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Court of Appeals  
Division II  
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No. 51516-4-II

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

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**TODD GAMACHE, Appellant**

**v.**

**DARICE GAMACHE, Respondent**

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**AMENDED  
REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

<b>I. ARGUMENT</b>	<b>1</b>
<b>1. THE TRIAL COURT ERRED BY NOT GRANTING CR 60(b) RELIEF</b>	<b>1</b>
<b>A. Relief Should Have Been Granted Under CR 60(b)(1)</b>	<b>1</b>
<i>The CR 2A Agreement is Ambiguous</i>	<b>1</b>
<i>Mutual assent – mutual mistake</i>	<b>7</b>
<b>B. Relief Should Have Been Granted Under CR 60(b)(9)</b>	<b>8</b>
<b>C. Relief Should Have Been Granted Under CR 60(b)(11)</b>	<b>8</b>
<b>D. The Trial Court Erred by Releasing the Funds to Darice</b>	<b>10</b>
<b>2. THE LEGAL DEFENSES RAISED BY DARICE DO NOT APPLY</b>	<b>11</b>
<b>A. There is no Argument for Equitable Estoppel</b>	<b>11</b>
<b>B. Motion to Set Aside CR 2A Agreement</b>	<b>14</b>
<b>C. Todd Did Not Ask For Arbitration or For an Oral Testimony Hearing for the First Time on Appeal</b>	<b>14</b>
<b>D. There is No Basis for Darice to Recover Fees</b>	<b>15</b>
<b>II. CONCLUSION</b>	<b>15</b>
<b>III. APPENDIX</b>	<b>16</b>

## TABLE OF AUTHORITIES

<b>CASES:</b>	<b>Page(s)</b>
<i>Brinkerhoff v. Campbell</i> , 99 Wn.App. 692, 696, 99 911 (2000)	2, 3, 5
<i>Condon v. Condon</i> , 177 Wn.2d 150, 161, 298 P.3d 86 (2013)	2
<i>Crisman v. Crisman</i> , 85 Wash.App. 15, 22, 931 P.2d 163, review denied, 132 Wash.2d 1008, 940 P.2d 653 (1997).	5, 6
<i>Cruz v. Chavez</i> , 186 Wash.App. 913, 347 P.3d 912 (2015)	7
<i>Ebel v. Fairwood Park II Homeowners' Ass'n</i> , 136 Wash.App. 787, 793–94, 150 P.3d 1163 (2007).	12, 13
<i>Favors v. Matzke</i> , 53 Wash.App. 789, 796, 770 P.2d 686, review denied, 113 Wash.2d 1033, 784 P.2d 531 (1989)	6
<i>Fire Protection District v. Yakima</i> , 122 Wash.2d 371, 390, 858 P.2d 245 (1993)	5
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 301, 494 P.2d 208 (1972)	9
<i>Herrera v. Villaneda</i> , 3 Wn.App. 2d 483, 416 P.3d 733 (2018)	15
<i>Howard v. Dimaggio</i> , 70 Wash.App. 734, 855 P.2d 335 (1993)	7
<i>In re Marriage of Ferree</i> , 71 Wash.App. 35, 43, 856 P.2d 706 (1993)	4
<i>In re Marriage of Foran</i> , 67 Wn. App. 242, 834 P. 2d 1031 (1992).	10

<i>In Re Marriage of Olivares</i> , 69 Wn.App. 324, 330, 848 P.2d 1281 (1993)	9
<i>Mayer v. Pierce County Medical Bureau, Inc.</i> , 80 Wn.App. 416, 421, 909 P.2d 1323 (1995)	1
<i>Mitchell v. Straith</i> , 40 Wash.App. 405, 410–11, 698 P.2d 609 (1985)	6
<i>Peters v. Skalman</i> , 27 Wn.App. 247, 251, 617 P.2d 448 (1980)	9
<i>Snohomish County v. Hawkins</i> , 121 Wash.App. 505, 510-11, 89 P.3d 713 (2004), <i>review denied</i> , 153 Wash.2d 1009, 111 P.3d 1190 (2005).	12, 13
<i>Tatham v. Rogers</i> , 170 Wash.App.76, 283 P.3d 583 (2012)	8
<i>West v. Thurston County</i> , 169 Wash.App. 862, 868, 282 P.3d 1150 (2012)	14
<b>RULES:</b>	
CR 2A	7
CR 60	14
CR 60(b)	3, 4, 7
CR 60 (b)(1)	1
CR 60 (b)(11)	8, 9
<b>STATUTES:</b>	
RCW 2.44.010	7
RCW 26.09.070(3)	9
RCW 26.09.080	9

