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

IN RE THE MARRIAGE OF:

THOMAS F. GREEN,

Appellant,

v.

GINA R. GREEN,

Respondent.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

IV. STATEMENT OF CASE 4

A. MARRIAGE AND INITIAL SEPARATION PROCEEDINGS 4

B. SETTLEMENT CONFERENCE AND EMAIL NEGOTIATIONS. 6

C. THE PSA AND MOTION FOR ORDER ADOPTING PROVISIONS. 9

V. ARGUMENT 14

A. STANDARD OF REVIEW 14

B. THE PARTIES DID NOT HAVE A VALID SETTLEMENT AGREEMENT UNDER BASIC CONTRACT LAW. 18

1. FORMATION AND PRELIMINARY NEGOTIATIONS 21

2. SUBSEQUENT ACTS AND CONDUCT OF PARTIES 24

3. REASONABLENESS OF PARTIES' INTERPRETATIONS 24

C. MS. GREEN DID NOT MEET HER BURDEN OF PROOF TO ESTABLISH A SETTLEMENT AGREEMENT SUFFICIENT UNDER CR 2A. 26

D. ATTORNEYS' FEES 30

VI. CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990) 19, 21

Brandt v. Impero, 1 Wn. App. 678, 463 P.2d 197 (1969)..... 30

Brinkerhoff v. Campbell, 99 Wn. App. 692, 994 P.2d 911 (2000) 14

Bryant v. Palmer Coking Coal Co., 67 Wn. App. 176,
858 P.2d 1110 (1992) 27

Condon v. Condon, 177 Wn.2d 150, 298 P.3d 86 (2013)..... 14, 26, 27, 29

Cruz v. Chavez, 186 Wn. App. 913, 347 P.3d 912 (2015)..... 19, 25, 27

Eddleman v. McGhan, 45 Wn.2d 430, 275 P.2d 729 (1954)..... 26

Evans & Son, Inc. v. City of Yakima, 136 Wn. App. 471,
149 P.3d 691 (2006) 18, 27

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

Landstar Inway Inc. v. Samrow, 181 Wn. App. 109,
325 P.3d 327 (2014) 15, 16, 17

Lavigne v. Green, 106 Wn. App 12, 23 P.3d 515 (2001) ..... passim

Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402,
282 P.3d 1069 (2012) 14

Morris v. Maks, 69 Wn. App. 865, 850 P.2d 1357 (1993) 27, 28

Ofuasia v. Smurr, 198 Wn. App. 133, 392 P.3d 1148 (2017) 15

Riley v. Iron Gate Self Storage, 198 Wn. App. 692,
395 P.3d 1059 (2017) 15

Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231,
23 P.3d 520 (2001) 30

Veith v. Xterra Wetsuits, L.L.C., 144 Wn. App. 362,
183 P.3d 334 (2008) 19

Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706,
334 P.3d 116 (2014) 15, 20, 24, 26

Statutes

RCW 2.44.010 ..... 26, 29

RCW 26.09.140 30

Rules

Civil Rule 2A 26, 29

Civil Rule 56 ..... 15, 18, 27

Rule of Appellate Procedure 18.1 30

Other Authorities

David K. DeWolfe, Keller W. Allen, Darleen Caruso, 25 Wash. Prac.,
Contract Law And Practice § 5:7 (3d ed. 2017) 19, 20, 21

David K. DeWolfe, Keller W. Allen, Darleen Caruso, 25 Wash. Prac.,
Contract Law And Practice § 5:8 (3d ed. 2017) 19, 21, 24

I. INTRODUCTION

Thomas Fredrick Green ("Mr. Green") and Gina Rene Green ("Ms. Green") (collectively, "the Greens" or "the parties") were married on July 23, 1991, and separated on November 13, 2016. Ms. Green filed a Petition For Divorce a month later. As a matter of course, the parties negotiated how to fairly distribute their personal property between each other. Along with material possessions and various debts, however, one particular source of money became contentious: the benefits earned from state employment by Mr. Green under the Department of Retirement Systems' Public Employees Retirement System Plan 2 ("PERS 2"). The parties also discussed at length the most appropriate survivor benefit for Ms. Green under Mr. Green's plan, as well as what his maintenance obligation would be over time. When a settlement conference was unsuccessful, they continued their negotiations through email and letters, trading offers and counteroffers for a property settlement agreement.

After almost two weeks, Ms. Green believed the parties had agreed to the terms of distribution for Mr. Green's retirement benefits and maintenance. However, Ms. Green was mistaken. When she forwarded Mr. Green a proposed final property settlement agreement ("the PSA"), he was alarmed to discover there had been a fundamental misunderstanding about the agreed division of his PERS 2 retirement benefits. The

"agreement" as presented let Ms. Green take half of all of Mr. Green's career retirement benefits and a 100 percent survivor benefit, instead of only her fair and equitable community portion of both—a difference worth over $100,000 to Mr. Green. Moreover, it provided for a nonmodifiable maintenance obligation, a restriction to which the parties never agreed. Mr. Green told Ms. Green he did not agree to these terms, and he refused to sign the document.

