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

In re the Matter of RAYMOND WALTERS,

CLAY WALTERS,

Appellant,

v.

CORBIN WALTERS,

Respondent.

BRIEF OF APPELLANT

LIFE POINT LAW

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I. INTRODUCTION

This case involves a Trust and Estate Dispute Resolution Act (“TEDRA”) action. Shortly before trial, the parties engaged in settlement negotiations. A notice of settlement was filed with the trial court. After filing the notice of settlement, Respondent provided Appellant with a proposed draft CR 2A agreement. The draft CR 2A agreement contained new broad release and hold harmless language that (a) was never negotiated in the settlement, (b) lacked consideration, (c) contained subject matter never assented to, and (d) included language Appellant disagreed with.

Despite this, the trial court issued an order enforcing the draft CR 2A. Additionally, the trial court’s order stated the action would be dismissed, with prejudice, seven days after issuing the order enforcing the draft CR 2A. But, the trial court later dismissed the action under PCLR 41(e)(3).¹ This order never stated dismissal was with prejudice. Months later, on Respondent’s motion, the trial court claimed to retain jurisdiction to issue an order, again, dismissing the case— this time with prejudice. The trial court denied Appellant’s motion to continue the hearing to allow counsel to properly defend such motion, although counsel had been retained

¹ **Dismissal on Court’s Motion.** If an order disposing of all claims against all parties is not entered within 90 days after the written notice of settlement is filed, the court shall dismiss the matter unless good cause is shown upon motion and order. PCLR 41(e)(3).

only two days before the hearing. This appeal ensued.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1. The trial court erred, as matter of law, when it imposed an unsigned draft CR 2A agreement on the Appellant containing terms outside of the negotiated settlement terms reached between the parties. Appellant never agreed to the broad release and hold harmless language in the CR 2A because: (1) the release and hold harmless language was not subject matter negotiated and agreed to in the settlement, and (2) Appellant never intended to be contractually bound by the broad release and hold harmless language.

Assignment of Error 2. The trial court lacked jurisdiction to grant Respondent's November 17, 2017, motion to dismiss with prejudice because the court had entered a dismissal order under PCLR 41(e)(3) on August 8, 2017, effectively terminating the litigation without prejudice. No party appealed the trial court's dismissal of the case.

Assignment of Error 3. The trial court abused its discretion when it denied Appellant's motion for a continuance to properly prepare to oppose Respondent's November 17, 2017, motion to dismiss with prejudice.

III. STATEMENT OF THE CASE

A. Appellant files TEDRA petition seeking relief relative to his beneficiary status to a trust.

The underlying proceeding involves TEDRA litigation. CP 1-15. Appellant filed his petition June 14, 2014. CP 15. Appellant sought, *inter alia*, an accounting of a trust to which he was a beneficiary, reimbursement, and the imposition of a resulting trust. CP 10-13. On October 13, 2016, after extensive discovery and pre-trial motion practice, the trial court issued a pretrial order. CP 33-36. The matter was set for trial. *Id.*

B. Parties negotiate terms for a future settlement.

On November 8, 2016, the parties participated in a full day mediation. CP 63. No settlement was reached, but the parties continued to negotiate. *Id.* On November 10, 2016, Respondent made an offer of settlement, in writing, to the Appellant. CP 77-78. The letter contained a broad release of individuals involved administration of the trust. *Id.* Appellant did not agree to the broad release. CP 47-48. On November 22, 2016, Appellant made a written counteroffer to Respondent. *Id.* Notably, Appellant offered to release and hold harmless Respondent, but not the other individuals in Respondent's November 10 letter. *Id.*

On November 23, 2016, the parties negotiated terms that would have been acceptable for a future settlement. CP 43. The material terms were:

(1) Appellant would receive \$87,500 from his parents' trust; (2) Respondent would resign as trustee; (3) Jerry Walker would become successor trustee of the Ray and Elaine Walters' Trust, and (4) all claims between the parties would be dismissed.² CP 44, 47-49. On November 28, 2016, relying on the above-agreement, counsel for Appellant broached the idea of filing a notice of settlement:

What do you think about filing a notice of settlement so that we get a little bit of breathing room to do the drafting and finalization...I want to keep the momentum going but worry that we don't have time to get it wrapped up. We could put something in the [notice of settlement] that gives the right to re-note for trial in 30 days?