## I. ARGUMENT

### 1. THE TRIAL COURT ERRED BY NOT GRANTING CR 60(b) RELIEF

#### A. Relief Should Have Been Granted Under CR 60(b)(1)

The CR 2A Agreement Is Ambiguous. The crux of this entire matter is that the parties' CR 2A Agreement is ambiguous. A contract provision is ambiguous if a given term can have more than one meaning. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. 416, 421, 909 P.2d 1323 (1995). Todd asks that the Court examine Exhibit C to the CR 2A Agreement closely. CP 7 and Appendix A. While Darice argues that Exhibit C only applies to the proceeds from the sale of the business, she does not even attempt to explain the other figures in Exhibit C. As the Court can see, Exhibit C has two columns of figures, presumably representing assets and liabilities in the case. At the bottom of the columns, the figures "59%" and "41%" are written. Arguably, these figures indicate that Darice is to receive 59% of the total estate and Todd is to receive 41%. Below the percentages, however, it is indicated that Darice is to receive \$32,750 in cash and Todd is to receive \$100,000 in cash.

However, nowhere on Exhibit C does it say "It is anticipated that after the debts listed 1-7 are paid, that approximately \$32,750 shall be awarded to the wife, and \$100,000 shall be awarded to the husband. If less, the amounts shall be reduced pro rata. If more, the amount shall be split 59% to the petitioner and 41% to the respondent." This is the

language that the trial court adopted as part of the Final Divorce Order it entered. CP 82. *It is submitted that the trial court could not read Exhibit C given the ambiguities described above, apply summary judgment standards as required, and determine that the interpretation it chose, and the language it adopted, was the only interpretation Exhibit C could be given.* That was error, and it was error for the trial court to not grant relief after considering the matter pursuant to Todd's CR 60(b) motion.

As is the Court knows, when a party moving to enforce a CR 2A agreement relies on documentary evidence, the trial court must treat the motion to enforce as if it is a summary judgment motion. *Condon v. Condon*, 177 Wn.2d 150, 161, 298 P.3d 86 (2013); *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 696, 994 P.2d 911 (2000). The submissions of the parties are therefore read in the light most favorable to the nonmoving party. *Condon*, 177 Wn.2d at 162. As stated in *Brinkerhoff*, "Thus, the party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement." *Id* at 696-97.

Todd raised a genuine issue of material fact as to Darice's interpretation of the CR 2A Agreement by filing his declaration of November 16, 2017 in response to Darice's Motion for Presentation of Final Pleadings. CP 63-66. In his declaration, Todd pointed out that:

1. He agreed to a 59/41 split of the assets; CP 63

2. The way Darice wrote her proposed Decree, he would get nothing and Darice would get over \$300,000; CP 63
3. Darice did not disclose an additional \$75,000 in business debt that she incurred while running the company and that she did not disclose in negotiations; CP 64
4. Darice took additional cash that the CR 2A Agreement did not contemplate; CP 64, and
5. The CR 2A required that the matter be sent back to Dan Smith for arbitration of any disputes. CR 65

At that point, there was no way the trial court could conclude that there was no genuine issue of material fact regarding the interpretation of the CR 2A Agreement – the trial court needed to schedule an evidentiary hearing or refer the matter to arbitration with Dan Smith. It was an abuse of discretion to deny Todd's CR 60(b) motion given this set of circumstances.