Despite this dispute as to the material terms of the PSA, Ms. Green moved to enforce it. She claimed Mr. Green did agree to its terms in their correspondence—and the Honorable Judge J. Andrew Toynbee ("the judge below") assented, adopting the settlement provisions and denying a subsequent motion for reconsideration by Mr. Green. The judge below heard arguments on whether the Findings of Facts and Conclusions of Law incorporating the PSA should be enforced, as well as if the parties had reached a valid settlement agreement under Civil Rule 2A ("CR 2A"). In so doing, however, he ignored a genuine dispute Mr. Green raised which demonstrated that he did not agree to the terms of the PSA. For this reason, as further established below, this Court should find the judge below erred in his Order and remand the matter to be resolved at trial.

II. ASSIGNMENTS OF ERROR

1. The judge below erred in failing to order a new trial date based on the disputed facts of the case.

2. The judge below erred in determining the PSA was valid under fundamental principles of contract law. CP 218–219.

3. The judge below erred in determining the parties had a valid settlement agreement under CR 2A, based on the disputed facts of the case. CP 218–219.

4. The judge below erred in determining there were no disputed material facts concerning the terms of the PSA when ordering its adoption. CP 218–219.

5. The judge below erred in determining that Mr. Green agreed to share half of both the community property and separate property portion of his retirement benefits, as well as 100 percent of the community property and separate property portions of the survivor benefit therefrom, with Ms. Green. CP 214–215.

6. The judge below erred in accepting the Findings of Fact and Conclusions of Law on December 5, 2017. CP 220–223.

7. The judge below erred in denying a Motion to Reconsider its decision and Order of December 5, 2017. CP 302.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a valid settlement agreement was reached under common-law contract principles or CR 2A when Mr. Green disputed material terms of the PSA and did not sign it. (Assignments of Error 3, 4, 6, and 7).

2. Whether a CR 2A agreement can be imposed when material facts about the agreement are disputed and no trial

was held to determine the weight of either party's evidence. (Assignments of Error 2, 3, 5, and 7).

3. Whether this case should be remanded for trial because the judge below failed to order a new trial date based on the disputed facts of the case. (Assignment of Error 1).

IV. STATEMENT OF CASE

A. MARRIAGE AND INITIAL SEPARATION PROCEEDINGS.

Mr. Green and Ms. Green were married on July 23, 1991. CP 1. Prior to and throughout their marriage, Mr. Green was employed by the State of Washington Department of Transportation ("DOT"). CP 21, 137. Ms. Green obtained a high school diploma prior to the marriage. *Id.* Early in their marriage, Ms. Green stayed home to raise their two children, and eventually worked as a paraeducater in the children's school. *See id.* She later began working at a gas station in Morton, Washington. *Id.*

The Greens agreed to separate on November 13, 2016. CP 1. Mr. Green's state employment granted him retirement benefits through a PERS 2 pension plan. CP 137. During their marriage, Mr. Green accumulated $106,585.21 worth of assets in his PERS 2 account. CP 137. On the date of their separation, his monthly PERS 2 benefit was thus approximately $3,350.87. CP 136–137, 163. This figure does not account for the benefits Mr. Green accrued prior to marriage, nor do they account for those accrued

after the date when his benefits started becoming separate property (November 13, 2016). *See id.*

Ms. Green filed a Petition For Divorce with the Lewis County Superior Court on December 12, 2016. CP 1. She asked for a fair and equitable division of the parties' real property, personal property, and debts, CP 2, and to establish November 13, 2016 as the date when the Greens separated, CP 1. Accompanying the petition, Ms. Green filed a Financial Declaration and Motion for Temporary Family Law Order. *See generally* CP 11–24. The Financial Declaration outlined her income and expenses, as well as an estimate of Mr. Green's income. CP 11–15. The Motion was for temporary monthly spousal maintenance payments of $2,307.27, to continue until this case resolved. CP 18–24. Ms. Green made this motion because her income was insufficient to pay all of her bills and she feared that Mr. Green would forget to pay some of them. CP 21–24. In his timely response thereto, Mr. Green disagreed with this maintenance request. CP 33. Ultimately, Court Commissioner Tracy Mitchell ("the Commissioner") agreed with Ms. Green and awarded her temporary maintenance of $2,307.27 a month. CP 37–40.

On January 27, 2017, the case was calendared for a settlement conference on May 9, 2017, with trial to follow on June 13, 2017. CP 42–44.

B. SETTLEMENT CONFERENCE AND EMAIL NEGOTIATIONS.

In a pre-settlement conference letter to the Commissioner dated May 4, 2017, Ms. Green stated that the "estimated marital benefit" from Mr. Green's PERS 2 plan was $3,350.87 a month. CP 131. The settlement conference took place as scheduled, but it did not lead to a final agreement between the parties. *See* CP 53. In the weeks following, the parties thus exchanged and negotiated a series of settlement offers and counteroffers by email. *See generally* CP 160–175. The crux of this case is whether a binding settlement agreement under CR 2A was created by these emails.

On May 31, 2017, counsel for Ms. Green, Jennifer Johnson ("Ms. Johnson"), emailed then-counsel for Mr. Green, Jason Fugate ("Mr. Fugate"), an outline of a proposed property settlement agreement based on their discussions at the settlement conference. CP 160–163. *Inter alia*, the offer would divide an interest in the community portion of Mr. Green's PERS 2 benefits to Ms. Green, and have Mr. Green pay $2,327.58 a month for eight years in spousal maintenance, then $1,000.00 a month for two years after. *Id.* The letter included a table which reiterated that the "PERS II Defined Benefit" to be equally divided between the Greens was $3,350.87 a month. CP 163. It also suggested multiple options for a survivor benefit from Mr. Green's retirement plan: 50 percent, 66.67 percent, and 100 percent. CP 160.