CP 80-81. Counsel for Respondent responded: "Not a bad idea – let me talk with my client." CP 82. Counsel for Respondent later stated she agreed with filing of a notice of settlement, however: "[Respondent] would like to get a CR 2A in place first..." CP 84. On November 29, 2016, Appellant responded:

We are going to file a notice of settlement this [morning]. It's going to take some amount of time to finalize the agreement and get signatures. I will keep the pressure on. As we discussed yesterday, we have agreement on the number.

CP 84-85.

² A dismissal of claims between the parties was negotiated. But, a dismissal of other non-litigant parties was never negotiated. CP 44.

C. Draft proposed CR 2A agreement is circulated. It is neither agreed to by Appellant nor signed by any party.

On December 2, 2016, counsel for Respondent emailed Appellant at draft CR 2A agreement.³ CP 73. On December 6, 2016, counsel for Respondent sent Appellant a revised version of the December 2, 2016, draft CR 2A agreement. *Id.* The release and hold harmless language at issue was:

A broad release of claims by [Appellant] and any new Trustee of the Walters Trust through the date of August 1, 2015, for any claims against the following professionals and individuals who provided services to the Trust and the Walters...

CP 95.

Appellant did not respond to the draft CR 2A agreement. CP 73. Appellant's position on the CR 2A agreement was later stated in a motion to the trial court:

Unfortunately, the parties have not been able to execute a written settlement, mainly due to language desired by [Respondent] about releases for witness in the case. Those witnesses are not parties to this case and [Respondent's] attorneys did not represent them in this case. In sum, [Appellant] does not believe the release language demanded by [Respondent] was ever a material term [agreed] to the settlement.

³ The second CR 2A agreement was only intended to correct typographical errors and add information inadvertently omitted by Respondent. CP 73.

CP 38, 44, 53-56.

Counsel for Respondent tells a different story. CP 72. Counsel for Respondent claims Appellant agreed to the broad release and hold harmless language as a material term:

Ultimately, [Respondent] agreed to forego any and all distributions he would be entitled to under the Trust and agreed to the \$87,500 to be paid to [Appellant] in exchange for obtaining the broad release of the individuals listed in paragraph 9 of the CR 2A draft...

CP 63. Counsel for Respondent relies on a text chain between her and counsel for Appellant to prove that at the time of filing the notice of settlement, “the parties had reached an agreement on the terms.” CP 73, 80-88.⁴ But, Appellant neither signed the draft CR 2A nor verbally assented to its terms. CP 63-64.

D. Trial court issues an order enforcing the unsigned draft CR 2A agreement.

Recognizing the impasse, on April 11, 2017, Appellant moved for court approval/determination regarding settlement. CP 37-42. Appellant sought an order from the trial court to:

⁴ This is a mischaracterization of the conversation. Counsel for Appellant makes the following statements: “What do you think about filing a notice of settlement so that we get a little bit of breathing room **to do the drafting and finalization?**” and “It’s going to take some time to **finalize the agreement...**” CP 80, 84 (emphasis added). Further, counsel for Respondent mentions in the text chain that the agreement is not finalized: “I would like to get a CR 2A in place first [before filing a notice of settlement].” CP 83-83.

[E]nforce, or otherwise determine the settlement that was reached with [Respondent] as reflected in the CR 2A, but without the paragraph regarding the release of claims against non-party witnesses who are not parties to this case and no represented by any counsel in this case.

CP 40. Respondent filed a response stating the broad release and hold harmless language had been previously agreed to during informal negotiations and was properly in the draft CR 2A. CP. 72-73.

