

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	3
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT RULED ON SUMMARY JUDGMENT THAT THE 3/28/05 LETTER AGREEMENT CONSTITUTED AN ENFORCEABLE SETTLEMENT OF APPELLANTS' PRIOR CLAIM FOR WRONGFUL ADOPTION	10
<i>(1) Under the Pre-existing Duty Rule the 3/28/05 Letter Agreement Is Unenforceable Because It Is Not Supported by Valid Consideration</i>	<i>11</i>
<i>(2) The 11/5/08 Adoption Support Agreement Did Not Release the State from the Claim of Wrongful Adoption and Did Not Relate Back to the 3/28/05 Letter Agreement the Court of Appeals Ruled Was Not a Contract</i>	<i>17</i>
<i>(3) The 3/28/05 Letter Agreement Is Unenforceable Because it Is Unconscionable</i>	<i>23</i>
<i>(4) The 3/28/05 Letter Agreement is Unenforceable Because it Violates Public Policy</i>	<i>25</i>
<i>(5) The 3/28/05 Letter Agreement is Unenforceable Because it Was the Product of a Unilateral Mistake Procured by the State Through Fraud or Inequitable Conduct</i>	<i>32</i>

**II. UNDER THE DOCTRINE OF LACHES, THE STATE
IS PRECLUDED FROM ARGUING THAT THE ADOPTION
SUPPORT AGREEMENT CONSTITUTED A RELEASE OF
THE CLAIM FOR WRONGFUL ADOPTION35**

E. CONCLUSION

TABLE OF AUTHORITIES

Page

Federal Cases

Brown v. Continental Can Co., 765 F.2d 810 (9th Cir.1985) 35

State Cases

Adler v. Manor,
153 Wn.2d 331, 104 P.3d 773 (2004) 23

Associated Petroleum Prods., Inc. v. NW Cascade, Inc.,
149 Wn.App. 429, 203 P.3d 1077 (2009) 33

Balise v. Underwood,
62 Wn.2d 195, 381 P.2d 966 (1963) 10

Basin Paving, Inc. v. Port of Moses Lake,
48 Wn.App. 180, 737 P.2d 1312 (1987) 33-35

Bates v. Bowles White & Co.,
56 Wn.2d 374, 353 P.2d 663 (1960) 10

Chauvlier v. Booth Creek,
109 Wn.App. 334, 35 P.3d 383 (2001) 31

Eelbode v. Chec Medical Centers, Inc.,
97 Wn.App. 462, 984 P.2d 436 (1999) 28

Emberson v. Hartley,
52 Wn.App. 597, 762 P.2d 364 (1988) 11

Finch v. Matthews,
74 Wn.2d 161, 443 P.2d 833 (1968) 26

Harris v. Morgensen,
31 Wn.2d 228, 196 P.2d 317 (1948) 12, 14

Hostetler v. Ward,
41 Wn.App. 343, 704 P.2d 1193 (1985) 10

<i>Huberdeau v. Desmarais</i> , 79 Wn. 2d 432, 486 P.2d 1074 (1971)	15
<i>Jeffery v. Weintraub</i> , 32 Wn.App. 536, 648 P.2d 914 (1982)	24
<i>McKinney v. State</i> , 134 Wn.2d 388, 950 P.2d 461 (1998)	27
<i>Multicare Med. Ctr. v. Department of Soc. & Health Servs.</i> , 114 Wn.2d 572, 790 P.2d 124 (1990)	12
<i>Nelson v. McGoldvick</i> , 127 Wn.2d 124, 896 P.2d 1258 (1995)	23, 24
<i>Ohler v. Tacoma General Hospital</i> , 92 Wn.2d 507, 598 P.2d 1358 (1979)	10
<i>Pierce v. King County</i> , 62 Wn.2d 324, 382 P.2d 628 (1963)	36
<i>Platts v. Arney</i> , 46 Wn.2d. 122, 278 P.2d 657 (1955)	17-19, 21
<i>Simonson v. Fendell</i> , 101 Wn.2d 88, 675 P.2d 1218 (1984)	33
<i>Vance v. City of Seattle</i> , 18 Wn.App. 418, 569 P.2d 1194 (1977)	36
<i>Vodopest v. McGregor</i> , 128 Wn.2d 840, 913 P.2d 779 (1996)	27, 30
<i>Wagenblast v. Odessa School Dist.</i> , 110 Wn.2d 845, 758 P.2d 968 (1988)	26-32

Other Authorities

1 J.M Perillo, <i>Corbin on Contracts</i> , § 4.7 (Rev. Ed. 1993)	18
25 WASH. PRACTICE § 2.24	12

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it granted summary judgment for the State because, under the pre-existing duty rule, the 3/28/05 Letter Agreement was not supported by valid consideration.

2. The trial court erred when it granted summary judgment for the state because the 11/5/08 Adoption Support Agreement did not release the state from the claim of wrongful adoption and did not relate back to the 3/28/05 Letter Agreement the court of appeals ruled was not a contract.

3. The trial court erred when it granted summary judgment for the state because the 3/28/05 Letter Agreement is unconscionable.

4. The trial court erred when it granted summary judgment for the state because the 3/28/05 Letter Agreement is unenforceable as a violation of public policy.

5. The trial court erred when it granted summary judgment for the state because the 3/28/05 Letter Agreement is unenforceable as the product of a unilateral mistake procured by the state through fraud or inequitable conduct.

6. Under the equitable doctrine of laches, the state is precluded from arguing that the Adoption Support Agreement constituted a release of the claim for wrongful adoption.

Issues Pertaining to Assignment of Error

1. Under the pre-existing duty rule, does an agreement to do what one is already obligated to do constitute valid consideration?
2. Does subsequent payment of a sum certain under a separate agreement reform a prior invalid contract that lacked consideration and dealt with a different issue?
3. Does a trial court err if it enforces a contract, a provision of which is unconscionable?
4. Does a trial court err if it enforces a contract, a provision of which violates public policy?
5. Does a trial court err if it enforces a waiver in a contract that one party obtained by procuring and exploiting the other party's mistake of fact?
6. Under the equitable doctrine of laches, is a party who inexcusably fails to timely raise a claim or defense to the detriment of the opposing party and a third party precluded from later raising that claim or defense?