In a response on June 7, 2017, Mr. Green agreed to sharing an interest in the PERS 2 plan and a survivor benefit in general, and specifically stated he would prefer maintenance of $1,600.00 a month for the first eight years. CP 165. However, Mr. Green expected to keep working for the DOT at least twenty more years, and so he was hesitant to let Ms. Green get two extra decades of benefits alongside her survivor benefit. *See* CP 165. Ms. Green counterproposed maintenance of $2,300.00 a month for five years, $1,800.00 for three years, and then $1,000.00 for two years. CP 167. In the same email, she clarified that she requested a 100 percent survivor benefit. *Id.* This was the first occurrence of an ambiguous term in the parties' "agreement." *See generally* CP 118–123. Ms. Johnson, on behalf of Ms. Green, did not define whether this 100 percent survivor benefit would come from both Mr. Green's current and future career retirement benefits or just her community property portion of it. CP 121–122. Mr. Fugate, on behalf of Mr. Green, believed the latter was the case. *Id.*

Mr. Green was willing to pay the ten-year tiered maintenance, but noted that he would also have to make payments to his PERS 2 account throughout his career, which both parties would benefit from with "future contributions." CP 168. Here, a second ambiguity arose in the agreement: the distribution of Mr. Green's PERS 2 retirement benefits he already received versus those to be received from his continuing employment. Mr. Fugate's

understanding was that division of "future contributions" by Mr. Green would just be calculated based on the community property. CP 119–120. Mr. Fugate sent Ms. Green calculations evidencing that she would receive $272.61 more in monthly income if the PERS 2 account was not separated and she had a future individual interest in the community portion of the account. CP 120–121. He emphasized that creating a 100 percent survivor benefit alongside this interest would benefit Mr. Green as much as Ms. Green. CP 168, 121–122.

Ms. Johnson said she would agree to Mr. Fugate's terms if, *inter alia*, Mr. Green would pay $18,000.00 in lost spousal maintenance should he leave the DOT pre-retirement, and if he would not take a lump-sum withdrawal from his PERS 2 account. CP 169. Mr. Fugate agreed to these terms on the conditions that Mr. Green only be required to pay that if he voluntarily left his job or was fired for cause, and the lost maintenance payment would only cover his months not worked. CP 170.

Ms. Johnson stated that she accepted Mr. Fugate's counteroffer, and offered the clarification that Mr. Green would make proportionate benefit payments to Ms. Green until retirement if he chose to keep working past age 65 in order to avoid paying Ms. Green her benefits due. CP 171. Mr. Fugate conveyed Mr. Green's agreement with this particular proposal in his subsequent email. CP 172. On June 12, 2017 at 3:43 p.m., Ms. Johnson

emailed Mr. Fugate that she would work on a memorialized PSA but was not sure she "[could] get that done before the morning." CP 174. Then, five hours later, at 8:25 p.m.—the evening before the scheduled trial—Ms. Johnson emailed Mr. Fugate a draft of the PSA. CP 175. The quickly prepared PSA stated that it was to "cover[] the[ir] entire agreement . . . and supersede[] any previous agreement," CP 99. It also purported to represent "a fair and equitable division of the marital community's assets." CP 97.

The following morning, Mr. Fugate pointed out to Ms. Johnson that she had fundamentally misunderstood what he agreed to as a division of Mr. Green's PERS 2 plan. CP 176. Ms. Johnson had provided for creating an interest in Mr. Green's entire career retirement benefits, not just the community property portion. CP 90–91, 176. The division established by the PSA would also give Ms. Green a "70/30 split on personal property, plus 10 years of maintenance, [cost of living adjustments] on the PERS II and 100 percent survivor benefit." CP 176; *see generally* CP 86–100. Ms. Johnson refused to acknowledge that there was a misunderstanding, directing Mr. Fugate to statements he made in previous e-mails. CP 177–181.

C. THE PSA AND MOTION FOR ORDER ADOPTING PROVISIONS.

On June 13, 2017, the trial date, Ms. Green offered the PSA, Findings and Conclusions About a Marriage ("Findings and Conclusions"),

and a Final Divorce Order to the judge below with the assumption both parties would agree to and sign them. *See generally* CP 77–100. However, because Mr. Fugate and Mr. Green did not agree to the PSA's material terms, they did not sign these documents. *See* CP 80, 84, 99. There had been, it was revealed, a fundamental misunderstanding about the agreed-upon division of the PERS 2 retirement benefits. Ms. Johnson thus informed the judge below that she would move to enforce the documents and resolve the case without a trial. *See* CP 54, 58.

On July 27, 2017, Mr. Fugate withdrew as Mr. Green's attorney and substituted new counsel, Paul Dugaw ("Mr. Dugaw"). CP 50. Mr. Dugaw scheduled another settlement conference for August 11, 2017, along with a trial setting date. CP 51. This second conference was still unsuccessful in establishing a settlement agreement between the parties.