The hearing on the motion was conducted on July 28, 2017. Verbatim Report of Proceedings, July 28, 2017 (“VBR 2”). At the hearing, counsel for the Appellant stated:

I did not feel that we were able to come to a full written agreement because [Respondent] requested some very broad releases of persons who were witnesses in the case, not represented by any counsel, and I didn’t feel that the monetized amount that was negotiated for that, but I did feel that the material terms of a monetized amount in exchange for dismissal was negotiated. As a result, I brought the motion.

VBR 2 at pgs. 2-3. Counsel for the Respondent stated:

I just think the issue is pretty clear from the text messages and the agreement that there was an agreement back in November and that when provided with the draft CR 2A there was a delay. At the very minimum, the Court under the TEDRA has authority to settle this matter. At a very minimum, Mr. Morgan’s motion constitutes a signed writing by the party. We would ask the Court to enforce the settlement with the broad release, without the broad release, but a minimum, end this matter.

VBR 2 at pgs. 3-4. The trial court’s ruling:

I believe the settlement agreement with the broad release is enforceable. I embrace [Respondent's] argument and the memorandum of the authorities that she provided and that is my ruling in this case.

At the end of the hearing, the trial court entered an order. CP 97-99. The order stated that: (1) the CR 2A agreement will be enforced, including the broad release; (2) the parties were directed to execute a TEDRA agreement and file it with the Court within 7 days of the order, and (3) the matter **would be** administratively dismissed with prejudice within seven days of the order. *Id.* (emphasis added).⁵

On August 8, 2017, the trial court entered an order of dismissal. CP 100. The trial court's order did not cite to its July 28, 2017, order. *Id.* The order simply stated the matter was dismissed under PCLR 41(e)(3).⁶ The order also did not state whether the case was dismissed with or without prejudice. On November 17, 2017, over three months after the last order was entered, Respondent moved for Dismissal with Prejudice and Other Relief. CP 101-107. Respondent requested: (1) acceptance of jurisdiction to hear the motion; (2) an order dismissing the matter, with prejudice, and (3) confirming trustee distributions rather than pursuing an executed

⁵ The trial court stated the date as "on or before Friday, August 4, 2017." CP 100.

⁶ See *supra* fn. 1.

TEDRA agreement from the Appellant. CP 101. Newly hired counsel for the Appellant requested a continuance to obtain declarations and properly defend the motion.⁷

The hearing on Respondent's motion was heard on November 17, 2017. Verbatim Report of Proceedings, November 17, 2017 ("VBR 1"). The trial court accepted jurisdiction, denied Appellant's motion for continuance and granted the Respondent's motion for dismissal. CP 192-193. The trial court's reasoning:

I'm not satisfied there is a basis to continue this matter. I think what I've attempted to convey in regards to the current status of this case essentially is over. And the reason we are here in part is because [Respondent has] refused to sign the CR 2A...I am going to, sir, deny [Appellant's motion]. I'm going to grant [Respondent's motion] and I'm going to sign an order to that effect.

VBR 2 at pgs. 8-9. This appeal ensued. CP 189-199.

IV. STANDARD OF REVIEW

We review a decision regarding the enforcement of a settlement agreement *de novo*. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). "The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed." *Condon v. Condon*, 177 Wn.2d 150,

⁷ New counsel for Appellant had been hired two days before the hearing. CP 181-182.

161–62, 298 P.3d 86 (2013). The trial court must view the evidence in the light most favorable to the nonmoving party and “determine whether reasonable minds could reach but one conclusion.” *In re Marriage Ferree*, 71 Wn. App. 35, 44, 856 P.2d 706 (1993). “[I]f the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.” *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000).

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. *In re Patterson*, 93 Wn. App. 579, 583, 969 P.2d 1106 (1999). The party moving to enforce a settlement agreement carries the burden of proving there is no genuine dispute on the material terms or existence of the agreement. *Brinkerhoff*, 99 Wn. App. at 696–97, 994 P.2d 911. If the moving party meets its burden, “the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact.” *Patterson*, 93 Wn. App. at 584, 969 P.2d 1106.

V. AUTHORITY

A. Trial court erred in enforcing the draft proposed CR 2A agreement with broad release and hold harmless language because the subject matter was not agreed upon.