STATEMENT OF THE CASE

On May 16, 1997, Appellants Thomas and Cecelia Raglin adopted Josiah, a foster child the Department of Social and Health Services (DSHS or the State) had previously placed in their home. CP 4. Following that adoption, Josiah developed severe emotional problems that the Raglins came to believe were the result of prior abuse and neglect. CP 3-6. The Raglins also came to believe that the state had known of this abuse and neglect and Josiah's potential for the development of severe problems, and that the State had knowingly failed to inform them of these facts as required by statute. CP 3-6. As a result, in June of 2006, the Raglins filed an action against the State of Washington for wrongful adoption. *Id.* The State eventually responded with a motion for summary judgment, arguing that on March 28, 2005, (3/28/05 Letter Agreement), prior to bringing their cause of action, the Raglins had entered into a binding agreement releasing the state from all claims arising from their adoption of Josiah. CP 103-113. The Raglins responded with a number of arguments, including claims that the state obtained the 3/28/05 Letter Agreement through mistake, that the agreement was unconscionable, and that it violated public policy. CP 299-308.

Following argument, the trial court granted the state's motion for summary judgment and dismissed the Raglins cause of action. CP 314-316. The Raglins then filed a notice of appeal. CP 309-313. By unpublished

opinion filed October 20, 2010, this court reversed the trial court's grant of summary judgment and remanded for further proceedings. *See Raglin v. State*, 152 Wn.App. 1, 152 Wn.App. 1047 (2009), at CP 7-16. The following is this court's factual statement from that decision:

The Raglins took Josiah into their home in 1993 and adopted him in 1997. The State, through its Department of Social and Health Services (DSHS), facilitated the adoption. When the Raglins signed adoption documents, they waived their right to apply for post-adoption financial support.

Before the Raglins adopted him, Josiah suffered abuse, including a fractured skull, a broken arm, cuts, and bruises. Josiah's birth mother also consumed alcohol during the pregnancy.

When the Raglins adopted Josiah, the State designated his health history and his birth mother's health history as "unavailable." Clerk's Papers (CP) at 114. The State did not provide this information to the Raglins despite their pre-adoption requests. At one point, Cecelia Raglin wrote a letter to the social worker assigned to Josiah's case saying that she had received no more than two letters from DSHS between May 1993 and December 1996 and was again requesting health information. Nonetheless, the State had collected health history information on Josiah and his birth parents. In 2005, the Raglins first learned about Josiah's birth mother's health history and health reports regarding her pregnancy.

As he grew older, Josiah exhibited dangerous and disturbing behavior, prompting the Raglins to seek post-adoption benefits or assistance from the State. Because the Raglins had not requested assistance at the time of the adoption, they had to undertake administrative proceedings challenging the State's denial of adoption support for Josiah.

Before concluding the administrative proceedings, the Raglins and the State reached an agreement that would allow an administrative law judge to enter an agreed order regarding the existence of extenuating circumstances. An Assistant Attorney

General wrote a letter on March 28, 2005, memorializing the agreement that the Raglins signed and an adoption support program manager signed on behalf of DSHS.

In pertinent part, the letter states:

You will need to fill out an application for adoption support and then negotiate an agreement with the Department. The agreement will be effective July 2004, the month that you requested adoption support. The Department also asks that you agree that this settlement resolves all claims that may exist with respect to Josiah's placement with you and his adoption by you.

....

To summarize:

- The Department will disregard your signed waiver of adoption support.
- The Department will prepare an Order Regarding Extenuating Circumstances and will present that Order to [the administrative law judge] for her signature.
- The Department has determined that, after the Order is signed and after an application for adoption support is submitted by you, Josiah would be eligible for federally subsidized adoption support benefits.
- You will complete the adoption support application and submit it to [an] Adoption Support Program Manager.
- You agree that your administrative hearing challenging the denial of adoption support will be continued until an adoption support agreement is negotiated and signed, and that you will then withdraw your request for hearing.
- You agree that this settlement constitutes a settlement of all claims for damages arising out of the Department's placement of Josiah with you and his subsequent adoption by you.

CP at 170-71.

About a year later, on March 3, 2006, after the Raglins retained counsel, the State proposed adoption support of \$1,300 a month until Josiah's 21st birthday. This offer resulted from negotiations between the State and the Raglins' counsel. In June 2006, without agreeing to

any support offer, the Raglins sued the State for wrongful adoption. They claimed that while they were prospective parents, the State failed to make reasonable disclosures of Josiah's family background and other information as RCW 26.33.380 requires. The Raglins moved for summary judgment on their claims.

The State cross-moved for summary judgment. It argued it had a binding agreement with the Raglins that precluded them from suing it for wrongful adoption.

The trial court granted the State's motion. The Raglins moved for reconsideration arguing that the agreement was (1) void on public policy grounds, (2) unconscionable, (3) the product of unilateral mistake, (4) invalid under the pre-existing duty rule, and (5) not supported by sufficient consideration. The trial court heard argument on the matter, considered the additional materials submitted, and denied the motion for reconsideration. The Raglins appealed.

Raglin v. State, 152 Wn.App. at 1-3.

Although this court noted in the foregoing that the Raglins had made five separate arguments as to why the release was unenforceable, this court only ruled on two. *Raglin v. State, supra*. The first was the claim that the agreement was not supported by sufficient consideration. *Id.* In reversing the trial court's grant of summary judgment, this court held the following concerning the adequacy of the state's consideration:

At oral argument, the State contended that the consideration was a stipulation to agree to a specific amount at a later date. This is alluded to in the summary section of the letter, which states in part, "You agree that your administrative hearing challenging the denial of adoption support will be continued until an adoption support agreement is negotiated and signed, and that you will then withdraw your request for a hearing." CP at 171.

But in so stating, the State really suggests that the letter was

essentially an agreement to agree. As a further meeting of the parties' minds was clearly required here, the settlement agreement was unenforceable as a contract.

In sum, the settlement agreement lacks sufficient consideration rendering it an invalid and unenforceable contract. For that reason, we reverse summary judgment and remand for further proceedings.

Raglin v. State, 152 Wn.App. at 4.

The second basis for this court's ruling was that the 3/28/05 Letter Agreement was unenforceable under the pre-existing duty rule. This court stated as follows on this issue:

Additionally, under the pre-existing duty rule, an agreement to do that which one is already legally obligated to do is not valid consideration. 25 Wash. Practice § 2:24, at 68.