On November 7, 2017, Ms. Green filed a motion for an Order Adopting Settlement Provisions Agreed Upon by the Parties as Confirmed on June 12, 2017 and to Adopt the Findings and Conclusions about a Marriage and Final Divorce Order which Memorializes Said Settlement ("Motion for Adopting Provisions"). CP 107–108. In so doing, Ms. Green re-presented three documents: (1) the Findings and Conclusions, CP 77–80, which stated that "[s]pousal support should be based on the [PSA]," CP 79; (2) the Final Divorce Order, which established, *inter alia*, that the Greens'

property would be distributed as set forth in the PSA, CP 81–84; and (3) the PSA itself, which stated that Ms. Green would be awarded half of Mr. Green's separate and community career retirement benefits, a 100 percent career survivor benefit of those retirement benefits, and a nonmodifiable term of spousal maintenance for ten years. *See generally* CP 86–100. Supporting declarations by Ms. Green and Ms. Johnson, CP 53–58, stated there was a "full and final agreement set forth *in writing* in the correspondence between Ms. Johnson and Mr. Fugate between May 31, 2017 and June 12, 2017." CP 53–54, 57.

Ms. Johnson maintained that the parties' agreement was formed by their written correspondence and then memorialized in the PSA, which the Findings and Conclusions and Final Divorce Order incorporate. *See* CP 58. She acknowledged "[t]he . . . provision in the proposed final orders Mr. Fugate contest[s] relate to Ms. Green receiving a portion of Mr. Green's future retirement contributions and resulting benefits." CP 58.

Mr. Dugaw responded to the motion on November 16, 2017. CP 112–117. In an accompanying sworn declaration, CP 118–124, Mr. Fugate reiterated his correspondence with Ms. Johnson was filled with misunderstandings and mutual mistakes of fact. CP 123. Mr. Fugate, on Mr. Green's behalf, had been agreeable to Ms. Green receiving a future share from the community portion of Mr. Green's retirement benefits. CP 119.

From their discussions, he believed he thus offered a marginal increase in Ms. Green's benefit from Mr. Green's PERS 2 account in exchange for her obtaining an interest in said account instead of creating a separate account. CP 119–120. This would have allowed Ms. Green to get an extra $272.61 per month in his retirement benefits, in further consideration for reducing Mr. Green's maintenance obligation. CP 121. Mr. Fugate calculated this based on the expected increase over time in Mr. Green's average final compensation ("AFC") while employed. CP 120. In sum, Mr. Fugate believed he agreed to a short-term reduction in Mr. Green's maintenance payments in exchange for a slight but long-term increase in retirement payout. *See* CP 119–121. Mr. Green did not intend to trading a savings of about $18,000.00 in maintenance for five years in exchange for a loss of over $100,000.00 in future retirement benefits. *See* CP 122. He did not agree—or intend to agree—to give half of <u>all</u> of Mr. Green's retirement benefits to Ms. Green, whether separate or community property. *See id*.

Mr. Green also took issue with Section V, paragraph D of the PSA, which stated that his maintenance obligation—$2,000.00 a month, subject to other conditions—was nonmodifiable. CP 123; *see* CP 95–96. Such nonmodifiability was a material term never discussed in the parties' correspondence. CP 123; *see generally* CP 160–175. Rather, they only agreed for Mr. Green to pay Ms. Green $2,000.00 a month until June 30,

2022, after which the amount would gradually reduce. CP 94. Further, if he chose not to retire at 65, or left work and returned, he would pay maintenance equal to what she would otherwise receive in PERS 2 benefits. CP 94–95. Overall, Mr. Green argued that Ms. Green failed to meet her burden of proof that there was no genuine dispute as to the material terms of the PSA. *See* CP 113. In particular, he argued that the parties' correspondence did not show there was a "meeting of the minds" between them. CP 116.

Ms. Green replied on November 27, 2017, *see generally* CP 182–191, with an insistence that the parties had a valid settlement agreement under CR 2A and general contract law, *see* CP 182–184. The next day, the judge below heard arguments from the parties on the issue of whether the three documents at issue should be enforced, and if a settlement agreement sufficient under CR 2A had indeed been reached. See CP 212–216. The judge below struck the nonmodifiability section from the PSA because it was not mutually intended and agreed to by the parties. CP 215. However, the judge below concluded that a settlement agreement sufficient under CR 2A had otherwise been reached between the parties, and on December 5, 2017 it ordered the PSA's enforcement, along with that of the Findings and Conclusions and Final Divorce Order incorporating it. CP 218–219.

On December 14, 2017, Mr. Green filed a Motion for Reconsideration, reiterating those arguments stated in his initial opposition to Ms. Green's motion. CP 244–249. Against further opposition from Ms. Green, CP 278–286, Mr. Green filed a reply memorandum of law, CP 292–295, but it was subsequently stricken for a procedural defect, CP 300. Mr. Green's Motion for Reconsideration was denied on June 20, 2018. CP 302. This appeal timely followed on July 19, 2018. CP 303.

V. ARGUMENT

A. STANDARD OF REVIEW

This Court will review the appeal of a trial court's order to enforce a settlement agreement *de novo*. *See Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86, 89 (2013). "When a moving party relies on affidavits or declaration to show that a settlement agreement is not genuinely disputed, the trial court proceeds as if considering a motion for summary judgment." *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911, 914 (2000). Summary judgment rulings, and those akin to them, are appropriate only if there is no genuine issue as to any material fact and the moving party is thus entitled to judgment as a matter of law. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 408, 282 P.3d 1069, 1073 (2012). A material fact is one on which the outcome of a case depends, in whole or in part. *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 700,

395 P.3d 1059, 1065 (2017). In particular, this Court "examine[s] the record, including the pleadings, . . . admissions on file, and affidavits, in the light most favorable to the nonmoving party, drawing all reasonable inference in the nonmoving party's favor, to determine if a genuine material issue of fact exists." *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327, 335 (2014); *see also* CR 56(c). Summary judgment rulings, and those akin to them, are only proper if reasonable minds could reach but one conclusion from the evidence presented. *See Ofuasia v. Smurr*, 198 Wn. App. 133, 141, 392 P.3d 1148, 1153 (2017).