Further, the *Brinkerhoff* court held that:

The threshold issue, the standard of review, is significant to our disposition of the case. Campbell contends that the trial court's decision to enforce the settlement agreement should be reviewed under the deferential abuse of discretion standard. We hold that the applicable standard of review is de novo because the evidence before the trial court consisted entirely of affidavits and the proceeding is similar to a summary judgment proceeding. *Id at 695-696*

The *Brinkerhoff* court went on to say that:

When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a motion for summary judgment. *In re Marriage of Ferree*, 71 Wash.App. 35, 43, 856 P.2d 706 (1993). *Patterson* relies on *Ferree*, see *Patterson*, 93 Wash.App. at 584, 969 P.2d 1106, and accepts *Ferree*'s application of summary judgment procedures. Thus, the party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement. *Ferree*, 71 Wash.App. at 41, 856 P.2d 706. The court must read the parties' submissions in the light most favorable to the nonmoving party and determine whether reasonable minds could reach but one conclusion. *Ferree*, 71 Wash.App. at 44, 856 P.2d 706.

Campbell suggests that the *Ferree* summary judgment standard applies *only* when there is a material dispute regarding the existence or material terms of the settlement agreement. We see no reason why the summary judgment standard of review should not also apply where, as here, there is a dispute of material fact about a defense to an agreement. **If there is an issue of material fact, the issue should be resolved by a fact-finding hearing. *Ferree*, *Morris* and *Patterson* are not discordant. Together, they establish that the governing principles in summary judgment proceedings are applicable to motions to enforce a settlement agreement; and if 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. *Id* at 696-697 (*emphasis added*)**

Again, it was an abuse of discretion to deny Todd's CR 60(b) motion and not grant him an evidentiary hearing, or refer the matter to

arbitration, given the circumstances of the case and the prevailing law as set forth in *Brinkerhoff*.

Finally, the *Brinkerhoff* opinion raises another point that is germane to our case. The Court stated that:

A party's misrepresentation of a material fact may render a contract voidable. *Fire Protection District v. Yakima*, 122 Wash.2d 371, 390, 858 P.2d 245 (1993), citing Restatement (Second) of Contract § 164(1) (1981); *Crisman v. Crisman*, 85 Wash.App. 15, 22, 931 P.2d 163, *review denied*, 132 Wash.2d 1008, 940 P.2d 653 (1997). The party seeking to have the contract voided based on misrepresentation has the burden of establishing that the party's manifestation of assent is induced by an assertion or representation not in accord with the facts; that the assertion is either fraudulent or material; and that the recipient is justified in relying on the assertion. *Fire Protection District*, 122 Wash.2d at 390, 858 P.2d 245.

Clearly, the extent of Campbell's coverage was a material fact. Brinkerhoff claims that Lewis's failure to correct his mistaken impression about the policy limits was tantamount to an "assertion" that Campbell's insurance coverage was limited to \$100,000. Campbell maintains that he and his agents made no assertion about policy limits; they simply remained silent believing they had no duty to disclose the actual limits unless asked to do so.

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist "where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure

to act in good faith and in accordance with reasonable standards of fair dealing." *Mitchell v. Straith*, 40 Wash.App. 405, 410–11, 698 P.2d 609 (1985), quoting Restatement (Second) of Contracts, § 161 (1981). But a person's silence does not amount to a failure to act in good faith absent an affirmative duty to disclose material facts. See *Crisman*, 85 Wash.App. at 22, 931 P.2d 163.

An affirmative duty to disclose can arise where a special relationship of trust and confidence has been developed between the parties; where one party is relying upon the superior specialized knowledge and experience of the other; where a seller has knowledge of a material fact not easily discoverable by the buyer; and where there exists a statutory duty to disclose. *Favors v. Matzke*, 53 Wash.App. 789, 796, 770 P.2d 686, review denied, 113 Wash.2d 1033, 784 P.2d 531 (1989). *Id* at 697-698

Darice deliberately failed to disclose in negotiations the amount of business debt and expense she incurred while she was in sole control of the company, and as sole manager was in a position of trust and confidence. She then took \$75,000 from the sale proceeds that was not contemplated by the agreement, and failed to disclose yet another \$75,000 in expense until the closing of the sale. These factors were pointed out by Todd to the trial court, but were apparently given no weight. The point to be made here, at the risk of being redundant, is that with yet another level of scrutiny required, the trial court could not have found that there was no genuine issue of material fact as to the

interpretation of the CR 2A Agreement, and accordingly it abused its discretion when it failed to grant Todd relief under CR 60(b).