Raglin v. State, 152 Wn.App. at 3.

On November 5, 2008, during the pendency of the first appeal in this case, DSHS and the Raglins entered into an Adoption Support Agreement (11/5/08 Adoption Support Agreement). CP 117-118. This agreement is a "fill in the blank" form used by DSHS and periodically revised. *Id.* At the bottom of both pages of the form it has the following footer: "DSHS 10-228 (REV. 05.2008) - TRANSLATED." The document is signed by two representatives of DSHS and the Raglins. *Id.* Although DSHS has at all times been represented by an Assistant Attorney General in this case, and the Raglins have at all times been represented by private counsel following that counsel's filing of a Notice of Appearance, the Adoption Support Agreement

does not mention either counsel and it is not signed by either counsel. *Id.*

According to the preamble of the 11/5/08 Adoption Support Agreement, both DSHS and the Raglins entered into it for the benefit of the adoptive child. CP 117. The preamble to this agreement states as follows:

The following agreement has been entered into by Thomas and CeCelia Raglin, Hereinafter referred to as the “adoptive parent(s)” and the Children’s Administration (CA), Washington State Department of Social and Health Services (DSHS), hereinafter referred to as the “Department,” for the benefit of the following child, Josiah, born on 03/30/1992. This child is is not eligible for Federal IV-E Adoption Assistance benefits.

The parties agree to review this adoption support agreement on or before 12/20/2009.

CP 117 (underlining in original).

The 11/5/08 Adoption Support Agreement does not mention the existence of the Raglins’ cause of action against the State for wrongful adoption, or the then pending appeal from the trial court’s first grant of summary judgment for the state on the Raglins’ action for wrongful adoption. CP 117-118. Neither does the 11/5/08 Adoption Support Agreement mention the existence or substance of the 3/28/05 Letter Agreement later ruled invalid by this court. *Id.* In addition, in no place does the 11/5/08 Adoption Support Agreement state that by the Raglins signatures on the agreement, or their acceptance of the benefits contained in it, constitutes a settlement of their cause of action in tort against the state for wrongful adoption. *Id.* However,

the agreement does provide that either party “may purpose adjustments in the monthly cash payments if there are changes in the special needs of the child, in the circumstances of the adoptive family, or in the maximum allowable adoption support payment.” CP 117.

In spite of the fact that DSHS and the Raglins entered the 11/5/08 Adoption Support Agreement only a month after the Raglins filed their original appeal from the order granting summary judgment, the state never attempted to supplement the record on the original appeal with the agreement, and the state never made an argument during the first appeal that the 11/5/08 Adoption Support Agreement, in conjunction with the 3/28/05 Letter Agreement then before the court constituted a release from the Raglin’s cause of action for wrongful adoption. *See* Brief of Respondent in *Raglin v. State*, No. 38459-1-II.

Following the filing of the mandate sending this case back down to the trial court, the state filed a new motion for summary judgment, claiming for the first time that the 11/5/08 Adoption Support Agreement, in conjunction with the 3/28/05 Letter Agreement held invalid by this court constituted a release of the Raglins’ cause of action for wrongful adoption. CP 102-113. Ultimately, the trial court agreed with the state and again granted summary judgment. CP 170-172. The Raglins have now appealed this second order of summary judgment. CP 173-175.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT RULED ON SUMMARY JUDGMENT THAT THE 3/28/05 LETTER AGREEMENT CONSTITUTED AN ENFORCEABLE SETTLEMENT OF APPELLANTS' PRIOR CLAIM FOR WRONGFUL ADOPTION.

Under CR 56(c), a party is not entitled to summary judgment unless “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). A “material fact” is one upon which the outcome of the litigation depends in whole or in part. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979). In determining whether a genuine issue as to any material fact exists, “[t]he court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Hostetler v. Ward*, 41 Wn.App. 343, 346, 704 P.2d 1193 (1985). Unless the moving party can meet the burden of proving both the absence of factual disputes and the right to judgment as a matter of law, the motion must be denied. *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960).

In the case at bar, the trial court granted the state’s motion for summary judgment, finding that there were no material facts at issue, and that the parties’ entry into the Adoption Support Agreement constituted a release

of the Raglin's tort claim of wrongful adoption. In fact, as the following argues, there were material facts remaining to be resolved. In addition, the trial court's ruling on the law was erroneous because: (1) under the pre-existing duty rule the 3/28/05 Letter Agreement is unenforceable because it is not supported by valid consideration; (2) the 11/5/08 Adoption Support Agreement did not release the state from the claim of wrongful adoption and did not relate back to the 3/28/05 Letter Agreement the court of appeals ruled was not a contract; (3) the 3/28/05 Letter Agreement is unenforceable because it is unconscionable; (4) the 3/28/05 Letter Agreement is unenforceable because it violates public policy; (5) the 3/28/05 Letter Agreement is unenforceable because it was the product of a unilateral mistake procured by the state through fraud or inequitable conduct; and (6) under the doctrine of laches, the state is precluded from arguing that the adoption support agreement constituted a release of the claim for wrongful adoption. The following sets out these arguments.

(1) Under the Pre-existing Duty Rule the 3/28/05 Letter Agreement Is Unenforceable Because It Is Not Supported by Valid Consideration.

Consideration sufficient to support enforcement of a contract may consist of an act, a forbearance, the creation, modification or destruction of a legal relationship, or a promise for a promise. *Emberson v. Hartley*, 52 Wn.App. 597, 601, 762 P.2d 364 (1988). However, under the pre-existing

duty rule, a party's promise to perform a pre-existing legal duty is not valid consideration. *Harris v. Morgensen*, 31 Wn.2d 228, 196 P.2d 317 (1948); *Multicare Med. Ctr. v. Department of Soc. & Health Servs.*, 114 Wn.2d 572, 586 n. 24, 790 P.2d 124 (1990). Washington Practice states this principle as follows:

Finally, a performance or a promise to perform a pre-existing duty does not constitute consideration. The pre-existing duty rule states that where a party does or promises to do what he is legally obligated to do or promises to refrain from doing what he is not legally privileged to do, he has not incurred detriment. In other words, performance of an agreement to do that which one is already obliged to do does not constitute consideration to support a contract. For example, if one promises to pay his or her spouse \$10,000 at the end of the year if the spouse carries out the obligations of the marriage, the spouse would not be entitled to the money because the spouse would merely have performed a pre-existing legal duty. The pre-existing duty rule applies regardless of whether the contract is unilateral or bilateral in nature.