Civil rules applied to particular facts are considered a question of law and are also reviewed *de novo*. *See Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712, 334 P.3d 116, 119 (2014).

Ms. Green's central claim in her Motion for Adopting Provisions is there was no misunderstanding or dispute over the material facts during her email communications with Mr. Green prior to June 13, 2017. However, in a sworn declaration, Mr. Fugate demonstrated that two reasonable minds came to two different conclusions during his negotiation of the settlement agreement with Ms. Green. CP 118–124; *see Ofuasia*, 198 Wn. App. at 141, 392 P.3d at 1153. Three particular aspects of this negotiation were impacted by ambiguities: the division of Mr. Green's PERS 2 retirement plan benefits, the amount of the survivor benefit to go

to Ms. Green, and the nature of Mr. Green's maintenance obligation. *See generally* CP 160–174. Mr. Fugate explained that, from his perspective, "[he] was always discussing the division of the community portion" of Mr. Green's retirement account with Ms. Johnson. CP 120. Specifically, discussing the worth of those benefits accrued during the span of the marriage established by Mr. Green through the Department of Retirement Systems: July 27, 1991 through November 13, 2016. *See* CP 148–149. This was the basis of his position that Ms. Johnson was also only considering the community property portion, not both the current and future career earnings of Mr. Green's retirement account. CP 120. Considering this fact in the light most favorable to the nonmoving party (below, Mr. Green) should lead to the conclusion that the judge below erred in not setting this property division dispute for trial. *See Landstar*, 181 Wn. App. at 120, 325 P.3d at 335.

Another dispute between the parties arose concerning the survivor benefit of Mr. Green's PERS 2 plan. This particular benefit will pay the remaining benefit of the account, if any, to a designated beneficiary when Mr. Green passes away. CP 197. As above, during their negotiations, Mr. Fugate believed that he and Ms. Johnson were talking about the community property portion of Mr. Green's retirement account—including the survivor benefit. CP 120. He believed he was accepting a

term of a 100 percent survivor benefit from the community portion of Mr. Green's retirement as consideration for lowering Mr. Green's monthly maintenance obligation. CP 120–121. Regarded in the light most favorable to Mr. Green, these facts further suggest that the judge below erred in not setting this property division dispute for trial. *See Landstar*, 181 Wn. App. at 120, 325 P.3d at 335.

Lastly, Ms. Johnson drafted the PSA to establish the terms of Mr. Green's maintenance obligation would be nonmodifiable. CP 123. The parties never discussed this term in their email negotiations. *See* CP 116–117; *see generally* CP 160–175. Indeed, it is true that the judge below struck that clause from the PSA because it was not negotiated. CP 215, 218. However, a fact is material if the outcome of case depends on it, even if only partially. *See Riley*, 198 Wn. App. at 700, 395 P.3d at 1065. The addition of this nonmodifiability term, in addition to the other disputed terms above, is the reason why neither Mr. Green nor Mr. Fugate would sign the PSA when Ms. Green presented it. CP 123. Further, as will be explained below, if not all the material terms of an agreement have been addressed, a court will not enforce it. *See Lavigne v. Green*, 106 Wn. App. 12, 21, 23 P.3d 515, 520 (2001). When addressing this disputed material term, however, the judge below only struck that particular clause instead of having the case proceed to trial. CP 215, 218.

Alone, each one of these disputed facts may be unpersuasive, but this Court should consider them collectively when "drawing all reasonable inferences in the nonmoving party's favor." *Landstar*, 181 Wn. App. at 120, 325 P.3d at 335; *see also* CR 56(c). Ultimately when viewing these facts with a similar standard to summary judgment—in the light most favorable to Mr. Green as the nonmoving party—this Court should deem the PSA invalid and remand this case to the Superior Court for trial.

B. THE PARTIES DID NOT HAVE A VALID SETTLEMENT AGREEMENT UNDER BASIC CONTRACT LAW.

This Court should reverse the holding of the judge below because he erroneously determined that the Greens came to a binding agreement which the PSA memorialized. CP 212, 218–219. On the contrary, under basic principles of contract law, no final agreement formed. This is because there was no objective meeting of the minds upon the settlement's material terms.

A settlement agreement is fundamentally a contract. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691, 694 (2006). To be bound by an agreement, the parties must objectively manifest their mutual assent to the essential terms. *Id*. Even when parties have agreed on a significant part of a matter, a court will not enforce an agreement if not all of the material terms have been addressed. *See Veith v. Xterra Wetsuits*,

L.L.C., 144 Wn. App. 362, 366–67, 183 P.3d 334, 337 (2008); *Lavigne*, 106 Wn. App. at 21, 23 P.3d at 520 (finding appellant raised issues of material fact as to validity of settlement agreement when he had not agreed to material terms or signed it).