CR 2A provides:

No agreement or consent between the parties or attorneys in respect to the proceeding in 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.

Our courts apply general principles of contract law to settlement agreements. *Lavigne v. Green*, 106 Wn. App. 12, 20, 23 P.3d 515 (2001).

An essential element to the valid formation of a contract is the parties' objective manifestation of mutual assent. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004). “The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” *H.D. Fowler Co. v. Warren*, 17 Wn. App. 178, 180, 562 P.2d 646 (1977) (quoting *National Bank v. Equity Investors*, 81 Wn.2d 886, 912–13, 506 P.2d 20 (1973)).

Where a party has signed a contract, he or she is presumed to have objectively manifested assent to its contents. *See Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381–84, 745 P.2d 37 (1987); *Tjart v. Smith*

Barney, Inc., 107 Wn. App. 885, 897, 28 P.3d 823 (2001). However, that rule will not apply where another contracting party committed fraud, deceit, misrepresentation, coercion, or other wrongful acts. See *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 389, 858 P.2d 245 (1993) (citing *Skagit State Bank*, 109 Wn.2d at 381–84, 745 P.2d 37); *Tjart*, 107 Wn. App. at 897, 28 P.3d 823.

Further, silence is ordinarily not a proper method of acceptance.⁸ *Goodman v. Darden, Doman & Stafford Associates*, 100 Wn.2d 476, 482-83, 670 P.2d 648 (1983) (promoter's suggestion that liability be limited to corporation, rather than corporation and promoter, did not become binding; other parties to contract had no duty to speak, and thus silence did not constitute acceptance); *American Aviation, Inc. v. Hinds*, 1 Wn. App. 959,

⁸ Restatement of Contracts (Second) § 69:

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance **in the following cases only**:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

961, 465 P.2d 676 (1970) (receipt of stock in exchange for airplane did not result in binding contract even though airplane owner did not immediately object to terms of agreement and waited until after evaluation of stock to return stock and reject agreement).

1. Draft proposed CR 2A agreement contained a broad release and hold harmless provision never fully negotiated and never assented to in open court, or in writing, by Appellant.

“The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.” *Blue Mt. Constr. Co. v. Grant Cy. Sch. Dist.* 150-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957). Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer and does not perfect the contract. *Roslyn v. Paul E. Hughes Constr. Co.*, 19 Wn. App. 59, 63, 573 P.2d 385 (1978). Specific to this case, a valid contract requires all parties to agree to all material terms. *Wash. Shoe Mfg. Co. v. Duke*, 126 Wash. 510, 516–17, 218 P. 232 (1923).

The above stated legal principles apply equally to settlement agreements. *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013). In *Condon*, the parties agreed in open court to a stipulated settlement, predicated upon dismissal with prejudice. *Id.* at 154. No written settlement or release was presented. *Id.* at 155. The parties signed a stipulation and

order of dismissal, and shortly thereafter, the trial court ordered dismissal with prejudice. *Id.* Before payment of settlement funds, and prior to the trial court ordering dismissal, respondent sent appellant a release agreement, which the parties had neither discussed nor placed on the record.⁹ *Id.* Appellant refused to sign the release stating the release was never part of settlement negotiations. *Id.* Respondent then moved to enforce the settlement and release. *Id.* Appellant opposed the motion by stating the release was never part of the settlement, thus never fully negotiated. *Id.* The trial court entered an order deeming the release signed. *Id.* Appellant moved for discretionary review with the Supreme Court. *Id.*

The Supreme Court held the trial court erred in enforcing terms not implied within the settlement agreement:

Here, there is no indication in the record or transcripts that the release agreement was intended by the parties. Instead, the record suggests that the settlement consisted entirely of [respondent's] payment to [appellant] and dismissal of the dispute, which is sufficient consideration for an enforceable settlement. We cannot read the release proposed by respondent into this otherwise valid settlement agreement when there is no evidence that the parties intended such terms.