In addition to the CR 2A Agreement being ambiguous, there was no “meeting of the minds” which is required for any contract enforcement.

**Mutual assent - mutual mistake.** Under principals of contract law, which govern settlement agreements, mutual assent is an essential element for the formation, or existence, of a valid settlement agreement. *Cruz v. Chavez*, 186 Wash.App. 913, 347 P.3d 912 (2015). There is no mutual assent unless there is a “meeting of the minds.” *Id.* Further, a settlement agreement is not enforceable under CR 2A and RCW 2.44.010 unless all of the significant terms are agreed to. *Howard v. Dimaggio*, 70 Wash.App. 734, 855 P.2d 335 (1993). If the procedures in CR 2A and RCW 2.44.010 are not followed, the agreement is not enforceable. *Howard v. Dimaggio, id.*

Darice cannot explain why she ended up with an additional \$75,000 before any of the agreed-upon debts were paid, or how the parties could have possibly had a “meeting of the minds” on their CR 2A Agreement when the taking of this money was never contemplated. Just as importantly, the taking of the money coupled with the additional undisclosed debt rendered the CR 2A Agreement impossible to perform. Darice continues to argue that Todd received \$40,000 while she received only \$32,750, but she fails to adequately address in her brief the first \$75,000 in cash that she received. Those funds were spent by Darice

and she claimed later than she used the funds to pay community bills. However, even if her statements were accurate, she did not use the funds to pay the bills contemplated by the CR 2A Agreement. Accordingly, Darice diverted an extra \$75,000 to her own benefit, which was not contemplated anywhere in the CR 2A Agreement. As a result, other bills contemplated by the CR 2A Agreement have yet to be paid and there is no money to pay them, or to pay to Todd. There was no mutual assent to this scenario.

**B. Relief Should Have Been Granted Under CR 60 (b)(9).**

Todd reiterates his position as set forth in his initial brief. Please review the Declaration of Joseph J. Loran dated December 6, 2017; CP 125-127. While Darice may argue that drug and alcohol addiction is self-inflicted, the medical community sees it as a disease.

**C. Relief Should Have Been Granted Under CR 60 (b)(11).**

Todd reiterates his position as set forth in his initial brief. CR 60(b)(11) gives the Court some discretion in granting relief for “Any other reason justifying relief from the operation of the judgment.” A motion for relief from judgment for any other reason justifying relief is the catch-all provision of the rule governing such motions, by which the courts may vacate judgments for reasons not identified in the rule’s more specific subsections. *Tatham v. Rogers*, 170 Wash.App.76, 283 P.3d 583 (2012).

Given the discussion above, Todd asks the Court to consider the following legal principles in conjunction with CR 60(b)(11).

First, a reviewing court must consider that spouses “do not deal with each other at arm’s length,” *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972), and therefore owe each other “the highest fiduciary duties.” *Peters v. Skalman*, 27 Wn.App. 247, 251, 617 P.2d 448 (1980). Darice breached her fiduciary duty to Todd.

Next, RCW 26.09.080 states that when disposing of property and liabilities in a dissolution case, the trial is to consider the “. . . economic circumstances of each spouse or domestic partner at the time the division of property is to become effective . . .” “[T]he economic circumstances of each spouse upon dissolution [are] of paramount concern.” *In re Marriage of Olivares*, 69 Wn.App. 324, 330, 848 P.2d 1281 (1993). Given the interpretation of the CR 2A Agreement adopted by the trial court and its subsequent orders, Todd is in a position to receive, at most, \$40,000, which is far less than 10% of the net community estate.