As such, "one who would recover on a contract must prove its existence and terms." In re *Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706, 709 (1993). When a contract's meaning is disputed, it should be interpreted to reflect the parties' intent. Context is critical; an essential element of a contract is objective evidence of mutual assent between the parties. *See Cruz v. Chavez*, 186 Wn. App. 913, 920, 347 P.3d 912, 916 (2015); David K. DeWolfe, Keller W. Allen, Darleen Caruso, 25 Wash. Prac., Contract Law And Practice § 5:8 (3d ed. 2017). "The context rule," as it is commonly known, "permits the admission of extrinsic evidence to assist in ascertaining the parties' intent when the evidence gives meaning to words used in the contract." DeWolfe et al. § 5:7; *see Berg v. Hudesman*, 115 Wn.2d 657, 666–67, 801 P.2d 222, 228 (1990). This extrinsic evidence may include:

1. All circumstances surrounding the contract's formation;
2. Subsequent acts and conduct of the parties;
3. The reasonableness of the parties' respective interpretations; and

4. Statements made by the parties in preliminary negotiations.

See DeWolfe et al. § 5:7. When a contract provision is subject to multiple reasonable interpretations, this Court will, considering extrinsic evidence where appropriate, construe it against the drafter. *See Viking Bank*, 183 Wn. App. at 713, 334 P.3d at 120.

The parties' initial settlement conference took place on May 9, 2017. CP 53. Ms. Green purported below that she subsequently formed a settlement agreement with Mr. Green in two phases: (1) a series of informal emails and letters between their attorneys from May 31 through June 12, 2017, *see generally* CP 160–175, and (2) a formal PSA drafted by Ms. Johnson and sent to Mr. Fugate on June 12, 2017 with the Findings and Conclusions and Final Divorce Order, *see generally* CP 77–100. Yet Mr. Green disputed his intent to agree to the PSA's terms of what retirement benefits Ms. Green would receive, *see* CP 176, and refused to sign it accordingly. As such, the PSA's proclamation that it was to "cover[] the[ir] entire agreement . . . and supersede[] any previous agreement," CP 99, could not be taken as established fact. Those letters and emails between the parties are extrinsic evidence surrounding the formation of a disputed contract. The court should consider the context and circumstances of this formation to determine what the parties actually

intended. *See Berg*, 115 Wn.2d at 666–67, 801 P.2d at 228; *Lavigne*, 106 Wn. App. at 21, 23 P.3d at 520; DeWolfe et al. §§ 5:7–8.

Here, (1) the circumstances surrounding the formation of the PSA and statements made by the parties in preliminary negotiations, (2) subsequent acts and conduct of parties, and (3) the reasonableness of the respective interpretations advocated by the parties demonstrate they did not objectively, mutually agree to the PSA's material terms. *See* DeWolfe et al. § 5:7.

1. FORMATION AND PRELIMINARY NEGOTIATIONS

This evidence demonstrates the parties had different intentions when they negotiated how much of Mr. Green's retirement benefits and survivor benefit Ms. Green would receive, as well as the terms of Mr. Green's maintenance obligation. Initially, in her emails and letters, Ms. Green proposed that Mr. Green give her an interest in the community portion of his PERS 2 benefits, plus a survivor benefit, and spousal maintenance of $2,327.58 for eight years. CP 160–163. On the date of their separation (November 13, 2016), Mr. Green's monthly PERS 2 benefit was approximately $3,350.87. CP 136–137, 163. Mr. Fugate responded—on behalf of Mr. Green—that he was fine with her receiving an interest in the community portion of his PERS 2 account and a 100 percent survivor benefit from to the community portion as well. CP 165,

168. However, he wanted to reduce the maintenance, as Mr. Green still had to also make contributions to the PERS 2 account himself for at least twenty more years. CP 165, 168. The essential goal of these negotiations was thus to determine a fair and equitable way for Ms. Green to benefit from Mr. Green's pension without him paying an excessive amount therefrom or in maintenance.

What the parties did not agree on was what to fairly and equitably do with the separate-property portion of Mr. Green's PERS 2 benefits. Up until the day before trial was set, Mr. Fugate's understanding of their correspondence was that Ms. Green agreed her future PERS 2 payouts would come solely from the community portion of Mr. Green's benefits. *See* CP 122, 176. He believed this because Ms. Green acknowledged $3,350.87 as the "estimated marital benefit" per month in a letter to the Court Commissioner on May 4, 2017, *see* CP 131. In Ms. Johnson's May 31, 2017 letter to Mr. Fugate, she forwarded him proposed property settlement calculations incorporating the same figure. *See* CP 163. Hence, when Mr. Fugate discussed including "future contributions" in Ms. Green's benefits, *see* CP 168, he just meant an increase of about $272.61 per month for the next twenty years of Mr. Green's expected contributions, to account for increases in his AFC. *See* CP 120–121. Yet Ms. Green mistakenly believed Mr. Green agreed to give her 50 percent of

both his community and future separate PERS 2 career benefit interests, *see* CP 90–91, and a 100 percent survivor benefit from the entire plan, *see* CP 93. With this dramatically differing intent as to material terms, Ms. Green sent the draft PSA to Mr. Fugate at 8:25 P.M. on June 12, 2017. CP 175. When looked at what she presented as their "agreement," he was disturbed to discover there had been a substantial misunderstanding and mutual mistake of fact—and promptly told Ms. Johnson so. *See* CP 176.

This lack of agreement touched not only general PERS 2 and associated survivor benefits but also Mr. Green's maintenance obligation: it was made nonmodifiable. *See* CP 95–96. None of the emails or letters between the parties contained any agreement to this material term. Rather, they simply agreed for Mr. Green to pay Ms. Green $2,000.00 a month until June 30, 2022, after which the amount would gradually reduce. CP 94. Further, if he chose not to retire at 65, or left work and returned, he would pay maintenance equal to what she would otherwise receive in PERS 2 benefits. CP 94–95. The judge below struck this section from the PSA precisely because it was not mutually intended and agreed to by the parties. CP 215. In so doing, the judge below acknowledged that this "final" contract contained disputed material terms. Yet he erroneously chose to strike one material clause instead of rightfully calling the entire agreement into question.