⁹ The parties discussed the broad release and hold harmless agreement. Appellant never agreed to it, and there is no document in writing, or record in open court, showing Appellant agreed to it. Respondent pins mutual assent on a string of text messages between counsel for the parties. CP 73.

Id. (internal citations omitted).

The Supreme Court also noted the broad release language. *Id.* 164. It stated the trial court's inclination to believe the parties intended a general release was correct because their agreement for dismissal with prejudice had the effect of limiting future claims. *Id.* However, the release the trial court deemed signed was far broader than what was achieved through a dismissal with prejudice. *Id.* For example, the release stated:

The undersigned, in consideration of FARMERS INSURANCE COMPANY tendering the settlement check directly to releasor's attorney, without naming lien holders as payees, further hereby covenants to defend, to indemnify, and hold harmless FARMERS INSURANCE COMPANY, its attorneys, agents, employees and assigns from and against all such lien and subrogation claims, including all costs and attorney's fees incurred in the defense of such claims.

Id. The Supreme Court noted that no evidence from the record reflected these broad release terms were contemplated by the parties when settlement was reached. *Id.* When appellant agreed to dismiss her claims, she only released respondent on those claims, and did not agree to hold Farmers harmless on any other claims. *Id.* The Supreme Court held that such a release must be expressly agreed to, and not implied by enforcement of the trial court. *Id.* (citations omitted).

2. Appellant must have demonstrated an objective manifestation to be bound by the CR 2A.

All parties to a settlement agreement must demonstrate their intent to be bound by the instrument. *Loewi v. Long et ux.*, 76 Wash. 480, 484, 146 P. 673 (1913). A settlement agreement without an objective intent to be bound is no agreement. *Howard v. Dimaggio*, 70 Wn. App. 734, 855 P.2d 335 (1993). In *Howard*, appellant sued respondent for injuries from an automobile accident. *Id.* at 736. The parties' attorneys negotiated a settlement. *Id.* Before execution of the settlement, respondent's insurance carrier paid appellant's insurance carrier for subrogation. *Id.* Appellant then refused to sign the settlement documents. *Id.* The court granted respondent's motion to enforce the settlement. *Id.* Ms. Howard contends the court erred. We agree, reverse and remand for trial. *Id.*

Three days before trial, respondent's attorney offered a settlement. *Id.* Appellant's attorney accepted the offer subject to client approval. *Id.* That same day, respondent's attorney notified appellant's insurer, that a settlement had been reached. *Id.* Respondent's attorney then drafted a release, a medical guaranty letter and a stipulation to an order of dismissal, and an order of dismissal with prejudice. *Id.* About a two months later, appellant stated that she was dissatisfied with the settlement agreement and would not be signing the documents. *Id.* at 737.

Thereafter, respondent moved to enforce the settlement agreement. *Id.* At the hearing, the trial court granted the motion, stating: “Settlement was agreed upon by the attorneys for the parties. [Appellant] is estopped to deny the settlement of this case.” *Id.* On appeal, relying on *Stottlemeyer v. Reed*, respondent argued appellant’s attorney admitted in his deposition that a settlement was reached, he waived his signature, and constructively signed the deposition under CR 30(e), thus meeting the requirements of CR 2A and RCW 2.44.010.¹⁰ 35 Wn. App. 169, 172, 665 P.2d 1383, *review denied*, 100 Wn.2d 1015 (1983).

The Court of Appeals stated respondent’s reliance on *Stottlemeyer* was misplaced, and it was “undisputed” CR 2A and RCW 2.44.010 procedures were not followed. *Id.* at 738. This was because the settlement agreement did not discuss details of the release and hold harmless documents, meaning such document was not fully negotiated. *Id.* While the evidence established an amount for the settlement, the record also established there was no agreement on the terms of the hold harmless and release provision.¹¹ *Id.* Therefore, noncompliance with CR 2A and RCW

¹⁰ Counsel for Respondent makes that exact argument for enforcement of the CR 2A: “At a very minimum, [counsel for Appellant’s] position in his motion constitutes a signed writing by the party. VBR 1 at pages 3-4.