25 WASH. PRACTICE § 2.24 at 68.

For example, in *Harris v. Morgensen, supra*, the plaintiff in a civil action entered into a contract to purchase a small restaurant from the defendant under which the plaintiff made a down payment of half the contract price with the remainder to be paid monthly with interest. Under the agreement, plaintiff's default in the agreed payments entitled the defendant to immediate repossession of the business and the right to retention of all payments made to that point. The business was unsuccessful, and plaintiff eventually defaulted on the monthly payments. However, prior to taking

repossession, the defendant agreed to pay an amount that was half of the down payment back to the plaintiff in return for plaintiff's relinquishing possession of the business.

After retaking possession, the defendant failed to make the promised payment, and plaintiff sued. The defendant responded that the subsequent agreement to pay, even if made, was not supported by valid consideration because, under the original contract, the defendant already had the right to retake possession. The trial court eventually ruled for the plaintiff, finding that plaintiff's agreement to relinquish possession constituted sufficient consideration to create an enforceable contract because the plaintiff might have refused to relinquish possession and put the defendant to the time and expense of seeking enforcement of the contract in a legal action. The defendant then appealed.

On review, the Washington Supreme Court first undertook its analysis of the pre-existing duty rule by quoting from the contracts section of both *Corpus Juris Secundum* and *American Jurisprudence*. The former quote relied upon by the court stated as follows:

As a general rule the performance of, or promise to perform an existing legal obligation is not a valid consideration.

A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. Therefore, as a general rule, the performance of, or promise

to perform, an existing legal obligation is not a valid consideration, except where the very existence of the duty is the subject of honest and reasonable dispute. Of course, where no legal duty exists, the principle is inapplicable.

Harris v. Morgenson, 31 Wn.2d at 325 (quoting 17 C.J.S., Contracts, § 110, p. 463).

The later treatise stated the following on the pre-existing duty rule and why the agreement to perform a pre-existing duty is not valid consideration for a contract:

The performance or promise of performance of a legal duty imposed by law or arising from a contract with the other party is insufficient consideration for a promise. Many widely different acts come within this rule. A familiar example is the payment of a debt which is due and undisputed. Similarly, payment of interest which is due is insufficient consideration for a promise to forbear until further notice. Likewise, voluntary restoration of that to which one is entitled is not a sufficient consideration to support a contract. It has accordingly been decided that a contract made by the owner to obtain possession of property which is unlawfully withheld from him is without consideration and void.

Harris v. Morgenson, 31 Wn.2d at 325 (quoting 12 Am.Jur. 582, Contracts, § 88).

After reviewing a number of decisions from other states applying the pre-existing duty rule, the Washington Supreme Court reversed the judgment for plaintiff, finding that since the defendant was entitled to possession of the business and retention of the payments made to that date, the subsequent agreement to pay a sum certain to obtain possession was not supported by

valid consideration and was not enforceable. *See also Huberdeau v. Desmarais*, 79 Wn. 2d 432, 486 P.2d 1074 (1971) (creditor of hop farmers were already obligated to forbear from foreclosure, and therefore alleged contract based on promise of forbearance was void for want of consideration).

In the case at bar, the trial court found that the parties' entry into the 11/5/08 Adoption Support Agreement, under which the Raglins received monthly payments and a lump sum for months payments from the day of their original claim constituted consideration sufficient to validate the 3/28/05 Letter Agreement and allow the state to enforce the general release of any and all claims stated in that letter agreement. The error in the court's ruling was its failure to recognize that (1) the State had the statutory duty to both process the Raglin's application for adoption support regardless of any waiver of adoption support previously signed, and (2) the State had the duty to enter the Adoption Support Agreement if the Raglins met the criteria statutorily mandated for the receipt of the benefits available in an 11/5/08 Adoption Support Agreement. Thus, under the pre-existing duty rule as illustrated in *Harris v. Morgenson*, (1) the State's agreement under the 3/28/05 to "disregard [the Raglin's] signed waiver of adoption support," and to process the Raglin's application for adoption support, and (2) the state's agreement to pay for post adoption support under the 11/5/08 Adoption Support

Agreement, did not constitute valid consideration to support enforcement of the Raglin's release.

A careful review of the previous decision in this case indicates that this court has already ruled on this issue and found that 3/28/05 Letter Agreement, even if fulfilled by the state, was not valid consideration because in the agreement, the state was not agreeing to anything more that it already had the duty to do. Admittedly, the majority of this court's prior decision addressed the issue concerning the illusory nature of the state's consideration in the 3/28/05 Letter Agreement. However, in that appeal, the Raglins also argued that the state's fulfillment of all of its promises in that letter agreement would still not be valid consideration under the pre-existing duty rule. This court ruled on this issue, holding as follows:

Additionally, under the pre-existing duty rule, an agreement to do that which one is already legally obligated to do is not valid consideration
25 WASH. PRACTICE § 2.24 at 68..

CP 15.

This ruling is just as valid following entry into the 11/5/08 Adoption Support Agreement as it was prior to entry into the 11/5/08 Adoption Support Agreement. The reason is that the eligibility for benefits in an adoption support agreement is established by state and federal statute and administrative rule. The right to such support is controlled by that statutory scheme. Nowhere within that statutory scheme is the state authorized to use

the monies allocated for adoption support to settle potential tort claims arising from the improper actions by state agents. Thus, since the state was obligated to enter into this agreement upon the Raglin's proof that they met the criteria for benefits under the program, the parties' entry into this agreement is not valid consideration to support the release contained in the 3/28/05 Letter Agreement.

(2) The 11/5/08 Adoption Support Agreement Did Not Release the State from the Claim of Wrongful Adoption and Did Not Relate Back to the 3/28/05 Letter Agreement the Court of Appeals Ruled Was Not a Contract.