2. SUBSEQUENT ACTS AND CONDUCT OF PARTIES

As these miscommunications demonstrate, there was a genuine dispute as to the PSA's material terms. It was for this reason neither Mr. Fugate nor Mr. Green signed the PSA when Ms. Green presented it for them to do so on June 12, 2017. This subsequent act by the men demonstrates Mr. Green did not assent to the essential terms of the PSA as Ms. Green proposed it. *See* DeWolfe et al. § 5:8.

3. REASONABLENESS OF PARTIES' INTERPRETATIONS

Additionally, the reasonableness of the respective interpretations advocated by the parties turns in Mr. Green's favor. *See* DeWolfe et al. § 5:8; *see also Viking Bank*, 183 Wn. App. at 713, 334 P.3d at 120. The PSA purported to represent "a fair and equitable division of the marital community's assets." CP 97. Yet the "agreement" in question would have been grossly unfair and inequitable to Mr. Green by dividing his community property as well as his future separate property, especially when Ms. Green was already receiving 70 percent of the community assets. CP 176. In negotiating settlement with Ms. Johnson, Mr. Fugate only intended for there to be a 50 percent division of benefits from the community portion of Mr. Green's PERS 2 retirement contributions. By no means did Mr. Fugate, or Mr. Green, ever intend to agree to give Ms. Green 50 percent of Mr. Green's entire present and future career benefits,

or 100 percent of them after he passes away. It is absurd to imagine Mr. Green would agree to a contract under which he would surrender half of his lifetime retirement benefits—worth over $100,000.00—just to save about $18,000.00 in maintenance over the next five years. *See* CP 121–122. Mr. Green's context and intent for the duration of the negotiation talks was to divide only their community property.

Ms. Green may be able to claim that the PSA "exists" in a physical sense, but the context of its formation shows the material terms of an agreement it purportedly memorialized were unclear. *See Ferree*, 71 Wn. App. at 41, 856 P.2d at 709. As established above, there was not a sufficient "meeting of the minds" as to all of its material terms. *See Cruz*, 186 Wn. App. at 920, 347 P.3d at 916. First, the nature of the payments Mr. Green would make to Ms. Green after their divorce were never objectively, mutually agreed to. Secondly, neither was a decision to make the maintenance obligation nonmodifiable. Lastly, Mr. Green would not sign the PSA. Mr. Fugate wanted to establish a division of benefits more agreeable to Ms. Green in exchange for a reduction in maintenance—not indiscriminately give Ms. Green half of Mr. Green's career pension and a survivor benefit of the rest of it. To the extent the PSA states otherwise, it is not a final, formal contract. The ambiguity with which it memorialized any agreement with Mr. Green should be construed against Ms. Green, the

drafter. *See Viking Bank*, 183 Wn. App. at 713, 334 P.3d at 120. Under basic principles of contract law, this Court should find the PSA invalid and overturn the ruling of the judge below accordingly.

C. MS. GREEN DID NOT MEET HER BURDEN OF PROOF TO ESTABLISH A SETTLEMENT AGREEMENT SUFFICIENT UNDER CR 2A.

Not only did the Greens' purported settlement agreement not become binding by way of a formal, final contract, but Ms. Green also did not meet her burden of proof to establish that it was at least a settlement agreement sufficient under CR 2A.

Under CR 2A,

> [n]o agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A; *see also* RCW 2.44.010 (establishing the same standard for agreements of an attorney which may bind a client). "The purpose of CR2A is to give certainty and finality to settlements." *Condon*, 177 Wn.2d at 157, 298 P.3d at 89. To wit, "negotiations toward a compromise are not binding." *Lavigne*, 106 Wn. App. at 18, 23 P.3d 515, 519 (quoting *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729, 730 (1954)). Even if the common-law criteria for a contract are met, a disputed

settlement agreement is invalid under CR 2A if it was not made in writing or put on the record. *See id.* at 162, 298 P.3d at 92; *see also Lavigne*, 106 Wn. App. at 17, 23 P.3d at 518; *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992).

Courts may find informal writings, such as letters and emails, sufficient to establish a CR 2A agreement even if a formal contract does not exist. This is only so when:

1. The subject matter has been agreed upon;
2. The terms are all stated in the informal writing; and
3. The parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.

Morris v. Maks, 69 Wn. App. 865, 869, 850 P.2d 1357, 1359 (1993); *see Evans*, 136 Wn. App. at 477, 149 P.3d at 694 (finding settlement agreement invalid when there was a genuine issue of material fact whether the letters preceding it established a meeting of the minds).

A trial court should judge a dispute over enforcement of a settlement agreement under CR 2A essentially the same as a summary judgment motion. *See Condon*, 177 Wn.2d at 161 n. 4. "When a motion is made to enforce a settlement agreement on grounds that its existence and material terms are not genuinely disputed, the issue is . . . whether a genuine dispute of fact exists." *Ferree*, 71 Wn. App. at 43, 856 P.2d at 710; *see Cruz*, 186 Wn. App. at 919, 347 P.3d at 915; *see also* CR 56(c). It

is the moving party's burden to prove there is no genuine dispute as to the agreement's existence and material terms, and he or she is entitled to judgment as a matter of law. *See Ferree*, 71 Wn. App. at 41, 856 P.2d at 709. The opposing party may establish a genuine dispute with a sworn assertion of specific facts which controvert the agreement's existence or terms. *See id.* at 42–43, 856 P.2d at 710.