Finally, RCW 26.09.070(3) provides that a separation contract shall be binding *unless* the court finds “. . . after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court . . .” that the contract was unfair at the time it was executed. The interpretation of the CR 2A Agreement adopted by the trial court rendered the agreement unfair at the time it was executed – the result of the interpretation was

financially unjustifiable. The Court must first look at whether an agreement is financially fair on its face and, if it finds that it is fair on its face, whether the agreement was knowingly and voluntarily entered into. *In re Marriage of Foran*, 67 Wn.App. 242, 834 P.2d 1031 (1992). The interpretation of the parties' CR 2A Agreement that the trial court adopted fails both prongs of the test; it renders the agreement financially unfair and, by definition, Todd could not have knowingly and voluntarily entered into it because he has testified several times that he believed the agreement had a different meaning. It was abuse of discretion for the trial court to not grant relief from the Final Divorce Order when these facts and principles were brought to its attention.

**D. The Trial Court Erred by Releasing the Funds to Darice.**

The trial court should not have released the funds directly to Darice, and should not have given her \$32,750 for her own use. The trial court's order (CP 257-259) was inconsistent with the Final Divorce Order the court entered (77-83), which was inconsistent with the parties' CR 2A Agreement (CP 1-7). Darice argues that the final distribution has yet to take place, but she was specifically given \$32,750 for her own use (CP 258, line 23-25), while there were, and still are, debts to be paid and no money to pay them, or to pay to Todd. As Todd testified to at CP 113:

According to Exhibit A of our Settlement Agreement, we are supposed to pay bills which will total substantially more than that, leaving absolutely no cash. The way Darice has the decree written, I would receive

nothing. I would literally receive nothing out of this settlement. That is not what the Settlement Agreement contemplates. The tax withholding at 25% is \$143,750 all by itself. As the Court can see, the Home Equity Line of Credit is \$127,000, the smaller line of credit is \$7,500 and the community credit cards to be paid are \$33,000. These things alone will take all of the remaining funds. There simply is not enough cash from the sale to make this transaction work. Again, this is not what was contemplated when we settled the case.

With the extra \$75,000 Darice took at the outset and the \$32,750 the trial court wrongfully disbursed to her, there is no money left and there are still bills left to be paid.

***THE LEGAL DEFENSES RAISED BY DARICE DO NOT APPLY***

***A. There is no Argument for Equitable Estoppel.***

Darice's argument that Todd was somehow equitably estopped from seeking legal relief is inaccurate. He did not accept the "benefit of the bargain." He had no reason to challenge the closing of the sale of the business because selling the business was not at issue – the issue was what the CR 2A Agreement and the Final Divorce Order would do with the proceeds of the sale as well as the rest of the community estate. Todd objected and challenged Darice's final pleadings as soon as she sought to present them. He objected and argued at every step of the way that her interpretation of the agreement was inaccurate. Again, Todd did not conduct himself in any manner that would estop him from seeking legal relief.

What Darice is really arguing is that Todd ratified the CR 2A Agreement and is thereby bound to its terms. Even if there are grounds to void a contract, a party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract's benefits. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wash.App. 787, 793–94, 150 P.3d 1163 (2007). That is not what Todd did at all. He objected to the Court's interpretation of the agreement at every turn. If one contrasts Todd conduct in our case with the conduct of the parties in *Ebel*, one will clearly see the distinction.

In the *Ebel* case, the Court of Appeals, Division 3, stated:

Furthermore, the Property Owners ratified the 1998 covenants and thus are estopped from challenging them now. "A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract's benefits." *Snohomish County v. Hawkins*, 121 Wash.App. 505, 510–11, 89 P.3d 713 (2004), *review denied*, 153 Wash.2d 1009, 111 P.3d 1190 (2005). The party must act voluntarily and with full knowledge of the facts. *Id.* at 511, 89 P.3d 713.