In its motion for summary judgment, the state argued, and the court agreed, that the payment of benefits under the 11/5/08 Adoption Support Agreement cured the uncertainty in the 3/28/05 Letter Agreement, thus allowing the state to enforce the Raglins' release of claims given in the 3/28/05 Letter Agreement. In making this argument, the state relied upon the principle that "the defense of uncertainty in the terms of a contract is not applicable in an action based upon the contract when performance has made it certain in every respect in which it might have been regarded as uncertain." State's Motion for Summary Judgment at CP 106 (quoting *Platts v. Arney*, 46 Wn.2d. 122, 126, 278 P.2d 657 (1955)). Corbin on Contracts states this principle as follows:

Even though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a

reasonable degree of certainty, they may cure this defect by later verbal clarification or their subsequent conduct that indicates their own practical interpretation.

1 J.M Perillo, *Corbin on Contracts*, § 4.7 (Rev. Ed. 1993).

While this is undoubtedly a correct statement of contract law, a careful review of the decision in *Platts v. Arney*, the facts of this case, and this court's prior decision indicates that this rule does not apply to allow enforcement of the release given in the letter agreement in this case. The following addresses this argument.

In *Platts v. Arney, supra*, the two parties entered into an oral contract for the exchange of realty with the final terms of the agreement to abide execution of the deeds of transfer, which were to later be given to an escrow agent for execution on a date specified. The parties later executed all of the documents necessary for the oral contract, agreed to all of the terms, and transferred the documents to the escrow agent to hold until the date specified for execution of the agreement. The only thing remaining was the passage of time to the date specified for the escrow agent to record the new deeds. However, prior to that date, the defendant revoked the agreement and instructed the escrow agent to refrain from filing the necessary deeds to transfer the real property.

Following the defendant's revocation of the agreement, the plaintiff brought an action for specific performance. Ultimately, the trial court ruled

for the defendant, holding that the initial agreement, standing alone, was unenforceable because it violated the parol evidence rule and was no more than a contract to enter into future contracts, or an agreement to agree. The plaintiff then appealed, arguing that when all of the documents were considered together, the oral exchange contract became definite and certain in all material matters through the deeds executed and given to the escrow agent, thus satisfying the statute of frauds and making the agreement enforceable.

On appeal, the court agreed with the plaintiff's arguments and reversed the trial court. The Court of Appeals held:

It is the execution of the documents that made the exchange contract definite and certain which distinguishes the case before us from *Hubbell v. Ward, supra*, and *Keys v. Klitten, supra*.

Construed together, the instruments signed by the defendant contain all of the essential terms of the agreement between the parties and are sufficient to satisfy the statute of frauds.

Several writings signed by the party to be charged, though executed at different times, may be construed together for the purpose of ascertaining the terms of a contract, and for the purpose of taking an action founded thereon out of the operation of the statute of frauds, if it appears, from the instruments themselves, that they are part of the same transaction.

Platts v. Arney, 46 Wn.2d. at 127.

In *Platts v. Arney*, the Court of Appeals based its ruling upon the fact that the entry of the parol agreement to exchange real estate started an

unbroken chain of actions that progressed to the execution of the deeds necessary to make the exchange, the transfer of the deeds to the escrow agent, and the agreement on the day upon which the escrow agent would file the executed deeds and make the exchange final. No action interrupted this continuous chain of events, which taken together, clearly manifested the intent of the parties to the entire agreement. Thus, the court found the agreement in compliance with the statute of frauds and sufficiently specific to allow enforcement.

By contrast, in the case at bar, there was no unbroken chain of events from the execution of the 3/28/05 Letter Agreement and the execution of the 11/5/08 Adoption Support Agreement. Not only were these documents executed over three and one-half years apart, but there were a number of significant intervening events that clearly manifested the absence of any meeting of the minds. The first of these intervening events was the Raglins' decision to retain an attorney to represent them. The second of these intervening events was the filing of the complaint against the State alleging the tort of wrongful adoption. The third of these intervening events was the state's first successful summary judgment. The fourth of these intervening events was the Raglins' action through counsel to prosecute an appeal from the trial court's decision to grant the state's first motion for summary judgment. Each of these events evinces a break in any claim that the

execution of the 11/5/08 Adoption Support Agreement was somehow a fulfillment of the 3/28/05 Letter Agreement.

A number of other facts also distinguish the facts in the case at bar from those in *Platts v. Arney*. Perhaps the most striking fact is that neither attorney then representing the parties took part in the execution of the 11/5/08 Adoption Support Agreement. However, also strikingly significant are the facts that (1) the 11/5/08 Adoption Support Agreement does not mention the existence of the 3/28/05 Letter Agreement, and (2) the 11/5/08 Adoption Support Agreement does not mention any claim that the Raglins' signature on it constitutes a waiver of their claim for wrongful adoption. In addition, as previously mentioned, the 11/5/08 Adoption Support Agreement is a creature of statute and administrative regulation to which a party is entitled if that party meets the criteria for entry of such an agreement. By contrast, the Raglins' claim of wrongful adoption is an action in tort, unrelated to the right to post adoption support.

One last fact distinguishes the disparate entry of the 3/28/05 Letter Agreement and the 11/5/08 Adoption Support Agreement from the continuous flow of agreements in *Platts v. Arney*. That distinguishing fact is the action of the parties. The 11/5/08 Adoption Support Agreement was entered just 30 days after the Raglins appealed from the trial court's first grant of summary judgment. Had the parties understood this to constitute a

release of the tort claim of wrongful adoption, then one is left to wonder why the state did not make such a claim before the court of appeals. Rather, the parties continued in prosecuting the appeal through the perfection of the record, through the preparation and filing of briefs, through oral argument, and through the State's unsuccessful motion for reconsideration following this court's decision. All of these facts distinguish this case from *Platts v. Arney* and militate towards a conclusion that the 11/5/08 Adoption Agreement was separate and distinct from the 3/28/05 Letter Agreement entered over three and one-half years previous.