¹¹ Counsel for Appellant sated the same at the hearing on the motion to enforce the settlement agreement in the underlying proceeding:

2.44.010 left the trial court without authority to enforce the alleged settlement agreement. *Id* at 739. (citations omitted).

Here, the trial court committed the exact errors the Supreme Court and Court of Appeals had to correct in the above-cited cases. First, the trial court erred in imposing terms in a draft unsigned CR 2A on Appellant not fully negotiated. *See e.g. Condon*, 177 Wn.2d at 163-64, 298 P.3d 86. For the trial court to impose these terms, they must have been “subject matter [must be] agreed upon.” *Loewi*, 76 Wash. at 484, 136 P. 673 (1913). In the underlying proceeding, Appellant objected to the unsigned draft CR 2A in his motion on the record, in open court. VBR 1 pgs. 3-4. Despite raising this objection at the hearing on the motion to enforce the settlement agreement, Respondent claims:

there was no response to the [CR 2A drafts indicating that they did not encompass the correct terms of the parties’ agreement...in fact, there was no communication at all from [Appellant] that would contradict the fact that the CR 2A constituted the parties’ agreement.

CP 64-65.

I did not feel that we were able to come to a full written agreement because [Respondent] requested some very broad releases of persons who were witnesses in the case, not represented by any counsel, **and I didn’t feel that the monetized amount that was negotiated for that,** but I did feel that the material terms of a monetized amount in exchange for dismissal was negotiated....

VBR 1 at pgs. 3-4. (emphasis added).

Respondent misstates the law, as silence is ordinarily not a proper method of acceptance. *Goodman*, 100 Wn.2d at 482-83, 670 P.2d 648 (promoter's suggestion that liability be limited to corporation, rather than corporation and promoter, did not become binding; other parties to contract had no duty to speak, and thus silence did not constitute acceptance); *American Aviation, Inc.*, 1 Wn. App. at 961, 465 P.2d 676 (receipt of stock in exchange for airplane did not result in binding contract even though airplane owner did not immediately object to terms of agreement and waited until after evaluation of stock to return stock and reject agreement). Here Appellant's silence cannot be construed as acceptance. *Stottlemyre*, 35 Wn. App. at 171, 665 P.2d 1383.

Second, the trial court erred in imposing the CR 2A on Appellant because Appellant never intended for the broad release language to be a part of the settlement. *Condon*, 177 Wn.2d at 163, 289 P.3d 86. This is explicitly stated by Appellant in a November 22, 2016, letter to Respondent:

Your November 10, 2016, letter references a request by [Respondent] for a release of claims by [Appellant] against a number of persons and entities who are not parties to this matter. We have debated back and forth about the propriety of [Respondent's] position...What if [Appellant] releases them but later discovers that one of these people did something to harm him in some fashion? [Appellant] would be barred from protecting himself. As mentioned above, they are not parties to the case. They are witnesses because [Respondent] (not [Appellant]) made them witnesses. That

is not [Appellant's] doing...Lastly, none of these persons or entities are contributing financially to the settlement so any release of them would be faulty due to lack of consideration.

CP 47-48. Just as in *Condon*, the trial court erred in enforcing the CR 2A agreement here because “there is no indication in the record or transcripts that the release agreement was intended by the parties.” 177 Wn.2d at 163, 298 P.3d 86. Further, even though there was an agreement on the consideration to settle between Appellant and Respondent, Appellant never intended to be bound by the draft proposed CR 2A broad release and hold harmless language. CP 47-48; In *Howard*, the Court of Appeals stated:

Even though the evidence establishes the attorneys agreed on the amount of the settlement, it also establishes they did not reach an agreement on the terms of the [CR 2A]...therefore noncompliance with CR 2A and RCW 2.44.010 left the trial court without authority to enforce the alleged settlement agreement.

Howard, 70 Wn. App. at 739.

B. Trial court lacked jurisdiction to rule on Respondent's motion to dismiss because it previously entered a CR 41 dismissing the case without prejudice.