It is undisputed that the Property Owners participated in the Association to varying degrees after it was created. All paid dues for over three years. Some served on the Board; others served on committees. Some submitted requests for property improvements to the Association for approval. All attended meetings in person or by proxy. The Property Owners clearly were aware of all the facts and accepted benefits from the Association. In these circumstances, they

cannot now claim the Association lacks authority. *Id.* at 793-4

Here is another example. In *Snohomish County v. Hawkins*, 121 Wash.App. 505, 89 P.3d 713 (2004), *review denied*, 153 Wash.2d 1009, 111 P.3d 1190 (2005), a case cited in the *Ebel* opinion, a party named Yasmin attempted to be relieved of a quit claim deed she signed. The Court of Appeals, Division 1, stated:

The trial court concluded that Yasmin ratified the recorded quitclaim deed and is estopped from claiming that Rocky lacked the authority to refinance the property. **A party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, she remains silent or continues to accept the contract's benefits.** A ratifying party must have acted voluntarily and with full knowledge of the facts.

Here, the trial court found that Yasmin intended to convey, release, and quitclaim all of her rights in the property, she executed the deed freely and voluntarily, she personally made and delivered several payments to Household without objection, and she told Carlin the property was not hers and she had quitclaimed it to Rocky. Yasmin did not assign error to these findings, and they are verities on appeal. This is substantial evidence demonstrating that Yasmin knew the quitclaim deed would terminate her property interest and that Rocky had refinanced. The trial court did not err in finding that Yasmin ratified the deed, the quitclaim deed is valid, and Yasmin's claims are barred. *Id.* at 510-11 (*emphasis added*)

Todd did not allow substantial time to pass and he never acted in concert with the Final Divorce Order absent objection. There is no factual basis to find that Todd somehow ratified the CR 2A Agreement or the subsequent terms of the Final Divorce Order by his words or actions.

**B. Motion to Set Aside CR 2A Agreement.**

Darice argues that Todd should have filed a motion to set aside the CR 2A Agreement. He had no reason to do that until the trial Court adopted, by Todd's reckoning, an inaccurate interpretation of the agreement. At that time, the trial Court invited Todd to file a CR 60 motion, which he did. The Court considered his arguments, but rejected them.

**C. Todd Did Not Ask For Arbitration or For an Oral Testimony Hearing for the First Time on Appeal.**

Darice argues that Todd asked for arbitration or an oral testimony hearing for the first time on appeal. However, he made this request throughout the proceedings; see CP 52, CP 65, CP 114 and CP 127.

**D. There is No Basis for Darice to Recover Fees.**

Darice requests an award of fees claiming that Todd's appeal is frivolous. "An appeal is frivolous if there are 'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *West v. Thurston County*, 169 Wash.App. 862, 868, 282 P.3d 1150 (2012). All doubts as to whether an appeal is frivolous should be resolved in favor of the

appellant. *Herrera v. Villaneda*, 3 Wn.App. 2d 483, 416 P. 3d 733 (2018). Todd's appeal has merit and it presents debatable issues; it is not frivolous and Darice's request for fees should be denied.

## **II. CONCLUSION**

In conclusion, Todd requests the following relief:

1. That Judge Whitener's order of January 26, 2018 denying Todd's Motion for Relief be vacated and, accordingly, the property and debt provisions of the parties' Decree of Dissolution also be vacated;
2. That Judge Whitener's order of January 26, 2018 granting Darice's Motion to Enforce be vacated; and
3. That the case be remanded to Superior Court for further proceedings in accordance with this Court's rulings.

**DATED** this 25<sup>th</sup> day of February, 2019.

**RESPECTFULLY SUBMITTED,**

  
\_\_\_\_\_  
Joseph J. Loran, WSBA #14746  
Attorney for Appellant

## **III. APPENDIX (ATTACHED)**

- A.** Exhibit C to CR 2A Settlement Agreement; CP 7

**DECLARATION OF TRANSMITTAL**

Under penalty of perjury under the laws of the State of Washington I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II, by email, and delivered a copy of this document via e-mail to:

Andrew Helland  
Helland Law Group  
960 Market Street  
Tacoma WA 98402  
andrew@hellandlawgroup.com

Signed at Tacoma, Washington on this 25<sup>th</sup> day of February, 2019.

  
\_\_\_\_\_  
Joseph J. Loran WSBA #14746  
Attorney for Appellant, Todd Gamache

**LORAN & RITCHIE, P.S.**

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**Transmittal Information**

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