The trial court's ruling that the 11/5/08 Adoption Support Agreement cured that lack of specificity in the 3/28/05 Letter Agreement also fails for another critical reason. That reason is the trial court's failure to understand the fundamental defect that this court found in the original agreement. This court stated as follows on that issue:

The March 28, 2005 letter does not contain a clear statement of the State's consideration. Disregarding the waiver of post-adoption support signed by the Raglins is insufficient because the State is already legally obligated to consider an adoption support request after an administrative law judge finds that "extenuating circumstances" led the adoptive parents not to seek adoption support before the adoption was finalized. See WAC 388-027-0305 to -0320. The State did not guarantee that post-adoption support would be provided if the Raglins signed the agreement and it does not discuss dollar figures. It only provides that after the Raglins submit an application, Josiah would be eligible for federally-subsidized support. The actual provision of support remains optional or discretionary under the terms. This contrasts with the Raglins' consideration, which was to

settle all claims for damages arising out of the State's placement of Josiah with them for no money aside from the potential of post-adoption support.

Raglin v. State, 152 Wn.App. at 3.

As the court pointed out, the 3/28/05 Letter Agreement failed because the state didn't agree to do anything in it other than what the state was already required by statute to do. It did not contain a guarantee to post-adoption support, much less guarantee a specific amount of post-adoption support. Thus, the fact that, over three and one-half years later, the state entered into an adoption support agreement, which was controlled by state and federal statute and administrative rule and which was entered pursuant to that rule bore no relation to the prior letter agreement or any supposed release from a claim in tort. Thus, in the case at bar, the trial court erred when it ruled that the entry of the 11/5/08 Post Adoption Support Agreement somehow cured the defect in the 3/28/05 Letter Agreement.

(3) The 3/28/05 Letter Agreement Is Unenforceable Because it Is Unconscionable.

Contracts which are substantively or procedurally unconscionable in their terms are unenforceable as a matter of law. *Adler v. Manor*, 153 Wn.2d 331, 104 P.3d 773 (2004). The question of unconscionability is an issue for the Court to decide as a matter of law. *Nelson v. McGoldvick*, 127 Wn.2d 124, 896 P.2d 1258 (1995). However, while unconscionability is ultimately

a question of law, the court must also base its finding on the factual circumstances surrounding the transaction in question. *Jeffery v. Weintraub*, 32 Wn.App. 536, 648 P.2d 914 (1982). In *Nelson v. McGoldvick*, the Washington Supreme Court recognized two types of unconscionability. The court notes:

Washington recognizes two types of unconscionability – substantive and procedural. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. . .Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including “[t]he manner in which the contract was entered,’ whether each party had ‘a reasonable opportunity to understand the terms of the contract,’ and whether ‘the important terms [were] hidden in a maze of fine print.’”

Nelson v. McGoldrick, 127 Wn.2d at 131 (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)).

In the case at bar, a review of the 3/28/05 Letter Agreement reveals that the actual release portion of the document is appended as if it were an afterthought in the letter. Indeed, it fails to reference just what is being waived, particularly under circumstances in which the Raglins did not have an attorney to represent them and did not even know what a cause of action in tort was, that they had a cause of action in tort, or that they were waiving that cause of action by signing either the 3/28/05 Letter Agreement or the 11/5/08 Adoption Support Agreement. The latter agreement, if seen as the missing consideration for the 3/28/05 Letter Agreement, is particularly

deceptive because it fails to even mention the existence of the 3/28/05 Letter Agreement or use any language of waiver at all.

However, while the Raglins were unaware of what a tort claim for wrongful adoption was at the time they signed the 3/28/05 Letter Agreement or what a waiver of such a claim was, the State did not act under any such lack of understanding. Indeed, the state was well aware that it was subject to a potential tort claim for wrongful adoption given the state's duplicitous conduct in (1) repeatedly failing to give the Raglins that information that statute required them to provide concerning the adoptive child, and (2) the state's conduct in repeatedly lying to the Raglins concerning the state's possession of that information. Given the relatively low dollar value of providing post-adoption support which it was probably required to give, compared to the potential large costs of a plaintiff's verdict for wrongful adoption, it is obvious that the State specifically drafted the 3/28/05 Letter Agreement in an attempt to disguise the release language inside a larger document that dealt with an entirely different subject. Under these facts, the 3/28/05 Letter Agreement was unconscionable and the trial court erred when it found the waiver enforceable.

(4) The 3/28/05 Letter Agreement is Unenforceable Because it Violates Public Policy.

Similar to unconscionability, our courts will not enforce contracts

which violate public policy. *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968). In *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 855, 758 P.2d 968 (1988), the Washington Supreme Court adopted a list of six nonexclusive factors for determining whether exculpatory agreements violate public policy. These six factors are as follows:

(1) The agreement concerns an endeavor of a type generally thought suitable for public regulation;

(2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;

(3) The party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards;

(4) Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;

(5) In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and

(6) The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

Wagenblast v. Odessa School Dist., 110 Wn.2d at 853-855,

In formulating this test, the Washington Supreme Court has explained

that the more of the foregoing six characteristics that appear in a given exculpatory agreement, the more likely the agreement will be declared invalid on public policy grounds. *Wagenblast v. Odessa School Dist.*, 110 Wn.2d at 858. Subsequently, the same court focused on the second of the six factors as one of the important characteristics on which Washington courts have focused in determining whether a particular exculpatory agreement is void as against public policy. *Vodopest v. McGregor*, 128 Wn.2d 840, 858, 913 P.2d 779 (1996).

A careful review of the record in this case indicates that all six factors from *Wagenblast* are present. First, both the Washington Legislature and DSHS's own rules and regulations address adoption procedures as well as the right to post adoption support and the procedures for obtaining it after having filed a waiver of post-adoption support. In addition, our courts have specifically recognized a right to recover under the tort of wrongful adoption. *See McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998). Thus, under the first *Wagenblast* criteria, both the right to post-adoption support, the right to recover a claim for the tort of wrongful adoption, and the entry of a waiver of either right is a matter that "concerns an endeavor of a type generally thought suitable for public regulation."

Second, it cannot reasonably be disputed that DSHS and adoptions through its agencies are not matters of great service and importance to the

people of the State of Washington, as recognized through the extensive adoptions regulations created by the legislature under the law and DSHS through its own administrative law process. Indeed, our courts have found a number of lesser services sufficiently important to qualify under this second criteria. See e.g. *Eelbode v. Chec Medical Centers, Inc.*, 97 Wn.App. 462, 471, 984 P.2d 436 (1999) (Private pre-employment physical examinations are matters of public importance given employers increasing demands that prospective employees submit to them.); *Wagenblast v. Odessa School Dist.*, *supra*, (School sports programs are highly regulated and a matter of public importance); *Vodapest v. McGregor*, *supra*, (Medical research on human subjects is highly regulated and is a matter of sufficient public importance to constitute a factor in favor of invalidating releases from damages arising from that research). Consequently, the second *Wagenblast* criteria is met in the case at bar because “the party seeking exculpation [DSHS] is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.”