Moving to enforce a settlement agreement presents several procedural and jurisdictional problems. *Condon*, 177 Wn.2d at 157-161, 298 P.3d 86. For example, the Court of Appeals has held a trial court lacked jurisdiction to enter a judgment awarding attorneys' fees against a defendant in a motion to vacate default judgment weeks after the plaintiff obtained a

voluntary dismissal. *Cork Insulation Sales Company v. Torgeson*, 54 Wn. App. 702, 705, 775 P.2d 970 (1989). In distinguishing *Cork*, the Court of Appeals' holding in *Hawk v. Branjes* stated a trial court had jurisdiction under a lease agreement to award attorney fees following voluntary nonsuit. *Hawk v. Branjes*, 97 Wn. App. 776, 782, 986 P.2d 841 (1999). The Court of Appeals supported their decision by stating:

“‘[s]everal cases have awarded costs and attorney fees under other statutory or specific contractual provisions when a complaint has been dismissed voluntarily, either with or without prejudice.’ We distinguished those cases in holding that the statutory provision at issue in *Cork Insulation* did not provide for attorneys' fees absent a judgment.

While a voluntary dismissal under CR 41(a)(1) generally divests a court of jurisdiction to decide a case on the merits, an award of attorneys' fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding. As a result, the court retains jurisdiction for the limited purpose of considering a defendant's motion for fees. Any other result would permit a party to voluntarily dismiss an action to evade an award of fees under the express terms of a statute or agreement. Moreover, to hold otherwise would unnecessarily subject the courts to separate actions to recover fees readily ascertainable upon dismissal of the underlying claim. Consequently, the trial court here properly retained jurisdiction to award attorneys' fees under the terms of the lease agreement.

Id. at 782-783.

The Supreme Court further addressed this topic in *Condon*. 177 Wn.2d at 157-161. Appellant argued dismissal with prejudice ended all

litigation, stripping the trial court of its jurisdiction to enforce a settlement agreement. *Id.* at 157. The Supreme Court applied *Cork* and *Hawk*, while also surveying federal and state law. *Id.* at 158-160. For instance, the Florida Supreme Court held a trial court retains jurisdiction to enforce a settlement agreement where it has incorporated the agreement into a final judgment or approved of the agreement by order *and retained jurisdiction to enforce the terms*. *Paulucci v. General Dynamics Corporation*, 842 So.2d 797, 803 (2003). In California, the Code of Civil Procedure allows a trial court to retain jurisdiction to enforce a settlement agreement following dismissal upon the parties' request. CAL. CIV PROC. § 664.6. In Illinois, the Court of Appeals held the trial court maintained jurisdiction to enforce a settlement agreement because the trial court expressly stated it retained jurisdiction for that purpose. *Director of Insurance v. A & A Midwest Rebuilders, Inc.*, 383 Ill.App.3d 721, 725, 891 N.E.2d 500 (2008).

The Supreme Court pointed out several Washington secondary authorities that have addressed this issue. *Condon*, 177 Wn. 2d at 160-161. One authority states a motion to enforce a settlement agreement under the original cause number is preferred; however, it is “probably necessary to simultaneously move to vacate under CR 60”.¹² 15 Karl B. Tegland,

¹² Respondent never moved to vacate under CR 60.

Washington Practice: Civil Procedure § 53:28, at 450 (2d ed. 2009) (citing *Oregon Mutual Insurance Co. v. Barton*, 109 Wn. App. 405, 36 P.3d 1065 (2001)). The view on vacating is shared in *American Jurisprudence* as well. See David F. Herr et al., *Motion to Enforce Settlements: An Important Procedural Tool*, 8 Am. J. Trial Advoc. 1 (1984-85).

