 1383 (1983).

Paragraph 6 of the Settlement Agreement provides that the parties can resolve *issues* by and through a subsequent arbitration. The essential terms of the contract are not *issues*. An *issue* might fairly be the location of the five acres to be conveyed, or the boundary line between the two new parcels. An *issue* might also be whether the boundary of the new parcel

was 180' from the wetland, or whether the county should be responsible for additional title insurance or boundary work ordered by Padvorac. An "issue" arising from the implementation of the Agreement is not a change to its essential terms.

## **II. Authority to Arbitrate Stems from the Settlement Agreement.**

San Juan County quotes *Davis v. General Dynamics Land Systems*, 152 Wn.App. 715, 217 P.3d 1191(2009) for the proposition that the court is to determine the arbitrability of the dispute by examining the arbitration agreement. Quite true. But there is no separate arbitration agreement – the "authority" to arbitrate comes from paragraph 6 of the CR2A Condemnation Settlement Agreement. Therefore, this court must examine the Settlement Agreement as an inextricable part of the Final Order. CP 11-14. In most other cases, the authority to arbitrate would be contained as a clause in a contract, in which case the court would look at the contract. But in the present situation, the parties agreed that "*any issues that arise in implementing this Agreement.*" would be submitted to arbitration. The question under *Davis* is can the court fairly say that the parties' arbitration agreement covers the

dispute. It does not. It was error for Judge Lukens to change the material terms of the written agreement.

If the essential terms of a settlement agreement were allowed to be substantively changed by an arbitrator, under the guise of “resolving an issue”, where would an arbitrator’s authority stop? Would it be just and prudent for the arbitrator to change the acreage being conveyed to four acres or six acres? No. Would it have been justified for the arbitrator to later award Padvorac \$285,000 to cover his additional out of pocket costs? No. The arbitrator had no authority to change the essential terms of the contract.

### **III. Review Limited to Face of Award**

While the County is correct that ordinarily review of arbitration awards are limited to the face of the award, here we have a situation where the arbitrator referred to, and as such, incorporated documents into the Final Award. In fact, Judge Luken's four page award did not recite the facts, but instead stated as follows:

*“The parties and counsel are well aware of the facts in this case and they need not be repeated here except as may be necessary to explain the award of the Arbitrator.” CP11*

The very verbiage of the Final Award refers to a) the terms of the Settlement Agreement, b) the second Attorney Declaration of Karen Vedder (county attorney at the time), and c) pre and post settlement correspondence from San Juan County. These documents must therefore be considered as incorporated into the Final Award. CP12-14.

The arbitrator stated he would not take into consideration any verbal discussions between counsel on the issue of the purchase price, but he *would* consider the pre and post settlement documents, including an unanswered email and unanswered letter from the county attorney *suggesting* the \$78,960 be deducted from the purchase price CP 11-12, 138). With all due respect, the fact that Padvorac's counsel at the time did not respond to the county's *suggestion* means and proves absolutely nothing. (Query: What if Padvorac's attorney had “suggested” in a pre-mediation email that his \$50,000 in attorneys fees be added to the settlement amount – but not reflected in the written agreement? Would it have been

proper for the arbitrator to grant an award for \$320,000?) The pre and post mediation emails should have been disregarded by the arbitrator. Once he discovered that the parties had not agreed on the purchase price, the proper remedy would have been to send them back to square one: litigate the condemnation case.

#### **IV. The Superior Court erred by Granting the Motion for Summary Judgment.**

Material issues of fact were presented by Padvorac to Judge Eaton. The County brought the issue before the court by and through a motion for summary judgment. CP 30-31. Both sides submitted documents for review, which are now contained in the record. CP 46-93,102-145,153. Padvorac presented evidence to show that there was clearly no meeting of the minds on the issue of price. CP 153.

“The moving party has the burden to prove there are no genuine disputes regarding the agreement's existence or material terms. If the moving party produces evidence that shows the absence of any genuine disputes, the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact.” *In Re Patterson, Wn.App. 579, 588, 969 P.2d 1106 (1999)*. The court must view the evidence in the light most favorable to the nonmoving party and decide whether reasonable minds could reach but one conclusion. *Brinkerhoff v. Campbell, 99 Wn.App. 692, 697, 994 P.2d 911 (2000)*. CR56

The same summary judgment standard applies where there is a dispute of material fact regarding a defense to the enforcement of a settlement agreement. If the nonmoving party raises a genuine issue of material fact related to a defense to enforcement, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 697, 994 P .2d 911 (2000).

Judge Eaton should have denied the county's motion for summary judgment. Since there is such a blatant issue of material fact in this case – i.e. whether there was a meeting of the minds in the underlying settlement agreement, it was error to grant the motion in favor of the county. If anything, the court should have granted the motion in favor of Padvorac. Padvorac provided evidence that he would not have signed the settlement agreement if the price was \$191,000. The County provided no evidence to the contrary and no evidence to support its position that there was no issue of material fact. The superior court did have the authority to review the pleadings presented, and did. It was improper under CR56(c) to grant San Juan county's motion for summary judgment. At the very least, the court should have held an evidentiary hearing to determine whether there was a valid settlement agreement.

## V. The Court Should have Denied the Award

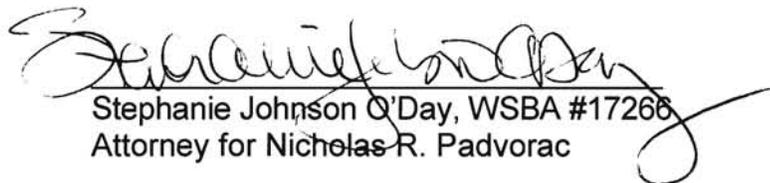
The superior court also had the authority to deny the confirmation of the Final Award on the grounds that because there was no meeting of the minds, the settlement agreement was null and void. This is a jurisdiction issue. If the settlement agreement was null and void, there could be no arbitration. The parties should have been directed to go to rewind and litigate the condemnation issue.

## VI. CONCLUSION

Nicholas R. Padvorac now respectfully requests that this Court overturn the arbitration award and direct that San Juan County to either pay Padvorac the \$270,000 or litigate the issue under the condemnation action. In the alternative, Padvorac requests that this court direct the superior court to hold an evidentiary hearing on the issue of whether the settlement agreement was null and void due to a failure of the parties to reach a meeting of the minds.

DATED this 27<sup>th</sup> day of April, 2012.

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