Here, Ms. Green did not meet her burden to prove there was no genuine dispute of material fact as to the existence of a settlement agreement under CR 2A. She claimed the parties' agreement was founded by informal writings: those emails and letters between May 31 and June 12, 2017. CP 57. Upon this, she moved for an order adopting the PSA with a claim that its existence and terms could not be genuinely disputed, *see* CP 107, and the judge below agreed, *see* CP 212–219. Yet not all of the criteria of the test established in *Morris v. Maks* were met here. *See* 69 Wn. App. at 869, 850 P.2d at 1359. Not all of the contract's terms were stated in the informal writing, and Mr. Green did not intend for those emails and letters to be binding before receiving the formal written PSA. Indeed, Mr. Green raised a genuine dispute of fact as to the existence and material terms of an agreement in these writings, and swore to specific facts in support thereof. *See* CP 118–123; *Ferree*, 71 Wn. App. at 42–43, 856 P.2d at 710. Specifically, he made it known that he did not agree to at

least two of the agreement's material terms: a distribution of half of all of his retirement benefits to Ms. Green—present and future—with a similarly all-encompassing 100 percent survivor benefit, and a nonmodifiable maintenance obligation. The last of these disputed terms being later rectified by an order, *see* CP 218, does not erase Mr. Green having disputed it when presented.

Ultimately, neither Mr. Fugate nor Mr. Green ever even signed the PSA. The plain and simple reason is because they did not agree to its interpretation of the material terms therein, based on Mr. Fugate's understanding of the settlement negotiations. For the same reasons established under general principles of contract law above, this further demonstrates the invalidity of the purported agreement under CR 2A and RCW 2.44.010.

Ms. Johnson did present the written PSA in open court, believing this sufficient to enforce it. CP 107. However, this was no "agreement" at all because, as established above, neither Mr. Fugate nor Mr. Green actually agreed to its terms in open court—and, consequently, neither man signed. There was neither certainty nor finality to the informal writings to negotiate distribution of retirement benefits between Mr. Green and Ms. Green. *See Condon*, 177 Wn.2d at 157, 298 P.3d at 89. Effectively, this agreement between the parties was not put on the record nor signed,

because no such agreement existed. Ms. Green did not meet her burden of proof to establish otherwise. *See Ferree*, 71 Wn. App. at 41, 856 P.2d at 709. Thus, this Court should reverse the Order of the judge below finding a CR 2A agreement was reached.

D. ATTORNEYS' FEES

Lastly, Mr. Green should be awarded his attorneys' fees and costs on appeal pursuant to Rule of Appellate Procedure ("RAP") 18.1. Where a statute or contract allows for the recovery of attorney fees at the trial court level, the appellate court has inherent authority to award them. *See Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 247, 23 P.3d 520, 529 (2001); *Brandt v. Impero*, 1 Wn. App. 678, 683, 463 P.2d 197, 200 (1969). In particular, upon appeal from a marital dissolution proceeding, RCW 26.09.140 allows this Court "in its discretion, [to] order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs."

In the present case, Mr. Green is appealing from a marital dissolution proceeding, asking this Court to reverse a trial court decision and vacate the parties' PSA. The award of attorney fees is hence authorized by RCW 26.09.140. An award of his attorney fees and costs on appeal under RAP 18.1 is hence appropriate should Mr. Green prevail.

VI. CONCLUSION

The judge below agreed with Ms. Green's assertions that she and Mr. Green entered into a valid and binding property settlement agreement. However, the letters and emails sent between the parties as part of their post-settlement conference negotiations blatantly contradict this stance. Put simply, the parties did not have a meeting of the minds sufficient to produce either a final written contract or an informal CR 2A agreement. The interpretation of the parties' "agreement" with respect to division of Mr. Green's PERS 2 account retirement benefits argued by Ms. Green, and upheld by the judge below, is unreasonable and unfair to Mr. Green. Mr. Green is a man with many years of gainful state employment still in his future—but also a man who needs to be able to comfortably continue to plan for his retirement. It is absurd to expect him to give away not only 50 percent of his community retirement benefits but 50 percent of his future *separate* retirement benefits, on top of a 100 percent survivor benefit for a partner whom he has divorced. This will cost him tens of thousands of dollars to which he did not even knowingly agree, and never would have if he knew what the "final" terms of this arrangement would be.

The subsequent refusal of Mr. Green and Mr. Fugate to sign the PSA or agree to its terms, supported by sworn statements affirming a dispute as to the terms, should defeat any notion that there is no genuine dispute of material fact in this matter. For these reasons, this Court should deem the PSA unenforceable, reverse the decision and Order of the judge below to the contrary, and remand the case for trial, with an award to Mr. Green of his attorneys' fees on appeal.

Respectfully submitted this 3rd day of December, 2018.

Presented By:
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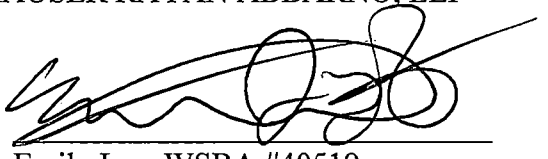
BY: 

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