Under the third *Wagenblast* criteria, waivers of liability are disfavored as a matter of public policy if the party who seeks enforcement of the waiver of liability “holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.” In the case at bar, DSHS not only holds itself out as

willing to perform adoption services for dependant children and potential adoptive parents, but it is required by statute to provide these services. Thus, in the case at bar, the Raglins' claim has met this third criteria.

Under the fourth *Wagenblast* criteria, waivers of liability are also disfavored as violative of public policy if, in "the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services." Little argument should exist that DSHS sits in such an advantageous position over potential adoptive parents, particularly given all of the resources DSHS has at its disposal, such as case workers intimately familiar with a labyrinthine statutory and administrative rule scheme, and DSHS's access to Assistant Attorneys General specifically assigned to provide DSHS advice and representation. Thus, the fourth *Wagenblast* criteria is present in the case at bar.

Under the fifth *Wagenblast* criteria, waivers of liability are disfavored as violative of public policy if the party who seeks to benefit from the waiver "confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence." It is true that the 3/28/05 Letter Agreement was not a standardized document. However, the 11/5/08 Adoption Support Agreement was a standardized form under which the

Raglins had no option to seek modification of its terms or seek to strike the waiver from the 3/28/05 agreement. In addition, in this case, DSHS acted from an overwhelmingly superior bargaining position. There was no provision for additional fees that the Raglins could have paid to protect against negligence arising from the State's refusal to follow the statutory demands of full disclosure. Indeed, the Raglins lacked the information necessary for any type of informed consent under facts in which the Raglins thought they were bargaining for support when the state was really bargaining for a release. Thus, the facts of this case qualify under the fifth *Wagenblast* criteria.

Finally, under the sixth *Wagenblast* criteria, waivers of liability violate public policy if “[t]he person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.” For example, in *Vodopest*, the court found this criteria met because a medical researcher's control over a test subject is common to most medical research projects and is one of the reasons why such strict regulations are imposed. *Vodopest v. McGregor*, 128 Wn.2d at 859-60. Similarly, in *Wagenblast*, the court found the six criteria met because, as a natural incident to the relationship of a student athlete coach, the student athlete is usually placed under the coach's considerable degree of control.

Wagenblast v. Odessa School Dist., 110 Wn.2d at 856. Finally, *Chauvlier v. Booth Creek*, 109 Wn.App. 334, 344, 35 P.3d 383 (2001), a case seeking to invalidate a waiver of liability imposed by a ski resort operator, the court held that the sixth *Wagenblast* criteria was met because users of the ski resort were subject to the risk that the operator would carelessly maintain ski runs and trails, even though users of the resort had control over which runs to ski as well as how prudently to ski.

In the same manner as these cases, the facts in the case at bar also support a finding that the sixth *Wagenblast* criteria is met. In this case, the Raglins were completely and entirely at the control of DSHS and they were demonstrably at risk for carelessness on the part of DSHS, just as any other potential adoptive parent seeking adoption of a dependent child is.

As has just been explained, the facts of this case meet all of the criteria set out in *Wagenblast*, thus supporting the conclusion that the waiver of liability the state inserted into the 3/28/05 Letter Agreement is void as violative of public policy. In addition, as was recognized in *Wagenblast*, the six criteria are illustrative only. Other facts can also support a finding that a waiver of liability is violative of public policy. In the case at bar, two further facts strongly militate towards the conclusion that the waiver of liability violates public policy. The first is the fact that the legislature has specifically mandated that DSHS provide the type of information about children being

considered for adoption that DSHS in the case at bar duplicitously hid from the Raglins. DSHS should not be allowed to frustrate the legislature's purposes in creating this requirement and then avoid liability for such conduct by requiring waivers of liability.

The second additional fact is that adoption procedures involve strong emotions in which potential adoptive parents are much more susceptible to undertaking the adoption of a child whose needs are beyond their capabilities to meet. In these instances, the adoption ends up being disastrous for both the parents and the adopted child. DSHS should not be allowed to facilitate the creation of such doomed adoptions by withholding or lying about the child's medical and emotional history and then shield itself from liability for its actions by requiring adoptive parents to sign waivers of liability.

For the reasons set out in *Wagenblast*, as well as for the reasons set out in the additional facts, this court should rule that the waiver of liability the State required the Raglins to sign in this case is unenforceable because it violates public policy.

(5) The 3/28/05 Letter Agreement is Unenforceable Because it Was the Product of a Unilateral Mistake Procured by the State Through Fraud or Inequitable Conduct.

Contracts which are the result of the unilateral mistake of one party are not enforceable if the other party was aware of the mistake and engaged in fraud or inequitable conduct to exploit or create it. *Associated Petroleum*

Prods., Inc. v. NW Cascade, Inc., 149 Wn.App. 429, 203 P.3d 1077, 1082 (2009). For the purpose of this rule, a mistake is a belief not in accord with the facts. *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984) (citing Restatement (Second) of Contracts § 151 (1981)). In addition, the concealment of a material fact may constitute a false representation and overreaching, thus invalidating a release. *Basin Paving, Inc. v. Port of Moses Lake*, 48 Wn.App. 180, 737 P.2d 1312 (1987).

For example, in *Basin Paving, Inc. v. Port of Moses Lake, supra*, a contractor sued a municipal corporation alleging that \$70,000.00 was due and owing on a paving contract. The municipal corporation counterclaimed for the return of the same amount of money, alleging that it had unwittingly overpaid the contractor on a previous contract. The contractor defended the counterclaim on the basis that following the completion of the prior construction project, both parties had executed a general release from liability. Following trial, the Superior Court reformed the general release executed by the parties to indicate that the \$70,000 overpayment was not included in its terms. The contractor then appealed.

On review, the Court of Appeals, affirmed the decision of the trial court based upon the principle that the waiver of liability had been based upon the unilateral mistake of one party, known to the party seeking to enforce the waiver. The court based the application of this rule upon the trial

court's factual findings that (1) the contractor knew that the municipality had made the overpayment, and (2) the contractor knew that the municipality was unaware of this error.