The Supreme Court never addressed the merits of Respondent's lack of jurisdiction argument. *Condon*, 177 Wn.2d at 161. But, the Supreme Court stated in *dicta* the best practice would have been for the trial court, *at the time of settlement*, to expressly retain jurisdiction for enforcement, or to enter a conditional order. *Id.* (Emphasis added). Since that did not happen, the moving party could have moved to vacate the original dismissal, and then motion to enforce the order. *Id.*

Respondent and the trial court did not follow this recommended procedure. The trial court signed an order enforcing the draft proposed CR 2A agreement on July 28, 2017. CP 97-99. This draft agreement was unsigned and never assented to by Appellant. CP 43. The order further stated the matter would be "administratively dismissed WITH PREJUDICE...on or before August 4, 2017." *Id.* at 98. This order did not explicitly state that the trial court was retaining jurisdiction for enforcing the draft proposed CR 2A agreement. *Id.*

On August 8, 2017, the trial court entered an order of dismissal under PCLR 41(e)(3). CP 100. That order did not state the trial court was retaining jurisdiction to enforce the purported settlement agreement. *Id.* That order also did not reflect whether the dismissal was with or without prejudice. *Id.* PCLR 41(e)(3) does not state what the prejudicial assumption is when an order lacks language on whether the dismissal was with or without prejudice. As a general principal, dismissals under CR 41(a) that do not state whether it was with or without prejudice will be deemed “without prejudice.” *Baker v. Winger*, 63 Wn. App. 819, 823, 822 P.2d 315 (1992). This is why mutually assented settlement agreements are crucial in clarifying the prejudicial intention of the parties. 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 53:4.

Over three months later, Respondent moved to dismiss with prejudice. CP 101-106. Respondent stated the purpose was to clarify whether the dismissal under PCLR 41(e)(3) was with or without prejudice. CP 106. In granting Respondent’s motion, the trial court entered another order on November 17, 2018. CP 187-188. This order stated the trial court “accepted jurisdiction of this matter for the limited purpose of hearing and ruling on this motion.” CP 187. The trial court further stated the “above-captioned case was dismissed with Prejudice.” *Id.*

Notwithstanding the trial court's legal error, the November 17, 2017, order is void for lack of jurisdiction. *Condon*. 177 Wash. 2d at 161, 298 P.3d 86. First, the August 8, 2017, order was dismissed without prejudice due to an absence of prejudicial language. *Baker*, 63 Wn. App. 819, 823, 822 P.2d 315. Second, while the July 28, 2017, order, and the oral record, stated at a future date an order dismissing the case administratively with prejudice would be entered, Washington case law is clear that a written order controls over any apparent inconsistency with the court's earlier oral ruling. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000).

Third, and most important, the trial court failed to follow the Supreme Court's instructions in *Condon*: "[t]he best practice would have been for the court, at the time of settlement, to expressly retain jurisdiction for purposes of enforcement or to enter a conditional or delayed dismissal." 177 Wn.2d at 161, 298 P.3d 86. (Emphasis added). Given there was no settlement agreement, and the CR 2A agreement was imposed on Appellant by the trial court, compliance with procedure was impossible. CP 44. The November 17, 2017 order dismissing the underlying case with prejudice is void for lack of jurisdiction. *Condon*, 177 Wash. 2d at 161, 298 P.3d 86. The August 8, 2017,

order controls, and it effectively terminated the underlying litigation without prejudice and Respondent never appealed that final order. *Id.*

VI. CONCLUSION

The trial court improperly imposed a draft proposed CR 2A agreement on Appellant. Basic common law contract principles were violated as Appellant did not objectively assent to his intent to be bound by the draft proposed CR 2A agreement. The trial court's forced inclusion of material terms not fully negotiated substantially destroys any previous agreement that might have been in place. Further, the trial court issued an order dismissing the underlying litigation with prejudice without having jurisdiction to do so. This case was dismissed without prejudice on August 8, 2017, and that final order was never appealed. Therefore, the trial court's July 28, 2017, order imposing the unsigned draft CR 2A agreement on Appellant, and the November 17, 2017, order dismissing the underlying case with prejudice should be reversed.

DATED this 24th day of April, 2018.

LIFE POINT LAW

s/Bryan C. White

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Counsel for Appellant Clay Walters

CERTIFICATE OF SERVICE

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

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DATED: April 24, 2018, at Federal Way, Washington

s/ Bryan C. White

Bryan C. White

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