In *Basin Paving*, the defendant in the counterclaim argued to the court that it was not liable for the overpayment because the plaintiff in the counterclaim had entered into a contract that contained a waiver of all future claims. Similarly, in the case at bar, the State argues to this court that it is not liable on a claim of wrongful adoption because the Raglins entered into a contract (the 3/28/05 Letter Agreement) that contained a waiver of all future claims. In *Basin Paving*, the plaintiff in the counterclaim responded by arguing that (1) it entered the waiver upon a mistake of fact (being unaware of the overpayment), and (2) that the defendant in the counterclaim was aware of the mistake when it procured the waiver. Similarly, in the case at bar, the Raglins responded to the State's claim by arguing that (1) they had entered the waiver upon a mistake of fact (being unaware of the child's medical history, unaware that they could apply for post-adoption support without the agreement including the waiver, and unaware that the state had lied to them about the availability of the child's medical history), and (2) that the State was aware of each of these mistakes of fact when it procured the waiver.

In the case at bar, the Raglins are also entitled to reformation of the

contract by voiding the waiver of liability in the same manner that the plaintiffs in the counterclaim in *Basin Paving* were entitled to such a reformation, if the Raglins can prove their factual claims. However, for the purpose of summary judgment, the trial court should have assumed the truth of the Raglins factual claims. Thus, at a minimum, the trial court in this case erred when it disregarded the facts supporting their claim of mistake in the formation of that portion of the 3/28/05 Letter Agreement that the State claimed constituted a waiver. As a result, the trial court erred when it granted the state's motion for summary judgment.

II. UNDER THE DOCTRINE OF LACHES, THE STATE IS PRECLUDED FROM ARGUING THAT THE ADOPTION SUPPORT AGREEMENT CONSTITUTED A RELEASE OF THE CLAIM FOR WRONGFUL ADOPTION.

Under the equitable doctrine of laches, a party may be precluded from raising a claim or defense, if the opposing party can prove the following two elements: (1) inexcusable delay on the part of the party now raising the claim or defense, and (2) prejudice to the other litigant or a third party from such delay. *See i.e., Brown v. Continental Can Co.*, 765 F.2d 810, 814 (9th Cir.1985). In determining whether the delay was inexcusable under the first criteria, the court should look to a variety of factors, including similar statutory and rule limitation periods. *Id.* However, the main component of the doctrine is not so much the delay in making the claim and the reasons for

it, as it is the proof of prejudice or damage resulting from the inexcusable delay. *Pierce v. King County*, 62 Wn.2d 324, 332, 382 P.2d 628 (1963); *see also Vance v. City of Seattle*, 18 Wn.App. 418, 423, 569 P.2d 1194 (1977).

In the case at bar, the Raglins argue that the equitable doctrine of laches precludes the state from now claiming that the 11/5/08 Adoption Support Agreement constituted the missing consideration from the 3/28/05 Letter Agreement because (1) the 11/5/08 Adoption Support Agreement was entered just 30 days after the Raglins filed their notice of appeal from the trial court's original grant of summary judgment, (2) the state failed to inform the Court of Appeals of this fact and to make this available argument throughout the pendency of the entire first appeal, and (3) to the extent the State's argument is correct on the waiver, the State's inexcusable delay in raising this claim has caused prejudice to both this court and the Raglins.

In this case, both the date of the notice of appeal from the original grant of summary judgment, as well as the date of the 11/5/08 Adoption Support Agreement appear clearly in the record. This court's prior decision in this case reveals that the mandate issued in the original appeal was on February 8, 2010. This mandate was over 15 months after the parties signed the 11/5/08 Adoption Support Agreement. Thus, the claim of waiver was available to the state prior to the filing of any briefs, well before oral argument, and before this court's decision. In addition, the lack of

consideration as argued by the plaintiff and found by this court, was the central issue in the first appeal.

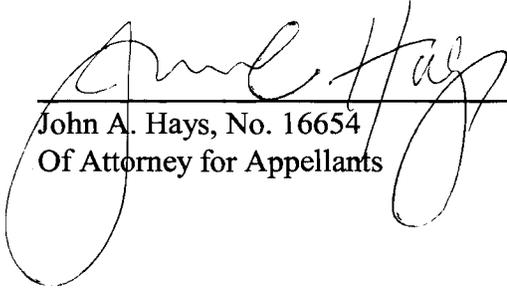
Had the state merely moved this court to supplement the record in the first appeal with the 11/5/08 Adoption Support Agreement, it could have properly brought its current claim during the first appeal. By not taking this simple step, the state has wasted the Raglins time and resources in prosecuting the first appeal, and now a second motion for summary judgment and second appeal. In addition, the state has also wasted this court's time by failing to make an undisputed factual claim (the existence of the agreement), that the state now argues would have required this court to find for it in the original appeal. Thus, under the equitable doctrine of laches, this court should preclude the state from now arguing that the 11/5/08 Adoption Support Agreement constitutes the missing consideration from the prior letter agreement.

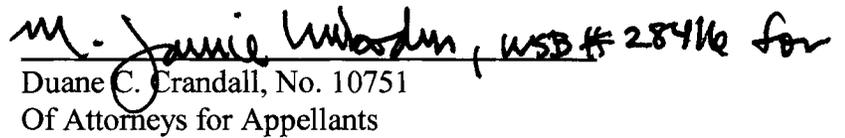
CONCLUSION

The trial court erred when it granted summary judgment for the state. As a result, this court should reverse the trial court's order and remand this case for trial.

DATED this 11th day of March, 2011.

Respectfully submitted,


John A. Hays, No. 16654
Of Attorney for Appellants


Duane C. Crandall, No. 10751
Of Attorneys for Appellants

1 THOMAS L. RAGLIN
2 222 KOKANEE DRIVE
3 KELSO, WA 98626

CECELIA M. RAGLIN
#35 615 7TH AVE.
LONGVIEW, WA 98632

4 Dated this 14th day of MARCH, 2011 at LONGVIEW, Washington.

5 
6 CATHY RUSSELL
7 LEGAL ASSISTANT TO JOHN A. HAYS
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AFFIRMATION OF SERVICE - 2

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084